Title IX Workshop

New Title IX Regulations in Effect August 14, 2020

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I. FOUNDATIONS

Non-Discrimination Mandate

"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 ...." 20 U.S.C. § 1681.

Sexual Harassment as a Subset of Sex Discrimination

"[S]exual harassment is a form of sex discrimination under Title IX." *Preamble* at 30,046. However, the ED points out that "Title IX is not an anti-sexual harassment statute; Title IX prohibits sex discrimination in education programs or activities." *Preamble* at 30,154 (emphasis added). The ED comments further that "Title IX is a non-sex discrimination statute and not a prohibition on all harassing conduct ...." *Preamble* at 30,159.

Sexual Harassment – Seriousness

"Sexual harassment ... qualifies as one of ''the most heinous offenses'' that one individual may perpetrate against another. Perpetration of sexual harassment impedes the equal educational access that Title IX was enacted to protect." *Preamble* at 30,050.

On Whom is the Focus of these Regulations?

The Title IX sexual harassment regulations are "[t]he framework for holding a [school district] responsible for the [school district's] response to [student] *peer-on-peer* or *employee-on-student* sexual harassment." *Preamble* at 30,119 (emphasis added). In other words, a student is the alleged victim. An employee as the alleged victim would be handled under the Title VII regulations. Title VII prohibits discrimination in employment on the basis of sex, race, national origin, color, and religion. *See* 42 U.S.C. § 2000e-2(a)(1).

Intent of the Regulations' Force

The Title IX regulations are "legally binding regulations addressing sexual harassment as a form of sex discrimination under Title IX." *Preamble* at 30,035.

Despite describing some degree of flexibility, ED appears to make little room for error: "[T]hese final regulations focus on precise legal compliance requirements governing [school districts]." *Preamble* at 30,030.

> For example, ED states that it "will hold [LEAs] responsible for a [LEA]'s failure or refusal to investigate a formal complaint." At 30,041. Also, ED warns that "[i]f a [LEA] fails to meet its Title IX obligations with respect to any complainant, the Department will hold the [LEA] liable under these final regulations." *Preamble* at 30,041.

Further, a school district's "response obligations will be enforced without any regard for whether [the district] "intentionally" violated [the Title IX] regulations." *Preamble* at 30,090.

Training

School districts/LEAs are obligated to training all Title IX Coordinators, Investigators, DecisionMakers, and any individual(s) who will facilitate the informal resolution process under Title IX.

Access not Elimination

"[LEAs] can and will, under these final regulations, be held accountable for responding to sexual harassment in ways designed to ensure complainants' equal access to education without depriving any party of educational access without due process or fundamental fairness." *Preamble* at 30,046.

However, "[the] regulations do not unrealistically hold [school districts] responsible where the recipient took all steps required under [the Title IX] regulations, took other actions that were not clearly unreasonable in light of the known circumstances, and a perpetrator of harassment reoffends. School districts cannot be guarantors that sexual harassment will never occur in education programs or activities[.]" *Preamble* at 30,046.

Balancing of Rights

The ED's goal was to "uphold Title IX's non-discrimination mandate while at the same time meeting requirements of constitutional due process and fundamental fairness." *Preamble* at 30,030. "Although elementary and secondary schools are not subject to the Clery Act, elementary and secondary school recipients must look to the definitions of sexual assault, dating violence, domestic violence, and stalking as defined in the Clery Act and VAWA in order to address those forms of sexual harassment under Title IX." *Preamble* at 30,036 n.93

The ED notes "the unique circumstances that sexual harassment allegations present, where through an equitable grievance process a [school district] often must weigh competing narratives about a particular incident between two (or more) individuals and arrive at a factual determination in order to then decide whether, or what kind of, actions are appropriate to ensure that no person is denied educational opportunities on the basis of sex." *Preamble* at 30,047.

Educational Context of Sexual Harassment Allegations

"Allegations of sexual harassment in an educational environment present unique challenges for the individuals involved, and for the [school district], with respect to how to best ensure that parties are treated fairly and accurate outcomes result." *Preamble* at 30,052.

II. DEFINITIONS

"Actual Knowledge"

"Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a [school district's] Title IX Coordinator or any official of the [school district] who has authority to institute corrective measures on behalf of the [school district], or to any employee of an elementary and secondary school." 34 C.F.R. § 160.30(a). In addition, "actual knowledge" exists "if an employee of an elementary or secondary school personally observes sexual harassment ...." *Preamble* at 30,107.

"Complainant"

"Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment." 34 C.F.R. § 160.30(a). "A parent or legal guardian may exercise their rights on behalf of their minor child who is the "complainant". *See* 34 C.F.R. § 160.6(g). Note that the definition of "complainant" does not include another individual who files a formal complaint, other than the alleged victim or their parent/guardian.

"Decision Maker"

A decision-maker is the individual or group of individuals who "issue a written determination regarding responsibility [of the respondent]." 34 C.F.R. § 160.45(b)(7). The decision-maker **cannot** be the Title IX Coordinator or the investigator. The ED notes that "the decision-maker is obligated to objectively evaluate all relevant evidence ...." *Preamble* at 30,249.

"Emergency removal"

A school district may "remov[e] a respondent from the [school district's] education program or activity on an emergency basis, provided that the [school district] undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and

provides the respondent with notice and an opportunity to challenge the decision immediately following the removal." 34 C.F.R § 106.44(c). An emergency removal is an exception to the general rule that a school district may not impose disciplinary or other sanctions on a respondent prior to the conclusion of the grievance process. *Preamble* at 30,230.

A school district may implement an emergency removal "before an investigation into sexual harassment allegations concludes (or where no grievance process is pending) ...." *Preamble* at 30,224. The ED cautions that "[e]mergency removal under § 106.44(c) is not a substitute for reaching a determination as to a respondent's responsibility for the sexual harassment allegations." *Preamble* at 30,224 (emphasis added).

"Formal Complaint"

"Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a [school district] and requesting that the [school district] investigate the allegation of sexual harassment." 34 C.F.R. § 160.30(a). In order for a document from a complainant to be a formal complaint, it must be signed physically or electronically or otherwise indicate that the complainant is the individual filing the document. Therefore, a "formal complaint" does *not* include a paper or electronic document filed anonymously by a complainant. *Preamble* at 30,133. As reflected in the definition of "complainant", the parent or legal guardian of a complainant may file a "formal complaint" on behalf of their minor child. However, a "formal complaint" *does* include a complaint signed by the Title IX Coordinator, even if the identity of the complainant is not known (e.g., a third party files a complaint regarding an anonymous complainant). The ED notes that "[t]he purpose of the formal complaint is to clarify that the complainant (or Title IX Coordinator) believes that the [school district] should investigate allegations of sexual harassment against a respondent." *Preamble* at 30,135.

"Grievance Process"

The process by which a school district responds to a formal complaint of sexual harassment. 34 C.F.R. § 106.45(b).

"Investigator"

An "investigator" is the individual or group of individuals who conducts the investigation of a formal complaint and issues a written report. *See* 34 C.F.R. § 160.45(b)(5). The investigator may also be the Title IX Coordinator, but the investigator may *not* also be the decision-maker. The ED notes that "[t]he investigator is obligated to gather evidence directly related to the allegations whether or not the [school district] intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the [school district's investigator does not believe the evidence to be credible and thus does not intend to rely on it)." *Preamble* at 30,248.

"Notice"

"Notice results whenever any elementary and secondary school employee, any Title IX Coordinator, or any official with authority: Witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (*i.e.,* a person alleged to be the victim) or a third party (*e.g.,* the complainant's parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means." *Preamble* at 30,040; *see id.* at 30,110. The ED states by further example that "any employee of an elementary and secondary school may receive notice through an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, through a newspaper article, through an anonymous report, or through various other means." *Preamble* at 30,115. The ED further states that "[t]he [Title IX] regulations do not restrict the form that "notice" might take, so notice conveyed by an anonymous report may convey actual knowledge to the [school district] and trigger a [school district's] response obligations. *Preamble* at 30,132.

