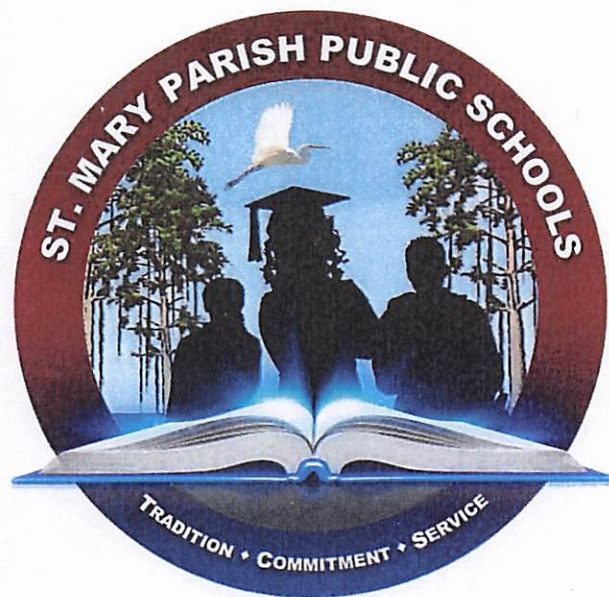


Title IX Training



**Presented:
Thursday, January 4, 2024
Materials and Operations Center**

Part 1

Foundations and Definitions

Part 2

Focused Q & A

"Sexual Harassment" under the 2020 Title IX Regulations

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Why are we here?

- Significantly amended Title IX regulations went into effect on August 14, 2020
- Those regulations obligate school districts to train staff, including:
 - "Title IX Coordinators"
 - "Investigators"*
 - "Decision-Makers"*

* definitions to follow

2



Objectives

- Understanding the obligations under the Title IX sexual harassment regulations
- Getting a firm grasp on roles & responsibilities
- Implementing appropriate procedures

3

General Outline

Part 1 – Foundations & Definitions

Part 2 – Focused Q&A

Part 3 – Policy & Procedural Requirements

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Part 1 -

Foundations & Definitions

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What is Title IX?

- Federal statute since 1972
- Prohibits sex discrimination in public schools
- Applies to other educational entities receiving federal funds (e.g., colleges, universities)

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What is Title IX?

"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 (emphasis added)

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"Program or Activity"

- A program or activity includes "all of the operations of" a school district. 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.

*Preamble to the Title IX regulations, 85 Fed. Reg. 30,026 (May 19, 2020) (the "*Preamble*")

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Sexual Harassment under Title IX

- U.S. Department of Education ("ED") published regulations May 19, 2020
- The 2020 regulations modified, changed, and expanded the Title IX regulations in 34 C.F.R. Part 106
- The 2020 regulations address "sexual harassment"

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Sexual Harassment under Title IX

- The 2020 regulations are the first *regulations* addressing “sexual harassment” under Title IX
- Previously, the ED had issued “guidance” documents regarding sexual harassment
- The 2020 regulations supersede and effectively replace the prior guidance

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Sexual Harassment under Title IX

- Current federal administration released in July 2022 a “notice of proposed rule making” (NPRM) with draft of amended regulations
- ED stated the final amended regulations were coming in October 2023; that did not occur
- ED released information in mid-December 2023 indicating the final amended regulations will be released in March 2024

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Sexual Harassment under Title IX

- Proposed amended regulations express intent to make several definitional and procedural changes to current regulations
- Legal challenges are likely after release
- After release, absent an injunction, the amended regulations may take effect in as little as 30 days but likely a longer time (e.g., 90 days).

