




TITLE IX: BEST PRACTICES IN TRAINING & COMPLIANCE

In Conjunction with:

**VSBA**
Virginia School Boards Association
Leadership · Advocacy · Support

Bradford A. King, Esq.
Nicole S. Cheuk, Esq.
bking@sandsanderson.com (804) 783-7263
ncheuk@sandsanderson.com (804) 783-7267

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Agenda

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- 1. FEDERAL STATUTORY LAW**
 - 20 U.S.C. § 1681 et seq.
- 2. FEDERAL GUIDANCE**
 - Dear Colleague Letters
 - Question & Answer Documents
- 3. INTAKE/INVESTIGATION BEST PRACTICES**
- 4. FINAL TAKEAWAYS**

Title IX Headlines

“Study: #MeToo Era Challenges Sex Discrimination Fight in Schools” – Public News Service – June 12, 2018

- Study from UC Boulder published in March 2018 – Title IX Coordinators as Street-Level Bureaucrats in U.S. Schools: Challenges Addressing Sex Discrimination in the #MeToo Era
- “Researchers found that key staff responsible for preventing and responding to harassment frequently didn’t know it was their job.”
- Concluded that: “school administrators had autonomy and discretion in interpreting and enacting their duties, however they lacked time, information, and other resources necessary to respond properly to the stated duties in their position.”
- Spent little time on Title IX related duties, felt under-supported and under-prepared, lack of understanding of role/responsibilities

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Title IX Headlines

“Winchester teen demands action in Title IX case” WVDM – June 26, 2018

- School division determined that it was more likely than not that the July off-campus sexual assault did not happen
- Plea deal in criminal case
- Students still attend same high school – student appealed to school board in June
- UPDATE: In August 24, 2018 letter, board Chairwoman Allyson Pate wrote “there is insufficient information to suggest, by the preponderance of the evidence, that our School Board Policy GBA/JFHA was violated”

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Title IX Headlines

"Of Course Sexual Harassment Is Rampant. It Starts in Our Schools." Fortune Magazine – October 2017

[Research by the American Association of University](#)

[Women](#) (AAUW) found that nearly half of students surveyed in grades 7–12 experienced some form of sexual harassment within the past school year—nearly 87% of those students reported that the harassment had a negative impact on them

"If left unchecked, harassment is a learned behavior that continues into adulthood"

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Title IX Headlines

"#MeTooK12: New campaign raises awareness about rights at school" Christian Science Monitor – January 18, 2018

- Launched by parents and advocates (Stop Sexual Assault in Schools – nonprofit) January 9, 2018 to draw attention to the issue and point people toward potential solutions

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Title IX Headlines

“These middle school students pretended to rape black classmates on Snapchat” – *Washington Post*, October 22, 2017

- Middle school football season cancelled
- Sensitivity training imposed
- Town hall held
- OCR complaint filed

The Younger Victims of Sexual Violence in School –

“Conversations about Title IX tend to focus on college, but cases among K-12 students are abundant and often poorly handled” – The Atlantic, August 10, 2017

“Students Drive New Policies As K-12 Sexual Assault Investigations Rise” – NPR, August 8, 2017

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Goals for today

- Readily recognize sexual harassment “grooming” behaviors that lead up to such misconduct
- Understand your obligation to report, investigate, take measures to prevent sexual violence/harassment or its recurrence
- Understand that individual school administrators/teachers may be held liable for failure to do so
- Enhanced duty to prevent/protect students under Title IX

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FEDERAL LAW

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Title IX

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (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"**
- U.S. Department of Education's Office for Civil Rights ("OCR") interprets this to include gender-based harassment
- Gender-based harassment includes verbal, non-verbal or physical aggression, intimidation, or hostility based on sex or sex stereotyping, including failing to conform to stereotypical notions of masculinity or femininity

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Title IX – Sexual Assault/Harassment

Since 2014, OCR K-12 investigations up 500%; as of July 27, 2018– 14 open investigations in VA school divisions

School divisions are not liable for one student harassing another, but may be liable for failing to respond adequately, ***whether or not the harassed student makes a complaint or asks the school to take action.***

School division may violate Title IX if:

- Harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the educational program;
- The division knew or *reasonably should have known* about the harassment; and
- The division failed to take appropriate responsive action

Because liability can be imposed when a single school administrator with authority to take corrective action responded to harassment with deliberate indifference, ***it is imperative that school divisions ensure that all staff and administrators understand their responsibilities to report and investigate suspected sexual abuse or harassment***

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Title IX – Sexual Assault/Harassment

When a school division knows or *reasonably should know* of possible harassment, it must take immediate and appropriate steps to investigate or otherwise determine what occurred

If an investigation reveals that the harassment created a hostile environment, the school division must then take prompt and effective steps reasonably calculated to:

- End the harassment;
- Eliminate the hostile environment;
- Prevent its reoccurrence; and
- As appropriate, remedy its effect

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Sexual Assault/Violence

Physical sexual acts perpetrated against a person's will or where a person is unable to give consent because of a person's age, intellectual disability, or due to the use of drugs and alcohol, AND

Where the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in, or benefit from, educational programs or activities

- One incident of sexual assault can trigger Title IX responsibilities, depending on the severity and impact on the student's ability to participate in educational programs or activities

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Sexual Harassment

QUID PRO QUO – employee conditions an educational benefit or decision on the student's submission to sexual conduct; or Conduct creates a "HOSTILE ENVIRONMENT"

- Degree to which the conduct affects students' education;
- Type, frequency and duration of the conduct;
- Identity and relationship between harasser(s) and victim(s);
- Number of individuals involved (group harassment);
- Age and sex of harasser and victim;
- Size of school, location of incidents, and context;
- Welcomeness (depends on age, relationship between offender and victim).

* In either case, conduct must deny or limit student's ability to participate in or benefit from educational programs or activities

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Grooming Behaviors

- Often occur in context of providing additional assistance to students; i.e., music lessons, advice on a school project, tutoring, athletic assistance or training, outdoor activities.
- What to look for:
 - Inappropriate and/or excessive communications such as through texting, "IM"ing, Facebook, Snapchat, and other social media
 - Overly involved in students' personal and social lives
 - Acting more like a friend than a teacher (being cool, talking about juvenile issues, dressing inappropriately, sharing music and videogames, etc.)
 - Visiting students at home with or without parent present.
 - Overly familiar and/or "touchy" with student
 - Attending social or athletic activities with students outside school-sponsored events
 - Favoritism or giving special privileges
 - Gifts.

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Grooming Offender Characteristics

- Teachers are the most likely offenders, followed by coaches, and persons whose jobs give them one-on-one access to students (music, band and drama teachers, bus drivers).
 - Additional assistance, tutoring
- Targets – 56 percent female, 44 percent male, 51 percent white, 25 percent African-American, 15 percent Hispanic.
 - Students with disabilities often targeted
 - Students from broken homes or undergoing other emotional or social stress rendering them vulnerable/needy
- Offenders exercise control and secrecy over students by gradual grooming behaviors intended to test child's ability to maintain secrecy and compliance

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Case Study: Stacy Shuler

Ohio PE teacher and athletic trainer for high school football team

Students sought her out to discuss personal issues

Invited them to her home and drank alcohol with students

Gave a student a massage that led to sex

Other students also had sex with the teacher, including in her shower, after which they all stood outside in the nude smoking cigarettes

Shuler earned a certificate of completion for a four-hour course provided by the School Division called "Child Abuse and Neglect Training"

Sentence: 4 years in prison, convicted of 16 felonies

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A Word On: Gender-Based Harassment

From OCR's website:

- *All students can experience sex-based harassment, including male and female students, LGBT students, students with disabilities, and students of different races, national origins, and ages. Title IX protects all students from sex-based harassment, regardless of the sex of the parties, including when they are members of the same sex*
- Examples of Policies and Emerging Practices for Supporting Transgender Students:
<https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>

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2017 Changes to Federal Guidance – Transgender Students

February 22, 2017

- Withdrawal of statements of policy and guidance reflected in May 2016 DCL on OCR's enforcement of Title IX with respect to transgender students based on gender identity as well as related January 2015 letter
- Notes that former guidance requiring access to sex-segregated facilities based on gender identity did not contain extensive legal analysis or explain how the position is consistent with the express language of Title IX or undergo any formal public process
- August of 2016, a Texas court preliminarily enjoined enforcement of the interpretation, case has since been dismissed
- March 6, 2017 U.S. Supreme Court vacated and remanded Gloucester County School Board v. G.G. case for further consideration; 4th Circuit remanded to US District court, School Division filed motion to dismiss for mootness
- May 22, 2018 US DC for EDVA denied School Division motion to dismiss

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2017 Changes to Federal Guidance – Transgender Students

June 6, 2017

- Internal memo from OCR to regional directors highlighting recent developments in the enforcement of Title IX, specifically with regard to transgender students
- OCR should rely on the Title IX and implementing regulations as interpreted in decisions of federal courts and OCR documents that have not been rescinded
- Provided specific examples of when OCR can assert subject matter jurisdiction
 - Failure to resolve a transgender student's complaint of sex discrimination
 - Failure to assess whether sexual harassment or gender-based harassment (refusing to use preferred name or pronouns) of a transgender student created a hostile environment
 - Different treatment based on sex stereotyping
- Provided actual suggestions for appropriate language to use in the case of a complaint dismissal, given the shift in enforcement with respect to transgender students

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Gloucester Case Status

August 3, 2017 – Fourth Circuit cancels oral argument and remands to district court to consider whether the suit should be dismissed because it is moot

On August 11, 2017, ACLU filed an amended complaint in lawsuit to reverse school district's policy, which prohibited transgender students from using restrooms consistent with their gender identity. Because of Grimm's graduation, the ACLU amended the complaint in his suit to seek damages and to overturn the school board's "anti-trans policy permanently"

On September 25, 2017 Gloucester moved to dismiss – reiterating earlier arguments, saying the policy did not violate constitutional rights or discriminate against him because all students treated the same. Policy requires students to use restrooms or locker facilities that match their biological sex or three private, single stall bathrooms

On May 22, 2018 – School Board Motion DENIED by USDC of EDVA

Federal Guidance

OCR Authority

U.S. Department of Education's Office for Civil Rights (OCR) enforces:

- Title VI of the Civil Rights Act of 1964 – prohibits discrimination on the basis of race, color and national origin
- Title IX of the Education Amendments of 1972 – prohibits discrimination on the basis of gender in educational programs receiving federal funds
- Section 504 of the Rehabilitation Act of 1973 – prohibits discrimination and harassment based on disability in programs that receive federal financial assistance

OCR Authority

Title II of the Americans with Disabilities Act of 1990 – prohibits discrimination and harassment based on disability in public entities

Age Discrimination Act of 1975 – prohibits discrimination based on age

Boy Scouts of America Equal Access Act of 2001 – prohibits denial of equal access to school facilities or programs or discrimination against any group officially affiliated with Boy Scouts



OCR Complaints

Complaints may be filed by anyone who believes that an educational institution that receives federal financial assistance has discriminated against someone on the basis of race, color, origin, sex, disability, or age – and need NOT be the victim

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Process for OCR Complaint and Investigation

Once filed, OCR decides whether or not to investigate:

- Is the complaint already being investigated by another agency or by the school's formal grievance procedure (or state)?
- Was the complaint made within 180 days from the last date of the alleged discrimination?

Early complaint resolution is offered, but both parties must consent – in some instances this will temporarily stay the data request, response requirements

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Investigation

During investigation, OCR will review information submitted by both parties, may conduct interviews

OCR will request data, the institution's narrative response, and any other available evidence:

- Record of trainings
- Policies
- Correspondence/communication

OCR's goal is to obtain independent written documentation that corroborates oral statements made by the complainant or witnesses

2018 Case Processing Manual:

<https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

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Finding of Discrimination

- OCR's finding that a school division violated one of the various laws it enforces must be supported by a preponderance of the evidence; that is, evidence that shows it is more likely than not that the school division took/failed to take the action alleged
- When there is a significant conflict in the evidence (no corroborating witness statements), OCR generally must conclude that there is insufficient evidence to establish a violation of the law

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Finding of Discrimination – What Happens Next?

- Resolution Agreement:
 - OCR will closely monitor
 - Will not close the complaint until the terms of the resolution agreement are fulfilled and the school division is in compliance with the statute(s) and regulation(s) at issue
- If no agreement, OCR will issue a Letter of Findings setting forth factual and legal basis for violation/non-violation
- May initiate administrative enforcement proceedings to terminate or suspend federal financial assistance to the division or refer the case to the Department of Justice (DOJ)
- OCR may also move to defer any new or additional federal money to the school division (Notice of Opportunity for Hearing)

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Compliance Reviews

- Regulations require OCR to initiate “periodic compliance reviews” to assess the practices of recipients to determine whether they comply with the regulations promulgated pursuant to the laws OCR enforces
- Broad discretion afforded by regulations to determine issues for investigation and the number and frequency
- Many fewer compliance reviews vs. complaints received

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Dear Colleague Letters

During previous administration, OCR increasingly issued what it calls “Dear Colleague Letters” and other guidance documents addressing a variety of civil rights issues on public K-12 school campuses

Examples

- Transgender student issues*
- Disabled students’ access to extracurricular activities
- Title IX and Pregnant/Parenting Students
- Discrimination in the administration of student discipline
- Title IX and Sexual Harassment/Violence*
- Avoiding discrimination in enrollment practices
- Bullying of students with disabilities
- English Language Learner Students and Limited English Proficient Parents

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2017 Changes to Federal Guidance

June 8, 2017 internal memo regarding changes to all investigations

- Case-by-case
- Highlighting effort to clear backlog
- Ending practice of requesting three years of data, except where allegations themselves raise “systemic” issues
- School divisions can expect less comprehensive data requests from OCR, narrower investigations, narrower remedies, and more emphasis on voluntary resolutions
- From January – August 2017 – OCR closed almost three thousand more complaints than in all of 2016
 - 75% of closures were dismissals
 - 7 % were administrative closures
 - 2 % were ECR
 - 9 % finding of insufficient evidence
 - 5 % resolution agreements

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2017 Changes to Federal Guidance – Title IX

September 22, 2017 - OCR formally revoked Obama administration's Title IX guidance (2011 and 2014) that interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate and resolve allegations of student-on-student misconduct, signaled that it plans to move forward with Title IX rulemaking

Also addressed:

- 2011 letter that required schools to adopt lower preponderance of the evidence standard in administering student discipline instead of higher clear and convincing
- That Obama-era Department imposed regulatory burdens without affording notice and the opportunity for public comment
- Possibility that K-12 schools could now rely on law enforcement investigations to satisfy their **Title IX** investigative obligations (2011 letter expressly prohibited doing so)
- **Going forward, Department will not rely on the withdrawn documents in its enforcement of Title IX**
- New Q & A on Campus Sexual Misconduct and on school compliance with Title IX (*7 pgs. of guidance now vs. 40 pg. 2014 DCL)

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Q & A on Campus Sexual Misconduct

<https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>

Overall impact of new guidance:

- Educational institutions may choose to apply the preponderance of the evidence standard or the clear and convincing standard based on student conduct policies
- Informal resolutions (voluntary) vs. formal investigations
- Police reports and police process in fact-gathering
 - 2011 Guidance provided that schools could not rely on law enforcement to satisfy their Title IX responsibilities and had to conduct own internal investigations
- Continues to confirm that schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities

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Q & A on Campus Sexual Misconduct

Schools' obligations with regard to complaints:

- Adopt and publish grievance procedures that provide for ***prompt and equitable resolution*** of complaints of sex discrimination, including sexual misconduct:
 - Notice
 - Applies procedures
 - Ensures adequate, reliable, and impartial investigation
 - Prompt time frame
 - Notifies parties of outcome
 - Provides assurance that school will take steps to prevent recurrence and remedy effects

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Q & A on Campus Sexual Misconduct

Interim Measures

- Individualized services offered to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct
- Prior to an investigation or while investigation is pending
- Must make every effort to avoid depriving any student of her or his education
- Check-in to make sure measures continue to be needed and effective
- Can include:
 - Counseling
 - Extensions of time or other course-related adjustments
 - Modifications of work or class schedules
 - Restrictions on contact between the parties
 - Changes in work or housing locations
 - Increased security and monitoring