"Official with Authority"

A school district's "official with authority" is an "official [who] must have authority to both repudiate th[e] conduct and eliminate the hostile environment." *Doe v. Edgewood Indep. Sch. Dist.*, No. 19-50737 (5th Cir. July 6, 2020). The Court has also stated that "the power to institute corrective measures must include the power to terminate or discipline." *Id*. "[T]he [U.S.] Department [of Education] will not assume that a person is an official with authority solely based on the fact that the person has received training on how to report sexual harassment or has the ability or obligation to report sexual harassment." *Preamble* at 30,043. The U.S. Fifth Circuit has stated that "the ability or obligation to report sexual harassment does not qualify an employee as having the ability to institute corrective measures on behalf of the [school district]." *Edgewood Indep. Sch. Dist.* at n.38. For purposes of Title IX, school resource officers (SROs) are <u>not</u> considered an "official with authority". "Similarly, the [U.S.] Department [of Education] will <u>not</u> conclude that volunteers and independent contractors are officials with authority, unless the school district has granted the volunteers or independent contractors authority to institute corrective measures on behalf of the [school district]." *Preamble* at 30,043 (emphasis added).

"Program or Activity"

A program or activity includes "all of the operations of" a LEA. 20 U.S.C. § 1687. A program or activity "includes locations, events, or circumstances over which the [school district] exercised substantial control over both the respondent and the context in which the harassment occurs." *Preamble* at 30,094.

"Recipient"

A "recipient" is the educational agency which receives federal funding. Obviously, a public school district is a "recipient".

"Relevant"

"Evidence is relevant if:
(a) it has any tendency to make a fact more or less probable than it would be without the evidence;and
(b) the fact is of consequence in determining the action." Fed. R. Evid. 401.

"Remedies"

"Remedies" are what the school district provides to the complainant and to the respondent, after the school district has made a determination of responsibility for sexual harassment against the respondent via a grievance process that complies with the Title IX regulations. 34 C.F.R. § 160.45(b)(1)(i). "Remedies must be designed to restore or preserve equal access to the [school district's] education program or activity. Such remedies may include ... "supportive measures"; however, remedies [for the respondent] need not be non-disciplinary or non-punitive and need not avoid burdening the respondent ...." *Id*.

"Report"

The act of providing a school district employee "notice" (as defined above) of alleged sexual harassment – whether through oral or written means. The ED sometimes refers to a "report" as a "disclosure".

"Respondent"

"Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment." 34 C.F.R. § 160.30(a). A parent or legal guardian may exercise their rights on behalf of their minor child who is the "respondent". *See* 34 C.F.R. § 160.6(g).

"Sexual Harassment"

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

(1) An employee of the [school district] conditioning the provision of an aid, benefit, or service ofthe [school district] on an individual's participation in unwelcome sexual conduct [aka, "*quid pro quo* sexual harassment"];

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school district's] education program or activity; or

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

"Sexual Assault"

"[S]exual assault" means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation (FBI UCR). 20 U.S.C. § 1092(f)(6)(A)(v).

> **"Consent"** (for purposes of allegations of "sexual assault" as defined above) "Consent" for sexual activity may be manifest in the voluntary words or actions of a student over the age of 12 to someone not greater than three (3) years older than the student, conveying a willingness to engage in a sexual act. Consent does not include the following: (a) a student's words or actions conveyed to a school district employee; (b) words or actions of a student who is incapable of resisting or of understanding the nature of the act by reason of a stupor or abnormal condition of mind produced by an intoxicating agent or any cause and the offender knew or should have known of the student's incapacity; and (c) words or actions of a student who has mental or physical infirmities which the offender knew or should have known to be significant.

"Dating violence"

The term "dating violence" means violence committed by a person–

(A) who is or has been in a social relationship of a romantic or intimate nature with thevictim; and

(B) where the existence of such a relationship shall be determined based on a considerationof the following factors:

(i) The length of the relationship.

(ii) The type of relationship.

(iii) The frequency of interaction between the persons involved in the relationship. 34 U.S.C. § 12291(a)(10).

"Domestic violence"

The term "domestic violence" includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction. 34 U.S.C. § 12291(a)(8).

"Stalking"

The term "stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to–

(A) fear for his or her safety or the safety of others; or

(B) suffer substantial emotional distress. 34 U.S.C. § 12291(a)(30).

Note that forms of sexual harassment under (1) (i.e., *quid pro quo*) and (3) (i.e., the specifically identified sexual offenses) do NOT require that the harassment be either severe, persistent, or objectively offensive. *Preamble* at 30,143 n.628. In other words, the criterion of "severe, pervasive, and objectively offensive" applies only to form (2) in the above definition of "sexual harassment". **"Standard of Evidence"**

The standard of evidence is the criterion by which the school district will use to determine responsibility of the respondent. 34 C.F.R. § 106.45(b)(1)(vii). This standard will be either "the preponderance of the evidence standard" or "the clear and convincing evidence standard". *Id*. The school district must apply the same standard of evidence for formal complaints against students as for formal complaints against employees. *Id*.

The ED provides the following descriptions of the standards:

Clear and convincing	"A clear and convincing evidence standard of evidence is understood to mean concluding that a fact is highly probable to be true." *Preamble* at 30,373 n.1409.
Preponderance of the evidence –	"A preponderance of the evidence standard of evidence is understood to mean concluding that a fact is more likely than not to be true." *Preamble* at 30,373 n.1409.

"Supportive Measures"

Supportive measures means 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 [school district's] education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the [school district'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, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The [school district] 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 [school district] to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. 34 C.F.R. § 106.30(a).

The school district must offer *supportive measures* "whenever the [school district] has actual knowledge that a person has been allegedly victimized by sexual harassment in the [school district's] education program or activity, regardless of whether the complainant or Title IX

Coordinator initiates a grievance process by filing or signing a formal complaint." *Preamble* at 30,128. The school district's grievance process must "[d]escribe the range of supportive measures available to complainants and respondents ...." 34 C.F.R. § 106.45(b)(1)(ix).

"Title IX Coordinator"

The Title IX regulations require each LEA to "*designate and authorize* at least one employee to coordinate its efforts to comply with its responsibilities under [the regulations], which employee must be referred to as the *Title IX Coordinator*." 34 C.F.R. § 106.8(a) (emphasis added). The ED noted that "[LEAs] have been required to designate a Title IX Coordinator for decades [i.e., since 1975]." *Preamble* at 30,111. The ED states that "the Title IX Coordinator [is] an essential component of the process to address sexual harassment ...." *Preamble* at 30,111. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. 34 C.F.R. § 106.30(a). Further, "the Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented." *Preamble* at 30,181. Other than the complainant, only a Title IX Coordinator can sign a formal complaint and initiate the grievance process. *Preamble* at 30,134.

"Unwelcome conduct"

As used in prongs (1) and (2) of the definition of "sexual harassment", the ED describes "unwelcome conduct" as follows:

> the [ED] interprets ''unwelcome'' ... as a subjective element; thus, even if a complainant in a *quid pro quo* situation pretended to welcome the conduct (for instance, due to fear of negative consequences for objecting to the employee's suggestions or advances in the moment), the complainant's subjective statement that the complainant found the conduct to be unwelcome suffices to meet the "unwelcome" element. *Preamble* at 30,148.

Q&A

1. Is a written document necessary to submit a "report" of sexual harassment?

No. A report may be written *or* verbal. Accordingly, a verbal report alone triggers the school district's responsibilities to offer supportive measures to the complainant.

2. In order for the school district to respond, does the report or notice need to have "proof" of equal access having been denied?