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Sexual Harassment under Title IX

- “[S]exual harassment is a form of sex discrimination under Title IX.” *Preamble* at 30,046.
- Sexual harassment adds to existing prohibitions on sex-based discrimination in other areas (e.g., athletics, program/activity access)

13

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

14

Sexual Harassment: Focus on the Student

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)

15

The Three Main Parties

- Complainant: alleged victim (i.e., a student)
- Respondent: alleged perpetrator
(i.e., a student or an employee)
- Recipient: "school district", as the recipient of federal funding and thus obligated to comply with Title IX

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Sexual Harassment: Defined

- The Title IX regulations define "sexual harassment" as encompassing any one of three (3) prongs.
- Conduct determined (via the outcome of the grievance process) to meet *any one* of the prongs will constitute "sex discrimination" under Title IX.

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Sexual Harassment: Defined

As defined in the regulations (34 C.F.R. § 106.30):

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

18

Sexual Harassment: Defined - Prong 1

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

19

Sexual Harassment: Defined - Prong 2

(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;

20

Sexual Harassment: Defined - Prongs 1 & 2 Components defined

"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

21

Sexual Harassment: Defined - Prong 3

(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).

22

Sexual Harassment: Defined - Prong 3 - Components defined

"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)

23

Sexual Harassment: Defined - Prong 3 - Components defined

"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.

34 U.S.C. § 12291(a)(10)

24

Sexual Harassment: Defined - Prong 3 - Components defined

"Domestic violence"

The term "domestic violence" includes felony or misdemeanor crimes committed by a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction receiving grant funding and, in the case of victim services, includes the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior, by a person who—

- (A) is a current or former spouse or intimate partner of the victim, or person similarly situated to a spouse of the victim;
- (B) is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
- (C) shares a child in common with the victim; or
- (D) commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

34 U.S.C. § 12291(a)(8)

25

Sexual Harassment: Defined - Prong 3 - Components defined

"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)

26

Sexual Harassment: Defined - Some Differences in Criteria

- Note that sexual harassment under prongs (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 prong (2) (i.e., the "unwelcome conduct" prong).

27

“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) (emphasis added).
- 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.

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“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) (emphasis added).
- 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).

29

“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 the elementary and secondary school.”

34 C.F.R. § 106.30(a) (emphasis added)

30

“Actual Knowledge”

In addition, “actual knowledge” exists “if an employee of an elementary or secondary school personally observes sexual harassment”

Preamble at 30,107 (emphasis added)

31

“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 (emphasis added); see id. at 30,110

32

“Notice”

“[A]ny 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 (emphasis added)

33

“Notice”

“The [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 (emphasis added)

34

“Report”

The act of providing (i.e., reporting to) 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”.

35

“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)

36

"Title IX Coordinator"

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

34 C.F.R. § 106.30(a) (emphasis added)

- 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 (emphasis added)

37

"Supportive Measures"

Supportive measures mean 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.

34 C.F.R. § 106.30(a)

38

"Supportive Measures"

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.

34 C.F.R. § 106.30(a)

39

“Supportive Measures”

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 [school] campus, and other similar measures.

34 C.F.R. § 106.30(a)

40

“Supportive 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)

41

“Supportive Measures”

The school district must offer supportive measures “whenever the [school board] 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 (emphasis added)

42

“Supportive Measures”

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) (emphasis added)

43

“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) (emphasis added)

44

“Formal Complaint”

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

45

“Formal Complaint”

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.

46

“Formal Complaint”

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).

47

“Formal Complaint”

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

48

“Grievance Process”

- The process by which a school district responds to a formal complaint of sexual harassment.
34 C.F.R. § 106.45(b)
- We will cover the Title IX grievance process in Part 3.

49

“Not Deliberately Indifferent”

This is the legal standard in the regulations by which the ED will assess a school district’s actions to actual knowledge of sexual harassment.

50

“Not Deliberately Indifferent”

“A [school district] with actual knowledge of sexual harassment in an education program or activity of the [school district] against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A [school district] is deliberately indifferent only if its response to sexual harassment is *clearly unreasonable in light of the known circumstances.*”

34 C.F.R. § 106.44(a) (emphasis added)

51

“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.

