New Title IX Training: The Decision-Maker

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Where the heck are we going?

- The Title IX Decision-Maker: Who they are and what they do
- Brief Overview of Grievance Process
- Sexual Harassment-new definitions
- School program or activity-defined
- Training Hot Topics
  - Bias, Impartiality, Prejudgment &
- Your Decision: Forms and Procedures
- Appeals
- …and much, much more!

34 C.F.R 106.45

requires decision-makers to be
free of conflicts of interest and bias
and
trained to serve impartially without
prejudging the facts at issue

Wait a minute, do we still have to worry about this??

Due to recent (political) events, what will happen to these regulations?

Let me check the TV….

Ignore, gamble and ask for forgiveness, if necessary?

Follow these rules unless/until there are now ones??

Door number 3_____?

Title IX Timeline

A Brief History

1972

Title IX Enacted

1974

Title IX Regulations Implemented

1980

Title IX Enforcement Transferred to US DOE OCR

1992

SCOTUS recognizes student right to money damages for sexual harassment (*Franklin v. Gwinnett County Schools*)

1997

OCR issues guidance on sexual harassment regarding institution's obligation to respond

1998

SCOTUS sets standard for teacher-on-student harassment liability as "deliberate indifference" after "actual notice" of misconduct (*Gebser v. Lago Vista Sch. Dist.*)

1999

SCOTUS sets standard for student-on-student sexual harassment (*Davis v. Monroe County Bd. of Educ.*)

TITLE IX COORDINATOR

Coordinates compliance. 34 CFR 106.8 (a). Responsible for effective implementation of any remedies/supportive measures. 34 CFR 106.45 (b)(7)(iv). Cannot be decision-maker or review any appeal. 34 C.F.R. 106.45 (b)(6)-(8).

INFORMAL RESOLUTION FACILITATOR

Offers informal resolution after formal complaint is filed but before decision-maker reaches a determination. 34 C.F.R. 106.45 (b)(9).

DECISION-MAKER

Cannot be the same person as the Title IX Coordinator or the investigator(s). Facilitates exchange of written questions after parties receive investigative report. Explains any decision regarding relevance of questions. Issues a detailed, written determination. 34 C.F.R. 106.45 (b)(6)-(7).

INVESTIGATOR

Cannot be decision-maker or consider appeal. Conducts duly noticed investigative interviews, considers evidence provided by parties and from other sources, provides parties equal opportunity to inspect and review evidence and prepares investigative report. 34 C.F.R. 106.45 (b)(5).

APPEAL

Cannot be the same person as the Title IX Coordinator, investigator(s) or decision-maker. Must provide parties equal opportunity to submit a written statement and provide a written decision on appeal. 34 C.F.R. 106.45 (b)(8).

Single-Investigator Model (RIP)

- What is (was) the single investigator model (SIM)?
- Disadvantages of SIM per the USDOE
  - Bias
  - Unfairness
  - Social pressure & false positives
- Possible advantages of SIM?
  - _____
- Panel of DM is allowed*
- Disadvantages of separate DM?
  - Staffing, costs ($), time+, _____

Overview of Grievance Process

- Federal grievance process is mandatory
- USDOE-no discipline prior to completion of grievance process
- Objective evaluation of all "relevant" evidence
- Credibility cannot be based on party status
- No conflict of interest or bias
- Mandatory training requirements
- Presumption that respondent is not responsible
- Reasonably prompt time frames
- Detailed rules for investigations
- Final determination and appeal

School program or activity?

- Program or activity *includes* locations, events, or circumstances over which the recipient exercised *substantial control* over *both* the respondent and the context in which the sexual harassment occurs
- Against a person in the United States

- Is this the scope, or just a floor?
- Are online classrooms covered?
- Study abroad?
- Post-pandemic, are off-campus activities covered? Away games?

