

Understanding Title IX Compliance for School Districts

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What is Title IX?

- Title IX of the Education Amendments of 1972 prohibits **discrimination based on sex** in education programs and activities that receive federal financial assistance.
- Title IX states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to **discrimination** under any education program or activity **receiving Federal financial assistance**[.]”

Receipt of Federal Funding

- Entities that receive Federal financial assistance and operate educational programs must adhere to Title IX.
- This applies to programs, services and activities offered by school districts, colleges, universities, and other institutions that operate educational programs.
- Title IX applies not only to students and other program participants but to employees of grant recipients.
- All public schools receive Federal financial assistance.

Discrimination on the basis of Sex.

- Discrimination includes treating one gender differently than others.
- Discrimination also includes sexual harassment and bullying.
- “On the basis of gender” includes:
 - Because of one’s gender, i.e., being male or female.
 - One’s identification as being transgender, non-binary or gender non-conforming has also been found to be protected as one’s sex under Title IX.

Discrimination on the basis of Sex

- Title IX protects all students—including lesbian, gay, bisexual, and transgender (LGBT) students—from gender-based harassment.
 - A gay student might have a Title IX claim for gender-based discrimination or harassment where he was subjected to anti-gay slurs, physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how boys are expected to act and appear.
 - Similarly, a transgender or non-binary student might have a Title IX claim for gender-based discrimination or harassment where they are subjected to slurs, physically assaulted, threatened, and ridiculed because of their gender identity.

Sexual Orientation and Gender Identity

- The Office of Civil Rights (“OCR”) and courts have followed the Supreme Court’s Title VII ruling in *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020): “[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex.”
- Harassment against a student because of his or her biological sex, sexual orientation, or gender identity are all covered by Title IX.

Sexual Orientation and Gender Identity

- The Department of Education has taken the position that discrimination against a student because of his or her biological sex, sexual orientation, or gender identity are all covered by Title IX.
- Different courts have taken different approaches to that issue.
 - Whitaker v. KUSD and A.C. v. Martinsville
 - Adams v. St. John's County

Sexual Orientation and Gender Identity

- The Department of Education issued new Title IX regulations in April 2024, effective August 1, 2024.
 - Defines “sex” to include transgender, non-binary and sexual orientation.
 - Effectively requires schools to allow students to use bathrooms that correspond to their “sex.”
 - It states that sex separation at schools isn’t always unlawful. However, the separation becomes a violation of Title IX’s nondiscrimination rule when it causes more than a very minor harm on a protected individual, “such as when it denies a transgender student access to a sex-separate facility or activity consistent with that student’s gender identity.”

Sexual Orientation and Gender Identity

- The Department of Education issued new Title IX regulations in April 2024, effective August 1, 2024.
- Current status of those rules.
 - Several different states have obtained injunctions.
 - Federal court in Kansas has issued an injunction prohibiting the enforcement of the new rules against any school that has a resident who is a member of Moms for Liberty (plaintiff in the case).
 - Waunakee Area School District is on that list.



Sexual Orientation and Gender Identity

- The Department of Education issued new Title IX regulations in April 2024, effective August 1, 2024.
 - Current status of those rules.
 - DOE cannot enforce those rules

BUT

- Still bound by *Whitaker* and *Martinsville*.
 - Title IX applies to transgender students, and they must be allowed to use the bathroom that corresponds to their gender identity. Can be enforced through a private right of action.
- Still bound by PI 9, Pupil Non-Discrimination.

Bullying and Harassment

- General Definitions

- **Bullying:** repeated instances of threatening or detrimental behavior directed toward another student, including communications made in writing or electronically directed toward a student that has or can be reasonably predicted to place the student in fear, cause a detrimental effect on the student's physical or mental health, interfere with the student's academic performance, or interfere with the student's ability to participate in or benefit from the services, activities, or privileges provided by a school.
- **Harassment:** Any behavior, whether physical, verbal, written, or otherwise, that is unwanted and unwelcome, and may offend or humiliate an individual.

Sexual Harassment

OCR enforces Title IX.

- OCR defines sexual harassment as unwelcomed conduct of a sexual nature.
- Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.
- Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance.

What is Harassment Based on Sex?