52

“Investigator”

The ED notes that “[t]he investigator is obligated to *gather evidence directly related to the allegations* whether or not the [school board] 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 (emphasis added)

53

“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)

54

"Decision-Maker"

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

55

"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

56

"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.*

57

“Standard of Evidence”

The ED provides the following descriptions:

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 (emphasis added).

Preponderance –

“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 (emphasis added).

58

“Standard of Evidence”

The school district must “apply the same standard of evidence for formal complaints against students as for formal complaints against employees”

34 C.F.R. § 106.45(b)(1)(vii)

59

“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) (emphasis added)

60

“Emergency Removal”

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

61

“Emergency Removal”

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

62

“Emergency Removal”

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)

63

Part 2 - Focused Q & A

64

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.

65

2. 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)

66

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

Note that a "third prong" offense (i.e., one of the named offenses under federal law) does not need to effectively deny equal access in order to meet the Title IX regulation's definition of sexual harassment.

67

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.

68

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."

Preamble at 30,156

69

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? (cont'd)

"This [evaluation process] 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

70

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? (cont'd)

Again, **no**. 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

71

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? (cont'd)

The ED further urges that the school district "carefully, thoughtfully, and reasonably evaluate each complainant's report or formal complaint."

Preamble at 30,156

72

5. Should the school district expect any specific "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

73

5. Should the school district expect any specific "profile" or behaviors of a complainant? (cont'd)

No. 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)

74

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, ...

75

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?

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

76

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 individual situations."

Preamble at 30,181

77

7. Does the school district have the flexibility to decide the supportive measures to be provided to the complainant and the respondent? **(cont'd)**

However, the ED advises that "if a [school board] determines that a particular supportive measure was not appropriate even though requested by a complainant, the [school board] must document why the [school board]'s response to the complainant was not deliberately indifferent."

Preamble at 30,181 n.801

78

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.

79

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

80

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.

81

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? (cont'd)

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.

82

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? (cont'd)

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)

83

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. ...

84

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? (cont'd)

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

85

12. Does the **Complainant's** choice not to file a formal complaint end the school **district's** responsibilities to address the alleged conduct?

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

86

12. Does the **Complainant's** choice not to file a formal complaint end the school **district's** responsibilities to address the alleged conduct? (cont'd)

In other words, 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.

87

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

88

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 board] must respect the complainant's wishes regarding whether to participate or not in the grievance process."

Preamble at 30,129 n.569

89

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. ...

90

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)? (cont'd)

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

91

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 (emphasis added)

92

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? (cont'd)

In other words, an individual's knowledge of whether their behavior was inappropriate 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.

93

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

94

17. Did the **"respondent"** have to **"intend"** the conduct which is alleged to be sexual harassment? **(cont'd)**

The sole exception: the behavior of "fondling" – as part of "sexual assault" – has an intent element.

Preamble at 30,090 n.437

95

18. In the determination of whether behavior constitutes **"sexual harassment"** under the Title IX regulations, do 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, perceptions, or beliefs.

96

21. In review 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. ...

100

21. In review 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? (cont'd)

"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), ...

101

21. In review 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? (cont'd)

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

102

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

103

23. 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

104

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

105

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

* The ED’s answer to this may change under the interpretation of the anticipated revisions in 2024

106

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

107

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 (emphasis added); see 34 C.F.R. § 106.45(b)(3)(i)

108

27. Does dismissal of a Title IX complaint prevent consequences for non-Title IX sexually related conduct? (cont'd)

For example, such prohibited conduct could include sexually based behavior which implicates possible bullying under La. R.S. § 17.416.14 and the school board's anti-bullying policies and procedures.

109

27. Does dismissal of a Title IX complaint prevent consequences for non-Title IX sexually related conduct? (cont'd)

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 board]s may address through a variety of actions"

Preamble at 30,161

110

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" *Preamble 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.

111

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. ...

112

29. What about criminal charges? (cont'd)

“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. ...