No. The ED notes that "the [school district] need **not** have received notice of facts that definitively indicate whether a reasonable person would determine that the complainant's equal access has been effectively denied in order for the [school

district] to be required to respond promptly in a non-deliberately indifferent manner under § 106.44(a)." *Preamble* at 30,192 (emphasis added). Note that a "third prong" offense does not need to effectively deny equal access in order to meet the Title IX regulation's definition of sexual harassment.

3. Is there a specific time limit for when a complainant must file formal complaint after an individual (e.g., complainant, other individual) makes a report of sexual harassment?

No. If the complainant is a student in the school district (or attempting to enter the school district), there is no time limitation on when a complainant or the Title IX Coordinator can file a formal complaint.

4. Are there any particular words which an individual must use when submitting a report or a complainant filing a formal complaint of sexual harassment? In other words, is it the complainant's burden? No. The ED states that

> there is no magic language needed to ''present'' a report or formal complaint in a particular way to trigger a [school district's] response obligations. Rather, the burden is on [school districts] to evaluate reports of sexual harassment in a common sense manner with respect to whether the facts of an incident constitute one (or more) of the three types of misconduct described in § 106.30. This includes taking into account a complainant's age, disability status, and other factors that may affect how an individual complainant describes or communicates about a situation involving unwelcome sex-based conduct. *Preamble* at 30,156.

The ED cautions that the regulations do NOT "require[] showing that a complainant dropped out of school, failed a class, had a panic attack, or otherwise reached a ''breaking point'' in order to report and receive a [school district's] supportive response to sexual harassment." *Preamble* at 30,169. The ED further urges that the school district "carefully, thoughtfully, and reasonably evaluate each complainant's report or formal complaint." *Preamble* at 30,156.

5. Should the school district expect any particular "profile" or behaviors of a complainant?

No. The ED cautions that "[t]he § 106.30 definition [of sexual harassment] neither requires nor permits school officials to impose notions of what a ''perfect victim'' does or says, nor may a [school district] refuse to respond to sexual harassment because a complainant is ''high-functioning'' or not showing particular symptoms following a sexual harassment incident." *Preamble* at 30,170. The ED states further, "School officials turning away a complainant by deciding the complainant was "not traumatized enough" would be *impermissible* under the final

regulations because § 106.30 does *not* require evidence of concrete manifestations of the harassment." *Preamble* at 30,170 (emphasis added).

6. Does the school district have a responsibility to respond appropriately even when no one has made a report or filed a formal complaint of sexual harassment?

Yes. The ED provides the following example:

> [S]chool [staff] may observe sexualized insults scrawled on school hallways, and even where no student has reported the incident, the school employees' notice of conduct that could constitute sexual harassment as defined in § 106.30 (*i.e.,* unwelcome conduct that a reasonable person would conclude is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education) charges the [school district] with actual knowledge, and the [school district] must respond in a manner that is not clearly unreasonable in light of the known circumstances, which could include the [school district] removing the sexually harassing insults and communicating to the student body that sexual harassment is unacceptable. *Preamble* at 30,210.

7. Does the school district have the flexibility to decide the supportive measures to be provided to the complainant and the respondent?

Yes. The ED states that school districts have the "flexibility to make those determinations by taking into the account the specific facts and circumstances and unique needs of the parties in individualsituations." *Preamble* at 30,181. However, the ED advises that "if a [school district] determines that a particular supportive measure was not appropriate even though requested by a complainant, the [school district] must document why the [school district's] response to the complainant was not deliberately indifferent." *Preamble* at 30,181 n.801.

8. Can a supportive measure "burden" a respondent?

Yes. However, it may not *unreasonably* burden the respondent. *See* 34 C.F.R. § 106.30. The extent of the burden and whether it's unreasonable will likely depend on the circumstances.

9. Can a "remedy" burden a respondent?

Yes. *See* 34 C.F.R. § 106.45(b)(1)(i). There is no qualification/limitation as with supportive measures. Further, it may include disciplinary measures. *Preamble* at 30,244.

10. Can a school district ignore federal statutes (e.g., IDEA, Section 504, ADA) when preparing to implement an "emergency removal" of a student under the Title IX regulations?

No. For students with disabilities, the days of "emergency removal" will likely constitute disciplinary removals. Recall that school districts have a *limited* number of days for which a student may be removed for disciplinary reasons without implicating free appropriate public education (FAPE) issues. It would very likely be *inconsistent* with a student's rights under IDEA or 504/ADA to consider "emergency removal" days under Title IX separate from disciplinary removal (e.g., suspension) days under district/school code of conduct. Federal statutes have greater legal weight than federal regulations. Accordingly, the Title IX regulation regarding emergency removals states that "[it] may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act." 34 C.F.R. § 106.44(c).

11. If report of alleged sexual harassment does not (or will not subsequently) identify the complainant (i.e., alleged victim), can the school district provide supportive measures to the complainant?

No. "A [school district's] ability to offer supportive measures to a complainant, or to consider whether to initiate a grievance process against a respondent, will be affected by whether the report disclosed the identity of the complainant or respondent. In order for a [school district] to provide supportive measures to a complainant, it is not possible for the complainant to remain anonymous because at least one school official (*e.g.,* the Title IX Coordinator) will need to know the complainant's identity in order to offer and implement any supportive measures." *Preamble* at 30,132.

12. Does the Complainant's choice not to file a formal complaint end the school district's responsibilities under Title IX?

Not necessarily. The Title IX Coordinator must respect the complainant's autonomy to file or not file a formal complaint. However, "the Title IX Coordinator, after having considered the complainant's wishes, [can] decide[] that it would be clearly unreasonable for the school [district] *not* to investigate the complainant's allegations." *Preamble* at 30,194. In other word, the factual allegations may reflect respondent conduct which, if school district does not pursue via the grievance process, would be evidence of the school district being deliberately indifferent under the circumstances.

13. Does the Title IX Coordinator's signing a formal complaint (over the complainant's choice not to file) make the Coordinator adverse to the respondent?

No. The ED states that "when a Title IX Coordinator signs a formal complaint, that action does not place the Title IX Coordinator in a position adverse to the respondent; the Title IX Coordinator is initiating an investigation based on allegations of which the Title IX Coordinator has been made aware, but that does not prevent the Title IX Coordinator from being free from bias or conflict of interest with respect to any party." *Preamble* at 30,123.

14. When the Title IX Coordinator initiates the grievance process (via formal complaint) over the complainant's choice to not file, is the complainant then compelled to participate in the grievance process, including the investigation?

No. The ED states, "Where a Title IX Coordinator signs a formal complaint knowing the complainant did not wish to do so, the [school district] must respect the complainant's wishes regarding whether to participate or not in the grievance process." *Preamble* at 30,129 n.569.

15. When the Title IX Coordinator initiates the grievance process (via formal complaint) over the Complainant's choice to not file, does the Title IX Coordinator still need to provide written notices to the Complainant if the Complainant chooses not to participate (in the grievance process)?

Yes. The ED states,

> Although a complainant who did not wish to file a formal complaint and does not want to participate in a grievance process may not want to receive notifications throughout the grievance process, the [school district] must treat the complainant as a party by sending required notices, and must not retaliate against the complainant for choosing not to participate. Nothing in the final regulations precludes a [school district] from communicating to a nonparticipating complainant that the [school district] is required under these final regulations to send the complainant notices throughout the grievance process and that such a requirement is intended to preserve the complainant's right to choose to participate, not to pressure the complainant into participating. Such a practice adopted by a [school district] would need to be applied equally to respondents who choose not to participate in a grievance process[.] *Preamble* at 30,122.

16. In the determination of whether behavior constitutes "sexual harassment" under the Title IX regulations, does the respondent's knowledge or understanding of inappropriateness of their actions matter?