- OCR and courts have broadly interpreted the scope of what constitutes harassment on the basis of sex.
- This includes situations where individuals are harassed; disciplined in a discriminatory manner; excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities; denied the benefits of a school's programs or activities; or otherwise treated differently because of their sexual orientation or gender identity.
- Same sex harassment is also covered.

Student on Student Sexual Harassment

- Student-on-student sexual harassment can create a *hostile educational environment*.
- A Title IX funding recipient is liable for student-on-student harassment not because it occurred, but because it was **deliberately indifferent** to sexual harassment. *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

Severe and Pervasive Harassment

- To establish a hostile educational environment claim under Title IX, a student must show that the alleged harassment was severe or pervasive enough to deprive them of access to educational benefits. *Qualls v. Cunningham*, 183 F. App'x 564, 567 (7th Cir. 2006).
- In other words, to raise to the level of sexual harassment the conduct must be “so severe, pervasive, and objectively offensive, and that 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.” *Davis*, 526 U.S. at 651.

Deliberate Indifference

- The Supreme Court has explained what “deliberate indifference” means in the context of a hostile educational environment claim. In *Davis*, the Supreme Court explained that:

School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed ‘deliberately indifferent’ to acts of student-on-student harassment only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances. The dissent consistently mischaracterizes this standard to require funding recipients to ‘remedy’ peer harassment, ... and to ‘ensur[e] that ... students conform their conduct to’ certain rules, post at 1682. Title IX imposes no such requirements. On the contrary, the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable. This is not a mere ‘reasonableness’ standard, as the dissent assumes.

526 U.S. at 648-49 (emphasis added).

Deliberate Indifference Is A Clearly Unreasonable Standard

- A school district is only deliberately indifferent where its “response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”
- “The ‘clearly unreasonable’ standard ‘sets a high bar for plaintiffs’ because ‘[s]chool administrators must continue to enjoy the flexibility they require in disciplinary decisions.’” *Bowe v. Eau Claire Area Sch. Dist.*, No. 16-cv-746-jdp, 2018 U.S. Dist. LEXIS 19671, at *7-8 (W.D. Wis. Feb. 7, 2018) (citing *Doe v. Galster*, 768 F.3d 611, 619 (7th Cir. 2014)).
- As explained by the Supreme Court, a school district is not required to prevent or end harassment: “We stress that our conclusion here—that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment—does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action.” *Davis*, 526 U.S. at 648 (emphasis added).

Severe and Pervasive Harassment

- The harassment must have a concrete negative effect on the victim's education.
 - Examples:
 - dropping grades
 - becoming homebound or hospitalized due to harassment
 - physical violence, such as suicidal thoughts or attempts
- Subjective and objective component. The student must subjectively believe that the harassment is severe and pervasive, and an objectively reasonable person would tend to agree.
- The impact on a victim's psychological well-being is not dispositive on the issue of severity, as no single factor is required.

Severe and Pervasive Harassment

- Simple teasing or being called an offensive, insensitive name is not enough to constitute harassment because “in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education.” *Davis*, 526 U.S. at 651-52.
- As explained by the Supreme Court in *Davis*: In the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it but damages are not available for simple acts of teasing and name-calling among school children even where these comments target differences.

Severe and Pervasive Harassment

- For harassment to be actionable under Title IX, it must be more than episodic; it must be sufficiently continuous and concerted.
 - Harassment must be severe and repeated and have a systemic effect.
 - Isolated or sporadic conduct is not the kind of severe, pervasive, objectively offensive conduct that has been held to violate Title IX.
- Whether conduct rises to the level of actionable harassment depends on the surrounding circumstances, expectations, and relationships, including the ages of the harassers and the victim.
- The analysis takes into account that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults and at least early on, students are still learning how to interact appropriately with their peers.

Student on Student Sexual Harassment

- A school district is **deliberately indifferent** to student-on-student harassment if:
 - **It has knowledge:** The institution must have actual knowledge of the sexual harassment. This means that the school or its officials must be aware of the misconduct through a formal complaint, a report to a responsible employee, observing the harassment, or other credible sources.
 - **Indifference:** The institution's response to the reported misconduct must demonstrate deliberate indifference. Deliberate indifference means that the institution's response was clearly unreasonable in light of the known circumstances. It requires a showing that the institution's response was inadequate, willfully indifferent, or clearly unreasonable, thereby causing harm or denying the complainant educational benefits.