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Q & A on Campus Sexual Misconduct

- No specific time frame for “prompt”, OCR will evaluate whether school made a good faith effort to conduct a fair and impartial investigation in a timely manner designed to provide all parties with resolution
- “Equitable”
 - Burden on school to gather sufficient evidence to reach fair and impartial determination
 - Person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of school
 - Any rights or opportunities that a school makes available to one party should be made available to the other on equal terms – gag orders discouraged

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Q & A on Campus Sexual Misconduct “Equitable” continued

- Once investigation is opened that may lead to disciplinary action, the school should provide written notice to the responding party of the allegations, including sufficient details and with sufficient time to prepare a response before any initial interview
 - Identities of parties involved
 - Specific section of code of conduct violated
 - Precise conduct allegedly constituting the potential violation
 - Date and location of the alleged incident

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Q & A on Campus Sexual Misconduct

Investigation Report

- Summarizes relevant exculpatory and inculpatory evidence
- The reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings

The investigator, or separate decision maker, with or without hearing, must make findings of fact and conclusions as to whether facts support a finding of responsibility for violation of school's sexual misconduct policy

If complaint presented more than a single allegation of misconduct, a decision should be reached separately as to each allegation

Parties should have opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing

Q & A on Campus Sexual Misconduct

Disciplinary sanctions

- Decisions must be made for the purpose of deciding how best to enforce the school's code of conduct
- Must consider impact of separating student from his or her education
- Must be proportionate to the violation

Q&A on Campus Sexual Misconduct

Notice of Outcome (to parents, if under 18; to student, if over 18)

- Whether it found the alleged conduct occurred
- Any individual remedies offered to the reporting party
- Sanctions imposed on responding party that directly relate to reporting party (i.e. an order that the responding party stay away from reporting party) – limitation allows the notice to comply with FERPA
- Other steps the school has taken to eliminate the hostile environment if the school found one to exist

Appeals

- Can allow appeals solely to responding party or by both parties

Informal Resolution

- If all parties voluntarily agree, the school may facilitate informal resolution including mediation
- There must be prior full disclosure of allegations and options for formal resolution

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OCR Resources

2015 Dear Colleague Letter:

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>

- Reminds all educational institutions receiving Federal financial assistance that they must designate at least one employee to coordinate Title IX compliance efforts
- Explains the significance of Title IX coordinators to the institution's compliance with Title IX and the importance of providing them with appropriate authority and support necessary to perform their responsibilities

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OCR Resources

2015 Resource Guide:

<https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>

- Succinct, covers application of Title IX to various issues, provides citations to regulations
- Summarizes Title IX's Administrative Requirements

Administrative Response and Investigations

Administrative Response to Sexual Harassment or Assault

- Must be trained to recognize sexual violence and harassment of students by other students or school employees
- Must be able to recognize “grooming behaviors” by other employees or other third parties (volunteers, coaches, etc.)
- Must investigate and report suspected harassment or grooming behaviors to principal and Title IX officer
- Failure to do so can contribute to liability of the Division under Title IX and individual liability of the employee under other laws

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Investigations

Whether or not the student files a complaint or asks the school to take action, if the school knows or reasonably should know of an incident of sexual misconduct, school must respond appropriately (immediate effective action to eliminate the hostile environment)

Failure to timely or thoroughly investigate may amount to deliberate indifference

To assemble facts to describe:

- What happened
- Why it happened



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The best investigations are:

1. Prompt
2. Thorough (and documented)
3. Objective

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Best Practices for Receiving a Complaint

- What will you say?
- What will you do?
- Who will investigate?
- How will you remedy the conduct?

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Step 1 - Intake

- Meet immediately with the student victim and the parents and document the same
- Determine the rules and law that apply
- Consult with legal counsel
- Map out the investigation
 - Who will investigate?
 - What will be investigated?
 - Who will be interviewed and in what order?
 - Outline a calendar of events to begin without delay
- Give notice to responding party
- Consider whether and what interim measures are required
- Consider whether informal resolution might be appropriate

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Step 2 – Find an Investigator

- Free of actual or reasonably perceived conflicts of interest and biases for or against any party
- Maintains confidentiality
- Analyzes and documents available evidence to support reliable decisions
- Objectively evaluates
- Synthesizes available evidence



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Step 3 - Gather Information

Reporting Party

Interview them like a journalist and LISTEN and DOCUMENT!

Chronological order

Obtain the names, addresses, contact info of anyone with knowledge

Ask about any proposed resolution

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Step 3 - Gather Information

Interim Measures

Different for each case – goal to minimize burden on the victim

- Placement of students in different classes
- Provide victim with escort or different transportation services
- Counseling
- Academic, emotional, and social support
- Written agreement with offender to avoid victim
- Safety plan
- Offending employee placed on administrative leave
- Short-term suspension of offender

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Step 3 - Gather Information

Responding Party

Give a detailed description of what has been alleged to allow full response

Inform the responding party that no conclusions have been made and not to discuss this matter with others

Inform the responding party that any attempt to influence or coerce or intimidate the reporting party will be grounds for immediate discipline

Consider the need for a recorded or written statement

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Step 3 - Gather Information

Witnesses

Interview third-party witnesses with open, not leading, questions

Provide some background to give witnesses the opportunity to address the issues – but preserve confidentiality if possible

Remind all witnesses of confidentiality and the prohibition of retaliation

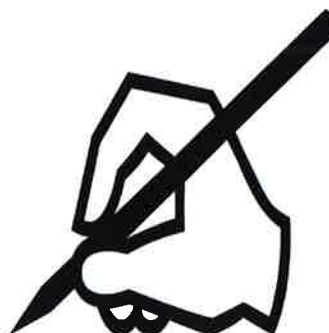
Compare all stories for consistency and inconsistency

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Step 4 – Record Your Findings

- Leave out insignificant details
- Highlight misconduct with a description of the events, not generalized conclusions
- Do not editorialize – but may make credibility determinations
- Make use of evidentiary attachments, such as photos, e-mails, texts, screen shots, videos, handwritten documents, etc.



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Step 5 – Report Results

Summarize both
inculpatory and
exculpatory evidence

Takes into account unique and
complex circumstances



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Conduct Off-School Grounds

Must also investigate to determine:

- Whether the misconduct occurred in the context of an educational program or school sponsored activity; *or*
- Had an effect on educational programs or activities

If so, must investigate just like a school-based incident

Must protect victims from off-site sexual perpetrators while on campus

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Adjudication/Finding

- Decision-maker (can be investigator) with or without hearing must make findings of fact and conclusions
 - Make credibility determinations regarding parties and witnesses and document
 - Apply either preponderance of the evidence standard or a clear and convincing evidence standard
 - Must offer same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report
 - Parties should have the opportunity to respond to the report in writing in advance of decision of responsibility or live hearing
- Decision making as to any disciplinary sanctions
 - Decision-maker may be the same or different from decision-maker who made the finding of responsibility
 - Proportionate
 - NOTICE IN WRITING TO THE PARTIES OF OUTCOME AND MEASURES TO PREVENT RECURRENCE

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Remedies for Student-on-Student Harassment

- Disciplinary measures against student offender
- Strict behavioral and “no contact” contract
- Separate classes, schedules, transportation, or programs
- Administrative transfer of victim (voluntary) or offender (voluntary or involuntary) to another school
- Targeted training for students who are creating a hostile environment, i.e. an athletic team or band

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Recent Case Law

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Russell County School Division: A Cautionary Tale

Doe v. Russell County School Board, 2017 U.S. Dist. LEXIS 56479 (W.D.Va. April 13, 2017) (motion to dismiss)

Employee-on-student sexual harassment

Facts:

- Gobble employed as a janitor from 2006-2014, arrested February 12, 2014 – confessed to serial sexual abuse of four boys
- Henley, principal of Lebanon Elementary School, allegedly knew that Gobble had Doe living with him and took him on weekend trips – failed to investigate and did not take any action
- Hooker, principal of LES during Doe's 4th grade year, knew Gobble spent substantial sums of money on and time with Doe, during and outside school hours
- Hooker sat in on DSS interviews of Gobble and Doe in which they denied that anything had happened between them
- Hooker did not independently investigate the complaint and took no other action
- Various teachers and other school board employees witnessed Gobble acting inappropriately toward Doe and other male students

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Doe v. Russell County School Board

- Plaintiff alleges that the School Defendants allowed Gobble to have unsupervised and unrestricted access to LES, including its most isolated areas, at all times of the day and year; allowed Gobble to have unrestricted access to LES students
- Opinion references USDOE, OCR and Virginia Board of Education and their repeated notifications to schools of the problems of sexual assault – recommended training, etc.
- Complaint alleges that the School Defendants failed to heed warnings and did not provide the required and recommended training for teachers, administrators, staff, students, or parents
- Defendants moved to dismiss because the allegations do not show that the School Board had actual knowledge that Gobble was abusing Doe, facts known by Gobble and Hooker did not create actual knowledge

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Doe v. Russell County School Board

To establish a claim – Plaintiff must show that:

- (1) He was a student at an educational institution receiving federal funds;
- (2) He was subjected to harassment based on his sex;
- (3) The harassment was sufficiently severe or pervasive to create a hostile or abusive environment in an educational program or activity; and
- (4) There is a basis for imputing liability to the institution

Supreme Court has held that a school district is not liable for damages based on sexual harassment of a student by a teacher "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."

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Doe v. Russell County School Board

Majority of circuits have concluded that principals have sufficient authority to impute liability to their school boards

Count I against principal allowed to go forward

Count II against school board allowed to go forward

Count III is a "failure to train" claim asserted against School Defendants under §1983, allowed to go forward because:

- In school context, the failure to train must amount to deliberate indifference to the rights of students, and the deficiency in training "must be closely related to the ultimate injury."
- Court concluded that the Plaintiff plausibly asserted that the School Defendants' failure to train teachers and employees on how to spot, investigate, and address sexual assault amounted to deliberate indifference

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Summary Judgement Decision – February 13, 2018

Summary judgement denied as to School Board

- Reasonable jurors could conclude that principal's response to the DSS investigation was clearly unreasonable in light of the known circumstances and that inaction allowed abuse to continue for months longer than it might otherwise have occurred
 - Through the DSS investigation, Principal learned that Doe, a particularly vulnerable elementary school student, was living in the same bedroom with a school employee to which he was unrelated
 - Principal also knew that Doe was regularly spending time with Gobble at school behind closed doors
- Court cited 2011 DCL, in deciding that reasonable jurors could conclude that School Board failed to take corrective action after Gobble's confession and arrest
 - Although Doe left for a time, he ultimately returned and is a student there now
 - Failed to offer counseling or other remedial measures
 - Failed to take action necessary to prevent future harassment, such as training or disciplining personnel, or revising applicable policies

Following denial, settlement reached for \$1.1 million

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K.I.D. v. Jones (Circuit Court, Richmond County, 2016)

- Student molested by SRO, who was also employed by school district (Northumberland County Public Schools) as a counselor and coach
- Superintendent, principal, and teacher sued for negligence, gross negligence, negligent infliction of emotional distress
- Allegations that superintendent and principal encouraged offender's employment as counselor, although not qualified; teacher did not keep attendance records while offender encouraged student's truancy in order to have sex with her; that District allowed SRO to transport victim in sheriff's vehicle; that principal allowed SRO to move office to increase privacy, and failed to enforce protocol to keep doors open, etc.
- The negligence per se claim against principal allowed to go forward – based on Dixon's violation of Virginia Code § 18.2-371

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Doe v. East Irondequoit Cent. Sch. Dist.

- *Doe v. East Irondequoit Cent. Sch. Dist.*, 118 LRP 19948 (W.D.N.Y. May 7, 2018)
 - New York district not deemed to have actual knowledge of a bus driver's potential to sexually abuse a student with an unspecified disability – summary judgment granted
 - The only information they received from a background check was a dismissed criminal charge of endangering the welfare of a child
 - The case had been sealed, therefore it was information impossible to obtain according to the court
 - The court determined that the “district must have actual knowledge of at least some incidents of harassment in order for liability to attach, and at minimum must have possessed enough knowledge of the harassment that it reasonably could have responded...”

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Doe v. League School of Greater Boston, Inc.

- *Doe v. League School of Greater Boston, Inc.*, 118 LRP 19558 (D. Mass. May 3, 2018)
 - Summary judgement denied to residential school
 - Student-on- student harassment – 17 year-old harasser; 11 year-old accuser with autism
 - School heard reports about improper sexual contact committed by a teenager who had similar charges waged against him previously – raising questions about whether the school had properly responded
 - The Student reported that teenager showed him pornography and touched him inappropriately
 - Court found that the jury could reasonably find that despite finding out about the pornography incident, the school failed to separate the students for six months, giving the older boy multiple opportunities to assault

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Strange v. Mansfield Independent School District

- *Strange v. Mansfield Independent School District*, 118 LRP 33963 (N.D. Texas, August 17, 2018)
- School division's motion to dismiss as to Title IX claims – denied
- Special education teacher-on-student sexual abuse
 - Sexual abuse of three autistic students
- Plaintiffs assert that the school division failed to train employees how to recognize signs of sexual abuse in children, particularly those with learning disabilities and predatory behavior in adults (42 U.S.C. § 1983 claim)
- Title IX claim for deliberate indifference

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McMinn v. Sloan-Hendrix School District

- *McMinn v. Sloan-Hendrix School District*, 118 LRP 9142 (E.D. A.K. March 12, 2018)
 - School division's motion for judgement on Title IX claim denied
 - Changes in IDEA-eligible student's behavior after being sexually assaulted by another student can be enough to put the district on notice
 - Student made unusual request for rubber gloves following incident in restroom with other unspecified behavioral changes
 - Court denied motion without prejudice and asked for more information in a timeline and a list of any substantially similar incidents by the accused student

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Takeaways

Publicize identity of Title IX coordinator

School Board Policy – Prohibition Against Harassment and Retaliation

- Violation to harass a student or school personnel based on sex, gender, race, color, national origin, disability, religion, ancestry, age, marital status, genetic information or any other characteristic protected by law
- Violation for any school personnel to tolerate harassment
- Sets forth that School Division will:
 - Conduct prompt investigation
 - Take prompt action to stop any harassment
 - Take appropriate action against any student or employee who violates the policy
 - Take action reasonably calculated to end and prevent further harassment of school personnel or students

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Title IX Policy

Define harassment based on sex

- Give examples

Set out Complaint Procedure

Set out parameters of Investigation

- May be conducted by Compliance Officer or third party
- Completed not later than 14 school days after receipt
- Written notice to reporting and receiving party
- Interim measures

In making determination, School Division shall consider at a minimum:

- Surrounding circumstances
- Nature of the behavior
- Past incidents or past or continuing patterns of behavior
- Relationship between the parties
- How often conduct occurred
- Identity of perpetrator
- Location
- Ages
- Context

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Title IX Policy

Report

Superintendent issues decision within 5 days, provided in writing to complainant and alleged perpetrator

Action may include discipline up to and including expulsion

Appeal process

- Available to both complainant and individual that receives discipline

Informal procedure explained

Prohibits Retaliation

Other Takeaways:

- Communicate Title IX procedures to your community
- Conduct annual trainings on Title IX policy
- FOLLOW YOUR POLICY/PROCEDURES

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Title IX Resources

Association of Title IX Administrators ("ATIXA")

- <https://atixa.org/>

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2018 Related Legislation

Family life education.

- Requires any curriculum offered in any elementary school, middle school, or high school to incorporate age-appropriate elements of effective and evidence-based programs on the importance of the **personal privacy** and **personal boundaries** of other individuals and tools for a student to use to ensure that he respects the personal privacy and personal boundaries of other individuals.
- Requires any *high school* curriculum offered by a local school division to incorporate age-appropriate elements of effective and evidence-based programs on the prevention of sexual harassment **using electronic means**. The bill permits the incorporation of age-appropriate elements of effective and evidence-based programs on the prevention, recognition, and awareness of child abduction, child abuse, child sexual exploitation, and child sexual abuse.

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Questions?

Thank you for your time!