113

29. What about criminal charges? (cont'd)

“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)

114

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., 964 F.3d 351 (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)

115

30. What about School Resource Officers (SROs)? (cont'd)

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.

116

30. What about School Resource Officers (SROs)? (cont'd)

However, an agreement/memorandum of understanding (MOU) between the LEA and the law enforcement agency(-ies) 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).

117

31. Can the complainant or respondent appeal the final determination of the **"decision-maker"** at the completion of grievance process?

Yes. "The final regulations require [school board]s 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))

118

31. Can the complainant or respondent appeal the final determination of the **"decision-maker"** at the completion of grievance process?
(cont'd)

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.

119

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 board]s."

Preamble at 30,104

120

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 districts]'s own code of conduct."

Preamble at 30,038 (emphasis added)

121

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. ...

122

34. How do teachers address classroom behavior? (cont'd)

"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

123

35. Who is responsible for enforcement of
compliance with Title IX?

ED's Office for Civil Rights (OCR)

124

36. Are there resources from OCR to assist in
further understanding the school **district's**
obligations under the 2020 Title IX regulations?

Yes. For example, refer to the following
publication:

*Questions and Answers on the Title IX
Regulations on Sexual Harassment* (OCR July
2021)

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Part 3

Policy & Procedures Requirements

Part 3

Policy and Procedures Requirements



HAMMONDS, SILLS, ADKINS,
GUICE, NOAH & PERKINS LLP
ATTORNEYS AT LAW

1



Designation of **Title IX Coordinator**

- To coordinate compliance with Title IX
- Name or title, office address, email address, and telephone number **must be made available** to:
 - Applicants (student and employee)
 - Students
 - Parents/Legal Guardians
 - Employees
 - Unions and/or professional organizations holding collective bargaining or professional agreements with school district

2



Title IX Coordinator - Publication of Contact Information

Identification and contact information must be prominently displayed on school district's **website** and in **each handbook** or catalog made available to *applicants, students, parents/legal guardians, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school district.*

3

Prohibition of Sex Discrimination

- Ensure no sex discrimination in treatment of parties during sexual harassment investigation
 - NO different treatment on basis of sex, for example:
 - Investigating complaints of sexual harassment brought by females but not by males

4

Equitable Treatment

- Hinges of **fair process** and resulting outcome
- Procedure should specify:
 - Remedies for Complainant and disciplinary sanctions against Respondent **only if determination of responsibility after fair process**

5

Equitable Treatment

Remedies – restore or preserve equal access

- Remedies may include “supportive” measures but may also be disciplinary, punitive, and burdensome toward respondent

6

Equitable Treatment does not prohibit Emergency Removals or Administrative Leave

Emergency Removal

- Respondent removed, *if immediate threat*
- Requires *safety and risk analysis*
- Requires *notice and opportunity to challenge*
- No modification of rights afforded students with disabilities (e.g., IDEA, Section 504)

7

Equitable Treatment does *not* prohibit Emergency Removals or Administrative Leave

Administrative Leave

- May place employee-respondent on leave during pendency of investigation
- No modification of rights afforded individuals with disabilities (e.g., ADA)

8

Objective Evaluation of *Relevant* Evidence

- Procedure must call for *objective evaluation* of relevant evidence, including:
 - *inculpatory* – tends to show responsibility
 - *exculpatory* – tends to show no responsibility
- No prejudgment
- Credibility determinations based on evidence, *not assumptions*

9

What is "Relevant" Evidence?

Evidence is relevant if it has a tendency to make a fact more or less probable and is of consequence to making a determination.

10

What is "Relevant" Evidence?