Teacher/Student Sexual Harassment

- A school district is **deliberately indifferent** to teacher-on-student harassment if:
 - **It has knowledge:** The institution must have actual knowledge of the sexual harassment. This means that the school or its officials must be aware of the misconduct through a formal complaint, a report to a responsible employee, observing the harassment, or other credible sources.
 - **Indifference:** The institution's response to the reported misconduct must demonstrate deliberate indifference. Deliberate indifference means that the institution's response was clearly unreasonable in light of the known circumstances. It requires a showing that the institution's response was inadequate, willfully indifferent, or clearly unreasonable, thereby causing harm or denying the complainant educational benefits.

Teacher/Student Sexual Harassment

- Sexual harassment by a teacher or staff member will be viewed differently than student on student sexual harassment.
 - Unlike the student-on-student analysis that takes into account that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults, adults will be held to that higher standard under Title IX.
- A **single instance** of improper **touching** can be actionable under Title IX.
- Comments of a sexual nature will not and cannot be tolerated by adults.

Teacher/Student Sexual Harassment

- Sexual harassment by a teacher or staff member can have implications beyond Title IX.
 - Certainly, unwelcomed conduct of a verbal nature can lead to claims of sexual harassment.
 - Subjects an adult to disciplinary action by the District.
 - Subjects an adult to a possible lawsuit under 42 USC § 1983 for violations of constitutional rights and Title IX.

Teacher/Student Sexual Harassment

- Sexual harassment by a teacher or staff member will be viewed differently than student on student sexual harassment.
 - Physical touching will always lead to claims of sexual harassment.
 - The ramifications are much broader.
 - Civil and Criminal implications.

Teacher/Student Sexual Harassment

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 - Physical touching will always lead to claims of sexual harassment.
 - The ramifications are much broader.
 - Civil and Criminal implications.
 - **Sadly**, we must have this talk.

Teacher/Student Sexual Harassment

Former Hudson Elementary Teacher Charged With 10 Sex Crimes Regarding Relationship With Student

By Thomas Schumacher

🕒 Aug 22, 2024 | 1:43 PM



CURRENT WEATHER



Madison Bergmann, Hudson elementary school teacher charged with assaulting 5th grade Wisconsin student.

HUDSON, WI (WSAU-WAOW) – The former Hudson elementary school teacher is suspected of engaging in a sexual connection with one of her fifth-grade students; nine further charges have been brought against her.

Madison Bergmann, 24, is now facing eleven charges, including child sexual abuse, inducement, and sexual misconduct by school personnel in relation to her relationship with an eleven-year-old student.

Teacher/Student Sexual Harassment

Two twisted female teachers in Wisconsin forced out for sexting student, trying to set up foursome: report

By [Steve Janoski](#)

Published June 11, 2024, 6:39 p.m. ET

 324 Comments

LinkedIn/Alexsia Saldaris



First-year teacher Alessia Saldaris allegedly Snapchatted five risqué photos of herself in underwear and lingerie to the unidentified male student.

Teacher/Student Sexual Harassment



MEAWW

<https://meaww.com> ▾

Who is Abby Dibbs? Wisconsin teacher, 35, had sex with student

WEB May 31, 2021 · PORTAGE, **WISCONSIN**: Authorities have filed a criminal complaint against a former English **teacher** with the Portage High School at **Wisconsin**, charging her with two counts of sexual assault of a **student** by school staff. Abby Dibbs, 35, is reportedly facing up to 12 years in prison after admitting to having a sexual relationship with a 17-year old ...



Fox6 Milwaukee

<https://www.fox6now.com/news/pro...> ▾

Prosecutors say teacher accused of sex with teen boy ...

WEB Apr 15, 2016 · This is the third female **teacher** in southeastern **Wisconsin** to be accused of having **sex** with a male **student** this year. 28-year-old Sara Domres has been **charged** with two counts of sexual assault of ...



Fox6 Milwaukee

<https://www.fox6now.com/news/oak-creek-teacher-sex-assault-c...> ▾

Oak Creek teacher sex assault case, Rachel Goodle sues district

WEB Aug 1, 2023 · Former Oak Creek High School **teacher** Rachel Goodle, **charged** with sexually assaulting a **student**, filed suit against the district in an attempt to block the release of public records about her ...