Bradford A. King, Esq. – (804) 783-7263

bking@sandsanderson.com

Nicole S. Cheuk, Esq. – (804) 783-7267

ncheuk@sandsanderson.com

Sands Anderson PC

1111 E. Main Street, Suite 2400
Richmond, VA 23219



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Title IX: Best Practices in Training and Compliance Part II

In conjunction with



VSBA

Virginia School Boards Association
Leadership · Advocacy · Support

Bradford A. King
BKing@sandsanderson.com
(804) 783-7263

Nicole S. Cheuk
NCheuk@sandsanderson.com
(804) 783-7267



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DISCLAIMER

We are not your School Board lawyers

Please consult with your School Board lawyer prior to addressing a specific fact pattern or situation

2

Purpose of Part I Training

- Today's training is intended to supplement Title IX Training Part I
 - Select materials from Part I appear in this presentation as a review/reminder regarding substantial regulatory changes and requirements
- Part I Training, as required by recently adopted federal implementing Regulations (34 CFR § 106.45(b)(1)), is designed for Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal process on the following:
 - Definition of sexual harassment
 - Scope of the school division's education program or activity
 - How to conduct an investigation and grievance process - including hearings, appeals, and informal processes, as applicable
 - How to serve impartially (avoiding prejudgment of facts, conflicts of interest, and bias)

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Purpose of Part II Training

- The Regulations at 34 CFR § 106.45(b)(1) require Part II Training:
 - Investigators must receive training on issues of relevance, investigative report that fairly summarizes relevant evidence
 - Decision-makers must receive training on any technology to be used at live hearing, relevance of questions and evidence

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Title IX Training Part I Review

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Title IX

- **Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (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”
 - School division may violate Title IX if it does not respond promptly to actual knowledge of sexual harassment in an education program or activity of the school division against a person in the United States in a manner that is not deliberately indifferent

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Title IX – Types of Harassment

Schools have responsibilities under Title IX both for alleged sexual harassment by staff, and by other students:

- **Staff-student harassment**
 - *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) established that school district could be liable for sexual harassment of student by teacher where school official with authority to institute corrective measure had notice of, but was deliberately indifferent to, misconduct
- **Student-student harassment**
 - School divisions are not liable for one student harassing another but may be liable for failing to respond adequately. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)

Title IX – 3 Types of Harassment

1) QUID PRO QUO – employee conditions an educational benefit or decision on the student's submission to unwelcome sexual conduct

2) Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive, as determined by a reasonable person, that it denies a person equal access to an educational program or activity

Factors to consider when making a determination regarding whether conduct meets definition of 2)

- Degree to which the conduct affects students' education
- Type, frequency and duration of the conduct
- Identity and relationship between complainant and respondent
- Number of individuals involved (group harassment)
- Age and sex of complainant and respondent
- Size of school, location of incidents, and context
- Welcomeness (depends on age, relationship between complainant and respondent)

Title IX – 3 Types of Harassment

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)

- One incident of sexual assault can trigger Title IX responsibilities
- “We believe that sexual assault inherently creates the kind of serious, sex-based impediment to equal access to education that Title IX is designed to prohibit, and decline to require ‘denial of equal access’ as a separate element of sexual assault”

34 C.F.R. PART 106

Title IX Regulations

Effective August 14, 2020

History of Sexual Harassment Enforcement

- 1975 - Department of Education promulgated rules to enact Title IX, sexual harassment not contemplated
- 1997 Guidance from DOE included sexual harassment under Title IX
- 1998 - SCOTUS rules an educational entity is liable for Title IX teacher-on-student harassment if it is “deliberately indifferent” to “actual notice” *Gebser v. Lago Vista*
- 1999 - SCOTUS rules peer-on-peer harassment is actionable under Title IX - *Davis v. Monroe County Board of Education*
- 2001 OCR revised 1997 guidance in light of *Gebser* and *Davis*, included “interim measures” to help victims
- 2011 and 2014 – sexual violence added to definition of sexual harassment, 2014 question and answer document based on multitude of questions regarding 2011 guidance
- 2017- OCR rescinded 2011 and 2014 guidance, provided 7pg. Q and A document

Title IX Recent Developments

- November 16, 2018 Notice of Proposed Rulemaking
<https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf>
- 124,000 + comments received
- May 19, 2020 final rule published - USDOE guidance document is over 2000 pages; previous Title IX regulations did not refer to sexual harassment
- Seventeen states (including Virginia) filed suit challenging the final rule and requesting a stay of its effective date pending judicial review - stay DENIED on August 12, 2020
 - “Although Plaintiffs have raised serious arguments about certain aspects of the Rule, they have not established a likelihood of success on their claims, nor have they established that they are likely to suffer irreparable harm”

Title IX Regulations – Training Requirements

- 34 CFR § 106.45(b)(1)
 - Training for Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal process on the following:
 - Definition of sexual harassment
 - Scope of the school division's education program or activity
 - How to conduct an investigation and grievance process - including hearings, appeals, and informal processes, as applicable
 - How to serve impartially (avoiding prejudgment of facts, conflicts of interest, and bias)
 - In addition:
 - Investigators must receive training on issues of relevance, investigative report that fairly summarizes relevant evidence
 - Decision-makers must receive training on any technology to be used at live hearing, relevance of questions and evidence

Title IX Regulations

- Defining Sexual Harassment - 34 CFR § 106.30(a) – Conduct on the basis of sex that meets one or more of the following:
 - Quid pro quo harassment;
 - Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive, as determined by a reasonable person, that it denies a person equal access; or
 - Sexual assault (as defined in the Clery Act regulations)
- What Triggers School's Obligation to Respond
 - Actual knowledge of any of three types of harassment
 - Reporting to a Title IX Coordinator will always give schools actual knowledge
 - In K-12, reporting sexual harassment to any employee at that school gives the school actual knowledge
 - Any individual may report, not just victim
 - Conduct within school division's own program or activity - includes any location, event, or circumstance over which the school division exhibits substantial control over both the alleged harasser and the context in which the harassment occurred
 - Perpetrated against a person "in the United States" (new provision)

Title IX Regulations

- General Response 34 C.F.R. § 106.44
 - Regulations require school divisions to appoint a Title IX Coordinator - specifically named on website, contact information, annual training, records of that training
 - *authorized to coordinate school division's compliance efforts*
 - *doesn't have to be full-time only job, but individual needs to have sufficient authority and time to carry out role*
 - Liability when school knows of sexual harassment allegations and responds in a way that is "deliberately indifferent" – "clearly unreasonable in light of the known circumstances"
 - Must "respond meaningfully to every report" – but must activate grievance process only when a **formal complaint** is filed
 - *If school follows grievance procedures – safe harbor against finding of deliberate indifference*
 - Must investigate formal complaints

Title IX Regulations – Receipt of Report

- How a School Must Respond
 - Reports trigger obligation to meet with and offer the complainant supportive measures (available to complainants and respondents)
 - Definition: non-disciplinary, non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed 34 CFR § 106.30 (a)
 - counseling, course modifications, schedule changes, monitoring, supervision, extensions of deadlines, security
 - removing a respondent completely from an activity would likely be considered punitive
 - Explain formal complaint process
 - K-12 schools need to protect younger students and may require the Title IX Coordinator to file a formal complaint even when a young victim does not want to file
- Emergency removal/administrative leave of respondent permitted under certain circumstances
 - Must conduct an individualized safety and risk analysis and determine that emergency removal is necessary in order to protect a student or other individual from an immediate threat to physical health or safety
 - School division must provide respondent with notice and an opportunity to challenge the decision immediately after the removal
 - Example: Accusation of sexual harassment leads to respondent's threats of physical self-harm

Title IX Regulations – Grievance Process

Formal Complaint

- Basic Requirements 34 CFR § 106.45(b)(1)
 - Treat complainants and respondents equitably
 - Objective evaluation of all relevant evidence
 - Presumption of innocence for respondent
 - Burden of proof on the school, preponderance of evidence vs. clear and convincing
 - Reasonably prompt time frames
 - Description of possible disciplinary outcomes and remedies following a determination of responsibility
- Notice of allegations 34 CFR § 106.45(b)(2)
 - Written notice to all parties of grievance process and allegations at issue
 - STATEMENT that respondent is presumed “not responsible” until final decision
 - Notice of right to advisor (who may be an attorney) and to inspect and review evidence
 - Notice of any code of conduct provision regarding false statements

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Title IX – Grievance Process

- Dismissal 34 CFR § 106.45(b)(3)
 - Mandatory if investigation reveals alleged conduct did not occur in school division’s program or activity OR against a person in U.S.
 - Permissive if complainant provides Title IX Coordinator in writing a request to withdraw complaint, if respondent is no longer employed by the recipient or enrolled in its education program; or if specific circumstances prevent the school division from gathering enough evidence to reach a decision
- Investigation 34 CFR § 106.45(b)(5)
 - Equal opportunity to present witnesses, evidence, **inspect and review evidence (10-day review period)**
 - *Cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a doctor, psychiatrist, psychologist, and made in connection with treatment to the party unless there is written consent from the parent to do so
 - No gag order
 - Advisors (can be a lawyer) permitted for complainant or respondent in any meeting, any restrictions imposed by school division as to advisors must be applied equally to both parties
 - Written notice of interviews

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Title IX – Grievance Process

- Investigative Report
 - *Must fairly summarize relevant evidence*
 - *At least 10 days before determination of responsibility - send it to each party and the party's advisor for their review and response*
- Hearings for K-12 - optional, but prior to determination, the parties must be allowed to submit written questions to challenge each other's credibility and decision-maker must allow for limited follow-up
 - Questions and evidence about the complainant's prior sexual behavior are not relevant, unless offered to prove that someone other than the respondent committed alleged conduct; or if it concerns specific incidents related to respondent to prove consent
 - Decision-Maker must explain to the party proposing the questions any decision to exclude a question as not relevant

Title IX – Grievance Process

- Decision-maker's Written Determination 34 CFR § 106.45(b)(7)
 - Must be made by someone other than Title IX Coordinator or investigator and must:
 - *identify allegations potentially constituting sexual harassment;*
 - *describe all procedural steps taken;*
 - *include findings of facts and conclusions about the application of code of conduct to the facts;*
 - *include a statement of, and a rationale for, the decision reached on each allegation;*
 - *identify whether remedies will be provided to complainant;*
 - *identify any disciplinary sanctions imposed on the respondent; and*
 - *include procedures and permissible bases for appeals*

Title IX – Grievance Process

- Appeals - 34 CFR § 106.45(b)(8)
 - Available to both parties after determination of responsibility or dismissal of formal complaint and based on the following
 - *procedural irregularity;*
 - *new evidence that could affect the outcome and that wasn't available at the time of dismissal or determination of responsibility; or*
 - *conflict of interest or bias by Title IX Coordinator, investigator, decision-maker*

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Title IX Regulations

- Informal resolution 34 CFR § 106.45(b)(9)
 - Cannot be required
 - May facilitate mediation or other informal process
 - May not be offered in employee-student harassment context
- Documentation 34 CFR § 106.45(b)(10)
 - For 7 years schools must create and maintain records documenting every Title IX sexual harassment investigation and determination of responsibility including:
 - Disciplinary sanctions imposed, if any;
 - Any informal resolution or appeal;
 - All materials used to train their Title IX Coordinators, investigators and decision-makers, and any person who facilitates an informal resolution process (parties may request copies); and
 - Basis for conclusion that its response was not deliberately indifferent
 - School must keep records regarding response to every report – including documentation of supportive measures offered and implemented for complainant

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Title IX – Regulations

- Other miscellaneous requirements and clarifications
 - Notice of policy, grievance procedures, and Title IX Coordinator's name or title, email address, office address, and telephone number published on website and sent to:
 - *applicants for admission and employment*
 - *students' parents or legal guardians*
 - *unions or professional organizations holding agreements with the school division (34 CFR § 106.8)*
 - Must also publish notice of nondiscrimination policy and Title IX Coordinator's contact information in handbooks to students/employees
 - Timelines must be reasonably prompt (see VSBA model policy)
 - No damages assessed by DOE
 - Nothing requires restriction of 1st Amendment, Due Process rights
 - Severability provisions
 - Prohibition on retaliation (34 CFR § 106.71)

Title IX Regulations – Office for Civil Rights Frequently Asked Questions – September 4, 2020

- Final Rule Effective: August 14, 2020, will not be enforced retroactively
- Districts have a duty under Title IX to address sexual harassment if the alleged victim shows "signs of enduring unequal educational access"
 - skipping a class
 - decline in GPA
 - difficulty concentrating
- An individual may file a formal Title IX complaint as long as she is participating or attempting to participate in the district's programs or activities (alumni groups included), specifically "a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is 'attempting to participate' in the recipient's education program or activity"
- The Title IX Rule does not adopt the Federal Rules of Evidence, uses "relevance" as the sole admissibility criterion
 - Not relevant: treatment records, information protected by legally recognized privilege, certain prior sexual behavior
 - Ordinary meaning of the word should be applied

Questions and Answers for K-12 Public Schools in the Current COVID-19 Environment (OCR Sept. 28, 2020)

- 4 of 13 questions related to Title IX
- Yes, school divisions must continue to accept and investigate reports and complaints of sexual harassment even in a distance learning only environment
- A school division may need additional time to complete the grievance process as the situation related to COVID-19 may in some circumstances qualify as “good cause”
- If a school division’s methods/process changes due to COVID-19 related interruption, it must promptly notify students/employees and display changes in process prominently on the school division website

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VSBA Model Policy - JFHA/GBA

- Compliance officer - receives all complaints of harassment **other than** Title IX sexual harassment (there can be more than one)
- Title IX Coordinator - designated and by School Board to coordinate efforts to comply with its responsibilities
- Any student/employee who believes he or she has been a victim of harassment should report it to the Title IX Coordinator
- Title IX Coordinator makes initial decision whether the allegations may be sexual harassment prohibited by Title IX - if it cannot be, then it is referred to the compliance officer who follows the “Compliance Officer Formal Procedure”

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VSBA Model Policy – JFHA/GBA

- Compliance Officer Formal Procedure
 - Set out parameters of Investigation
 - May be conducted by Compliance Officer or third party
 - Completed not later than 14 school days after receipt
 - Written notice to reporting and receiving party
 - Interim measures
- In making determination, School Division shall consider at a minimum:
 - Surrounding circumstances
 - Nature of the behavior
 - Past incidents or past or continuing patterns of behavior
 - Relationship between the parties
 - How often conduct occurred
 - Identity of perpetrator
 - Location
 - Ages
 - Context

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VSBA Model Policy – JFHA/GBA

- Action by Superintendent within 5 days of Compliance Officer Report
- Appeal available to complainant if the superintendent determines that no prohibited harassment occurred
- Informal Procedure available with consent of both parties
- Sexual Harassment Prohibited by Title IX
 - Definitions
 - Title IX Grievance Process
 - Dismissal of Formal Complaints
 - Investigation of Formal Complaints
 - Determination regarding responsibility
 - decision-maker cannot be Title IX Coordinator or investigator
 - determination provided simultaneously

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VSBA Model Policy – JFHA/GBA

- Appeals
 - Gives both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
 - Reviews the evidence gathered by the investigator, the investigator's report, and the decision-maker's written decision
 - Issues written decision and provides simultaneously to both parties
- Timelines (*tolled if informal process initiated, extended for good cause)
 - Investigative report within 35 days formal complaint filed
 - Determination within 10 working days from the date the investigative report is provided to decision-maker
 - Either party may appeal within 5 working days
 - Appeal resolved within 15 calendar days from the filing of the appeal

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VSBA Model Policy – JFHA/GBA

- Informal Resolution Process
 - Such as mediation
 - When one party requests, the other must respond within 3 days
 - Must be completed within 10 days
 - Facilitated by trained educational professional, consultant, or other individual
 - If resolved, facilitator documents the nature of complaint and resolution, both parties sign and receive a copy, forwarded to Title IX Coordinator
- Recordkeeping

Retaliation

Prevention and Notice of Policy

False Charges

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Administrative Response and Investigations

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Administrative Response to Sexual Harassment or Assault

- All employees must be able to recognize sexual violence and harassment of students by other students or school employees
- All employees must be able to recognize “grooming behaviors” by other employees or other third parties (volunteers, coaches, etc.)
- All employees must know to report suspected harassment or grooming behaviors to principal and Title IX Coordinator
- Failure to do so can contribute to liability of the Division under Title IX and individual liability of the employee under other laws

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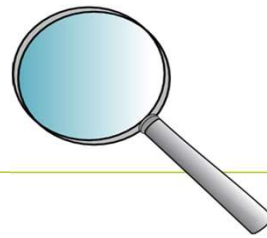
General Response and Investigations