- Should **not** consider evidence, if probative value substantially *outweighed* by:
 - danger of unfair prejudice
 - confusing the issues
 - misleading the fact finder
 - causing undue delay or waste of time
 - needlessly cumulative

11

Evidence of Complainant's Prior Sexual Predisposition or Behavior **Not Relevant**

Such questions and evidence not relevant, *unless*

- Offered to prove someone other than respondent committed the alleged conduct; or
- Involve incidents of prior sexual behavior with respect to respondent and offered to prove consent by complainant

12

Standard of Evidence

Procedure must state one of two available standards of evidence to be used in determining responsibility

- Preponderance of the evidence
 - More probable than not
- Clear and convincing evidence
 - Highly probable or probably certain

13

Conflict of Interest, Bias, and Impartiality

Title IX Coordinator, Investigator, and Decision-Maker, (plus, if applicable, Informal Resolution Facilitator) **must**

- not have a conflict of interest or bias against complainants or respondents generally or an individual party specifically
- be *without* bias as to sex, race, ethnicity, socioeconomic status (SES), disability, age, language (e.g., EL status), LGBTQ+ status, or other characteristics

14

Presumption Respondent Not Responsible

- Procedure must state inherent presumption that respondent not responsible
- Presumption not intended to impart unfair advantage
- Benefit to both parties
 - Increased legitimacy of findings of responsibility for Complainants
 - Assures Respondent (and Complainant) a fair and impartial grievance process

15

Supportive Measures

- Grievance procedure should describe range of supportive measures available to complainants and respondents that cannot burden either party
- **Obligation** to offer supportive measures to Complainants, including interactive discussion to determine appropriate supportive measures
- **Incentivizes** making supportive measures available to Respondents

16

Range of Disciplinary Sanctions and Remedies

- Grievance procedure should describe range of possible disciplinary sanctions and remedies
- School Districts to determine whether procedure will include a specific list or only a range of possible sanctions

17

Privileged Information

Grievance procedure cannot require or allow use of questions or evidence subject to legally recognized privilege without consent, including

- Attorney-client privilege
- Doctor-patient privilege
- Spousal privilege

18

Time to Complete Grievance Process

- “reasonably prompt” but no set time-frames
- School district should determine reasonable time-frames and include in the procedure
- Procedure should also allow for temporary delays or limited extensions of time for good cause
 - If delay, written notice should be provided to parties with reasons

19

Appeal Procedure and Basis for Appeal

- Must include Appeal Process in procedures
 - Both parties have right to appeal
- Must be offered on at least the following 3 bases:
 - Procedural irregularities that affected the outcome; or
 - New evidence not reasonably available when determination was made that could have affected outcome; or
 - Conflict of interest or bias that affected the outcome

20

Training Requirements - Title IX Coordinators Investigators, and Decision Makers *(and informal resolution process facilitator, if different from Title IX Coordinator)*

Must be trained on the following:

- definition of sexual harassment
- scope of the school district's education program or activity
- how to conduct the full investigation and grievance process
- how to serve in their respective roles in an impartial manner

21

Training Requirements - Investigators

Investigators must *also* be trained on:

- issues of relevance to create an investigative report that fairly summarizes the evidence

22

Training Requirements - Decision-Makers

Decision-Makers must *also* be trained on the following:

- 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 (with very limited exceptions)
- technology for live hearings (if applicable; hearings NOT required at elementary and secondary level)

23

Grievance Process From Report to Conclusion

24

Report of / Reporting Sexual Harassment

- Any person may report sexual discrimination or harassment by any means that results in Title IX Coordinator receiving the report, such as:
 - In-person
 - Mail or email
 - Telephone
- Need not be during business hours

25

Title IX Coordinator's Obligation

- Contact complainant to determine facts and discuss availability of supportive measures
- Inform complainant of right and process to file formal complaint

26

What if Complainant refuses to file formal complaint? Option A: *Close without Action*

- Provide supportive measures as appropriate (measures must remain confidential)
- Document reasons response is not deliberately indifferent
- Document measures taken to preserve and restore equal access to programs or activities
- If no supportive measures – document reasons the response was not clearly unreasonable
- Maintain confidential report for seven (7) years

27

What if Complainant refuses to file formal complaint? Option B: *Open Investigation*