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Teacher/Student Sexual Harassment

948.095 Sexual assault of a child by a school staff person or a person who works or volunteers with children.

(1) In this section:

- (a) "School" means a public or private elementary or secondary school, or a tribal school, as defined in s. 115.001 (15m).
- (b) "School staff" means any person who provides services to a school or a school board, including an employee of a school or a school board and a person who provides services to a school or a school board under a contract.

(2) Whoever has sexual contact or sexual intercourse with a child who has attained the age of 16 years and who is not the defendant's spouse is guilty of a Class H felony if all of the following apply:

- (a) The child is enrolled as a student in a school or a school district.
- (b) The defendant is a member of the school staff of the school or school district in which the child is enrolled as a student.

(3)

- (a) A person who has attained the age of 21 years and who engages in an occupation or participates in a volunteer position that requires him or her to work or interact directly with children may not have sexual contact or sexual intercourse with a child who has attained the age of 16 years, who is not the person's spouse, and with whom the person works or interacts through that occupation or volunteer position.
- (b) Whoever violates par. (a) is guilty of a Class H felony.
- (c) Paragraph (a) does not apply to an offense to which sub. (2) applies.
- (d) Evidence that a person engages in an occupation or participates in a volunteer position relating to any of the following is prima facie evidence that the occupation or position requires him or her to work or interact directly with children:
 - 1. Teaching children.
 - 2. Child care.
 - 3. Youth counseling.
 - 4. Youth organization.
 - 5. Coaching children.
 - 6. Parks or playground recreation.
 - 7. School bus driving.



Teacher/Student Sexual Harassment

948.098 Sexual misconduct by a school staff person or volunteer.

(1) In this section:

(a) “Physical contact of a sexual nature” means any of the following types of intentional touching, whether direct or through clothing:

1. Intentional touching by the actor or, upon the actor's instruction, by another person, by the use of any body part or object, if the purpose of the intentional touching is any of the following:
 - a. To sexually degrade or sexually humiliate the pupil.
 - b. To sexually degrade or sexually humiliate the actor.
 - c. To sexually arouse or sexually gratify the pupil.
 - d. To sexually arouse or sexually gratify the actor.
2. Intentional touching by the pupil, by the use of any body part or object, of the actor or, if done upon the actor's instructions, another person, if the purpose of the intentional touching is any of the following:
 - a. To sexually degrade or sexually humiliate the pupil.
 - b. To sexually degrade or sexually humiliate the actor.
 - c. To sexually arouse or sexually gratify the pupil.
 - d. To sexually arouse or sexually gratify the actor.

(b) “School” means a public or private elementary or secondary school, or a tribal school, as defined in s. 115.001 (15m).

(c) “School staff member” means any person who provides services to a school or a school board, including an employee of a school or a school board and a person who provides services to a school or a school board under a contract. “School staff member” includes a bus driver.

(d) “Sexual misconduct” means verbal conduct of a sexual nature or physical contact of a sexual nature. “Sexual misconduct” includes conduct directed by a person at another person of the same or opposite gender.

(e) “Verbal conduct of a sexual nature” means communications made intentionally for any of the following purposes:

1. Sexually degrading or sexually humiliating the pupil
2. Sexually degrading or sexually humiliating the actor.
3. Sexually arousing or sexually gratifying the pupil.
4. Sexually arousing or sexually gratifying the actor.

(2) Any school staff member or volunteer who commits an act of sexual misconduct against a pupil enrolled in the school is guilty of a Class I felony.

Bullying

- Bullying is a form of harassment.
- The U.S. Department of Health & Human Services (“HHS”) defines bullying as follows:
 - Bullying is unwanted, aggressive behavior among school aged children that involves a real or perceived power imbalance.
 - The behavior is repeated, or has the potential to be repeated, over time.
 - Bullying includes actions such as making threats, spreading rumors, attacking someone physically or verbally, and excluding someone from a group on purpose.

Bullying

- “Bullying” is not garden-variety teasing or a two-way conflict involving peers with equal power or social status.
- Nor is it the “drama” that is typical of teenagers’ ordinary interpersonal conflicts. Interpersonal conflicts and “drama” among equal peers is a normal rite of childhood passage.