No. The ED noted that "a respondent's lack of comprehension that conduct constituting sexual harassment violates the bodily or emotional autonomy and dignity of a victim does not excuse the misconduct, though genuine lack of understanding may (in a [school district's] discretion) factor into the sanction decision affecting a particular respondent ...." *Preamble* at 30,144. In other words, an individual's knowledge of whether their behavior was inappropriate or not is only a factor after the school district determined that the conduct was sexual harassment and then considers what discipline or other consequences the respondent should receive.

17. Did the "respondent" have to "intend" the conduct which is alleged to be sexual harassment?

No. With a single exception, the Title IX regulations require the school district to "respond to allegations of sexual harassment as defined in [34 C.F.R.] § 106.30, irrespective of whether the alleged conduct was intentional or unintentional on the part of the respondent ...." *Preamble* at 30,090. The sole exception: the behavior of "fondling" – as part of "sexual assault" – has an intent element. *Preamble* at 30,090 n.437.

18. In the determination of whether behavior constitutes "sexual harassment" under the Title IX regulations, does the respondent's beliefs or perceptions about the target's sex, sexual orientation, or gender identity matter?

No. The ED stated, "Where [the respondent's] conduct is sexual in nature, or where conduct references one sex or another, that suffices to constitute conduct "on the basis of sex." *Preamble* at 30,146. The focus is on the behavior directed to the complainant, not thoughts or beliefs.

19. Does the inappropriate behavior need to be in-person contact (verbally or non-verbally) in order to constitute "sexual harassment"?

No. The ED states that "[t]he § 106.30 sexual harassment definition does not make sexual harassment dependent on the method by which the harassment is carried out; use of email, the internet, or other technologies may constitute sexual harassment as much as use of in[-]person, postal mail, handwritten, or other communications." *Preamble* at 30,146.

20. If the respondent (e.g., a student) used a personal device (e.g., cell phone) to engage in inappropriate conduct at school, does that automatically remove the respondent from being a part of a situation over which the school district has "substantial control"?

No. The ED provides the following example: "[A] student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the [school district] exercises substantial control." *Preamble* at 30,202. The ED stated further that the "regulations apply to sexual harassment perpetrated through use of cell phones or the internet if sexual harassment occurred in the [school district's] education program or activity." *Preamble* at 30,202.

21. In review of whether inappropriate behavior constitutes the *quid pro quo* form of sexual harassment, does the school/district employee need to tell the student that the sexual behavior is in trade for or a bargain for something?

No. The ED provides the following guidance:

> Determining whether unwelcome sexual conduct is proposed, suggested, or directed at a complainant, by a [school district's] employee, as part of the employee ''conditioning'' an educational benefit on participation in the unwelcome conduct, does not require the employee to expressly tell the complainant that such a bargain is being proposed, and the age and position of the complainant is relevant to this

determination. For example, elementary and secondary school students are generally expected to submit to the instructions and directions of teachers, such that if a teacher makes a student feel uncomfortable through sex-based or other sexual conduct (*e.g.,* back rubs or touching students' shoulders or thighs), it is likely that elementary and secondary school students will interpret that conduct as implying that the student must submit to the conduct in order to maintain educational benefits (*e.g.,* not getting in trouble, or continuing to please the teacher and earn good grades). *Preamble* at 30,148-149 n.643.

22. Do non-employees of the school district (e.g., volunteers, others) fall under the definition of *quid pro quo* sexual harassment (i.e., first prong) under the Title IX regulations?

No. However, the ED notes that "the unwelcome conduct of a non-employee individual may constitute sexual harassment under the second or third prongs of the § 106.30 definition." *Preamble* at 30,149.

23. In order to be "sexual harassment" under Title IX, does a "third prong" offense need to effectively deny a complainant's equal access to educational opportunities?

No. The ED notes that the third prong prohibiting sexual assault, dating violence, domestic violence, and stalking assumes that such conduct effectively denies equal access to education. *Preamble* at 30,151.

24. Is there any "subjective" element in the second prong?

Yes. The ED notes that "whether harassment is actionable turns on both subjectivity (*i.e.,* whether the conduct is unwelcome, according to the complainant) and objectivity (*i.e., "*objectively offensive")." *Preamble* at 30,167.

25. Does verbal harassment of an individual based on actual or perceived sexual orientation or gender identity fall under "sexual harassment" under the Title IX regulations?

No. The ED explains that "actions [which] do not involve conduct of a sexual nature ... would not be sexual harassment covered by Title IX." *Preamble* at 30,179.

26. Does "sexual harassment" under the Title IX regulations depend on the complainant's or respondent's sex, sexual orientation, or gender identity?

No. The focus is on sexual behavior as defined by the regulations as "sexual harassment". *See Preamble* at 30,179.

27. Does dismissal of a Title IX complaint prevent consequences for non-Title IX sexually related conduct?

No. The ED notes that "dismissal [of sexual harassment allegations] is only for purposes of Title IX and does not preclude the [school district] from responding to the allegations under the [school district's] own code of conduct." *Preamble* at 30,150; *see* 34 C.F.R. 106.45(b)(3)(i). For example, such prohibited conduct could include sexually based behavior which implicates possible bullying under La. R.S. 17.416.13 and the school board's anti-bullying policies and procedures.
More generally, the ED comments, "[T]he fact that not every harassing or offensive remark is prohibited under Title IX in no way condones or encourages crude, insulting, demeaning behavior, which [school districts] may address through a variety of actions ...." *Preamble* at 30,161.

28. What about child abuse or neglect?

A school district's obligations under Title IX are "[i]n addition to any obligations imposed on school employees under State child abuse laws ...." At 30,107. Following Title IX procedures does NOT discharge any obligation a mandatory reporter has under Louisiana law for the reporting of suspected child neglect or abuse.

29. What about criminal charges?

The ED warns that "a [school district] *cannot* discharge its legal obligation to provide education programs or activities free from sex discrimination by referring Title IX sexual harassment allegations to law enforcement (or requiring or advising complainants to do so), because the purpose of law enforcement differs from the purpose of a [school district] offering education programs or activities free from sex discrimination. Whether or not particular allegations of Title IX sexual harassment also meet definitions of criminal offenses, the [school district's] obligation is to respond supportively to the complainant and provide remedies where appropriate, to ensure that sex discrimination does not deny any person equal access to educational opportunities. Nothing in the final regulations prohibits or discourages a complainant from pursuing criminal charges in addition to a § 106.45 grievance process. *Preamble* at 30,099 (emphasis added).

30. What about School Resource Officers (SROs)?

For most Louisiana LEAs, SROs are not employees of the LEA. As such, under the Title IX regulations, a person's report of alleged sexual harassment to a non-employee SRO would not automatically qualify as "actual knowledge" by the LEA of sexual harassment. *See also, Doe v. Englewood Indep. Sch. Dist.*, No. 19-50737, — F.3d —, 2020 WL 3634519 (5th Cir. 2020) (stating that, under Title IX, law enforcement official for a school does not have authority to take corrective action on behalf of school district). Accordingly, SRO's having received such allegations would not trigger the LEA's obligations to respond to the allegations (e.g., supportive measures, investigation).

Still, under the Title IX regulations, the SRO may report allegations to the Title IX coordinator. However, an agreement or memorandum of understanding between the LEA and the law enforcement agency from which the SROs come can and should include an obligation and procedures for the SRO to communicate sexual harassment to the LEA's Title IX Coordinator or other authorized official (e.g., school principal).

31. Can the complainant or respondent appeal the final determination of the "decisionmaker" at the completion of grievance process?

Yes. "The final regulations require [school districts] to offer appeals, equally to both parties, on at least the three following bases: (1) Procedural irregularity that affected the outcome; (2) new evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome; or (3) the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome." *Preamble* at 30,276 (referencing 34 C.F.R. § 106.45(b)(8)). Note that the regulations specify the three bases which school districts must address an appeal; however, a school district *may* allow for an additional basis for appeal.