General response: Whether or not the student files a formal complaint or asks the school to take action, if the school knows of an incident of sexual misconduct, school must respond appropriately (immediate effective action to eliminate the hostile environment)

Failure to timely or thoroughly investigate may amount to deliberate indifference

To assemble facts to describe:

- What happened
- Why it happened



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The Best Investigations Are:

- Prompt (meeting school division policy requirements)
- Thorough (and documented)
- Objective

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Step 1 - Intake

- Title IX Coordinator must meet promptly with the complainant and the parents and document the same
 - discuss availability of supportive measures with or without the filing of a formal complaint; explain process
 - If formal complaint is filed, consider whether informal resolution might be appropriate
- Determine the rules and law that apply; consult counsel if necessary
- Map out the investigation
 - Who will investigate?
 - What will be investigated?
 - Who will be interviewed and in what order?
 - Outline a calendar of events to begin without delay
- Give notice to both parties
- Consider whether and what supportive measures are required for the responding party during investigation

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Step 2 – Designate an Investigator(s)

- Free of actual or reasonably perceived conflicts of interest and biases for or against any party
- Maintains confidentiality
- Analyzes and documents available evidence to support reliable decisions
- Objectively evaluates
- Synthesizes available evidence



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Step 3 – Gather Information

Complainant

- Interview them like a journalist and LISTEN and DOCUMENT!
- Chronological order
- Obtain the names, addresses, contact info of anyone with knowledge
- Ask about any proposed resolution

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Step 3 – Gather Information

Supportive Measures

Different for each case –

- Placement of students in different classes
- Provide victim with escort or different transportation services
- Counseling
- Academic, emotional, and social support
- Written agreement with respondent to avoid complainant
- Extension of deadlines
- Safety plan
- Offending employee placed on administrative leave
- Emergency removal

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Step 3 – Gather Information

Respondent

- Give a detailed description of what has been alleged to allow full response
- Inform the responding party that no conclusions have been made
- Inform the responding party that any attempt to influence or coerce or intimidate the reporting party will be grounds for immediate discipline
- Consider the need for a recorded or written statement

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Step 3 – Gather Information

Witnesses

- Interview third-party witnesses with open, not leading, questions
- Provide some background to give witnesses the opportunity to address the issues – but preserve confidentiality if possible
- Remind all witnesses of confidentiality and the prohibition of retaliation
- Compare all stories for consistency and inconsistency

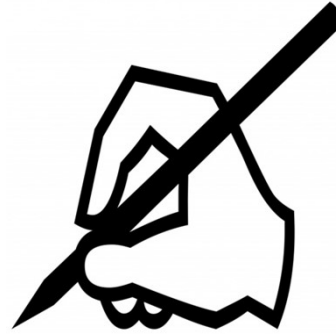
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Step 4 – Record Your Findings – Investigative Report

- Leave out insignificant details
- Highlight misconduct with specific description of the events, not generalized conclusions
- Do not editorialize – but may make credibility determinations, which can't be based on party's status as complainant, respondent or witness
- Make use of evidentiary attachments, such as photos, e-mails, texts, screen shots, videos, handwritten documents, etc.
- Provide to parties and they have 10 days to provide a written response



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Step 5 – Report Results to Decision-Maker

Report should summarize both inculpatory and exculpatory evidence

Takes into account unique and complex circumstances

Decision-maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness and explain to the party proposing a question any decision to exclude a question as not relevant

Limited follow-up questions



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Step 6 - Decision-Maker's Written Determination of Responsibility

- Makes decision regarding determination of responsibility, cannot be the investigator OR the Title IX Coordinator
 - Commentary addresses consideration of consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, lack of credibility
- Must include:
 - identification of allegations
 - description of procedural steps taken from the receipt of formal complaint through determination
 - findings of fact supporting the determination
 - conclusions regarding application of code of conduct to facts
 - statement of and rationale for the result as to each allegation, including disciplinary sanctions
 - details regarding appeal procedures
- Is it more likely than not that the respondent engaged in the alleged misconduct?
- Decision is final when provided to both parties simultaneously

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Step 7- Appeal Decision-Maker

- Not the same person as initial decision-maker, investigator, or the Title IX Coordinator
- Decides appeal on following bases:
 - procedural irregularity that affected outcome of matter;
 - new evidence not reasonably available at the time the determination regarding responsibility or dismissal was made; or
 - Title IX Coordinator, investigator, decision-maker bias
- Provides notification in writing to both parties:
 - when appeal filed; and
 - of decision, describing result and rationale for result

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Serving Impartially – Decision-makers

- Regulations' preamble states that being impartial = free from bias
 - Whether bias exists requires examination of facts and school divisions should apply an objective commonsense approach to evaluating whether a particular person is biased
- Consider perceived conflict of interest vs. actual conflict of interest toward complainants or respondents generally or an individual complainant or respondent
 - Past advocacy for victim or respondent's rights
 - Prior adjudication involving complainant or respondent
- Avoid:
 - Reliance on sex stereotypes (complainant always female, respondent always male)
 - Pre-judgement of facts

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Conduct Off-School Grounds

- Regulations do not impose a geographic test or draw a distinction between on-campus and off-campus misconduct
- Required to investigate if the sexual harassment occurred within the scope of an educational program or school-sponsored activity

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Remedies for Student-on-Student Harassment

- Disciplinary sanctions against respondent
- Strict behavioral and “no contact” contract
- Separate classes, schedules, transportation, or programs
- Administrative transfer of complainant (voluntary) or respondent (voluntary or involuntary) to another school
- Targeted training for students who are creating a hostile environment, i.e. an athletic team or band

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Title IX Part II Training

For Investigators and Decision-Makers



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Relevance

- Investigators must receive training on (1) **relevance** and (2) writing reports that fairly summarize **relevant evidence**
- Decision-makers must receive training on **relevance of questions and evidence**
- So what is relevance?
 - Generally, “relevant” evidence is that evidence tending to prove or disprove an alleged fact
 - Stated differently, it is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence

Live Hearings

- Live hearings are NOT required for elementary and secondary school Title IX grievance proceedings.
 - **IF** your division intends to conduct live hearings, additional training for decision-makers is required, specifically for the use of technology in such proceedings
 - This presentation presumes the recipient is NOT conducting live hearings

What is Relevant Evidence?

- The Preamble addresses this definition as follows:
 - “The requirement for recipients to summarize and evaluate relevant evidence, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to § 106.45, appropriately directs recipients ***to focus investigations and adjudications on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant).***” 85 F.R. 30294

So What is Relevant Evidence?

- Do recipients have latitude to define relevance on their own?
 - OCR’s September 4, 2020 Q&A Document offers guidance:
 - “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.” Q&A #8
 - “Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance. For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.” Q&A #8

Rules of Evidence

- Importantly, the regulations specifically do NOT apply formal rules of evidence:
 - “The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and declines to impose a comprehensive, detailed set of evidentiary rules for resolution of contested allegations of sexual harassment under Title IX.” 85 FR 30337
 - “A recipient’s grievance process must . . . Require an objective evaluation of all relevant evidence – including both ***inculpatory and exculpatory evidence*** – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.” 34 C.F.R. 106.45(b)(1)(ii)
 - Again, from OCR’s September 4, 2020 Q&A Guidance:
 - “The Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX. . . . [T]he Rule uses ‘relevance’ as the sole admissibility criterion.” Q&A #7*

More on Rules of Evidence and Relevance

The Title IX Rule also deems certain evidence and information to be not relevant or otherwise precludes the recipient from using it:

- (i) *a party’s treatment (medical, psychological and similar) records, without the party’s prior written consent [§ 106.45(b)(5)(i)];*
- (ii) *information protected by a legally recognized privilege [§ 106.45(b)(1)(x)]; and*
- (iii) *questions or evidence about a complainant’s prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)]*
 - 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

Legally Privileged Information

- A recipient, when *investigating* a formal complaint:
 - “Cannot access, consider, disclose or otherwise use a party’s records that are maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance under this section.” § 106.45(b)(5)(i)
- Other recognized privileges:
 - Attorney-client communications
 - Spousal testimony in criminal matters
 - Fifth Amendment (right against self-incrimination)
 - Confessions to a clergy member

More on Relevance

- The Preamble to the new Rule provides further explanation:
 - “These final regulations require objective evaluation of relevant evidence and contain several provisions specifying types of evidence deemed irrelevant or excluded from consideration in a grievance process; a recipient may not adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45. For example, a recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the Federal Rules of Evidence, the Federal Rules of Evidence constitute a complex, comprehensive set of evidentiary rules and exceptions designed to be applied by judges and lawyers, while Title IX grievance processes are not court trials and are expected to be overseen by layperson officials of a school, college or university rather than by a judge or a lawyer.” (As cited in Q&A #7)

More on Relevance

- Continuing, the Preamble states:
 - “Similarly, a recipient may not adopt rules excluding certain types of relevant evidence (e.g., lie detector test results or rape kits) where the type of evidence is not either deemed ‘not relevant’ (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege).” (As cited in Q&A #7)

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Weight and Credibility

- The guidance documents recognize a difference between the **admission** of relevant evidence, and the **weight, credibility, or persuasiveness** of particular evidence:
 - “The § 106.45 process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.” (Q&A #8, citing the Preamble)
 - “A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party’s prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents.” (Q&A #8, citing the Preamble)

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Gathering the Evidence

- Recall that the grievance process must provide that the parties have an equal opportunity to inspect, review, and respond to evidence directly related to the allegations (§ 106.45(b)(5)(vi)) and an equal opportunity to review and respond to the recipient's investigative report. (§ 106.45(b)(5)(vii))
 - This process "allows each party the opportunity to provide input and make arguments about the relevance of evidence and how a decision-maker should weigh the evidence." Q&A #13.
 - The decision-maker must (i) afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions for each party, and (ii) explain to the party proposing the questions any decision to exclude a question as not relevant § 106.45(b)(6)(ii)
- The Preamble asserts that the Rule "... balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence." (As cited in Q&A #13)

Determining the Facts

- For each fact in dispute, weigh the evidence and argument submitted by the parties – including making credibility determinations – and make a determination: a "finding of fact"
- These findings will inform the overall determination of responsibility/non-responsibility
- The Preamble states that the decision-maker should be looking at consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility 85 FR 30315 and 30330
 - Consider all witness statements: look for consistency in stories; corroboration; changes in complainant's or respondent's behavior after alleged incident, and potential sources/causes of such changes
 - Timing of complaint MAY inform decision in several aspects: consider whether filed promptly; however, a delay may reflect hesitation that claim may not be believed or a fear of retaliation

Avoiding Bias in Decision-Making

- The Preamble includes significant discussion addressing concerns by commenters regarding potential bias and unfairness in the grievance process
 - Examples include: decision-maker's financial and reputational interests encourage protecting the institution; inappropriately combining administrative and adjudicative roles; Title IX Coordinator may supervise decision-maker; past role as advocate for victim's or respondent's rights
 - Also includes concerns about marginalized groups: racial minorities, LGBTQ community, disabled persons
- The Rule now provides that a recipient's grievance process must:
 - "Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent"
 - Further, "A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on . . . **how to serve impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interests, and bias"

§ 106.45(b)(iii)

Preventing Biased Decisions

- Bias may be created by differences in cultural backgrounds; age; race; religion; life experiences; trauma
 - Decision-makers must remain impartial, avoiding sympathy or a personal perspective on the claim
 - Avoid sex stereo-types (e.g., women have regret and/or lie about sexual assault; men are sexual aggressors)
- Decision-makers may nonetheless draw reasonable inferences from the evidence
- The Preamble encourages recipients to apply an objective (reasonable person), common sense approach to evaluate whether a particular person is biased

Weighing the Evidence

- Do not make a decision until all evidence has been received and reviewed, do not “pre-judge” the facts § 106.45(b)(1)(iii)
- Consider only relevant evidence and make findings of fact and determinations based only on the evidence received in its totality
- Determine what evidence is worthy of belief and its importance along with necessary and reasonable inferences
 - Rely on direct evidence whenever possible
- Make witness credibility determinations (motives, bias, probability, consistency, etc.) and ascribe the testimony the weight you believe it deserves
 - But remember you are confirming FACTS
- These determinations do require judgments, but the judgments must be impartial
- Do not consider potential consequences or outcomes of the determination at the fact-finding stage

Determination of Responsibility/Non-Responsibility

- Findings of fact will then be assessed by applying the recipient’s identified standard of proof (e.g., preponderance of the evidence or clear and convincing) to the elements of the alleged offense (e.g., sexual assault, harassment, etc.)
 - Preponderance of the evidence: a fact is more likely than not to be true
 - Clear and convincing: a fact is highly probable to be true
 - 85 FR 30373, fn 1409
- Recall that recipient MUST begin with a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process

§ 106.45(b)(iv)

Written Determination

- Remember: Decision-maker cannot be the same person as the Title IX Coordinator or the investigator
- Must issue a written decision regarding responsibility/non-responsibility
- Applying standard of evidence identified by recipient's policy

Written Determination

- The Written Determination Must Include:
 - Identification of the allegations potentially constituting sexual harassment;
 - Description of the procedural steps taken;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the recipient's code of conduct to the facts;
 - A statement of, and rationale for, the result as to each allegation, including:
 - *(i) a determination regarding responsibility,*
 - *(ii) any disciplinary sanctions the recipient imposes on the respondent, and*
 - *(iii) whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and*
 - The recipient's procedures and permissible bases for the complainant and respondent to appeal

§ 106.45(b)(7)(ii)(A)-(F)

Written Determination and Appeals

- The recipient must provide the written determination to the parties simultaneously.
 - The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely

§ 106.45(b)(7)(iii)

- The recipient must offer both parties an appeal from the determination on the following bases:
 - Procedural irregularity that affected the outcome;
 - New evidence not reasonably available at the time the determination was made that could affect the outcome; or
 - The Title IX Coordinator, investigator, or decision-maker 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

§ 106.45(b)(8)(i)(A)-(C)

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Questions?

Thank You for your time!