- Title IX Coordinator has authority to sign and file formal complaint even where complainant opts not to move forward
 - Report sufficient to impart knowledge that any person is sexually harassing or assaulting students or implies a pattern of sexual harassment by person in position of authority
- Avoid deliberate indifference – err on side of caution

28

Initiation of Investigation

- Initiated immediately upon receipt of formal complaint – either by complainant or Title IX Coordinator
- Title IX Coordinator reviews complaint, issues required notices, and issues dismissal if appropriate
- Investigator – investigates the Complaint

29

Notice - Required Components

Title IX Coordinator immediately provides parties a copy of the grievance procedure and written notice of the following:

- Details of allegations
- Presumption Respondent not responsible
- Right to advisor/attorney of their choosing
- Right to inspect and review evidence
- Prohibition against false statements or submission of false information during the grievance process

30

Expanded Allegations - Notice

If during course of investigation the school district decides to investigate allegations not included in the first notice, the school district must provide both parties subsequent notice detailing the new allegations.

31

Retaliation Prohibited

The Title IX regulations include a specific prohibition against intimidation, threats, coercion, or discrimination of any individual with a purpose of interfering with any right or privilege secured by Title IX.

See 34 C.F.R. § 106.71

32

Notice - Recommended Components

Prudent to include other required components of grievance procedure in the notice, including:

- Prohibition against retaliation
- Notice of equitable treatment
- Notice that Title IX Coordinator may consolidate formal complaints as appropriate
- Notice that employee-respondent may be placed on administrative leave during pendency of grievance process

33

Dismissal of Formal Complaint - Mandatory

- After review of formal complaint, Title IX Coordinator **must dismiss**, if one of the following apply:
 - Conduct, even if true, would not constitute “sexual harassment” as defined in the regulations
 - Conduct did not occur in school district’s educational program or activity
 - Conduct did not occur against person in the U.S.
- Dismissal **does not preclude** disciplinary action under other provisions of school district’s code of conduct

34

Dismissal of Formal Complaint - Discretionary

After review of formal complaint, Title IX Coordinator *may* dismiss, if one of the following apply:

- Complainant wishes to withdraw the complaint
- Respondent no longer enrolled or employed
- Specific circumstances prevent ability to gather evidence sufficient to reach a determination

35

Notice of Dismissal

- Upon dismissal – whether mandatory or discretionary – Title IX Coordinator must provide notice of the dismissal with specific reasons to the Complainant and Respondent *simultaneously*

36

Investigation Requirements

- Ensure burden of proof and burden of gathering evidence rests on Title IX Coordinator and Investigator, not the parties
 - Cannot access medical/psychological treatment records without consent
- Provide equal opportunity to both parties to present witnesses (fact and expert), submit relevant written questions for other party/witness to answer, and present evidence (inculpatory and exculpatory)

37

Investigation Requirements (cont'd)

- Cannot restrict either party from disclosing allegations under investigation or to gather and present relevant evidence
 - Allows parties to garner emotional support and gather evidence
 - Public criticism of process permissible
- Does not permit discussion of information outside of allegations – such as evidence, investigative summaries, etc.
- Does not permit redisclosure of information subject to FERPA

38

Investigation Requirements (cont'd)

Questions and evidence of complainant's sexual predisposition or prior sexual behavior are not permitted, *unless* such questions and evidence are offered

1. to prove that someone other than the respondent committed the conduct alleged in the complaint; or
2. if the questions and evidence concern specific incidents of prior sexual behavior with respect to the respondent and are offered to prove consent (by the complainant)

39

Investigation Requirements (cont'd)

Provide parties same opportunity to have an **"advisor"** present during any proceeding, meeting, or interview

- Advisor may (but is not required to) be an attorney
- Cannot limit choice or presence of advisor
- **May establish restrictions as to extent to which advisor may participate**, provided restrictions apply equally to both parties

40

Investigation Requirements (cont'd)