32. Can there be disciplinary consequences for sexual harassment?

Yes. "Because Title IX is a civil rights law concerned with equal educational access, these [Title IX] regulations do not require or prescribe disciplinary sanctions. ... [The regulations] leav[e] discipline decisions within the discretion of the LEA." *Preamble* at 30,070. The ED "believes that disciplinary decisions are best left to the sound discretion of [school districts]." *Preamble* at 30,104.

33. Can there be consequences for conduct outside of Title IX's definition but within the definition of sexually inappropriate behavior under the district's code of conduct?

Yes. ED explains that "dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, does not preclude a [school district] from addressing the alleged misconduct under other provisions of the [school district's] own code of conduct." *Preamble* at 30,038. The ED states further that "the fact that not every harassing or offensive remark is prohibited under Title IX in no way condones or encourages crude, insulting, demeaning behavior, which [school districts] may address through a variety of actions ...." *Preamble* at 30,161.

34. How do teachers address classroom behavior?

"Nothing in the final regulations reduces or limits the ability of a teacher to respond to classroom behavior. If the in[-]class behavior constitutes Title IX sexual harassment, the school is responsible for responding promptly without deliberate indifference, including offering appropriate supportive measures to the complainant, which may include separating the complainant from the respondent, counseling the respondent about appropriate behavior, and taking other actions that meet the §

106.30 definition of ‘‘supportive measures’’ while a grievance process resolves any factual issues about the sexual harassment incident. If the in-class behavior does not constitute Title IX sexual harassment (for example, because the conduct is not severe, or is not pervasive), then the [Title IX] regulations do not apply and do not affect a decision made by the teacher as to how best to discipline the offending student or keep order in the classroom." *Preamble* at 30,069.

35. Who is responsible for enforcement of a school district's compliance with the Title IX?

The ED's Office for Civil Rights (OCR).

Additional Louisiana Statute of Note

Act 272 of the Regulation Session of the Louisiana Legislative amends the Louisiana Children's Code (i.e., State law) and requires the following individuals to complete yearly (by August 31) online training via the Department of Child and Family Services (DCFS):

> **any person who provides or assists in the teaching, training, and supervision of a child**, including **any public or private teacher, teacher's aide, instructional aide, school principal, school staff member, bus driver, coach**, professor, technical or vocational instructor, technical or vocational school staff member, college or university administrator, college or university staff member, **social worker**, probation officer, foster home parent, group home or other child care institutional staff member, personnel of residential home facilities, a licensed or unlicensed day care provider, or **any individual who provides such services to a child in a voluntary or professional capacity**. Children's Code art. 603(d) (emphasis added).

III. PROCEDURES – THE SCOPE & SEQUENCE

A. Designation of Title IX Coordinator

Each [school district] must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities pursuant to Title IX, referred to as the "Title IX Coordinator." The name, or title, office address, electronic mailing address, and telephone number of the Title IX Coordinator must be made available to all applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the [school district]. 34 C.F.R. § 106.8(a).

The Title IX "regulations require [school districts] to notify all students and employees (and parents and guardians of elementary and secondary school students) of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to § 106.8(a) so that students and employees will know to

whom they may report sexual harassment and how to make such a report, including options for reporting during nonbusiness hours." *Preamble* at 30,088–30,089. See **Definitions** section, "Title IX Coordinator".

The ED states that "a [school district] may designate one employee to coordinate multiple types of anti-discrimination and diversity efforts, yet the [school district] *must use the title "Title IX Coordinator" in its notices to students and employees, on its website, and so forth* so that the [school district's] educational community knows who to contact to report sex discrimination, including sexual harassment." *Preamble* at 30,114-115 n.514 (emphasis added).

Where does the district post and publish?

"Each [school district] also must prominently display the contact information required to be listed for the Title IX Coordinator on its website, if any, and in each handbook or catalog that it makes available to applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the [school district]." *Preamble* at 30,089.

B. Policy and Procedure - Requirements

Prohibition of sex discrimination in the treatment of formal complaints

Title IX prohibits discrimination on the basis of sex and the regulations emphasize that "[a]lthough a grievance process takes place in the context of resolving allegations of one type of sex discrimination (sexual harassment), a [school district] must take care not to treat a party differently on the basis of the party's sex because to do so would inject further sex discrimination into the situation." *Preamble* 30,239-240. For example, investigating complaints of sexual harassment brought by females but not males may constitute sexual harassment. *Preamble* 30,240; 34 C.F.R. § 106.45(a).

Equitable Treatment

With respect to remedies and sanctions, "equitable treatment" hinges on a fair process and resulting outcome. The grievance procedure should specify that a complainant may be provided with remedies *only* where a determination of responsibility for sexual harassment has been made against the respondent. Likewise, disciplinary sanctions or other actions that are not "supportive" (as defined in 34 C.F.R. § 106.30(a)) may *only* be imposed if, at the conclusion of the fair process, there is a determination of responsibility for sexual harassment. *Preamble* 30,246; 34 C.F.R. § 106.45(b)(1)(i). Remedies must be designed to restore or preserve equal access to the [school district's] education program or activity. Such remedies may include the same individualized

services described in 34 C.F.R. § 106.30 as "supportive measures;" however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.[1]

Objective Evaluation of all Relevant Evidence

Title IX regulations require an objective evaluation of all relevant evidence - both inculpatory (that which shows or tends to show the respondent's engagement in the alleged activity) and exculpatory (that which shows or tends to show the respondent did not engage in the alleged activity). The regulations further require that credibility determinations my *not* be based on a person's status as a complainant, respondent, or witness. 34 C.F.R. § 106.45(b)(1)(ii).

The ED recognizes that the type and extent of evidence available will vary based on the facts of each incident. In some situations, there may be little or no evidence other than statements from the parties themselves, and makes clear that corroborating evidence is not necessary to make a final determination. Fact finders will be required to made credibility determinations based on the evidence and not on presumptions as to party status. The ED notes that the presumption of nonresponsibility is not interpreted to mean that a respondent is considered truthful or credible, but rather that investigators and decision-makers serve impartially without prejudging the facts at issue. Determinations of credibility as to all parties and witnesses must be based on evidence, not assumptions about respondents, complainants, or witnesses. *Preamble* at 30,247.

What is "Relevant" Evidence?

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action (Fed. R. Evid. 401).

Relevant evidence should not be considered if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the [fact finder], undue delay, wasting time, or needlessly presenting cumulative evidence (Fed. R. Evid. 403).

Evidence related to a 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 in the complaint, 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. 34 C.F.R. § 106.45(b)(6).

[1] Does not prevent emergency removals or placement on administrative leave pursuant to 34 C.F.R. § 106.44.

Standard of Evidence

Grievance procedure must 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, and apply the same standard of evidence to all formal complaints of sexual harassment. 34 C.F.R. § 106.45(b)(1)(vii).
Each recipient school district must select the standard of evidence to be utilized, and then that standard is to be used consistently to all formal complaints of sexual harassment to ensure a fair process. *Preamble* at 30,275.

Preponderance of the Evidence Standard - More probable than not respondent is responsible

Clear and Convincing Evidence Standard - Highly probably or probably certain that the respondent is responsible

What are a School District's responsibilities regarding "conflicts of interest", "bias", and "impartiality"?