Nicole S. Cheuk
NCheuk@sandsanderson.com
(804) 783-7267



Bradford A. King
BKing@sandsanderson.com
(804) 783-7263

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Sands Anderson PC
1111 E. Main Street, Suite 2400
Richmond, VA 23219



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Title IX: Best Practices in Training and Compliance

Part I and Part II Training

In conjunction with



VSBA

Virginia School Boards Association

Leadership • Advocacy • Support

Bradford A. King
BKing@sandsanderson.com
(804) 783-7263

Nicole S. Cheuk
NCheuk@sandsanderson.com
(804) 783-7267



DISCLAIMER

Please consult with your School Board lawyer prior to addressing any specific fact pattern or situation

Purpose of Part I Training

- Today's presentation includes Title IX Training Parts I and II
- Part I Training, as required by recently adopted federal implementing Regulations (34 CFR § 106.45(b)(1)), is designed for Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal process on the following:
 - Definition of sexual harassment
 - Scope of the school division's education program or activity
 - How to conduct an investigation and grievance process - including hearings, appeals, and informal processes, as applicable
 - How to serve impartially (avoiding prejudgment of facts, conflicts of interest, and bias)

Purpose of Part II Training

- The Regulations at 34 CFR § 106.45(b)(1) require Part II Training:
 - Investigators must receive training on issues of relevance, investigative report that fairly summarizes relevant evidence
 - Decision-makers must receive training on any technology to be used at live hearing, relevance of questions and evidence

Title IX Training Part I

Title IX

- Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (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”
 - School division may violate Title IX if it does not respond promptly to actual knowledge of sexual harassment in an education program or activity of the school division against a person in the United States in a manner that is not deliberately indifferent

Title IX – Types of Harassment

Schools have responsibilities under Title IX both for alleged sexual harassment by staff, and by other students:

- **Staff-student harassment**
 - *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) established that school district could be liable for sexual harassment of student by teacher where school official with authority to institute corrective measure had notice of, but was deliberately indifferent to, misconduct
- **Student-student harassment**
 - School divisions are not liable for one student harassing another but may be liable for failing to respond adequately. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)

Title IX – 3 Types of Harassment

1) QUID PRO QUO – employee conditions an educational benefit or decision on the student's submission to unwelcome sexual conduct

2) Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive, as determined by a reasonable person, that it denies a person equal access to an educational program or activity

Factors to consider when making a determination regarding whether conduct meets definition of 2)

- Degree to which the conduct affects students' education
- Type, frequency and duration of the conduct
- Identity and relationship between complainant and respondent
- Number of individuals involved (group harassment)
- Age and sex of complainant and respondent
- Size of school, location of incidents, and context
- Welcomeness (depends on age, relationship between complainant and respondent)

Title IX - Types of Harassment

“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)

- One incident of sexual assault can trigger Title IX responsibilities
- “We believe that sexual assault inherently creates the kind of serious, sex-based impediment to equal access to education that Title IX is designed to prohibit, and decline to require ‘denial of equal access’ as a separate element of sexual assault”

34 C.F.R. PART 106

Title IX Regulations

Effective August 14, 2020



History of Sexual Harassment Enforcement

- 1975 - Department of Education promulgated rules to enact Title IX, sexual harassment not contemplated
- 1997 Guidance from DOE included sexual harassment under Title IX
- 1998 - SCOTUS rules an educational entity is liable for Title IX teacher-on-student harassment if it is “deliberately indifferent” to “actual notice” *Gebser v. Lago Vista*
- 1999 - SCOTUS rules peer-on-peer harassment is actionable under Title IX - *Davis v. Monroe County Board of Education*
- 2001 OCR revised 1997 guidance in light of *Gebser* and *Davis*, included “interim measures” to help victims
- 2011 and 2014 – sexual violence added to definition of sexual harassment, 2014 question and answer document based on multitude of questions regarding 2011 guidance
- 2017- OCR rescinded 2011 and 2014 guidance, provided 7pg. Q and A document

Title IX Recent Developments

- November 16, 2018 Notice of Proposed Rulemaking
<https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf>
- 124,000 + comments received
- May 19, 2020 final rule published - USDOE guidance document is over 2000 pages; previous Title IX regulations did not refer to sexual harassment
- Seventeen states (including Virginia) filed suit challenging the final rule and requesting a stay of its effective date pending judicial review - stay DENIED on August 12, 2020
 - “Although Plaintiffs have raised serious arguments about certain aspects of the Rule, they have not established a likelihood of success on their claims, nor have they established that they are likely to suffer irreparable harm”

Title IX Regulations – Training Requirements

- 34 CFR § 106.45(b)(1)
 - Training for Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal process on the following (Part I):
 - Definition of sexual harassment
 - Scope of the school division's education program or activity
 - How to conduct an investigation and grievance process - including hearings, appeals, and informal processes, as applicable
 - How to serve impartially (avoiding prejudgment of facts, conflicts of interest, and bias)
 - In addition (Part II):
 - Investigators must receive training on issues of relevance, investigative report that fairly summarizes relevant evidence
 - Decision-makers must receive training on any technology to be used at live hearing, relevance of questions and evidence

Title IX Regulations

- Defining Sexual Harassment - 34 CFR § 106.30(a) – Conduct on the basis of sex that meets one or more of the following:
 - Quid pro quo harassment;
 - Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive, as determined by a reasonable person, that it denies a person equal access; or
 - Sexual assault (as defined in the Clery Act regulations)
- What Triggers School's Obligation to Respond
 - Actual knowledge
 - Reporting to a Title IX Coordinator will always give schools actual knowledge
 - In K-12, reporting sexual harassment to any employee at that school gives the school actual knowledge
 - Any individual may report, not just individual allegedly subjected to misconduct
 - Conduct within school division's own program or activity - includes any location, event, or circumstance over which the school division exhibits substantial control over both the alleged harasser and the context in which the harassment occurred
 - Perpetrated against a person "in the United States" (new provision)

Title IX Regulations

- General Response 34 C.F.R. § 106.44
 - Regulations require school divisions to appoint a Title IX Coordinator - specifically named on website, contact information, annual training, records of that training
 - *authorized to coordinate school division's compliance efforts*
 - *doesn't have to be full-time only job, but individual needs to have sufficient authority and time to carry out role*
 - Liability when school knows of sexual harassment allegations and responds in a way that is "deliberately indifferent," defined as "clearly unreasonable in light of the known circumstances"
 - Must "respond meaningfully to every report" – but must activate grievance process only when a **formal complaint** is filed
 - If school follows grievance procedures – **safe harbor against finding of deliberate indifference**
 - Must investigate formal complaints
 - Must treat complainants and respondents equitably

Title IX Regulations – Receipt of Report

- How a School Must Respond
 - Reports trigger obligation for Title IX Coordinator to meet with and offer the complainant supportive measures (available to complainants and respondents)
 - Definition: non-disciplinary, non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed 34 CFR § 106.30 (a)
 - counseling, course modifications, schedule changes, monitoring, supervision, extensions of deadlines, security
 - removing a respondent completely from an activity would likely be considered punitive
 - Explain formal complaint process
 - K-12 schools need to protect younger students and may require the Title IX Coordinator to file a formal complaint even when a young complainant does not want to file
- Emergency removal/administrative leave of respondent permitted under certain circumstances
 - Must conduct an individualized safety and risk analysis and determine that emergency removal is necessary in order to protect a student or other individual from an immediate threat to physical health or safety
 - School division must provide respondent with notice and an opportunity to challenge the decision immediately after the removal
 - Example: Accusation of sexual harassment leads to respondent's threats of physical self-harm

Title IX Regulations – Grievance Process

Formal Complaint

- Basic Requirements 34 CFR § 106.45(b)(1)
 - Treat complainants and respondents equitably
 - Objective evaluation of all relevant evidence
 - Presumption of innocence for respondent
 - Burden of proof on the school, preponderance of evidence vs. clear and convincing
 - Reasonably prompt time frames
 - Description of possible disciplinary outcomes and remedies following a determination of responsibility
- Notice of allegations 34 CFR § 106.45(b)(2)
 - Written notice to all parties of grievance process and allegations at issue
 - STATEMENT that respondent is presumed “not responsible” until final decision
 - Notice of right to advisor (who may be an attorney) and to inspect and review evidence
 - Notice of any code of conduct provision regarding false statements

Title IX – Grievance Process

- Dismissal 34 CFR § 106.45(b)(3)
 - *Mandatory* if investigation reveals alleged conduct did not occur in school division's program or activity OR against a person in U.S.
 - *Mandatory* if alleged conduct would not constitute sexual harassment prohibited by Title IX even if proved
 - *Permissive* if complainant provides Title IX Coordinator in writing a request to withdraw complaint, if respondent is no longer employed by the recipient or enrolled in its education program; or if specific circumstances prevent the school division from gathering enough evidence to reach a decision
- Investigation 34 CFR § 106.45(b)(5)
 - Equal opportunity to present witnesses, evidence, **inspect and review evidence (10-day review period)**
 - *Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a doctor, psychiatrist, psychologist, and made in connection with treatment to the party unless there is written consent from the parent to do so
 - No gag order
 - Advisors (can be a lawyer) permitted for complainant or respondent in any meeting, any restrictions imposed by school division as to advisors must be applied equally to both parties
 - Written notice of interviews

Title IX – Grievance Process

- Investigative Report
 - *Must fairly summarize relevant evidence*
 - *At least 10 days before determination of responsibility - send it to each party and the party's advisor for their review and response*
- Hearings for K-12 - optional, but prior to determination, the parties must be allowed to submit written questions to challenge each other's credibility and decision-maker must allow for limited follow-up
 - Questions and evidence about the complainant's prior sexual behavior are not relevant, unless offered to prove that someone other than the respondent committed alleged conduct; or if it concerns specific incidents related to respondent to prove consent
 - Decision-Maker must explain to the party proposing the questions any decision to exclude a question as not relevant

Title IX – Grievance Process

- Decision-maker's Written Determination 34 CFR § 106.45(b)(7)
 - Must be made by someone other than Title IX Coordinator or investigator and must:
 - *identify allegations potentially constituting sexual harassment;*
 - *describe all procedural steps taken;*
 - *include findings of facts and conclusions about the application of code of conduct to the facts;*
 - *include a statement of, and a rationale for, the decision reached on each allegation;*
 - *identify whether remedies will be provided to complainant;*
 - *identify any disciplinary sanctions imposed on the respondent; and*
 - *include procedures and permissible bases for appeals*

Title IX – Grievance Process

- Appeals - 34 CFR § 106.45(b)(8)
 - Available to both parties after determination of responsibility or dismissal of formal complaint and based on the following
 - *procedural irregularity;*
 - *new evidence that could affect the outcome and that wasn't available at the time of dismissal or determination of responsibility; or*
 - *conflict of interest or bias by Title IX Coordinator, investigator, decision-maker*

Title IX Regulations

- Informal resolution 34 CFR § 106.45(b)(9)
 - Cannot be required
 - May facilitate mediation or other informal process
 - May not be offered in employee-student harassment context
- Documentation 34 CFR § 106.45(b)(10)
 - For 7 years schools must create and maintain records documenting every Title IX sexual harassment investigation and determination of responsibility including:
 - Disciplinary sanctions imposed, if any;
 - Any informal resolution or appeal;
 - All materials used to train their Title IX Coordinators, investigators and decision-makers, and any person who facilitates an informal resolution process (parties may request copies); and
 - Basis for conclusion that its response was not deliberately indifferent
 - School must keep records regarding response to every report – including documentation of supportive measures offered and implemented for complainant

Title IX – Regulations

- Other miscellaneous requirements and clarifications
 - Notice of policy, grievance procedures, and Title IX Coordinator's name or title, email address, office address, and telephone number published on website and sent to:
 - *applicants for admission and employment*
 - *students' parents or legal guardians*
 - *unions or professional organizations holding agreements with the school division (34 CFR § 106.8)*
 - Must also publish notice of nondiscrimination policy and Title IX Coordinator's contact information in handbooks to students/employees
 - Timelines must be reasonably prompt
 - No damages assessed by DOE
 - Nothing requires restriction of 1st Amendment, Due Process rights
 - Severability provisions
 - Prohibition on retaliation (34 CFR § 106.71)

Title IX Regulations – Office for Civil Rights

Frequently Asked Questions – September 4, 2020

- Final Rule Effective: August 14, 2020, will not be enforced retroactively*
- Districts have a duty under Title IX to address sexual harassment if the alleged victim shows “signs of enduring unequal educational access”
 - skipping a class
 - decline in GPA
 - difficulty concentrating
- An individual may file a formal Title IX complaint as long as she is participating or attempting to participate in the district’s programs or activities (alumni groups included), specifically “a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is ‘attempting to participate’ in the recipient’s education program or activity”
- The Title IX Rule does not adopt the Federal Rules of Evidence, uses “relevance” as the sole admissibility criterion
 - Not relevant: treatment records, information protected by legally recognized privilege, certain prior sexual behavior
 - Ordinary meaning of the word should be applied

Doe v. Rensselaer Polytechnic Institute, 2020 U.S. Dist. LEXIS 191676, (N.D. NY. October 16, 2020)

- Case involved early 2020 conduct, but complaint process straddled the August 2014, 2020 effective date, with an appeal hearing scheduled for after that date
- Accused student demanded that school use its new Title IX policies and procedures for the rest of the investigation and disciplinary hearing, claiming that using the old policy when it could use the 2020 policy was sex discrimination against him
- Student and counsel particularly interested in the eight new rights that the regulations would have afforded him
- Court acknowledged OCR's preamble and blog post regarding enforcement of rules retroactively, but ultimately agreed with the student that RPI "could have easily implemented the 2020 policy for hearing
- Court agreed with Student that OCR's blog post isn't entitled to deference and "need not be the last word on the matter"
- School could still have elected to use the 2020 policy, regardless of OCR post regarding enforcement

California Lawsuit Filed – March 2021

- The Women's Student Union at Berkeley High School sued US DOE in federal district court on March 8, 2021
- Focuses on four changes to Title IX regulations
 - Definition of sexual harassment requires severe and pervasive conduct
 - Location of harassment on school grounds or at a school activity
 - Actual knowledge
 - Required to respond in a manner that is not clearly unreasonable under the circumstances
- Lawsuit alleges that these changes mean school districts do not need to take sexual harassment as seriously as before
- Attorney hopes litigation will be speedier than review ordered by President Biden and that court will set regulations aside until review is completed

U.S. DOE's OCR announced a comprehensive review of the Title IX regulations – April 6, 2021

- President Biden issued an Executive Order on March 8, 2021 - *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*
- As a result, OCR issued a letter on April 6, 2021 to students, educators, and other stakeholders, outlining plans to solicit the public's input on the regulations
- Could lead to possible revisions through a notice of proposed rulemaking
- Guidance expected from US DOE on implementation of current regulations

Questions and Answers for K-12 Public Schools in the Current COVID-19 Environment (OCR Sept. 28, 2020)

- 4 of 13 questions related to Title IX
- Yes, school divisions must continue to accept and investigate reports and complaints of sexual harassment even in a distance learning only environment
- A school division may need additional time to complete the grievance process and the situation related to COVID-19 may in some circumstances qualify as “good cause” for a delay, so long as all parties are notified promptly
- If a school division’s methods/process changes due to COVID-19 related interruption, it must promptly notify students/employees and display changes in process prominently on the school division website

VSBA Model Policy– Prohibition of Harassment and Retaliation

- Comports with Title IX Regulations
 - Applicable definitions
 - Reporting guidelines (confidentiality, prompt reporting, false statements and retaliation prohibited)
 - Reporting processes (including informal complaints)
 - Grievance procedures (reporting, initial response, supportive measures, formal complaints, notice requirements, informal resolution, investigation, determination regarding responsibility, written determination, appeal/review, discipline, records retention)
 - Annual notification and training requirements

Administrative Response and Investigations

Administrative Response to Sexual Harassment or Assault

- All employees must be able to recognize sexual violence and harassment of students by other students or school employees
- All employees must be able to recognize “grooming behaviors” by other employees or other third parties (volunteers, coaches, etc.)
- All employees must know to report suspected harassment or grooming behaviors to Title IX Coordinator
- Failure to do so can contribute to liability of the Division under Title IX and individual liability of the employee under other laws

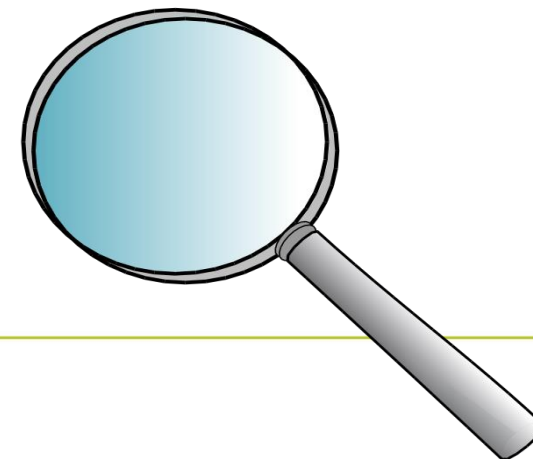
General Response and Investigations

General response: Whether or not the student files a formal complaint or asks the school to take action, if the school knows of an incident of sexual misconduct, school must respond appropriately (prompt response in a manner that is not deliberately indifferent)

Failure to timely or thoroughly investigate in accordance with policy may amount to deliberate indifference

To assemble facts to describe:

- What happened
- Why it happened



The Best Investigations Are:

- Prompt (meeting school division policy/regulation requirements)
- Thorough (and documented)
- Objective

Step 1 - Intake

- Title IX Coordinator must meet promptly with the complainant and the parents and document the same
 - discuss availability of supportive measures with or without the filing of a formal complaint; explain process
 - If formal complaint is filed, consider whether informal resolution might be appropriate
- Determine the rules and law that apply; consult counsel if necessary
- Map out the investigation
 - Who will investigate?
 - What will be investigated?
 - Who will be interviewed and in what order?
 - Outline a calendar of events to begin without delay
- Give notice to both parties
- Consider whether and what supportive measures are required for the responding party during investigation

Step 2 – Designate an Investigator(s)

- Free of actual or reasonably perceived conflicts of interest and biases for or against any party
- Maintains confidentiality
- Analyzes and documents available evidence to support reliable decisions
- Objectively evaluates
- Synthesizes available evidence



