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Breaking News: Title IX Coming to You!

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- Henderson High School (Texas) → Rachel Bradshaw-Bean was kicked out of school after making an allegation for rape and sent to an alternative school alongside the individual that she had accused.
- Jacobsen Middle School (California) → Seth Walsh suffered from sexual and gender based harassment by his peers ultimately leading to him committing suicide at the age of 13.


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WHAT IS TITLE IX?
No sex discrimination. No sexual assault. Period.



- ▶ 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.
- ▶ General Scopes of Protections
 - ▶ Sports Participation & Opportunities
 - ▶ Other Sports Benefits & Opportunities
 - ▶ Hazing, Bullying & Cyberbullying
 - ▶ Other School Activities
 - ▶ **Sexual Harassment & Sexual Violence (Clery Act)**
 - ▶ **Retaliation**

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What happened after the 1972 Enactment?

- ▶ 1975 → HEW promulgated regulations without addressing sexual harassment
- ▶ 1979 → *Cannon v. University of Chicago*
- ▶ 1992 → *Franklin v. Gwinnett County Public Schools*
- ▶ 1997 → ED started addressing sexual harassment through a series of guidance documents, notably the 2001 Guidance, the withdrawn 2011 Dear Colleague Letter, the withdrawn 2014 Q & A and the 2017 Q & A
- ▶ **1998 → *Gebser v. Lago Vista Independent School Districts***
- ▶ **1999 → *Davis v. Monroe County Board of Education***
- ▶ November 29, 2018 → ED Secretary published a notice of proposed rulemaking
- ▶ May 6, 2020 → Final regulations were published
- ▶ August 14, 2020 → Final regulations became effective

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Summary of Major Provisions of New Title IX Regulations effective Aug 14, 2020

- ▶ Define the conduct constituting sexual harassment for Title IX purposes;
- ▶ Specify the conditions that activate a recipient's obligation to respond to allegations of sexual harassment;
- ▶ Impose a general standard for the sufficiency of the response;
- ▶ Specify requirements that such a response must include, i.e., offering supportive measures;
- ▶ Specify conditions that require a recipient to initiate a grievance process to investigate and adjudicate a formal complaint of sexual harassment;
- ▶ Establish procedural due process protections that must be incorporated into a recipient's grievance process;
- ▶ Affirms that OCR may require recipients to take remedial action for discriminating on the basis of sex or otherwise violating Title IX;

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Summary of Major Provisions cont'd

- ▶ Clarifies that recipients are not required to deprive an individual of rights guaranteed under the U.S. Constitution when responding to a claim of sexual harassment under Title IX;
- ▶ Acknowledges the intersection of Title IX, Title VII and FERPA;
- ▶ Acknowledges the legal rights of parents/guardians to act on behalf of individuals with respect to Title IX;
- ▶ Updates the requirements for recipients to designate Title IX Coordinators, disseminate policy and Title IX Coordinator's contact information and notify students, employees and others of the recipient's grievance procedures and process for handling reports and complaints of sex discrimination, including sexual harassment; and
- ▶ Prohibits retaliation.



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New Three-Prong Definition of Sexual Harassment

1. Quid Pro Quo Harassment by a recipient's employee
 - ▶ Applies whether the "bargain" proposed by the recipient's employee is communicated expressly or impliedly
2. Unwelcome Conduct on the Basis of Sex that is so Severe and Pervasive, and Objectively Offensive that it effectively denies a person Equal Access to Education
3. Clery Act & VAWA Offenses
 - ▶ Sexual Assault - 20 U.S.C 1092(f)(6)(A)(v)
 - ▶ Dating Violence - 34 U.S.C. 12291(a)(10)
 - ▶ Domestic Violence - 34 U.S.C. 12291(a)(8)
 - ▶ Stalking - 34 U.S.C. 12291(a)(30)

Whether or not misconduct is actionable under Title IX, it may be actionable under another part of a recipient's code of conduct (e.g., anti-bullying)

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ASMS Considerations

- ▶ Title IX does not prohibit an educational institution "from maintaining separate living facilities for the different sexes" pursuant to 20 U.S.C. 1686.
- ▶ Title IX regulations expressly permit sex-specific housing in 34 CFR 106.32 ("[h]ousing provided by a recipient to students of one sex, when compared to that provided to students of the other sex"), separate intimate facilities on the basis of sex in 34 CFR 106.33 ("separate toilet, lockerroom, and shower facilities on the basis of sex" with references to "one sex" and "the other sex).



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What constitutes Notice for Elementary and Secondary Schools?