The Title IX regulations "[r]equire that any individual designated by a [school district] as a Title IX Coordinator, investigator, decision-maker, or any person designated by a [school district] to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent." 34 C.F.R. § 106.45(b)(1)(iii). All parts of the Title IX process, including the actions of the Title IX Coordinator, Investigator, and Decision-Maker, must be "without bias against an individual's sex, race, ethnicity, socioeconomic status, or other characteristics." *Preamble* at 30,095. Bias can also manifest in negative stereotypes about an individual – whether complainant or respondent; individuals generally who file complaints (e.g., "complainants"); individuals generally who are "victims"; or individuals generally who are alleged to have sexually harassed (i.e., the "respondent") someone. A conflict of interest may also be viewed as a "lack of neutrality". *See Preamble* at 30,216. The terms are <u>not</u> mutually exclusive but overlap in meaning.

bias: "a personal and sometimes unreasoned judgment : prejudice"
(source: https://www.merriam-webster.com/dictionary/bias)

impartial: "not partial or biased : treating or affecting all equally"
(source: https://www.merriam-webster.com/dictionary/impartial)

conflict of interest: "a conflict between the private interests and the official responsibilities of a person in a position of trust" (source: https://www.merriam-webster.com/dictionary/conflict%20of%20interest)

The ED cautions, "If a Title IX Coordinator responds to a complainant by not taking a report seriously, or with bias against the complainant, the [school district] has violated [the Title IX] regulations." *Preamble* at 30,112. Further, the ED comments that "sexual harassment under any part of the § 106.30 definition cannot be excused by trying to blame the victim or rationalize the perpetrator's behavior ...." *Preamble* at 30,167.

Presumption Respondent is Not Responsible

The regulations include an inherent presumption that the respondent is not responsible for alleged conduct until a determination of responsibility is made at the conclusion of the grievance process. 34 C.F.R. § 106.45(b)(1)(iv).

The presumption is not intended to give an advantage to the respondent or to increase the adversarial nature of the proceedings; rather, the intent is to ensure that the grievance process remains impartial toward parties whose views are adverse to each other. ED notes that the presumption should benefit both parties - complainants will have increased "legitimacy of [school district] determinations when respondents are found responsible, while respondents will benefit from assurance that a [school district' cannot treat the respondent as though responsibility has been determined until conclusion of a fair grievance process." *Preamble* at 30,266.

How long does a school district have to complete the grievance process?

Title IX regulations call for "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 applicable). The process should allow for temporary delays or limited extensions of time for good cause with written notice to the complainant and respondent of the delay or extension and reason for the action. 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 accommodations of disabilities. 34 C.F.R. § 106.45(b)(1)(v).

The ED declined to impose specified time-lines, noting that [school districts] are in the best position to balance the interests of promptness, fairness and accuracy. School districts are required to designate and include in its grievance process what its set time frame will be, for each phase of the process, including appeals and any informal resolution process (if applicable). *Preamble* at 30,270. [school districts] should retain flexibility in designating time frames that are "reasonably prompt," and what is "reasonable" is a decision made in the context of its purpose to provide education free from sex discrimination balanced with the need to conduct the grievance process fairly in a manner that reaches reliable outcomes. *Preamble* at 30,272.

As it relates to extensions for "good cause," those listed in 34 C.F.R. § 106.45(b)(1)(v) are illustrative, not exhaustive, and the ED defers to the [school districts] to make sound determinations regarding the length of a brief delay. *Preamble* at 30,273.

Range of Disciplinary Sanctions and Remedies

A recipient school district's grievance procedure must describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the [school district] may implement following any determination of responsibility. 34 C.F.R. § 106.45(b)(1)(vi).

The ED leaves it to [school districts] to determine whether the grievance procedure will include a specific list of possible disciplinary sanctions, or to describe the range of possible sanctions. *Preamble* at 30,275.

Appeal Procedure and Bases for Appeal

Title IX Regulations require the grievance procedure to Include the procedures to appeal a determination of responsibility and the permissible bases for the complainant and respondent to appeal 34 C.F.R. § 106.45(b)(1)(viii).

Both parties have the right to appeal an adverse determination. The ED notes that complainants and respondents have different interests in the outcome of a sexual harassment complaint, and thought the interests may differ, each represents a "high-stakes, potentially life altering consequence deserving of an accurate outcome." *Preamble* at 30,276.

Appeals should be offered on at least the three following bases:

(1) Procedural irregularities that affected the outcome;

(2) new evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome; or

(3) the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome.

Preamble at 30,276; 34 C.F.R. § 106.45(b)(8).

Supportive Measures

The grievance procedure should describe the range of supportive measures available to complainants and respondents. 34 C.F.R. § 106.45(b)(1)(ix).

The ED clarifies that this provision does not require equality or parity in terms of the supportive measures actually available to complainants and respondents generally, or to complainants or respondents in a particular case. "This provision must be understood in conjunction with the *obligation* of a [school district] to offer supportive measures to complainants, (including having the Title IX Coordinator engage in an interactive discussion with the complainant to determine appropriate supportive measures), while no such obligation exists with respect to respondents. By defining supportive measure to mean individualized services that cannot unreasonably burden either party, these final regulations *incentivize* [school districts] to make supportive measures

available to respondents, but these final regulations *require* [school districts] to offer supportive measures to complainants." *Preamble* at 30,276 (emphasis added).

Privileged Information

The grievance procedure cannot 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. 34 C.F.R. § 106.45(b)(1)(x).

The ED clarifies that the grievance procedure respects information protected by a legally recognized privilege, and provides examples including attorney-client privilege, doctor-patient privilege, spousal privilege, etc. *Preamble* at 30,277.

Training Requirements

The Title IX regulations delineate specific training requirements for Title IX Coordinators, Investigators, Decision-Makers, and informal resolution process facilitators (if applicable), as follows:

Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process (who may be the Title IX Coordinator), must receive training on the following:

- definition of sexual harassment as defined in 34 C.F.R. § 106.30 (see above);
- scope of the school district'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 in their respective roles in an impartial manner

Decision-Makers must receive training on the following:

- technology for live hearings (if applicable);
- 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 34 C.F.R. § 106.45(b)(6).

Investigators must receive training on the following:

- issues of relevance to create an investigative report that fairly summarizes the evidence as set forth in 34 C.F.R. § 106.45(b)(5)(vii).

Training cannot rely on sex stereotypes and must promote impartial investigations and adjudications 34 C.F.R. § 106.45(b)(1)(iii).[2]

[2] This HSA&G Title IX training series covers the required topic areas; however, it is important to note that school districts are required to ensure all individuals serving in any

C. Grievance Process - From Report to Conclusion

"Report" of Sexual Discrimination and Harassment

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator. 34 C.F.R. § 106.8(a).

A school district with "actual knowledge" of sexual harassment in an education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent - i.e., clearly unreasonable in light of known circumstances. 34 C.F.R. § 106.44(a).

- A report of sexual harassment may impute "actual knowledge" and a failure to take any steps with respect to the report would constitute "deliberate indifference."

What are the Title IX Coordinator's obligations upon receipt of a report of sexual harassment?

1. promptly contact the complainant to determine available facts and to discuss all options, including the availability of supportive measures and the complainant's wishes with respect to supportive measures. **Supportive measures (as defined above) are available *without* the filing of a formal complaint.** 34 C.F.R. § 106.44(a).

2. Inform the complainant of the right to and the process for filing a formal complaint. 34 C.F.R. § 106.44(a).
3. In the event the complainant decides not to file a complaint, or the Title IX Coordinator does not file a complaint, the report is closed without further action. The report and any provided supportive measures remain confidential and such information may not be released. The Title IX Coordinator must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to preserve and restore or preserve equal access to education. If a complainant is not provided supportive measures, the title IX Coordinator must document the reasons why such response was not clearly unreasonable in light of known circumstances. The Title IX Coordinator is to maintain the report as a confidential document for seven years. 34 C.F.R. §§ 106.44 and 106.45(10)(ii).

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of the above-referenced capacities are fully trained as staff changes. The Title IX Regulations do not require periodic repeated training for employees already trained who remain in their respective roles.