Step 3 – Gather Information

Complainant

- Interview them like a journalist and LISTEN and DOCUMENT!
- Chronological order
- Obtain the names, addresses, contact info of anyone with knowledge
- Ask about any proposed resolution

Step 3 – Gather Information

Supportive Measures

Different for each case –

- Placement of students in different classes
- Provide complainant with escort or different transportation services
- Counseling
- Academic, emotional, and social support
- Written agreement with respondent to avoid complainant
- Extension of deadlines
- Safety plan
- Offending employee placed on administrative leave
- Emergency removal

Step 3 – Gather Information

Respondent

- Give a detailed description of what has been alleged to allow full response
- Inform the responding party that no conclusions have been made
- Inform the responding party that any attempt to influence or coerce or intimidate the reporting party will be grounds for immediate discipline
- Consider the need for a recorded or written statement

Step 3 – Gather Information

Witnesses

- Interview third-party witnesses with open, not leading, questions
- Provide some background to give witnesses the opportunity to address the issues – but preserve confidentiality if possible
- Remind all witnesses of confidentiality and the prohibition of retaliation
- Compare all stories for consistency and inconsistency

Step 4 – Record Your Findings – Investigative Report

- Leave out insignificant details
- Highlight misconduct with specific description of the events, not generalized conclusions
- Do not editorialize – but may make credibility determinations, which can't be based on party's status as complainant, respondent or witness
- Make use of evidentiary attachments, such as photos, e-mails, texts, screen shots, videos, handwritten documents, etc.
- Summarize both inculpatory and exculpatory evidence
- Account for unique and complex circumstances
- Provide to parties and they have 10 days to provide a written response



Step 5 – Report Results to Decision-Maker

Decision-maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness and explain to the party proposing a question any decision to exclude a question as not relevant

Limited follow-up questions



Step 6 - Decision-Maker's Written Determination of Responsibility

- Makes decision regarding determination of responsibility, cannot be the investigator OR the Title IX Coordinator
 - Commentary addresses consideration of consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, lack of credibility
- Must include:
 - identification of allegations
 - description of procedural steps taken from the receipt of formal complaint through determination
 - findings of fact supporting the determination
 - conclusions regarding application of code of conduct to facts
 - statement of and rationale for the result as to each allegation, including disciplinary sanctions
 - details regarding appeal procedures
- Is it more likely than not that the respondent engaged in the alleged misconduct?
- Decision is final when provided to both parties simultaneously and time for appeal expires

Step 7- Appeal Decision-Maker

- Not the same person as initial decision-maker, investigator, or the Title IX Coordinator
- Decides appeal on following bases:
 - procedural irregularity that affected outcome of matter;
 - new evidence not reasonably available at the time the determination regarding responsibility or dismissal was made; or
 - Title IX Coordinator, investigator, decision-maker bias
- Provides notification in writing to both parties:
 - when appeal filed; and
 - of decision, describing result and rationale for result

Serving Impartially – Decision-makers

- Regulations' preamble states that being impartial = free from bias
 - Whether bias exists requires examination of facts and school divisions should apply an objective, commonsense approach to evaluating whether a particular person is biased
- Consider perceived conflict of interest vs. actual conflict of interest toward complainants or respondents generally or an individual complainant or respondent
 - Past advocacy for victim or respondent's rights
 - Prior adjudication involving complainant or respondent
- Avoid:
 - Reliance on sex stereotypes (complainant always female, respondent always male)
 - Pre-judgement of facts

Conduct Off-School Grounds

- Regulations do not impose a geographic test or draw a distinction between on-campus and off-campus misconduct
- Required to investigate if the sexual harassment occurred within the scope of an educational program or school-sponsored activity

Remedies for Student-on-Student Harassment

- Disciplinary sanctions against respondent
- Strict behavioral and “no contact” contract
- Separate classes, schedules, transportation, or programs
- Administrative transfer of complainant (voluntary) or respondent (voluntary or involuntary) to another school
- Targeted training for certain groups (i.e. band, athletic team)

Title IX Part II Training

For Investigators and Decision-Makers



Relevance

- Investigators must receive training on (1) **relevance** and (2) writing reports that fairly summarize **relevant evidence**
- So what is relevance?
 - Generally, “relevant” evidence is that evidence tending to prove or disprove an alleged fact.
 - Stated differently, it is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

What is Relevant Evidence?

- The Preamble addresses this definition as follows:
 - “The requirement for recipients to summarize and evaluate relevant evidence, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to § 106.45, appropriately directs recipients ***to focus investigations and adjudications on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant).***” 85 F.R. 30294

So What is Relevant Evidence?

- Do recipients have latitude to define relevance on their own?
 - Again, the Q&A Document offers guidance:
 - “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.” Q&A #8.
 - “Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance. For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. A recipient may adopt rules of order or decorum to forbid badgering a witness and may fairly deem repetition of the same question to be irrelevant.” Q&A #8.

Rules of Evidence

- Importantly, the regulations specifically do NOT apply formal rules of evidence:
 - “The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and declines to impose a comprehensive, detailed set of evidentiary rules for resolution of contested allegations of sexual harassment under Title IX.” Comments to the Regulations, 85 FR 30337
 - “A recipient’s grievance process must . . . Require an objective evaluation of all relevant evidence – including both ***inculpatory and exculpatory evidence*** – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.” 34 C.F.R. 106.45(b)(1)(ii)

More on Rules of Evidence and Relevance

- OCR's September 4, 2020 "Questions and Answers Regarding the Department's Final Title IX Rule:
 - "The Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX. . . .[T]he Rule uses 'relevance' as the sole admissibility criterion." Q&A #7.
 - "The Title IX Rule also deems certain evidence and information to be not relevant or otherwise precludes the recipient from using it:
 - *(i) a party's treatment (medical, psychological and similar) records, without the party's prior written consent [§ 106.45(b)(5)(i)];*
 - *(ii) information protected by a legally recognized privilege [§ 106.45(b)(1)(x)]; and*
 - *(iii) questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)].*

Legally Privileged Information

- A recipient, when *investigating* a formal complaint:
 - “Cannot access, consider, disclose or otherwise use a party’s records that are maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance under this section. § 106.45(b)(5)(i).
- Other recognized privileges:
 - Attorney-client communications
 - Spousal testimony in criminal matters
 - Fifth Amendment (right against self-incrimination)
 - Confessions to a clergy member

More on Relevance

- The Preamble to the new Rule provides further explanation:
 - “These final regulations require objective evaluation of relevant evidence and contain several provisions specifying types of evidence deemed irrelevant or excluded from consideration in a grievance process; a recipient may not adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45. For example, a recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the Federal Rules of Evidence, the Federal Rules of Evidence constitute a complex, comprehensive set of evidentiary rules and exceptions designed to be applied by judges and lawyers, while Title IX grievance processes are not court trials and are expected to be overseen by layperson officials of a school, college or university rather than by a judge or a lawyer.” (As cited in Q&A #7)

More on Relevance

- Continuing, the Preamble states:
 - “Similarly, a recipient may not adopt rules excluding certain types of relevant evidence (e.g., lie detector test results or rape kits) where the type of evidence is not either deemed ‘not relevant’ (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege). However, the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.” As cited in Q&A #7.

Weight and Credibility

- The guidance documents recognize a difference between the ***admission*** of relevant evidence, and the ***weight, credibility, or persuasiveness*** of particular evidence:
 - “The § 106.45 process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.” Q&A #8, citing the Preamble.
 - “A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party’s prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents.” Q&A #8, citing the Preamble.

Gathering the Evidence

- Recall that the grievance process must provide that the parties have an equal opportunity to inspect, review, and respond to evidence directly related to the allegations (§ 106.45(b)(5)(vi)) and an equal opportunity to review and respond to the recipient's investigative report. (§ 106.45(b)(5)(vii))
 - This process “allows each party the opportunity to provide input and make arguments about the relevance of evidence and how a decision-maker should weigh the evidence.” Q&A #13.
 - The decision-maker must (i) afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions for each party, and (ii) explain to the party proposing the questions any decision to exclude a question as not relevant. § 106.45(b)(6)(ii)
- The Preamble asserts that the Rule “. . . balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence.” (As cited in Q&A #13)

Determining the Facts

- For each fact in dispute, weigh the evidence and argument submitted by the parties – including making credibility determinations – and make a determination: a “finding of fact.”
- These findings will inform the overall determination of responsibility.
- The Preamble states that the decision-maker should be looking at consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility. 85 FR 30315 and 30330
 - Consider all witness statements; detail and consistency in stories; corroboration; changes in complainant’s behavior after alleged incident, and potential sources/causes of such changes
 - Timing of complaint MAY inform decision in several aspects: consider whether filed promptly; however, a delay may reflect hesitation that claim may not be believed or a fear of retaliation

Avoiding Bias in Decision-Making

- The Preamble includes significant discussion addressing concerns by commenters regarding potential bias and unfairness in the grievance process.
 - Examples include: decision-maker's financial and reputational interests encourage protecting the institution; inappropriately combining administrative and adjudicative roles; Title IX Coordinator may supervise decision-maker; past role as advocate for victim's or respondent's rights.
 - Also includes concerns about marginalized groups: racial minorities, LGBTQ community, disabled persons.
- The Rule now provides that a recipient's grievance process must:
 - "Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent."
 - Further, "A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on . . . **how to serve impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interests, and bias."
 - § 106.45(b)(iii)

Preventing Biased Decisions

- Bias may be created by differences in cultural backgrounds; age; race; religion; life experiences; trauma.
 - Decision-makers must remain impartial, avoiding sympathy or a personal perspective on the claim.
 - Avoid sex stereo-types (e.g., women have regret and/or lie about sexual assault; men are sexual aggressors).
- Decision-makers may nonetheless draw reasonable inferences from the evidence.
- The Preamble encourages recipients to apply an objective (reasonable person), common sense approach to evaluate whether a particular person is biased.

Weighing the Evidence

- Do not make a decision until all evidence has been received and reviewed. Do not “pre-judge” the facts. § 106.45(b)(1)(iii)
- Consider only relevant evidence and make findings of fact and determinations based only on the evidence received in its totality.
- Determine what evidence is worthy of belief and its importance along with necessary and reasonable inferences.
 - Rely on direct evidence whenever possible.
- Make witness credibility determinations (motives, bias, probability, consistency, etc.) and ascribe the testimony the weight you believe it deserves.
 - But remember you are confirming FACTS.
- These do require judgments, but the judgments must be impartial.
- Do not consider potential consequences or outcomes at fact-finding stage.

Determination of Responsibility/Non-Responsibility

- Findings of fact will then be assessed by applying the recipient's identified standard of proof (e.g., preponderance of the evidence or clear and convincing) to the elements of the alleged offense (e.g., sexual assault, harassment, etc.)
 - Preponderance of the evidence: a fact is more likely than not to be true.
 - Clear and convincing: a fact is highly probable to be true.
 - 85 FR 30373, fn 1409
- Recall that recipient MUST begin with a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

§ 106.45(b)(iv)

Written Determination

- Remember: Decision-maker cannot be the same person as the Title IX Coordinator or the investigator.
- Must issue a written decision regarding responsibility.
- Applying standard of evidence identified by recipient's policy

Written Determination

- The Written Determination Must Include:
 - Identification of the allegations potentially constituting sexual harassment;
 - Description of the procedural steps taken;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the recipient's code of conduct to the facts;
 - A statement of, and rationale for, the result as to each allegation, including
 - *(i) a determination regarding responsibility,*
 - *(ii) any disciplinary sanctions the recipient imposes on the respondent, and*
 - *(iii) whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and*
 - The recipient's procedures and permissible bases for the complainant and respondent to appeal.
 - § 106.45(b)(7)(ii)(A)-(F)

Written Determination and Appeals

- The recipient must provide the written determination to the parties simultaneously.
 - The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely. § 106.45(b)(7)(iii)
- The recipient must offer both parties an appeal from the determination on the following bases:
 - Procedural irregularity that affected the outcome;
 - New evidence not reasonably available at the time the determination was made that could affect the outcome; or
 - The Title IX Coordinator, investigator, or decision-maker 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.
 - § 106.45(b)(8)(i)(A)-(C)

Live Hearings

- Live hearings are NOT required for elementary and secondary school Title IX grievance proceedings.
 - IF your division intends to conduct live hearings, additional training is required, specifically for the use of technology in such proceedings.
 - This presentation presumes the recipient is NOT conducting live hearings.

Questions?

Thank You for your time!



Nicole S. Cheuk
NCheuk@sandsanderson.com
(804) 783-7267



Bradford A. King
BKing@sandsanderson.com
(804) 783-7263

Sands Anderson PC
1111 E. Main Street, Suite 2400
Richmond, VA 23219

Title IX: Best Practices in Training and Compliance

Part I and Part II Training – September 26, 2023

In conjunction with



VSBA

Virginia School Boards Association

Leadership • Advocacy • Support

Nicole S. Cheuk
NCheuk@sandsanderson.com
(804) 783-7267

LaToya H. Croxton
LCroxton@sandsanderson.com
(804) 783-7243



DISCLAIMER

Please consult with your School Board attorney prior to addressing any specific fact pattern or situation.

Purpose of Part I Training

- Required by federal implementing Regulations (34 CFR § 106.45(b)(1)) for a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal process.
- Must be trained on:
 - Definition of sexual harassment.
 - Scope of the school division's education program or activity.
 - How to conduct an investigation and grievance process - including hearings, appeals, and informal processes, as applicable.
 - How to serve impartially (avoiding prejudgment of facts, conflicts of interest, and bias).

Purpose of Part II Training

- Required by the Regulations at 34 CFR § 106.45(b)(1) for investigators and decision makers:
 - Investigators must receive training on issues of relevance and crafting an investigative report that fairly summarizes relevant evidence.
 - Decision-makers must receive training on any technology to be used at live hearings and relevance of questions and evidence.

Title IX Training Part I

34 C.F.R. PART 106

Title IX Regulations

Effective August 14, 2020

Title IX

- Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (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.”
 - A school division may violate Title IX if it does not respond promptly to actual knowledge of sexual harassment in an education program or activity of the school division against a person in the United States or if they respond in a manner that is deliberately indifferent.

What Triggers a School's Obligation to Respond

1. Actual knowledge
2. Report of sexual harassment
3. Conduct within school division's own program or activity
4. Perpetrated against a person "in the United States" (new provision)

#1 – Actual Knowledge

- A report to a Title IX Coordinator will always give schools actual knowledge.
- In K-12, reporting sexual harassment to any employee at that school gives the school actual knowledge.
- Any individual may report, not just the individual allegedly subjected to misconduct.

Doe v. Fairfax County School Board, No. 19-2201 (4th Cir. 2021)

- Background
 - Male to female, student-on-student sexual harassment case brought under Title IX.
 - Doe claimed that FCPS was deliberately indifferent in its response to known sexual harassment which occurred on the bus during a band trip.
 - FCPS officials stated that they thoroughly investigated and determined that it amounted to mutual sexual touching.
 - Jury verdict in favor of FCPS because it found there wasn't "actual knowledge" of sexual harassment.
- Fourth Circuit reversed the district court's judgment in favor of the School Board and agreed with Doe that the district court misconstrued what it meant for a school to have actual notice or knowledge of alleged harassment in Title IX cases.
- Remanded for a new trial. Court found that no evidence in the record supported the jury's verdict when using the correct legal standard.

Doe v. Fairfax County School Board, No. 19-2201 (4th Cir. 2021)

- Rationale for reversal:
 - Reviewed objectively
 - “A school’s receipt of a report that can objectively be taken to allege sexual harassment is sufficient to establish actual notice or knowledge under Title IX – regardless of whether school officials subjectively understood the report to allege sexual harassment or whether they believed the sexual harassment actually occurred.”
 - The School Board, through appropriate officials with authority to address complaints of sexual harassment and to institute corrective measures, including an Assistant Principal, received multiple reports alleging the sexual assault.
 - Jury could find that Doe was deprived of equal access to educational opportunities or benefits.
 - Sexual violence would have a severe and traumatic impact on any high school student.
 - Jury could find that School Board’s response was clearly unreasonable and it acted with deliberate indifference.
 - Principal made inappropriate jokes about the incident – “how many inches under the blanket or on the ground.”
 - Doe testified that security specialist’s behavior during meeting with student after band trip “menacing.”