Bullying

HHS, in accordance with educational research, identifies three types of peer bullying suffered by school aged children:

1. Verbal bullying, which is saying or writing mean things. Verbal bullying includes:

- Teasing;
- Name-calling;
- Inappropriate sexual comments;
- Taunting;
- Threatening to cause harm.

Bullying

2. Social or “relational” bullying, which involves hurting someone’s reputation or relationships. Social bullying includes:

- Excluding someone on purpose;
- Telling other children not to be friends with someone;
- Spreading rumors about someone;
- Embarrassing someone in public.

Bullying

3. Physical bullying, which involves hurting a person's body or possessions. Physical bullying can include:

- Hitting, kicking and pinching;
- Spitting;
- Tripping and pushing;
- Taking or breaking someone's things;
- Making mean or rude hand gestures.

Bullying

School bullying is not limited to bullying that happens during school hours in a school building.

- It can occur after hours, during extracurricular activities.
- It can also occur in other places, such as on the playground, athletic fields or the bus, when travelling to or from school.
- It can also occur on the Internet, often referred to as cyber bullying.

Bullying

Comprehensive description of what bullying is, what it is not, and the effects of bullying can be found in *T.K. v. New York City Dept. of Educ.*, 779 F.Supp.2d 289, 297-307, 270 Ed. Law Rep. 593 (E.D. NY 2011).

- Bullying takes three forms: physical (e.g., hitting); verbal (e.g., taunting); and psychological (e.g., engaging in social exclusion).

Confronting Anti-LGBTQI+ Harassment

- Many students face bullying, harassment, and discrimination based on sex stereotypes and assumptions about what it means to be a boy or a girl.
- Students who are lesbian, gay, bisexual, transgender, queer, intersex, nonbinary, or otherwise gender non-conforming may face harassment based on how they dress or act, or for simply being who they are. It is important to know that discrimination against students based on their sexual orientation or gender identity is a form of sex discrimination prohibited by federal law. It is also important that LGBTQI+ students feel safe and know what to do if they experience discrimination.

Examples of LGBTQI+ Harassment

- The following examples have been provided by OCR as situations where a funding recipient violates Title IX:
 - When he starts middle school, a transgender boy introduces himself as Brayden and tells his classmates he uses he/him pronouns. Some of his former elementary school classmates “out” him to others, and every day during physical education class call him transphobic slurs, push him, and call him by his former name. When he reports it to the school’s administrators, they dismiss it, saying: “you can’t expect everyone to agree with your choices.”
 - A lesbian high school student wants to bring her girlfriend to a school social event where students can bring a date. Teachers refuse to sell her tickets, telling the student that bringing a girl as a date is “not appropriate for school.” Teachers suggest that the student attend alone or bring a boy as a date.

- A student discloses he's gay during a seminar discussion. Leaving class, a group of students calls him a homophobic slur, and one bumps him into the wall. A teacher witnesses this but does nothing. Over the next month, the harassment worsens. The student goes to his principal after missing several classes out of fear. The school interviews one, but not all, of the harassers, does nothing more, and never follows up with the student.
- An elementary school student with intersex traits dresses in a gender-neutral way, identifies as nonbinary, and uses they/them pronouns. The student's teacher laughs when other students ask if they are "a boy or a girl" and comments that there is "only one way to find out." The teacher tells the class that there are only boys and girls and anyone who thinks otherwise has something wrong with them. The student tells an administrator, who remarks "you have to be able to laugh at yourself sometimes."
- On her way to the girls' restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys' restroom or nurse's office because her school records identify her as "male." Later, the student joins her friends to try out for the girls' cheerleading team and the coach turns her away from tryouts solely because she is transgender. When the student complains, the principal tells her "those are the district's policies."

What is a Reasonable Response to Harassment And Bullying?

- A school's response to known acts of harassment is not clearly unreasonable if it takes "some action."
 - "Some action" means that if a school official receives actual notice of harassment, "they are required to act."
- "Acting" does not mean that a school district must end all interaction between a student and the harasser. Nor does it mean that the school must be liable if there is any further harassment.

What is a Reasonable Response to Harassment And Bullying?