4. The Title IX Coordinator has the authority and, depending on the circumstances, the responsibility, to file and sign a formal complaint even if the complainant does not wish to file a complaint.

   The ED states:

   "The final regulations thus create clear, accessible channels for any person to report sexual harassment in a way that triggers a [school district's] response obligations. A [school district] must promptly respond if it has actual knowledge that any person including someone in a position of authority, is sexually harassing or assaulting students; failure to do so violates these final regulations. As previously stated, the deliberate indifference standard is flexible and may require a different response depending on the unique circumstances of each report of sexual harassment. If a [school district] 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 [school district's] Title IX Coordinator to sign a formal complaint obligating the [school district] to investigate in accordance with § 106.45, even if the complainant (*i.e.,* the person alleged to be the victim) does not wish to file a formal complaint or participate in a grievance process" *Preamble* at 30,089.

When Do You Begin an "Investigation"?

"If a [school district] has *actual knowledge* of sexual harassment (or *allegations* of sexual harassment) in its education program or activity against a person in the United States, then it must begin an investigation as soon as the complainant requests an investigation by filing a formal complaint (or when the Title IX Coordinator determines that circumstances require or justify signing a formal complaint)." *Preamble* at 30,089 (emphasis added).

Upon receipt of a formal complaint filed by a complainant or signed by the Title IX Coordinator, the Title IX Coordinator must immediately provide written notice to the known parties, containing a copy of the grievance procedure, including the formal resolution process and appeal process. Such written notice must contain the following elements:

1. Notice of the allegations of sexual harassment potentially constituting "sexual harassment" as defined in 34 C.F.R. § 106.30 including sufficient details known at the time and with sufficient time to prepare a response before any initial interview or other proceeding. Sufficient details include the identities of the known parties involved in the incident, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.

2. A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility will not be made until conclusion of the grievance process by the decision-maker.

3. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence pursuant to 34 C.F.R. § 106.45(b)(5)(vi).

4. The written notice must inform the parties of any provision in the [school district's] code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process. 34 C.F.R. § 106.45(b)(2)(i).

If, in the course of an investigation, the school district decides to investigate allegations about the complainant or respondent that are not included in the notice described above, the school district must provide notice of the additional allegations to the parties whose identities are known. 34 C.F.R. § 106.45(b)(2)(ii).

The ED acknowledged concerns of a perceived lack of protection against retaliation, and therefore the final regulations added § 106.71 which prohibits any person from intimidating, threatening, coercing, or discriminating against any individual for the purposes of interfering with any right or privilege secured by Title IX including, among other things, making a report or formal complaint of sexual harassment. *Preamble* at 30,278; 34 C.F.R. § 106.71.

Communication of the prohibition may be provided in any manner the school district chooses; however, one option would be include such statement in the notice described above, *for example*:

- Intimidating, threatening, coercing, or discriminating against any individual for the purposes of interfering with any right or privilege secured by Title IX is expressly prohibited.

Other required components of the grievance procedure recommended to be included in the notice are as follows:

- A statement that the complainant and respondent will be treated equitably by providing remedies for a complaint when a determination of responsibility for sexual harassment has been made against the respondent and by following the grievance process before imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent. Remedies must be designated to restore or preserve equal access to the education program or activities and

  include individual services such as "supportive measures"; however, remedies can be disciplinary or punitive and need not avoid burdening the respondent. 34 C.F.R. § 106.45(b)(1)(i).

- Notice that the Title IX Coordinator may consolidate formal complaints as to 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. Where a complaint process involves more than one complainant or more than one respondent, references in the Title IX policy and/or

procedure to the singular "party," "complainant," or "respondent" include the plural, as applicable. 34 C.F.R. § 106.45(b)(4).

- Notice that if the respondent is a school district employee, such employee may be placed on administrative leave during the pendency of a grievance process. 34 C.F.R. § 106.44(b)(2)(d).

Dismissal of a Formal Complaint

The Title IX Coordinator reviews the allegations made in a formal complaint, if one of the following circumstances apply, the Title IX Coordinator *must* dismiss the Complaint for purposes of sexual harassment:

1. If the conduct alleged in the formal complaint, even if true, would not constitute "sexual harassment" as defined above.

2. If the conduct did not occur in the recipient's educational program or activity.

3. If the conduct did not occur against a person in the United States.

However, such dismissal *does not* preclude action under another provision of the school district's code of conduct. 34 C.F.R. § 106.45(b)(3)(i).

For Example: If sexual harassment by a student towards another student during study abroad, the Title IX Grievance Procedure would not be applicable; however, the student could be disciplined pursuant to the ordinary code of conduct.

The Title IX Coordinator *may* dismiss the formal complaint or any allegations therein one of the following circumstances:

1. Complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegation;

2. The respondent is no longer enrolled or employed by the school district, or
3. Specific circumstances prevent the school district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. 34 C.F.R. § 106.45(b)(3)(ii).

Upon dismissal, whether mandatory or discretionary, the school district must promptly send written notice to simultaneously to the parties with specific reasons for the dismissal. 34 C.F.R. § 106.45(b)(3)(iii).

Investigation of Formal Complaint

When investigating a formal complaint and throughout the grievance process, a school district must:

1. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the Title IX Coordinator and Investigator and not on the parties. However, the Title IX Coordinator and the Investigator cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to a party, unless the Title IX Coordinator or Investigator obtains that party's voluntary, written consent to do so for the Title IX grievance process under this section. If the party is a minor, then the school district must obtain the voluntary, written consent of the parent or legal guardian. If the student has reached the age of majority, then such consent should be obtained from the student. 34 C.F.R. § 106.45(b)(5)(i).

   This requirement takes the burden of proof and gathering of evidence off of the shoulders of the parties; while the regulations as a whole ensure the parties may fully participate in the investigation process by gathering evidence, presenting fact and expert witnesses, reviewing the evidence gathered, responding to the investigative report that summarizes relevant evidence, and asking questions of other parties and witnesses before a decision-maker has reached a determination regarding responsibility. *Preamble* at 30,291.

2. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, submit written questions for the other party/witness to answer provided the questions are relevant, and other relevant inculpatory and exculpatory evidence. 34 C.F.R. § 106.45(b)(5)(ii).

3. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. 34 C.F.R. § 106.45(b)(5)(iii).

   The ED recognizes concerns over confidentiality, but believes that such concerns should not be used as a guise to restrain parties from writing or speaking about the allegations under investigation. Parties may need support from friends, family, advisors, advocacy groups, etc. Furthermore, discussion of the allegations may be necessary for each party to be able to gather and present evidence. *Preamble* at 30,295.

   The ED also recognizes that this could lead to public criticism of the manner in which an investigation is being conducted, and is supportive of such activism. *Preamble* at 30,295.

   This section *does not* permit discussion of information that does not consist of "the allegations under investigation," including the evidence that has been collected and exchanged between parties and their advisors or the investigative report summarizing relevant evidence sent to the parties and their advisors. *Preamble* at 30,295-296.

The regulations should not be interpreted to be inconsistent with FERPA, and while parties and advisors may utilize information gathered for purposes of participating in the grievance process, such should not be subject to dissemination or re-disclosure. *Preamble* at 30,297-298.

4. Not allow as relevant evidence questions and evidence related to a 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 in the complaint, 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. 34 C.F.R. § 106.45(b)(6).

5. Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the school district may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties. 34 C.F.R. § 106.45(b)(5)(iv).

6. Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings (if applicable), investigative interviews, or other meetings, with sufficient time for the party to prepare to participate. 34 C.F.R. § 106.45(b)(5)(v).

7. Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the school district does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the school district must send to each party and the party's advisor, if any, 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. The school district must make all such evidence subject to the parties' inspection and review available at any hearing (if applicable) to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination. 34 C.F.R. § 106.45(b)(5)(vi).

8. Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if [applicable]) or other 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. 34 C.F.R. § 106.45(b)(5)(vii).

Hearings (if applicable) and Written Questions

Post-secondary institutions are required to provide for a live hearing. Hearings are *not required* for elementary and secondary schools. 34 C.F.R. § 106.45(b)(6)(ii).[3]

> With or without a hearing, after the school district has sent the investigative report to the parties as described above 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. 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. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant. 34 C.F.R. § 106.45(b)(6)(ii).

Determinations Regarding Responsibility

After the investigative report is sent to the parties and before the decision-maker reaches a determination regarding responsibility, the decision-maker must afford each party seven (7) calendar days for the opportunity to submit written, relevant questions that a party wants asked of any party or witnesses, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the school district must apply the standard of evidence selected by the school district as defined above. 34 C.F.R. § 106.45(b)(7)(i).

How do you determine whether a respondent's behavior was "severe, pervasive, and objectively offensive"?

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[3] While elementary and secondary schools could opt to add a live hearing requirement to its grievance procedure, it is not recommended; however, if your school district opts to do so, information related to the hearing process may be found at 34 C.F.R. § 106.45(b)(6)(1) and in the *Preamble* at pages 30,312-30,362.

Generally, the ED states that the "[e]lements of severity, pervasiveness, and objective offensiveness must be evaluated in light of the known circumstances and depend on the facts of each situation, but must be determined from the perspective of a reasonable person standing in the shoes of the complainant." *Preamble* at 30,156. The determinations of whether an "unwelcome" behavior is "severe" and whether a behavior is "pervasive" are distinct inquiries. *Preamble* at 30,156. The ED suggests that investigators "tak[e] into account the ages and abilities of the individuals involved ...." *Preamble* at 30,158.

With regard to the "**severity**" element, the ED states,

> evaluation of whether harassment is ''severe'' appropriately takes into account the circumstances facing a particular complainant, such as the complainant's age, disability status, sex, and other characteristics. This evaluation does not burden a complainant to ''prove severity,'' because a complainant need only describe what occurred and the [school district] must then consider whether the described occurrence was severe from the perspective of a reasonable person in the complainant's position. *Preamble* at 30,165.

The ED comments that conduct may meet the "**pervasiveness**" element, "particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement." *Preamble* at 30,166.

With regard to the "**objectively offensive**" element, the ED cautions, "It would be inappropriate for a Title IX Coordinator to evaluate conduct for objective offensiveness by shrugging off unwelcome conduct as simply "boys being boys" or make similar assumptions based on bias or prejudice." *Preamble* at 30,167.

In the second prong, what does "effectively deny a person equal access" mean?

For the conduct to meet the second prong of the sexual harassment definition, the criterion "requires that a person's "equal" access to education has been denied, *not* that a person's total or entire educational access has been denied." *Preamble* at 30,169 (emphasis added). The "*equal* access [is] measured against the access of a person who has not been subjected to the sexual harassment." *Preamble* at 30,169 (emphasis in original text). The ED explains that "the § 106.30 definition does not apply only when a complainant has been entirely, physically excluded from educational opportunities but to any situation where the sexual harassment so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Preamble* at 30,169 (internal quotation marks and citation omitted). The ED states that "no specific type of reaction to the alleged sexual harassment is necessary to conclude that severe, pervasive, objectively offensive sexual harassment has denied a complainant *equal access*." *Preamble* at 30,170.

The ED provides some examples to assist in the process:

> Signs of enduring *unequal* educational access due to severe, pervasive, and objectively offensive sexual harassment may include ... skipping class to avoid a

> harasser, a decline in a student's grade point average, or having difficulty concentrating in class; however, no concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant's position of the ability to access the [school district's] education program or activity on an equal basis with persons who are not suffering such harassment. *Preamble* at 30,170.

What must be included in the Written Determination?

The written determination must include (34 C.F.R. § 106.45(b)(7)(ii)):

1. Identification of the allegations potentially constituting sexual harassment as defined above (34 C.F.R. § 106.45(b)(7)(ii)(A));

2. 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 (34 C.F.R. § 106.45(b)(7)(ii)(B));

3. Findings of fact supporting the determination (34 C.F.R. § 106.45(b)(7)(ii)(C));

4. Conclusions regarding the application of the school district's code of conduct to the facts (34 C.F.R. § 106.45(b)(7)(ii)(D));

5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the school district imposes on the respondent, and whether remedies designed to restore or preserve equal access to the school district's education program or activity will be provided by the school district to the complainant (34 C.F.R. § 106.45(b)(7)(ii)(E)); and

6. The school district's procedures and permissible bases for the complainant and respondent to appeal.

The school district must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the school district provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely. 34 C.F.R. § 106.45(b)(7)(iii).

The Title IX Coordinator is responsible for effective implementation of any remedies. 34 C.F.R. § 106.45(b)(7)(iv).

Appeals

A school district must offer both parties an appeal from a determination regarding responsibility, and from a school district's dismissal of a formal complaint or any allegations therein, on the following bases (34 C.F.R. § 106.45(b)(8)(i)):

1. Procedural irregularity that affected the outcome of the matter (34 C.F.R. § 106.45(b)(8)(i)(A));

2. 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 (34 C.F.R. § 106.45(b)(8)(i)(B)); and

3. 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 (34 C.F.R. § 106.45(b)(8)(i)(C)).

A school district may offer an appeal equally to both parties on additional bases. 34 C.F.R. § 106.45(b)(8)(ii).

As to all appeals, the school district must (34 C.F.R. § 106.45(b)(8)(iii)):

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties (34 C.F.R. § 106.45(b)(8)(iii)(A));

2. 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 (34 C.F.R. § 106.45(b)(8)(iii)(B));

3. Ensure that the decision-maker(s) for the appeal complies with the standards set forth above (34 C.F.R. § 106.45(b)(8)(iii)(C));

4. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome (34 C.F.R. § 106.45(b)(8)(iii)(D));

5. Issue a written decision describing the result of the appeal and the rationale for the result (34 C.F.R. § 106.45(b)(8)(i)(E)); and

6. Provide the written decision simultaneously to both parties (34 C.F.R. § 106.45(b)(8)(iii)(F)).

Informal Resolution

The Title IX Coordinator or Investigator may not require parties to participate in informal resolution as a condition of enrollment or continuing enrollment, employment or continued employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment. Similarly, the parties may not be required to participate in an informal resolution process pursuant to the Title IX grievance procedure and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the school district may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the Title IX Coordinator (34 C.F.R. § 106.45(b)(9):

1. 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, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared (34 C.F.R. § 106.45(b)(9)(i));

2. Obtains the parties' voluntary, written consent to the informal resolution process (34 C.F.R. § 106.45(b)(9)(ii)); and

3. Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student (34 C.F.R. § 106.45(b)(9)(iii)).

Record keeping

A school district must maintain for a period of seven years records of the following (34 C.F.R. § 106.45(b)(10)(i)):

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required by any hearing (if applicable), any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the school district's education program or activity (34 C.F.R. § 106.45(b)(10)(i)(A));

2. Any appeal and the result therefrom (34 C.F.R. § 106.45(b)(10)(i)(B));

3. Any informal resolution and the result therefrom (34 C.F.R. § 106.45(b)(10)(i)(C)); and

4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A school district must make these training materials publicly available on its website, or if the school district does not maintain a website the school district must make these materials available upon request for inspection by members of the public (34 C.F.R. § 106.45(b)(10)(i)(D)).

For each response to a report or formal complaint of sexual harassment, a school district 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 school district 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 school district's education program or activity. If a school district does not provide a complainant with supportive measures, then the school district 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 school district in the future from providing additional explanations or detailing additional measures taken. 34 C.F.R. § 106.45(b)(10)(ii).