Doe v. Fairfax County School Board, No. 19-2201 (4th Cir. 2021)

- Persuasive findings:
 - A reasonable jury could conclude that the sexual violence Doe allegedly suffered was severe, offensive and harrowing.
 - No evidence in the record supports the jury's finding that the School Board lacked actual notice or knowledge.
 - To the contrary, the School Board had actual knowledge of the following:
 - During a bus trip, Doe sat next to an older male student who repeatedly touched her breasts and genitals and penetrated her vagina with his fingers despite her efforts to physically block him and that he put her hand on his penis repeatedly.
 - Doe told two friends who in turn relayed the information to two school administrators.
 - Doe did not think the sexual activity was consensual.
 - Doe's mother explicitly described the bus incident as "sexual assault" or "sexual harassment."
 - Doe's parents requested a number of accommodations to help Doe cope with the psychological and emotional trauma.

#2 – Report of Sexual Harassment

Schools have responsibilities under Title IX for both alleged sexual harassment by staff and by other students:

- **Staff-student harassment**
 - *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) established that a school district could be liable for sexual harassment of a student by a teacher where the school official with authority to institute corrective measure had notice of, but was deliberately indifferent to, misconduct.
- **Student-student harassment**
 - School divisions are not liable for one student harassing another but may be liable for failing to respond adequately. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

Definition of “sexual harassment” (34 CFR § 106.30(a))

Defined broadly to include any of three types of misconduct on the basis of sex:

- 1) QUID PRO QUO – An employee conditions an educational benefit or decision on the student’s submission to unwelcome sexual conduct.
- 2) Unwelcome conduct on the basis of sex that is *so severe, pervasive and objectively offensive*, as determined by a reasonable person, that it denies a person equal access to an educational program or activity.

Factors to consider:

- Degree to which the conduct affects students’ education
- Type, frequency and duration of the conduct
- Identity and relationship between complainant and respondent
- Number of individuals involved (group harassment)
- Age and sex of complainant and respondent
- Size of school, location of incidents, and context
- Welcomeness (depends on age, relationship between complainant and respondent)

- 3) Any instance of sexual assault, dating violence, domestic violence, or stalking as defined in VAWA.

Relevant Definitions

- “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)
 - “Stalking” as defined in 34 U.S.C. 12291(a)(30)
-
- One incident of sexual assault can trigger Title IX responsibilities.
 - “We believe that sexual assault inherently creates the kind of serious, sex-based impediment to equal access to education that Title IX is designed to prohibit, and decline to require ‘denial of equal access’ as a separate element of sexual assault.”

Report of Sexual Harassment – Who are the Parties?

Complainant – the person who experienced the alleged harassment.

- Attempting to access or participated in the educational program or activity.
- Generally, a current student or employee.

Respondent – the person alleged to have perpetrated the conduct that would constitute harassment.

- Presumed innocent

Recipient – the School Division who received federal funding.

#3 – Conduct Within School Division’s Own Program or Activity

- Includes any location, event, or circumstance over which the school division exhibits substantial control over both the alleged harasser and the context in which the harassment occurred.

#4 – Subject of Allegation in the U.S.

- The act must have been perpetrated against a person “in the United States” (new provision).

General Response, 34 C.F.R. § 106.44

- Must appoint a Title IX Coordinator
 - Authorized to coordinate school division's compliance efforts.
 - Doesn't have to be coordinator's full-time job, but the individual must have sufficient authority and time to carry out the role.
- Must respond in a way that is not "deliberately indifferent"
 - Defined as "clearly unreasonable in light of the known circumstances."
 - Division will be held liable if non-compliant.
- Must "respond meaningfully to every report"
- Must activate grievance process when a formal complaint is filed
 - If school follows grievance procedures – **safe harbor against finding of deliberate indifference.**
- Must investigate formal complaints
- Must treat complainants and respondents equitably

Receipt of Report

- How a School Must Respond
 - Reports trigger the obligation for Title IX Coordinator to meet with and offer the complainant supportive measures (available to complainants and respondents).
 - Definition: non-disciplinary, non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed 34 CFR § 106.30 (a).
 - Removing a respondent completely from an activity would likely be considered punitive.
 - Explain the formal complaint process.
 - K-12 schools need to protect younger students; this may require the Title IX Coordinator to file a formal complaint even when a young complainant does not want to file.
- Emergency removal/administrative leave of respondent is permitted under certain circumstances.
 - Must conduct an individualized safety and risk analysis and determine if emergency removal is necessary to protect a student or other individual from an immediate threat to physical health or safety.
 - Must provide respondent with notice and an opportunity to challenge the decision immediately after the removal.
 - Example: An accusation of sexual harassment leads to respondent's threats of physical self-harm.

Title IX Grievance Process

- Basic Requirements, 34 CFR § 106.45(b)(1)
 - Treat complainants and respondents equitably.
 - Objective evaluation of all relevant evidence.
 - Presumption of innocence for respondent.
 - Burden of proof and burden of gathering evidence on recipient.
 - Standards: preponderance of evidence vs. clear and convincing.
 - Reasonably prompt timeframes.
 - Description of possible disciplinary outcomes and remedies following a determination of responsibility.
- Notice of allegations, 34 CFR § 106.45(b)(2)
 - Written notice to all parties of grievance process and allegations at issue.
 - STATEMENT that respondent is presumed “not responsible” until final decision.
 - Notice of right to advisor (who may be an attorney) and to inspect and review evidence.
 - Notice of any code of conduct provision prohibiting false statements.

Title IX Grievance Process

- Dismissal 34 CFR § 106.45(b)(3)
 - *Mandatory* if elements #2, 3, or 4 are not met.
 - *Mandatory if alleged conduct would not constitute sexual harassment prohibited by Title IX even if proved.*
 - *Alleged conduct did not occur in school division's program or activity.*
 - *Allegation against a person not in U.S.*
 - *Permissive* if complainant provides Title IX Coordinator in writing a request to withdraw complaint, if respondent is no longer employed by the recipient or enrolled in its education program, or if specific circumstances prevent the school division from gathering enough evidence to reach a decision.
 - Give parties written notice of dismissal.
- Investigation Phase 34 CFR § 106.45(b)(5)
 - Equal opportunity to present witnesses and evidence.
 - Equal opportunity to inspect and review evidence (10-day review period).
 - *Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a doctor, psychiatrist, psychologist, and made in connection with treatment to the party unless there is written consent from the parent to do so.
 - No gag order.
 - Advisors (can be a lawyer) permitted for complainant or respondent in any meeting, any restrictions imposed by school division as to advisors must be applied equally to both parties.
 - Written notice of interviews.

Title IX Grievance Process

- Investigative Report
 - Must fairly summarize relevant evidence (Investigator-specific training).
 - At least 10 days before determination of responsibility - send it to each party and the party's advisor for their review and response.
- Decision-making Phase
 - Decision-maker must be someone other than Title IX Coordinator or investigator.
 - Reviews investigative report and parties' responses to it.
 - If no hearing, must allow parties to submit written questions to challenge each other's credibility and allow for limited follow-up.
 - Questions and evidence about the complainant's prior sexual behavior are not relevant, unless offered to prove that someone other than the respondent committed alleged conduct; or if it concerns specific incidents related to respondent to prove consent.
 - Decision-maker must explain to the party proposing the questions any decision to exclude a question as not relevant.

Title IX Grievance Process

- Decision-maker's Written Determination 34 CFR § 106.45(b)(7)
 - Determination must:
 - Identify allegations potentially constituting sexual harassment;
 - Describe all procedural steps taken;
 - Include findings of facts and conclusions about the application of code of conduct to the facts;
 - Include a statement of, and a rationale for, the decision reached on each allegation;
 - Identify whether remedies will be provided to the complainant;
 - Identify any disciplinary sanctions imposed on the respondent; and
 - Include procedures and permissible bases for appeals.

Title IX Grievance Process

- Appeals - 34 CFR § 106.45(b)(8)
 - Available to both parties after determination of responsibility or dismissal of formal complaint and based on the following:
 - Procedural irregularity;
 - New evidence that could affect the outcome and that wasn't available at the time of dismissal or determination of responsibility; or
 - Conflict of interest or bias by Title IX Coordinator, investigator, or decision-maker.

Title IX Regulations – Other requirements

- Informal resolution, 34 CFR § 106.45(b)(9)
 - Cannot be required and can only be offered if formal complaint has been filed.
 - May facilitate mediation or other informal process.
 - MAY NOT be offered in employee-student harassment context.
- Documentation, 34 CFR § 106.45(b)(10)

For **7 years** schools must create and maintain records:

 - Document every Title IX sexual harassment investigation and determination of responsibility, including disciplinary sanctions imposed or remedies provided;
 - Any informal resolution or appeal;
 - All materials used to train Title IX Coordinators, investigators and decision-makers, and any person who facilitates an informal resolution process (parties may request copies); and
 - Basis for conclusion that its response was not deliberately indifferent.
 - School must keep records regarding response to every report or formal complaint – including documentation of supportive measures offered and implemented.

Title IX Regulations – Other Requirements

- Notice of policy, grievance procedures, and Title IX Coordinator's name or title, email address, office address, and telephone number must be published on website and sent to:
 - Applicants for admission and employment.
 - Students' parents or legal guardians.
 - Unions or professional organizations holding agreements with the school division (34 CFR § 106.8).
- Must publish notice of nondiscrimination policy and Title IX Coordinator's contact information in handbooks to students/employees.
- Must publish training materials on website.
- Timelines must be reasonably prompt.
- Prohibition on retaliation (34 CFR § 106.71).

Questions and Answers on the Title IX Regulations on Sexual Harassment (July 20, 2021)

Question: Which settings are covered by the 2020 amendments?

Answer:

- Buildings or other locations part of school's operations, *including remote learning platforms*.
- Off-campus settings if the school exercised substantial control over the respondent and the context in which alleged conduct occurred (field trip).
- Off-campus buildings owned or controlled by a student organization (fraternity/sorority).

*Practice tips:

- May still offer supportive measures to a complainant who reports sexual harassment that occurred outside school's program or activity.
- Any sexual harassment that occurs in a school's program or activity must be responded to even if it related to or happens subsequent to sexual harassment that occurred outside school's program or activity.

Question and Answers on the Title IX Regulations on Sexual Harassment (July 20, 2021)

Question:

Which school employees must be notified about allegations of sexual harassment for a school to be put on notice that it must respond?

Answer:

In K-12 settings a school must respond whenever **ANY** school employee has notice of sexual harassment. This includes notice to a: teacher, teacher's aide, bus driver, cafeteria worker, counselor, school resource officer, maintenance staff, coach, athletic trainer, or any other school employee.

Question and Answers on the Title IX Regulations on Sexual Harassment (July 20, 2021)

Question:

How should a school respond to complaints alleging sex discrimination that do not include sexual harassment allegations?

Answer:

Schools must respond to complaints alleging discrimination based on pregnancy, different treatment based on sex, or other forms of sex discrimination using the “prompt and equitable” grievance procedures that schools have been required to adopt and publish since 1975 when the original Title IX regulations were issued.

VSBA Model Policy– Prohibition of Harassment and Retaliation

- Comports with Title IX Regulations
 - Applicable definitions
 - Reporting guidelines (confidentiality, prompt reporting, false statements and retaliation prohibited)
 - Reporting processes (including informal complaints)
 - Grievance procedures (reporting, initial response, supportive measures, formal complaints, notice requirements, informal resolution, investigation, determination regarding responsibility, written determination, appeal/review, discipline, records retention)
 - Annual notification and training requirements

Response to Report and Investigation

Administrative Response to Sexual Harassment or Assault

- All employees must be able to recognize sexual violence and harassment of students by other students or school employees.
- All employees must be able to recognize “grooming behaviors” by other employees or other third parties (volunteers, coaches, etc.).
- All employees must know to report suspected harassment or grooming behaviors to Title IX Coordinator.
- Failure to do so can contribute to liability of the Division under Title IX and individual liability of the employee under other laws.

Step 1 – Title IX Coordinator Initiates Process

- Title IX Coordinator must meet promptly with the complainant and the parents and document the same.
 - Discuss availability of supportive measures with or without the filing of a formal complaint; explain process.
 - If formal complaint is filed, consider whether informal resolution might be appropriate.
- Determine the rules and law that apply; consult counsel if necessary.
- Map out the investigation:
 - Who will investigate?
 - What will be investigated?
 - Who will be interviewed and in what order?
 - Outline a calendar of events to begin without delay.
- Provide notice of allegations to both parties.
- Consider whether and what supportive measures are required for Respondent.

Supportive Measures to Consider

- Placement of students in different classes
- Provide complainant with escort or different transportation services
- Counseling
- Academic, emotional, and social support
- Written agreement with respondent to avoid complainant
- Extension of deadlines
- Safety plan
- Offending employee placed on administrative leave
- Emergency removal

Step 2 – Designate an Investigator(s)

- Free of actual or reasonably perceived conflicts of interest and biases for or against any party
- Trained
- Maintains confidentiality
- Analyzes and documents available evidence to support reliable decisions
- Objectively evaluates
- Synthesizes available evidence



Step 3 – Gather Information

Complainant

- Interview them like a journalist and LISTEN and DOCUMENT!
- Chronological order
- Obtain the names, addresses, contact info of anyone with knowledge.
- Ask about any proposed resolution.

Step 3 – Gather Information

Respondent

- Give a detailed description of what has been alleged to allow full response.
- Inform the responding party that no conclusions have been made.
- Inform the responding party that any attempt to influence, coerce or intimidate the reporting party will be grounds for immediate discipline.
- Consider the need for a recorded or written statement.

Step 3 – Gather Information

Witnesses

- Interview third-party witnesses with open, non-leading questions.
- Provide some background to give witnesses the opportunity to address the issues, but try to preserve confidentiality.
- Remind all witnesses of confidentiality and prohibition of retaliation.
- Compare all statements for consistency and inconsistency.

Step 3 – Gather Information

Sample questions:

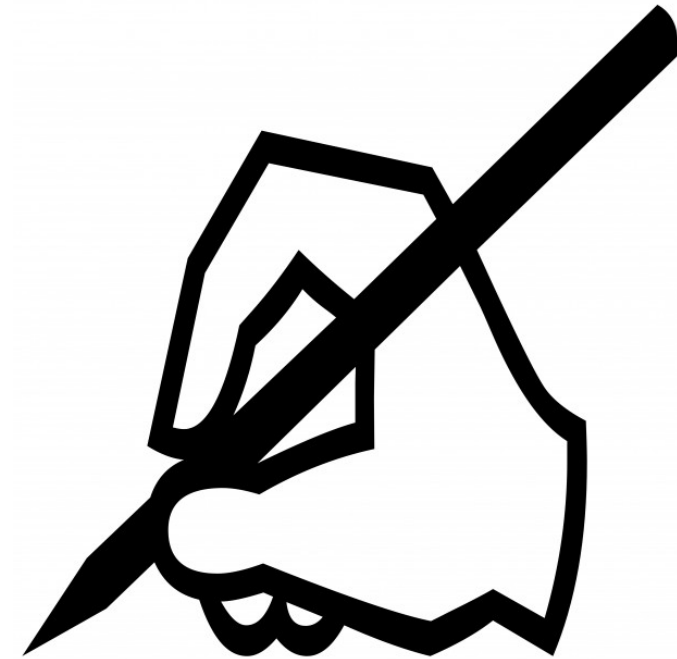
- What can you tell me about the allegation?
- Where would you like to start?
- Where and when did it occur?
- Who was involved?
- Can you tell me more?
- Did anyone else see it happen?
- Have you talked to anyone since?
- Do you know anyone else with information about it?

Investigation Checklist

Interviewed Complainant	Interviewed Respondent
Interviewed Witnesses	Written witness statements
Interviewed complainant(s) parent(s)/guardian(s)	Interviewed respondent(s) parent(s)/guardian(s)
Examined physical evidence	Reviewed medical information (if privilege is waived)
Reviewed student records	Reviewed social history between parties
Interviewed teachers and/or school staff (list names)	Reviewed student attendance and grades
Reviewed video surveillance	Reviewed electronic/web content

Step 4 – Submit Investigative Report to Decision-Maker

- Eliminate insignificant details.
- Highlight misconduct with specific description of the events, not generalized conclusions.
- Do not editorialize – but may make credibility determinations, which can't be based on party's status as complainant, respondent or witness.
- Make use of evidentiary attachments, such as photos, e-mails, texts, screen shots, videos, handwritten documents, etc.
- Summarize both inculpatory and exculpatory evidence.
- Account for unique and complex circumstances.
- Provide copy to both parties (and advisors); 10 days to provide a written response.