- Acting means that the school complies with its obligations by following up with reported incidents in “some way,” either by investigating the occurrence or by punishing involved students. *N.K. v. St. Mary’s Springs Acad. of Fond Du Lac Wisconsin, Inc.*, 965 F. Supp. 2d 1025, 1035 (E.D. Wis. 2013);
- *See also P.R. v. Metro. Sch. Dist. of Wash. Twp.*, No. 1:08-cv-1562-WTL-DML, 2010 U.S. Dist. LEXIS 116223, at *25 (S.D. Ind. Nov. 1, 2010) (holding that a school was not deliberately indifferent when it was undisputed that the school “took *some* action after every reported incident”).

Examples of Reasonable Responses to Harassment

- Examples of action that courts have deemed sufficient in light of allegations of student-on-student harassment:
 - Investigating incidents after they were reported, speaking with students, and holding conferences with parents and teachers regarding students' reports of bullying and providing their students and teachers with lessons and training on bullying prevention.
 - Promptly investigating allegations of harassment to substantiate the claim.
 - Speaking to a student about name calling, involving guidance counselors, reducing contact between students, and asking students to stay away from each other have all been held to show that a school's response to harassment was not clearly unreasonable.

Examples of Reasonable Responses to Harassment

- Communicating with the parents of the students who committed acts of harassment or bullying is evidence that a school district did not act with deliberate indifference.
- Counseling accused students to avoid the accuser was found to be a reasonable response by a school.
- Write-ups and suspensions constitute sufficient responses.
- Referring an allegation to law enforcement also evidences that a school did not act with deliberate indifference.
- Requiring an apology is also appropriate remedial action.

Discipline

- Schools are not required to take particular (or any) disciplinary action against every student accused of misconduct.
- “*Davis* disapproved of a standard that would force funding recipients to suspend or expel every student accused of misconduct.”
- A school does not act unreasonably just because a plaintiff believes that the school’s disciplinary decision was insufficient, and victims have no right to make any remedial demands.

Discipline

Courts have been skeptical of arguments premised on the degree to which a school punishes its students, and the Supreme Court has rejected the argument that victims of peer harassment have a Title VI right to make particular remedial demands on the school.

- The degree and nature of the punishment is immaterial, and courts will not second guess the level of discipline.
- School administrators enjoy a great deal of flexibility when making disciplinary decisions and responding to allegations of harassment.
- Federal law gives school officials wide discretion in making disciplinary decisions, especially as they have to balance the interests of all concerned.
- Counseling students instead of imposing more severe types of discipline is not clearly unreasonable.

“*Davis* does not entitle plaintiffs to any specific remedial measure or require that a school remedy all peer harassment, and a school’s actions do not become clearly unreasonable simply because a student’s parents advocated for stronger remedial measures.” *Jauquet v. Green Bay Area Catholic Educ.*, No. 20-C-647, 2020 U.S. Dist. LEXIS 153636, at *19 (E.D. Wis. Aug. 24, 2020).

Examples of Clearly Unreasonable Responses

- Nominal or ineffectual action can be inferred as deliberate indifference under some circumstances.
- The Supreme Court has indicated that deliberate indifference to harassment would require the school to “deliberately ignore requests for aid” and “know[ingly] refus[e] to take any action.” *Davis*, 526 U.S. at 650-51. Examples include:
 - Allowing the same or small group of students to continually harass one student can be evidence of deliberate indifference.
 - Constant verbal harassment, physical violence, and death threats have been found as evidence that remedial action was clearly ineffective.
 - Making no effort to investigate or put an end to the harassment.

Examples of Clearly Unreasonable Responses

- Taking no action or not disciplining anyone.
- Staff failing to report observed harassment.
- Responding to multiple allegations of verbal and physical harassment with verbal warnings when the harassment continues.
- Nominal action could be clearly unreasonable in some circumstances, as in *Davis*, when the school merely 'threatened' a male student who repeatedly sexually harassed the plaintiff by speaking to her in vulgar language, rubbing against her in a sexually suggestive behavior, and attempting to touch her breasts and genital area.

Complaints of discrimination, harassment, or bullying.

- The Board has adopted detailed policies for reporting and investigating **complaints** of discrimination, harassment or bullying.
 - All staff should review:

Policies of the Board of Education; Series 400: Students
SEXUAL HARASSMENT, Rule 412/512.

Policies of the Board of Education; Series 400: Students
NONDISCRIMINATION IN DISTRICT PROGRAMS,
ACTIVITIES AND OPERATIONS, Rule 413/513.