- Provide written notice of date, time, location, participation, and purpose of all proceedings, meetings, or interviews with sufficient time for party to prepare to participate
- Provide equal opportunity for both parties to review all evidence obtained with opportunity to respond
 - Must be given at least ten (10) days to respond

41

Investigation Requirements (cont'd)

- Create investigative report that fairly summarizes relevant evidence; and,
- At least ten (10) days prior to hearing (if applicable) or other time of determination as to responsibility, send to each party and the party's advisor for review and written response

42

Hearings (If Applicable)

- Post-secondary institutions are required to provide for a live hearing. **Hearings are not required for elementary and secondary schools.**
- Elementary and secondary schools can opt to add a live hearing requirement to its grievance procedure.
 - If you opt 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.

43

Written Questions

- After investigative report sent to parties, and before reaching a determination, each party has seven (7) calendar days to submit written, relevant questions to be answered by another party or witness
 - Irrelevant questions regarding Complainant's sexual predisposition or history must be denied by decision-maker with reasons provided to requesting party
- Decision-maker must provide answers to questions to both parties
- Additional time for follow-up questions must be allowed

44

Determinations Regarding Responsibility

- Upon conclusion of question-and-answer period, decision-maker must issue a written determination regarding responsibility
- Decision-Maker **cannot** be the Title IX Coordinator or the Investigator
- Must apply the standard of evidence selected by the School District

45

How to Determine if *Severe, Pervasive, and Objectively Offensive*?

Evaluate from perspective of a “reasonable person standing in the shoes of complainant”

- Consider the student’s age, disability status, and other characteristics
- How often or how wide-spread was the conduct?
- Should not shrug off unwelcome conduct as simply “boys being boys” or make other similar assumptions or preconceptions based on bias or prejudice

46

What does “effectively deny a person equal access” mean?

- Equal access is the focus – *not* a complete denial of education
- Measured against a person who has not been subjected to sexual harassment
 - Examples:
 - Skipping class to avoid harasser
 - Decline in GPA
 - Difficulty concentrating
- NO concrete injury is required

47

Written Determination

- Required Components
 - Identification of the allegations
 - Description of procedural steps
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the school district’s code of conduct to the facts

48

Written Determination (cont'd)

- Required Components (cont'd):
 - Statement of and rationale for result as to each allegation, including determination of responsibility, disciplinary sanctions, and remedies to restore or preserve equal access to complainant
 - Appeal procedure with permissible bases
- Must provide to both parties, in writing, simultaneously

49

Appeal

Both parties have right of appeal, on following bases (at a minimum):

- Procedural irregularity
- New evidence unavailable previously
- Conflict of interest or bias

Additional right of appeal possible:

- Any other bases school board determines pursuant to adopted procedure

50

Action Steps upon Appeal

- Notify other party and implement appeal process equally for both parties
- Ensure decision-maker on appeal is not the same person as original decision-maker or the investigator during the grievance process or the Title IX Coordinator

51

Action Steps upon Appeal (cont'd)

- Ensure compliance with standard of evidence
- Give both parties reasonable opportunity to submit written statement
- Issue written decision simultaneously to both parties describing result of appeal and rationale for result

52

Informal Resolution

Cannot require participation but may facilitate an informal resolution process at any point prior to a determination provided the Title IX Coordinator:

- Provides notice of process, including rights and consequences
- Obtains voluntary, written consent

53

Informal Resolution (cont'd)

- Process *not* available when allegations involve an employee sexually harassing a student
- Title IX Coordinator *may* act in capacity as informal resolution facilitator

54

Record Keeping

The following information must be maintained for seven (7) years:

- Each sexual harassment investigation file, including all evidence
- Any appeal and result therefrom
- Any informal resolution and result therefrom
- Information regarding supportive measures taken in response to a report or formal complaint of sexual harassment

55

Training Materials - Record Keeping

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process (if different from Title IX Coordinator).
- 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

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Thank You

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