

Title IX Sexual Harassment

AASB Fall District
Meetings



Discrimination
=
**Treating People
Differently**

- Discrimination is the act of treating people differently based on a protected characteristic (or stereotypes based on that characteristic)
- Focus on access to education opportunities, resources, programs, and activities
- Disparate treatment in the workplace/school
- Disparate impact claims (neutral policies that have discriminatory impacts)

Common Types of Protected Traits

- Race**
- Color**
- Religion**
- Sex (gender)**
- Military status**
- National origin**
- Disability**
- Age**
- Ancestry**
- Marital status**
- Pregnancy**
- Genetic information**



Title VI (Students) and Title VII (Employees)

Title VI - "Any program, activity receiving Federal financial assistance"

- Race, color, or national origin
- Contracts, grants, educational activities

Title VII - "An unlawful employment practice for any employer..."

- Fail or refuse to hire, or discriminate, on the basis of race, color, religion, sex**, or national origin
- Limit, segregate, or classify employees that would deprive or limit employment opportunities based on...

Sex Discrimination and Harassment:

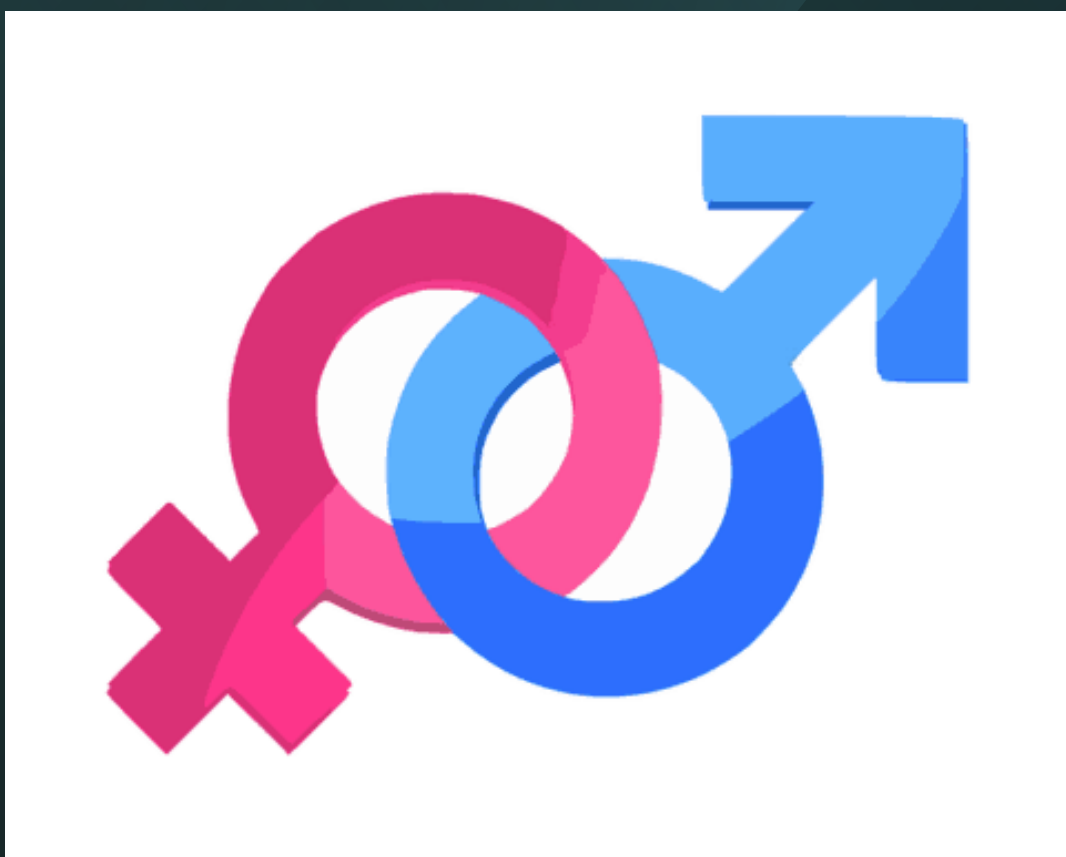
Title VII
(employees)
and
Title IX
(employees and
students)

"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..."