[District Response to Possible Title IX Violations; Including The District's Title IX Grievance Procedures 413/513 - Rule](#)

This is a major change in procedures and is detailed, well-defined and takes away much of the former subjective approach.

Complaints of discrimination, harassment, or bullying.

- The opportunity for students or others to file complaints of sex-based discrimination does not excuse your obligation to “do something” when you see it.
 - If you see it, report it.
 - Document it.
 - Act on it.
- You can’t do nothing.

Responding to a complaint of discrimination.

How to Respond to a Complaint?

- The response must treat complainants and respondents equitably by:
 - (1) offering **supportive measures** to a complainant and
 - (2) following **grievance procedures** before imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent.



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Responding to a complaint of discrimination.

What is a Voluntary Informal Resolution and When is it Available? [34 CFR §106.45(b)(9)]:

- Prior to final determination, the District may explore an **informal resolution**, such as mediation, so long as the District:
 - (1) provides the parties with written notice of:
 - (a) the allegations;
 - (b) the informal resolution requirements; and
 - (c) any consequences of the informal resolution process.
 - (2) obtains the parties' voluntary, written consent; and
 - (3) does not offer an informal resolution process regarding allegations that an employee sexually harassed a student.
- Many claims may start going this route.

Responding to a complaint of discrimination.

A District may not:

- (1) require a waiver of the right to a formal investigation and adjudication of sexual harassment claims as a condition of enrollment/employment/enjoyment of other rights; or
- (2) require the parties to participate in an informal resolution.

Note: Informal resolutions may only be offered after a formal complaint is filed.

Responding to a complaint of discrimination.

When is Dismissal of a Formal Complaint Required?

[34 CFR §106.45(b)(3)(i)]:

- (1) The conduct alleged in the complaint would not constitute sexual harassment even if proved;
- (2) The conduct did not occur in an education program or activity; or
- (3) The conduct did not occur against a person in the United States.

Responding to a complaint of discrimination.

When is Dismissal of a Formal Complaint Permitted?

[34 CFR §106.45(b)(3)(ii)]:

- (1) Complainant notifies the Coordinator in writing that he/she would like to withdraw the formal complaint or allegations therein;
- (2) The respondent is no longer enrolled or employed by the District; or
- (3) Specific circumstances prevent the District from gathering evidence sufficient to reach a determination.

Responding to a complaint of discrimination.

Per 34 CFR §104.45(b)(2)(i), the Coordinator/District must provide written notice to the parties of:

- (1) The District's grievance process, including any informal resolution process;
- (2) The allegations of sexual harassment, including:
 - (a) sufficient details and with sufficient time to prepare a response;
 - (b) a statement that respondent is presumed not responsible and that responsibility is determined at the conclusion of the grievance process;
- (3) The parties' right to have advisor (including an attorney) inspect and review the evidence; and
- (4) Any provisions in the District's code of conduct that prohibits knowingly making false statements during the process.

Implementing Supportive Measures

- Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent (34 CFR §106.30).
 - Supportive measures are available before or after the filing of a formal complaint or where no formal complaint has been filed.
- Supportive measures are designed to:
 - (1) restore or preserve equal access to the District's education program or activity without unreasonably burdening the other party; and
 - (2) to deter sexual harassment.

Implementing Supportive Measures

- Supportive Measures Before a Formal Complaint is filed.
 - [34 CFR §106.44(a)] :
 - Upon “actual knowledge” of sexual harassment, Coordinator must promptly contact alleged victim to:
 - (1) discuss the availability of supportive measures;
 - (2) consider the complainant’s wishes regarding supportive measures;
 - (3) inform the complainant of the availability of supportive measures with or without a formal complaint; and
 - (4) explain the process for filing a formal complaint.
- Even if a formal complaint is filed, the parties are still entitled to have supportive measures during the grievance process/procedures. 34 C.F.R. § 106.45

Implementing Supportive Measures

What Supportive Measures are Available?

[34 CFR §106.30] :

- Counseling;
- Extensions of deadlines or other course-related adjustments;
- Modifications of work or class schedules;
- Mutual restrictions on contact between the parties;
- Leaves of absence;
- Increased monitoring;
- And other similar measures.