- ▶ Notice to “any employee” (in addition to the Title IX Coordinator or to any official with authority) triggers the recipient’s response obligations
- ▶ Notice results whenever any employee, any Title IX Coordinator, or any official with authority:
 - ▶ Witnesses sexual harassment;
 - ▶ Hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim), or a third party (i.e., the complainant’s parent, friend or peer);
 - ▶ Receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or
 - ▶ Other Means (E.g., 2001 Guidance at 13).
- ▶ Any person may trigger a recipient’s response obligation by reporting to Title IX Coordinator using published contact information

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How should the recipient respond now that it has Actual Knowledge?

- ▶ ED revised Section 106.44(a) to specify that a recipient’s response must:
 - ▶ Be prompt
 - ▶ Be equitable by following a grievance process that complies with 106.45 before imposing disciplinary sanctions
 - ▶ Consist of offering supportive measures to the complainant
 - ▶ Ensure that the Title IX Coordinator contacts each complainant to discuss supportive measures
 - ▶ Consider the complainant’s wishes regarding supportive measures
 - ▶ Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
 - ▶ Explain to the complainant the process for filing a complaint

THIS PROCESS IS CONSIDERED MANDATORY, PROACTIVE AND INTERACTIVE

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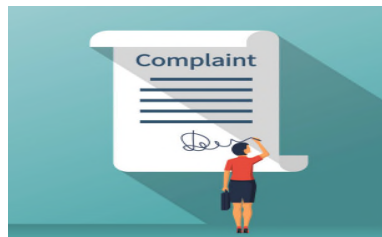
What about Emergency Situations?

- ▶ The Final Regulations expressly authorize recipients to remove a respondent from the recipient's education program or activities on an emergency basis, with or without a grievance process pending, *as long as* post-deprivation notice and opportunity to challenge the removal is given to the respondent.
- ▶ A recipient's decision to initiate an emergency removal will be evaluated under the deliberate indifference standard.



Section 106.44(c)

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- ▶ A formal complaint is a document filed by the complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegations of sexual harassment.
 - ▶ This may be a hardcopy document or electronic submission; may be consolidated
 - ▶ This may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.
- ▶ The definition outlined in § 106.30 requires a document “alleging sexual harassment against a respondent” but contains no requirement as to a detailed statement of the facts.
- ▶ There is no time limit on a complainant's decision to file a formal complaint.

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Rights of Parents & Guardians

- ▶ Section 106.6(g) was added to acknowledge the legal rights of parents and guardians to act on behalf of a complainant, respondent, or other individual with respect to exercise of rights under Title IX, including but not limited to the filing of a formal complaint.



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Informal Resolutions



- ▶ Can only be offered after a complaint is filed
- ▶ Discretionary so long as parties give voluntary, informed *and* written consent
- ▶ Cannot compel participation
- ▶ Options include mediation, restorative justice, etc.
- ▶ Any party has the right to withdraw from the information resolution process and resume the grievance process at any time prior to agreeing to an informal resolution

Cannot be offered if the allegations are made against an employee

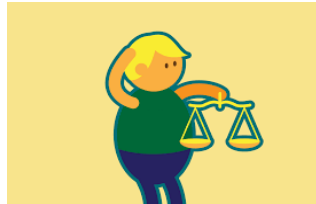
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Mandatory vs Discretionary Dismissals

- ▶ **Mandatory Dismissal**
 - ▶ If the allegations do not constitute sexual harassment as defined
 - ▶ If the allegations did not occur in the educational institution's program or activity
 - ▶ If the allegations did not occur against a person in the United States
- ▶ **Discretionary Dismissal**
 - ▶ If complainant notifies the Title IX Coordinator at any time that he/she wishes to withdraw the complaint
 - ▶ If the respondent's enrollment or employment ends
 - ▶ If specific circumstances prevent the educational institution from gathering evidence

Notice of dismissal must be provided to both parties to include the reasons for dismissal

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- ▶ The Final Regulations prescribe a grievance process in Section 106.45 that is grounded in principles of due process for the benefit of both complainants and respondents, seeking justice in each sexual harassment situation that arise in a recipient's education program or activity.
- ▶ **What are some due process principles?**
 - ▶ It describes a procedure that justifies the outcome.
 - ▶ It provides reasons for asserting that the treatment the person receives is the treatment he [or she] deserves.
 - ▶ It is the fundamental constitutional principle in American jurisprudence. It appears in criminal law, civil law and administrative law.
 - ▶ It is a principle which is used to generate a number of specific rights, procedures and practices.