DEFINITION OF SEXUAL HARASSMENT

Unwelcome Conduct

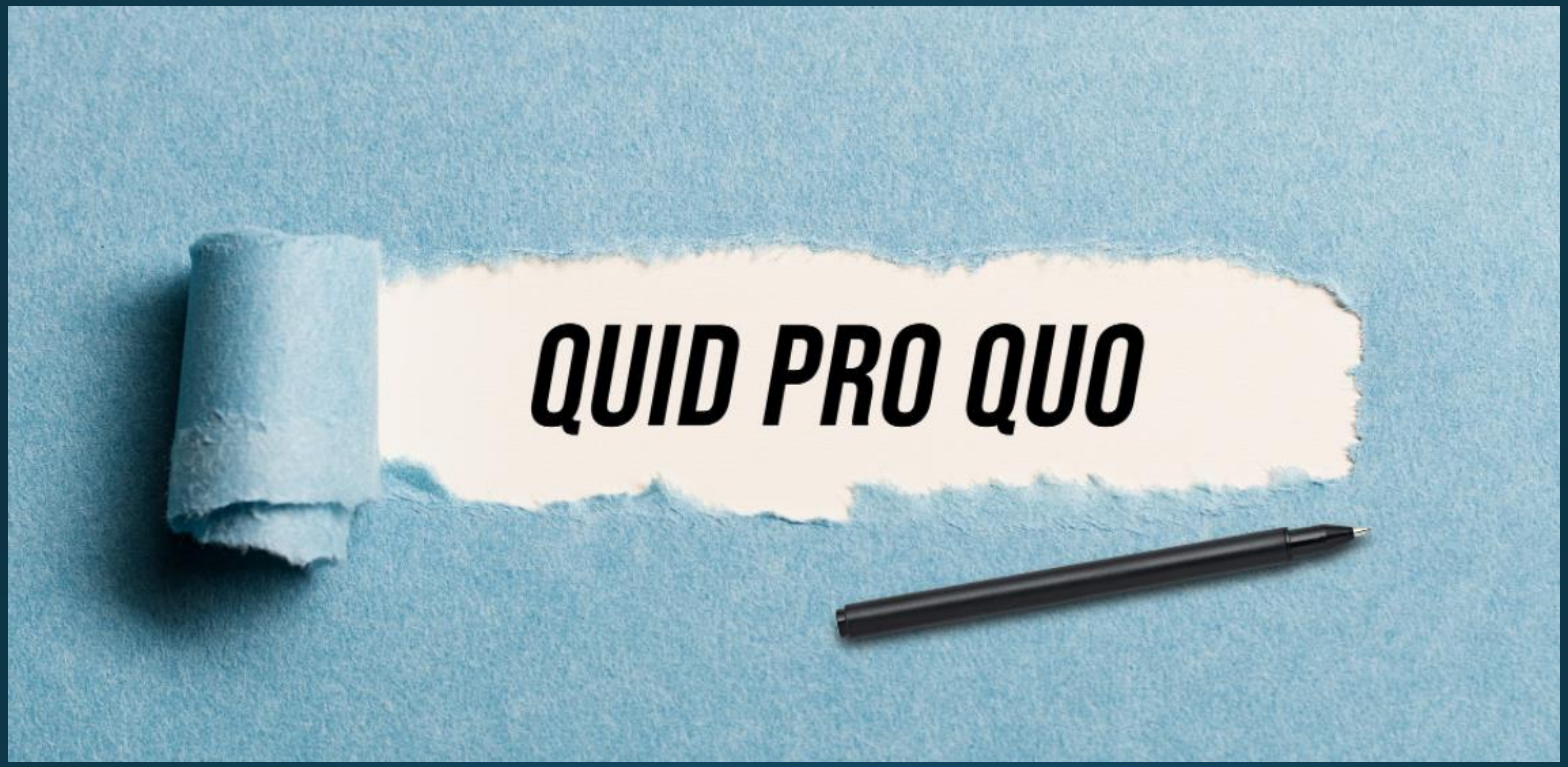
Determined by a reasonable person to be...

OLD DEFINITION

...severe, pervasive or persistent, and to interfere with or limit a student's ability to participate in or benefit from school services, activities or opportunities

NEW DEFINITION

...so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity.