Step 5 – Parties Submit Written, Relevant Questions to Decision-Maker

- After decision-maker receives investigative report AND before any determination is made, decision-maker must afford each party 10 days to submit written, relevant questions that a party wants asked of any party or witness and explain to the party proposing a question any decision to exclude a question as not relevant.
- Only relevant questions allowed.
- Limited follow-up questions allowed.



Step 6 - Decision-Maker's Written Determination of Responsibility

- Cannot be the investigator OR the Title IX Coordinator.
- Makes written decision regarding determination of responsibility:
 - Commentary addresses consideration of consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, lack of credibility.
- Must include:
 - Identification of allegations.
 - Description of procedural steps taken from the receipt of formal complaint through determination.
 - Findings of fact supporting the determination.
 - Conclusions regarding application of code of conduct to facts.
 - Statement of and rationale for the result as to each allegation, including disciplinary sanctions.
 - Identification of any remedies to be provided to the complainant.
 - Details regarding appeal procedures.
- Standard: Is it more likely than not that the respondent engaged in the alleged misconduct?
- Provide written decision to both parties simultaneously.

Step 7- Appeals

- Appeal decision-maker is NOT the same person as the initial decision-maker, investigator, or the Title IX Coordinator.
- Must give both sides a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
- Decides appeal on the following bases:
 - Procedural irregularity that affected outcome of matter;
 - New evidence not reasonably available at the time the determination regarding responsibility or dismissal was made; or
 - Title IX Coordinator, investigator, decision-maker bias.
- Provides notification in writing to both parties:
 - Of receipt of the appeal within three days of appeal filing; and
 - Of decision, describing result and rationale for result (must be simultaneous).

Decision-makers must be IMPARTIAL

- Regulations' preamble states that being impartial = free from bias.
 - Whether bias exists requires examination of facts and school divisions should apply an objective, commonsense approach to evaluating whether a particular person is biased.
- Consider perceived conflict of interest vs. actual conflict of interest toward complainants or respondents generally or an individual complainant or respondent.
 - Past advocacy for victim or respondent's rights
 - Prior adjudication involving complainant or respondent
- Avoid:
 - Reliance on sex stereotypes (complainant always female, respondent always male)
 - Pre-judgement of facts

Remedies for Student-on-Student Harassment

- Disciplinary sanctions against respondent
- Strict behavioral and “no contact” contract
- Separate classes, schedules, transportation, or programs
- Administrative transfer of complainant (voluntary) or respondent (voluntary or involuntary) to another school
- Targeted training for certain groups (i.e. band, athletic team)
- Safe person plan
- Follow-up/monitoring

Sanctions

- Students
 - Loss of privileges
 - Removal from extra-curricular activity
 - Any other sanction authorized by Student Code of Conduct
 - Detention
 - In-school suspension/out-of-school suspension
 - Expulsion
- Staff
 - Leave of absence
 - Termination
 - Reassignment

Title IX Part II Training

For Investigators and Decision-Makers

Relevance

- Investigators must receive training on (1) **relevance** and (2) writing reports that fairly summarize **relevant evidence**.
- So, what is relevance?
 - Generally, “relevant” evidence is that evidence tending to prove or disprove an alleged fact.
 - Stated differently, it is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.



What is Relevant Evidence?

- The Preamble addresses this definition as follows:
 - “The requirement for recipients to summarize and evaluate relevant evidence, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to § 106.45, appropriately directs recipients ***to focus investigations and adjudications on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant).***” 85 F.R. 30294.

Rules of Evidence

- Importantly, the regulations specifically do NOT apply formal rules of evidence:
 - “The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and declines to impose a comprehensive, detailed set of evidentiary rules for resolution of contested allegations of sexual harassment under Title IX.” Comments to the Regulations, 85 FR 30337.
 - “A recipient’s grievance process must . . . require an objective evaluation of all relevant evidence – including both ***inculpatory and exculpatory evidence*** – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.” 34 C.F.R. 106.45(b)(1)(ii).

More on Rules of Evidence and Relevance

- OCR's September 4, 2020 "Questions and Answers Regarding the Department's Final Title IX Rule":
 - "The Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX. . . .[T]he Rule uses 'relevance' as the sole admissibility criterion." Q&A #7.
 - The Title IX Rule also deems certain evidence and information to be not relevant or otherwise precludes the recipient from using it:
 - A party's treatment (medical, psychological and similar) records, without the party's prior written consent [§ 106.45(b)(5)(i)];
 - Information protected by a legally recognized privilege [§ 106.45(b)(1)(x)]; and
 - Questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)].

Legally Privileged Information

- A recipient, when *investigating* a formal complaint:
 - “Cannot access, consider, disclose or otherwise use a party’s records that are maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance under this section.” § 106.45(b)(5)(i).
- Other recognized privileges:
 - Attorney-client communications
 - Spousal testimony in criminal matters
 - Fifth Amendment (right against self-incrimination)
 - Confessions to a clergy member

Weight and Credibility

- The guidance documents recognize a difference between the ***admission*** of relevant evidence, and the ***weight, credibility, or persuasiveness*** of particular evidence:
 - “The § 106.45 process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.” Q&A #8, citing the Preamble.
 - “A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party’s prior bad acts, so long as such a rule is applied equally to the prior bad acts of complainants and the prior bad acts of respondents.” Q&A #8, citing the Preamble.

Gathering the Evidence



- Parties must have an equal opportunity to inspect, review, and respond to evidence directly related to the allegations. (§ 106.45(b)(5)(vi)).
- Parties must have an equal opportunity to review and respond to the recipient's investigative report. (§ 106.45(b)(5)(vii)).
- The decision-maker must: (i) afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions for each party, and (ii) explain to the party proposing the questions any decision to exclude a question as not relevant. § 106.45(b)(6)(ii).

Determining the Facts

- For each fact in dispute, weigh the evidence and argument submitted by the parties – including making credibility determinations – and make a determination: a “finding of fact.”
- The investigator’s findings will inform the decision-maker’s overall determination of responsibility.
- The Preamble states that the decision-maker should be looking at consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility. 85 FR 30315 and 30330.
 - Consider all witness statements; detail and consistency in stories; corroboration; changes in complainant’s behavior after alleged incident, and potential sources/causes of such changes
 - Timing of the complaint MAY inform decision in several aspects: consider whether filed promptly; however, a delay may reflect hesitation that claim may not be believed or a fear of retaliation.

Weighing the Evidence

- Do not make a decision until all evidence has been received and reviewed. Do not “pre-judge” the facts. § 106.45(b)(1)(iii).
- Consider only relevant evidence and make findings of fact and determinations based only on the evidence received in its totality.
- Determine what evidence is worthy of belief and its importance along with necessary and reasonable inferences.
 - Rely on direct evidence whenever possible.
- Make witness credibility determinations (motives, bias, probability, consistency, etc.) and ascribe the testimony the weight you believe it deserves.
 - But remember you are confirming FACTS.
- These do require judgments, but the judgments must be impartial.
- Do not consider potential consequences or outcomes at fact-finding stage.

Investigative Report Elements

- Allegation(s) Investigated
- Description of Procedural Steps Taken
 - Written notice
 - Selection of investigator and investigative approach
 - Relevant school board policies/code of conduct provisions
 - Pre-investigation gathering of relevant evidence
 - Witness interviews
 - Delivery of directly related evidence
 - Parties' written responses to directly related evidence
- Findings of Fact and Credibility Determinations
- Notification of the right to respond to evidence/submit written relevant questions to other party through the decision maker

Avoiding Bias in Decision-Making

- The Preamble includes significant discussion addressing concerns by commenters regarding potential bias and unfairness in the grievance process.
 - Examples include: decision-maker's financial and reputational interests encourage protecting the institution; inappropriately combining administrative and adjudicative roles; Title IX Coordinator may supervise decision-maker; past role as advocate for victim's or respondent's rights.
 - Also includes concerns about marginalized groups: racial minorities, LGBTQ community, disabled persons.
- The Rule now provides that a recipient's grievance process must:
 - "Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent."
 - Further, "A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on . . . **how to serve impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interests, and bias."
 - § 106.45(b)(iii)

Preventing Biased Decisions

- Bias may be created by differences in cultural backgrounds; age; race; religion; life experiences; trauma.
 - Decision-makers must remain impartial, avoiding sympathy or a personal perspective on the claim.
 - Avoid sex-based stereotypes (e.g., women have regret and/or lie about sexual assault; men are sexual aggressors).
- Decision-makers may nonetheless draw reasonable inferences from the evidence.
- The Preamble encourages recipients to apply an objective (reasonable person), common sense approach to evaluate whether a particular person is biased.

Determination of Responsibility/Non-Responsibility

- Findings of fact will then be assessed by applying the recipient's identified standard of proof (e.g., preponderance of the evidence or clear and convincing) to the elements of the alleged offense (e.g., sexual assault, harassment, etc.)
 - Preponderance of the evidence: a fact is more likely than not to be true.
 - Clear and convincing: a fact is highly probable to be true.
 - 85 FR 30373, FN 1409
- Recall that a recipient MUST begin with a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. § 106.45(b)(iv)

Written Determination of Responsibility/Non-Responsibility

- Must Include:
 - Identification of the allegations potentially constituting sexual harassment;
 - Description of the procedural steps taken;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the recipient's code of conduct to the facts;
 - A statement of, and rationale for, the result as to each allegation, including:
 - A determination regarding responsibility,
 - Any disciplinary sanctions the recipient imposes on the respondent, and
 - Whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant.
 - The recipient's procedures and permissible bases for the complainant and respondent to appeal.
 - § 106.45(b)(7)(ii)(A)-(F)

Written Determination and Appeals

- The recipient must provide the written determination to the parties simultaneously.
 - The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely. § 106.45(b)(7)(iii)
- The recipient must offer both parties an appeal from the determination on the following bases:
 - Procedural irregularity that affected the outcome;
 - New evidence not reasonably available at the time the determination was made that could affect the outcome; or
 - The Title IX Coordinator, investigator, or decision-maker 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. § 106.45(b)(8)(i)(A)-(C)

Live Hearings

- Live hearings are NOT required for elementary and secondary school Title IX grievance proceedings.
 - If your division intends to conduct live hearings, additional training is required, specifically for the use of technology in such proceedings.
 - This presentation presumes the recipient is NOT conducting live hearings.

Recent Law Update

Doe v. Virginia Polytechnic Institute and State University (4th Cir. 2023)

- Background: Two romantically involved students at VT broke up. Roe accused Doe of physical assault. VT opened a Title IX investigation. Doe then accused Roe of physical assault. Both were found responsible. Doe was suspended for 1.5 yrs. and Roe got probation.
- Grievance Process:
 - Initial notice didn't include any information about specific incidents, allegations or possible violations of the Student Conduct Code being investigated.
 - Didn't interview respondent's witnesses during investigation of Roe's allegations, but did interview them once Doe filed his own complaint.
 - Investigation Report didn't include exact allegations or charges being brought against respondent.
 - Respondent made allegations against complainant so joint hearing held.

Doe v. Virginia Polytechnic Institute and State University (4th Cir. 2023)

- Procedural History: Doe sued VT and several university officials alleging gender-based discrimination in violation of Title IX, violations of his due process rights under the U.S. Constitution and VA Constitution, and state-law claims including breach of contract. Federal district court found in favor of VT and school officials. Doe appealed to 4th Circuit.
- Fourth Circuit Rulings:
 - Doe failed to allege a claim under either the 14th Amendment or the VA constitution that his due process rights were violated because he failed to show that he was deprived of a cognizable liberty or property interest in his continuing education by some form of “state action.” Court said fundamental requirements of due process are “notice and an opportunity to be heard.”
 - No due process violation where university failed to interview Doe’s witnesses during investigation of Roe’s allegations, but Doe had opportunity to present witnesses at hearing, and sanction occurred after hearing. Reiterated that this Court has never held that a university has an obligation to present exculpatory evidence on behalf of accused student.

Doe v. Virginia Polytechnic Institute and State University (4th Cir. 2023)

- Rationale

- Doe was found responsible and suspended only after he was given a chance to review the university's report, eventually received notice of the charges against him two months prior to the hearing, and was given a hearing.
 - *Distinguishes this fact pattern from Doe v. Rector & Visitors of George Mason University, 149 F. Supp. 3d 602 (E.D. Va. 2016) where student was never given notice at any point of certain allegations against him, and therefore, was not allowed any opportunity to meaningfully defend himself prior to being found responsible.*
- Of note, Title IX Regulation § 106.45 which now requires pre-investigation notice of the allegations was adopted in 2020 so it didn't apply to Doe's disciplinary proceedings.
- The Court said that even if Doe had been given pre-investigation notice, it would have provided minimal incremental value because the procedures VT employed before imposing sanctions sufficiently mitigated the risk of him being erroneously suspended.
- Doe's witnesses were unavailable at hearing. University did not prevent them from testifying. No obligation on university to present Doe's exculpatory evidence on his behalf.

Proposed Amendments to Title IX Regulations

- Issued on: June 23, 2022
- Final Rule expected in October; effective date of amendments - unknown
- Significant revisions:
 - Definition of “sex-based” harassment means: Sexual harassment on the basis of stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity, and other conduct on the basis of sex that is: quid pro quo harassment; hostile environment, and specific offense of assault, dating violence, domestic violence, or stalking.
 - *Hostile environment - unwelcome sex-based conduct sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.*
 - Same grievance process for sexual harassment would apply to any alleged violation of Title IX (all forms of sex discrimination).
 - **Supportive measures** can include measures that burden a respondent, such as requiring changes in a respondent’s class, work, housing or extracurricular or any other activity; but must allow the respondent opportunity to seek modification or termination of such measures before they are imposed.

Proposed Amendments to Title IX Regulations

- Training requirement for ALL employees.
- Title IX roles – the decision-maker may be the same person as Title IX Coordinator or investigator.
- Definition of “relevant.”
- On campus vs. off campus activity: Proposed § 106.11 would clarify that Title IX’s prohibition on sex discrimination would apply to a hostile environment under a recipient’s education program or activity, even if sex-based harassment contributing to such a hostile environment occurred outside of the recipient’s education program or activity or occurred within an education program or activity but outside of the United States.

Frequently Asked Questions – “Is this a Title IX matter?”

- Report of a current employee’s alleged sexual conduct toward a student’s sibling (who does not attend the school division where the employee works);
- Report of an administrator’s refusal to allow a transgender student to use the bathroom corresponding to their gender identity;
- Report of teacher’s inappropriate comments to a group of students, comments are of a sexual nature;
- If Title IX Coordinator receives report and determines it does not fall within the grievance process, what should he/she do?
- If the complainant decides not to file a formal complaint, what should the Title IX Coordinator do?

Case Study #1

Facts:

- Student #1 complains that Student #2 touched him inappropriately on their way off the bus at school one day.
- Student #1 mentions this allegation to his homeroom teacher.
- The homeroom teacher immediately notifies the building principal.
- The building principal calls Student #2 to his office.
- Building principal determines that Student #2's story that he accidentally hit Student #1's buttocks with his lacrosse stick sounds plausible and thus does not call the Title IX coordinator.

THOUGHTS?

Case Study #2

- **Post-graduation**, student complains to volleyball coach that a female teacher invited him to dinner by text and forwards the text message, noting that he felt uncomfortable.
- In the same communication about the invitation, student complains about conversations he allegedly had during school year regarding such topics as:
 - Sexual activity
 - Whether student has a girlfriend
 - What age females he preferred
- Student alleges that at the end of the school year, the teacher hugged and kissed him and that it made him feel “uncomfortable.”
- The volleyball coach forwarded the student’s complaint to the principal.
- What should the principal do next?

Questions?

Thank You for your time!



Nicole S. Cheuk
NCheuk@sandsanderson.com
(804) 783-7267



LaToya H. Croxton
LCroxton@sandsanderson.com
(804) 783-7243

Sands Anderson PC
1111 E. Main Street, Suite 2400
Richmond, VA 23219