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Ten “Commandments” Section 106.45

1. 106.45(a) acknowledges that a recipient’s treatment of a complainant, or a respondent, could constitute sex discrimination prohibited under Title IX.
2. 106.45(b)(1)(i)-(x) requires recipients to adopt a grievance process that:
 - ▶ Treats complainants and respondents equitably by recognizing the need for complainants to receive remedies where a respondent is determined responsible and for respondents to face disciplinary sanctions only after a fair process determines responsibility;
 - ▶ Objectively evaluates all relevant evidence, both inculpatory and exculpatory, and ensures that rules voluntarily adopted by a recipient treat the parties equally;
 - ▶ Requires Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions to be free from conflicts of interest and bias and trained to serve impartially without prejudging the facts at issue;

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“Ten” Commandments cont’d

- ▶ Presumes the non-responsibility of respondents until conclusion of the grievance process
 - ▶ Includes reasonably prompt time frames for the grievance process;
 - ▶ Informs all parties of critical information about the recipient’s procedures including the range of remedies and disciplinary sanctions a recipient may impose, the standard of evidence applied by the recipient to all formal complaints of sexual harassment under Title IX (which must be either the preponderance of the evidence standard, or the clear and convincing standard), the recipient’s appeal procedures, and the range of supportive measures available to both parties; and
 - ▶ Protects any legally recognized privilege from being pierced during a grievance process.
3. 106.45(b)(2) requires written notice of the allegations to both parties, including informing the parties of the right to select an advisor of choice.

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“Ten” Commandments cont’d

4. 106.45(b)(3)-(b)(4) require recipients to investigate formal complaints, describe when a formal complaint is subject to mandatory or discretionary dismissal, require the recipient to notify the parties of any dismissal, and authorize discretionary consolidation of formal complaints when allegations of sexual harassment arise out of the same facts or circumstances.
5. 106.45(b)(5)(i)-(vii) requires recipients to investigate formal complaints in a manner that:
 - ▶ Keeps the burden of proof and burden of gathering evidence on the recipient while protecting every party’s right to consent to the use of the party’s own medical, psychological, and similar treatment records;
 - ▶ Provides the parties equal opportunity to present fact and expert witnesses and other inculpatory and exculpatory evidence;

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“Ten” Commandments cont’d

- ▶ Does not restrict the parties from discussing the allegations or gathering evidence;
 - ▶ Gives the parties equal opportunity to select an advisor of the party’s choice (who may be, but does not need to be, an attorney);
 - ▶ Requires written notice when a party’s participation is invited or expected for an interview, meeting or hearing;
 - ▶ Provides both parties equal opportunity to review and respond to the evidence gathered during the investigation; and
 - ▶ Sends both parties the recipient’s investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility.
6. 106.45(b)(6) requires a live hearing with cross-examination conducted by the parties’ advisors at postsecondary institutions, while making hearings **optional** for elementary and secondary schools so long as the parties have equal

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“Ten” Commandments cont’d

opportunity to submit written questions for the other parties and witnesses to answer before a determination regarding responsibility is reached.

7. 106.45(b)(7) requires a decision-maker who is not the same person as the Title IX Coordinator or the investigator to reach a determination regarding responsibility by applying the standard of evidence the recipient has designated in the recipient’s grievance process for use in all formal complaints of sexual harassment, and the recipient must simultaneously send the parties a written determination explaining the reasons for the outcome.
8. 106.45(b)(8) requires recipients to offer appeals equally to both parties, on the bases that procedural deficiencies, newly discovered evidence, or bias or conflict of interest affected the outcome.

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“Ten” Commandments cont’d

9. 106.45(b)(9) allows recipients to offer and facilitate an informal resolution process, within certain parameters to ensure such informal resolution only occurs with the voluntary, written consent of both parties; informal resolution is not permitted to resolve allegations that an employee sexually harassed a student.
10. 106.45(b)(10) requires recipients to maintain records and documentation concerning sexual harassment reports, formal complaints, investigations, and adjudications; and to publish materials used for training Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions on the recipient’s website or make these materials available upon request for inspection by members of the public.

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Knowledge Check: What Initiates this Grievance Process?

▶ Actual Knowledge



This initiates supportive measures, which does not require a written statement.

▶ Formal Complaint



The grievance process can proceed without the complainant's participation; however, the complainant will still be treated as a party.

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Who are the Key Players in All of This?