Sexual harassment is also defined to include…

…a school employee conditioning aid, benefit or service on an individual's participation in unwelcome sexual conduct

Davis v. Monroe County Bd. of Educ.

STUDENT-ON-STUDENT SEXUAL HARASSMENT

School District may be liable for money damages under Title IX if:

***GEBSER* STANDARDS MET**

The *Gebser* standards of "actual notice" and "deliberate indifference" are met.

+ SUBSTANTIAL CONTROL

The school has substantial control over the "context" in which the harassment occurs and over the alleged harasser.

DENIED EQUAL ACCESS

The conduct is "so severe, pervaisove and objectively offensive" that it "effectively denie[s] equal access to an institutions resources or opportunities."

Sexual harassment is (also)…

Sexual assault, which means…

- **(v)** An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

- Forcible sex offenses
  - Rape
  - Sodomy
  - Assault w/ an object
  - Fondling
- Nonforcible
  - Incest
  - Statutory rape

Sexual Harassment: Dating violence

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

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

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

(i) The length of the relationship.

(ii) The type of relationship.

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

Domestic violence

- (8) 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.

Harassment is…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.

Investigations-Notice of Report

- A fair summary of relevant evidence
- What is relevance?
  - Tendency of a piece of evidence to prove/disprove a violation of Title IX
- Each party 10 days to respond
- Investigative report (draft) v. completed report v. final determination of responsibility

_____ COUNTY/CITY SCHOOL DISTRICT/SYSTEM
Title IX Investigative Report Circle one (Draft/Final)
Provided to both parties
(Optional)

RE: Sexual Harassment Complaint No. _____

Dear _____:

As the assigned Investigator on the above referenced complaint, this is my investigative report regarding the above-referenced complaint.

A. Allegations

The allegations potentially constituting sexual harassment as defined in 34 C.F.R. § 106.30 are as follows:

_____
_____
_____

B. Procedure

The procedural steps taken from the receipt of the formal complaint through this summary, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence, were as follows:

_____
_____
_____
_____
_____
_____

C. Prior Notice

Pursuant to the _____ County/City School District/System Grievance procedures, the following notice(s) and/or response(s) have previously been provided to the indicated parties.

		Complainant (Date)	Respondent (Date)
1.	Initial Response to Complaint	_____	_____
2.	Notice of Allegations	_____	_____
3.	Notice of Emergency Removal	_____	_____
4.	Notice of Dismissal	_____	_____
5.	Notice of Interview/Meeting	_____	_____

Notice of Interview/Meeting _____ _____

Notice of Interview/Meeting _____ _____

6. Notice of Evidence _____ _____

7. Notice of Investigative Report _____ _____

D. Undisputed Facts

_____
_____
_____
_____

E. Disputed Facts

_____
_____
_____
_____
_____

G. Summary of Relevant Evidence as to Disputed Facts

Having thoroughly reviewed and considered all the evidence, my summary of the relevant evidence is as follows:

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

H. Credibility Issues (if any) and factors related to resolution of same (optional)

_____
_____
_____

I. Special Considerations of any responses received to draft report, if any (optional)

_____
_____

Do you want to have hearings?

Hearings are optional in the K-12 setting

High school only? > Age? Peers?

Live-hearing, cross-examination and due process

Credibility w/ or w/o hearing?

No hearing? "plausibility" & "consistency"

Confidentiality still applies

LEA may adopt 'rules of decorum' IF hearings are conducted

34 C.F.R 106.45(B)(7)

must apply the standard of evidence designated for use in all formal complaints of sexual harassment

The Investigator & You: Opportunity to submit questions

- If no hearing, written, relevant questions may be asked of any party or witness
- Answers provided to both parties
- Limited follow-up questions and answers must also allowed
- Timing? After final report, before final determination

- Relevancy in general
- Relevancy of complainant's sexual predisposition or prior sexual behavior exceptions
  - Consent
  - Someone else committed the conduct
- Relevancy decisions must be explained in the final determination

"OCR will not substitute its judgment for that of the recipient's decision-maker with respect to weighing of the relevant evidence at issue in a particular case."