Emergency Removal – 34 CFR §106.44(c)

- May remove a student from educational program or activity on an emergency basis when:
 - (1)Coordinator/District conducts an individualized safety and risk analysis and determines an **immediate** threat to the physical health or safety of any student or individual arising from the allegations of sexual harassment justifies removal; and
 - Must be supported by particularized facts—not speculation.
 - The District is given flexibility in terms of how it conducts its analysis.
 - (2)Coordinator/District provides the student with notice and an opportunity to challenge the decision immediately following the removal.
- *Emergency removal does not modify student's rights under the IDEA & Section 504.
- There is no temporal restriction on emergency removals—they can be implemented at any time.

Formal Grievance Process

Basic Statutory Requirements [34 CFR §106.45(b)(1)]:

- (i) Treat complainants and respondents equitably by providing remedies to the complainant and by following the grievance process;
 - Remedies are designed to restore/preserve equal access to an education program or activity.
- (ii) Require an **objective** evaluation of evidence and provide that credibility determinations are not based on a person's status;
- (i) Require that the Coordinator, Investigator, Decision-Maker, and others do not have a conflict of interest or bias;

Formal Grievance Process

Statutory Requirements (continued):

- (iv) Include a presumption that neither party is responsible for the alleged conduct until a determination;
- (v) Include reasonably prompt time frames for the grievance process;
 - Filing, appeals, and informal resolution
- (vi) Describe/list the range of possible disciplinary sanctions and remedies;
- (vii) State whether the standard of evidence is (1) preponderance of the evidence or (2) clear and convincing evidence;
- (viii) Include the procedures and permissible bases for appeal;

Formal Grievance Process

Statutory Requirements (continued):

- (ix) Describe the supportive measures available to complainants/respondents; and
- (x) Not require, allow, rely upon, or use questions or evidence that constitute, or seek disclosure of, information protected under a recognized privilege.



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Formal Grievance Process

Notice of Allegations – 34 CFR §106.45(b)(2).

- Must provide the parties with written notice of (i) the grievance process; and (ii) the allegations of sexual harassment.
- Notice must also:
 - (i) include a statement that the respondent is presumed not responsible;
 - (ii) inform the parties that they may have an advisor of their choice if they choose; and
 - (iii) inform the parties of any provision in the District's code of conduct that prohibits knowingly making false statements.

Formal Grievance Process

Coordinator's Role During the Investigatory/Decision-Making Process:

- Once the parties receive the evidence, Coordinator may be responsible for working with Investigator to facilitate the review process.
- After a determination regarding responsibility is given, Coordinator is responsible for effective implementation of any remedies.

Formal Grievance Process

Coordinator's Obligation if There is a Hearing – 34 CFR §106.45(b)(6):

Coordinator may be responsible for facilitating the hearing, including:

- Scheduling;
- Explaining the hearing process and procedures to the parties;
- Provide accommodations (Zoom logistics) at the hearing if necessary;
- More as needed.



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Consequences of Title IX Violations

Section 1983 Claims: Constitutional Violations Resulting from Bullying.

- Impact/Importance of § 1983:
 - Title IX claims only permit victims of discrimination, harassment or bullying to assert claims against the school district.
 - Constitutional claims under § 1983 are not limited in this way.
 - § 1983 permits bullying victims to sue **school officials and employees** in their individual capacities for money damages and punitive damages.

Consequences of Title IX Violations

A school district risks its receipt of federal funds if it violates Title IX. For most school districts this is a risk of losing several million dollars.

The other risk of a Title IX violation is that it can give rise to claims under 42 U.S.C. § 1983 for constitutional violations resulting from bullying.

- Victims of discrimination, harassment or bullying may also assert claims alleging violations of the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.
- These claims may be brought pursuant to 42 U.S.C. § 1983, which provides a private right of action for violations of rights secured by the Constitution and federal laws.

Takeaways for Compliance.

- The lesson to be learned from the case law is that every occurrence, complaint or allegation of discrimination, harassment or bullying must be reported and investigated, and if the claim is substantiated, prompt remedial action must be taken.
- While every single allegation or incident does not necessarily need to lead to discipline, some action, whether that is counseling, mediation, contacting a parent, etc., must be taken.
- Ignoring the issue or failing to investigate will expose the District to liability.
- Do not turn a blind eye and “do nothing” in the face of actual knowledge of discrimination, harassment or bullying.
- Treat allegations of same sex, sexual orientation, and gender identity harassment equally.



Understanding Title IX Compliance for School Districts

Questions?

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