- ▶ Title IX Coordinator
- ▶ Mediator
- ▶ Investigator
- ▶ Decision-Maker
- ▶ Appeals Official



**ALL MUST BE PROPERLY TRAINED AND
FREE OF CONFLICTS**

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Title IX Coordinator

- ▶ Roles and Responsibilities Include:
 - ▶ Contacting the complainant confidentially to discuss supportive measures
 - ▶ Supportive measures may include counseling, course modifications, schedule changes, increased monitoring or supervision, etc. They are non-punitive and individualized
 - ▶ Considering the complainant's wishes regarding supportive measures
 - ▶ Informing the complainant of the availability of supportive measures with or without the filing of a formal complaint
 - ▶ Explaining the process for filing a formal complaint
 - ▶ Receiving (and possibly signs) complaints
 - ▶ Sending written notice of allegations to both parties
 - ▶ Determining whether to initiate the grievance process

The Title IX Coordinator oversees the program and cannot serve as the investigator or decision-maker

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Investigator



- ▶ Roles and Responsibilities Include:
 - ▶ Ensuring that the burden of proof and gathering evidence remain on the school - not the parties
 - ▶ Providing equal opportunity for the parties to present witnesses (fact and expert) and evidence (inculpatory or exculpatory)
 - ▶ Ensuring that there are no restrictions on the parties ability to discuss the allegations or gather evidence (i.e., no "gag orders")
 - ▶ Ensuring that the parties have the same opportunity to select an advisor of the party's choice to be present during interviews or other proceedings
 - ▶ Providing written notice of any investigative interviews, meetings or hearings
 - ▶ Providing parties and their advisors with evidence directly related to the allegations and allowing at least 10 days for the parties to inspect, review and respond to the evidence, which must be considered before completing investigation report
 - ▶ Preparing a written investigation report that fairly summarizes the relevant evidence and providing the report to the parties and their advisors at least 10 days prior to a hearing

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Decision-Maker



- ▶ Roles and Responsibilities Include:
 - ▶ Understanding the evidentiary standard used, how questioning is handled and any legal privileges - **HEARINGS ARE OPTIONAL FOR K-12 SCHOOLS**
 - ▶ Providing each party the opportunity to submit, after the completion of the investigation report, written and relevant questions that the party wants asked of another party or witness and provides each party with the answers to allow for limited follow-up questions
 - ▶ Issuing a written determination of responsibility that:
 1. Identifies the allegations that potentially constitute sexual harassment
 2. Describes the educational institution's procedural steps taken from the receipt of the complaint to the determination
 3. Includes findings of fact supporting the determination
 4. Includes conclusions regarding application of the code of conduct to the facts
 5. Includes a statement of, and a rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions, and any remedies provided to the complainant
 6. Includes procedures for appeal

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- ▶ Both parties must be offered a right to appeal any determination regarding responsibility and any decision to dismiss a formal complaint
- ▶ An appeal must be allowed based on the following:
 - ▶ Procedural irregularities that impacted the outcome;
 - ▶ New evidence that was not available prior to the decision that could impact the outcome; or
 - ▶ Conflict of interest or bias on the part the "Key Players" of the Title IX process
- ▶ An appeal may be offered equally to both parties on additional bases
- ▶ When an appeal is filed, ASMS must notify all parties in writing, identify who will hear and decide the appeal and ensure that the appeal decider is free of conflict of interest or bias and has been properly trained.
- ▶ A written decision of the appeal must be provided to both parties simultaneously

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Recordkeeping

- ▶ Must maintain all relevant records regarding sexual harassment allegations and investigations for at least **seven** years
 - ▶ Relevant records → informal resolutions, investigations and any required recording or transcription, determinations regarding responsibility, disciplinary sanctions, remedies provided and appeals
- ▶ Must also maintain any materials used to train the “Key Players” for **seven** years; training material should be posted on website
- ▶ Records should reflect that ASMS’s response was not deliberately indifferent
 - ▶ For example, ASMS should document why it did not offer supportive measures to show that action was not clearly unreasonable under the known circumstances

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- ▶ **Retaliation is PROHIBITED!**
- ▶ Retaliation may be addressed under the Title IX grievance process
- ▶ ASMS must keep confidential the identity of complainants, respondents, witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding
- ▶ The exercise of rights under the First Amendment does not constitute retaliation

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Putting the Pieces of the Puzzle Together: What Now?

- ▶ Identify your Title IX Coordinator and Publish his/her Contact Information
- ▶ Review & Revise Title IX Policies and Procedures
- ▶ Review & Revise Codes of Conduct and Handbooks
- ▶ Conduct Professional Development
- ▶ Educate and Train Students & Parents/Guardians
- ▶ Adopt a Formal Process for maintain Records



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Thank You!



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