_____ COUNTY/CITY SCHOOL DISTRICT/SYSTEM

Title IX Notice of Right to Written Questions

(to both parties and their advisors)

RE: Sexual Harassment Complaint No. _____

Dear _____:

This is notification to each party of his/her opportunity to submit written, relevant questions that the party wants asked of any party or witness. The procedure for same is as follows:

1. Written questions must be received by me within __ days of the date hereof.
2. I will provide the person(s) to whom such questions are submitted a copy thereof.
3. Answers to the questions must be submitted to me within ___ days of the date I provide the questions.
4. I will provide copies of the questions and answers thereto to both parties.
5. Either party may submit to me additional, limited follow-up questions. Such questions must be submitted to me within ___ days of the date I provide the original answers to you pursuant to no. 4 above.
6. I will provide the person(s) to whom such additional questions are submitted a copy thereof.
7. Answers to the additional questions must be submitted to me within ___ days of the date I provide the additional questions.
8. I will provide copies of the questions and answers thereto to both parties.

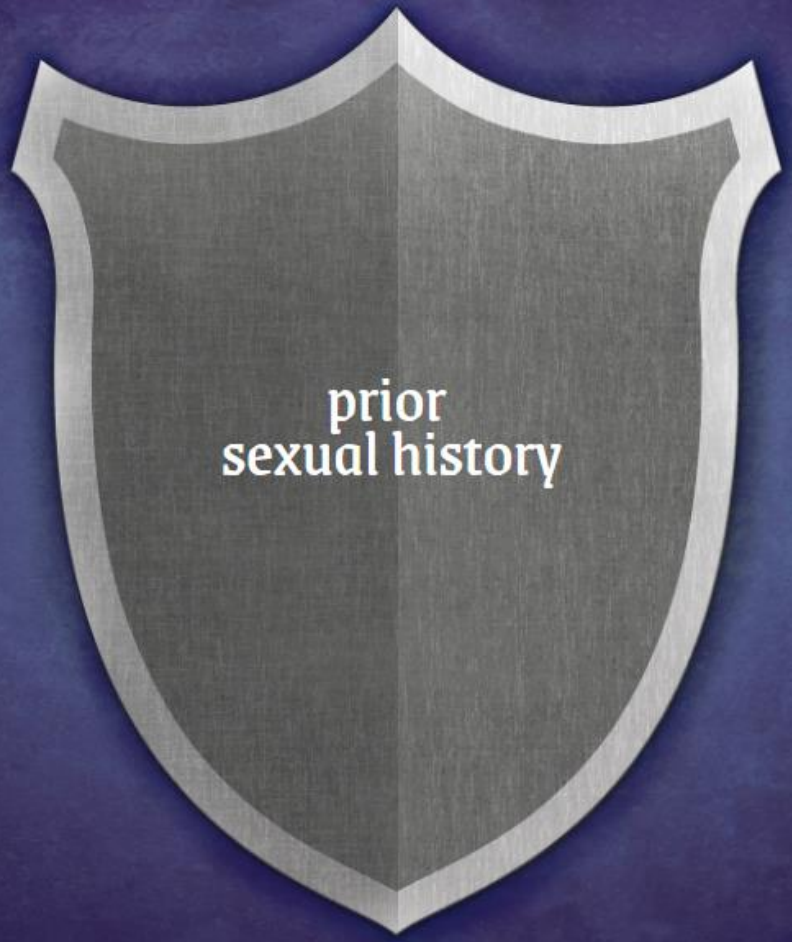
Please note that questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by 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.

Neither party may be forced to answer a question, and any person may object to a question on the grounds it is irrelevant. If I decide to exclude a question as irrelevant, I will explain that decision to the party proposing the question.

Sincerely,

_____

Decision-Maker


prior
sexual history

Final Determination (by you!)

- May <u>not</u> be Title IX Coordinator OR investigator
- *Must be written & include…*
- *ID of alleged violations of Title IX*
- *Procedural steps taken*
- *Findings of Fact*
- *<u>Conclusions re: Code of Conduct</u>*
- *Statement & rational for each result*
- *Procedures for appeals*

- Becomes final after either
  - Decision on appeal, OR
  - Time to appeal expires
- Implemented by Title IX Coordinator
  - Again, not YOU!

_____ COUNTY/CITY SCHOOL DISTRICT/SYSTEM
Title IX Determination
(to both parties and their advisors)

RE: Sexual Harassment Complaint No. _____

Dear _____:

As the assigned Decision-Maker on the above referenced complaint, this is my written determination regarding responsibility. This Written Determination has been made using the preponderance of the evidence standard, and is being provided to both parties simultaneously.

A. Allegations

The allegations potentially constituting sexual harassment as defined in 34 C.F.R. § 106.30 are as follows:

B. Procedure

The procedural steps taken from the receipt of the formal complaint through this determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence, are as follows:

C. Excluded questions

I have decided to exclude the following question(s) submitted by the parties as irtrelvant for the following reasons:

D. Findings of Fact

Having thoroughly reviewed and considered all the evidence, my findings of fact are as follows:

E. Code of Student Conduct

My conclusions regarding the application of the District's code of student conduct to the facts as determined above is that the respondent has or has not violated the following provisions of the code of conduct:

Code Section	Description of Offense	Violation (yes or no)

F. Determination of Responsibility

Allegation No. 1

Description of Allegation:

Respondent Responsible (yes or no):
Rationale for Determination:
Discipline to be Imposed on respondent:
Remedies to be provided to complainant:

Allegation No. 2
Description of Allegation:
Respondent Responsible (yes or no):
Rationale for Determination:
Discipline to be Imposed on respondent:
Remedies to be provided to complainant:

G. Appeal

Either or both complainant and respondent may appeal from this Determination of Responsibility.

The possible grounds for appeal are as follows:
1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time the determination regarding responsibility was made and that could affect the outcome of the matter; 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.

A party wishing to appeal must submit written notice thereof to me within 10 days of the date hereof. The appeal must specify the grounds for appeal and, as to each ground specified, a description of the evidence supporting such ground. If the evidence was not previously submitted, it must be included with the notice of appeal.

The notice of appeal may be submitted in person, by mail or by email, but in any event must be received by me within 10 days of the date hereof. My contact information is as follows:
Name:
Title:
Office address:
Electronic mail address:
Telephone number:

- Dismissal mandatory if…
  - Conduct alleged is not sexual harassment per new definitions
  - Conduct not a part of a school program/activity
  - Victim not a person in the U.S.
- Dismissal discretionary when…
  - Complainant withdraws
  - Respondent no longer enrolled/employed
  - School cannot gather evidence to make final decision
    - Respondent cooperation?
- Prompt, written notice to both parties

_____ COUNTY/CITY SCHOOL DISTRICT/SYSTEM
Title IX Notice of Dismissal
(to both parties and their advisors)

RE: Sexual Harassment Complaint No. _____

Dear _____:

Upon investigation, the District has determined to dismiss the above referenced complaint for the following reason(s):

____ The conduct alleged in the formal complaint would not constitute sexual harassment as defined in 34 C.F.R. § 106.30 even if proved.

____ The conduct alleged in the formal complaint did not occur in the District's education programs or activities.

____ The conduct alleged in the formal complaint did not occur against a person in the United States.

_____ The complainant has notified the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint.*

_____ The respondent is no longer enrolled or employed by the District.*

_____ Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Those circumstances are as follows: _____.*

- Final determination or dismissal
- Grounds for appeal
  - Procedural irregularity
  - New evidence
  - Conflict of interest or bias
  - Added bases, if to both
- Different decision-maker
- Written result & rationale

- Record-keeping (7 yrs)
  - Investigations, sanctions & remedies
    - All your notes…
  - Training materials, appeals & informal resolution

Whew…so what have we learned?

- Decision-maker v. Investigator
- After you get the Investigative Report-now what?
- Hearing or no hearing?
- Your determination
  - Form and Key Elements
- Guard against conflict of interest and bias

- Compliance will be a team sport
- Role of the Decision-maker
- _____
- _____
- _____
- _____

- You are all underpaid!

Thank you so much…

…for your kind attention