This Photo by Unknown Author is licensed under [CC BY-NC-ND](#)

What does "Sex" Mean?



Biological sex

Gender Identity

Sex stereotyping

**Sexual
orientation****

"Sex" as a verb

Final Title IX Regulations

The DOE amended just the regulations governing campus sexual harassment under Title IX

New regulations were effective August 14, 2020

These regulations apply to elementary and secondary as well as postsecondary

- Elementary and secondary school means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by The Every Student Succeeds Act, a preschool, or a private elementary or secondary school

Apply to Employees

- Recipients that are subject to both Title VII and Title IX must comply with both
- “Deliberate indifference” standard applies - Because Title IX recipients are “in the business of education”

Outline of Points

- 1. What is sexual harassment?
- 2. When is a school on Notice?
- 3. What must a school do to support alleged victims?
- 4. What personnel and policies do schools need?
- 5. What grievance process must a school follow before making findings and disciplining?
- 6. What are other features of the new regulations?
- 7. How do the new regulations protect free speech?
- 8. Who needs to be trained?
- 9. What forms do we need?

1. What is Sexual Harassment under Title IX?

- **Employee quid pro quo**
- **Hostile environment
(newly defined)**
- **VAWA “big four”**

New Definitions of Sexual Harassment

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

- **Quid pro quo** - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct
- **Hostile environment** - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- **Clery crimes** - Sexual assault, dating violence, domestic violence, or stalking [Clery regulatory definition cites omitted]

Quid Pro Quo

Codified: Severity and harm presumed

New: Only an employee (not a volunteer, another student, etc.)

Definition: An employee of the recipient conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct

QUIDPROQUO

This for that.



• **New Definition**

- Unwelcome conduct
- Determined by a reasonable person
- To be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person's equal access to the recipient's education program or activity

VAWA “Big Four”

Sexual Assault 20 U.S.C.
1092(f)(6)(A)(v)

Domestic Violence 34 U.S.C.
12291(a)(8)

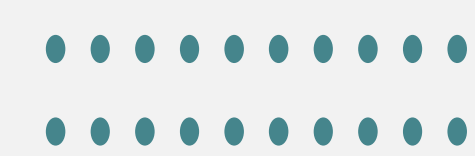
Dating violence 34 U.S.C.
12291(a)(10)

Stalking 34 U.S.C. 12291(a)(30)



Outline of Points

- 1. What is sexual harassment?
- 2. When is a school on Notice?
- 3. What must a school do to support alleged victims?
- 4. What personnel and policies do schools need?
- 5. What grievance process must a school follow before making findings and disciplining?
- 6. What are other features of the new regulations?
- 7. How do the new regulations protect free speech?
- 8. Who needs to be trained?
- 9. What forms do we need?



2. When is a School on Notice of Sexual Harassment?



This Photo by Unknown Author is licensed under CC BY-NC

- A recipient with **actual knowledge** of sexual harassment in an educational program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not **deliberately indifferent**.
- Once a school has actual knowledge of sexual harassment or allegations of sexual harassment, the school has to respond and take action.
- A school has actual knowledge when the school has notice that a person may have been victimized by sexual harassment.
- Any person, whether the alleged victim or a parent, friend, or bystander, has the right to report sexual harassment to put the school on notice.
- If school personnel will personally witness sexual harassment.

Break it Down...

Actual knowledge =

Notice of sexual harassment or allegations of sexual harassment to a recipient's:

1. Title IX Coordinator, or
2. Any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or
3. To **any employee** of an elementary or secondary school 34 C.F.R. § 106.30(a)



**“In a
program or
activity”**

“Educational program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs...

Outline of Points

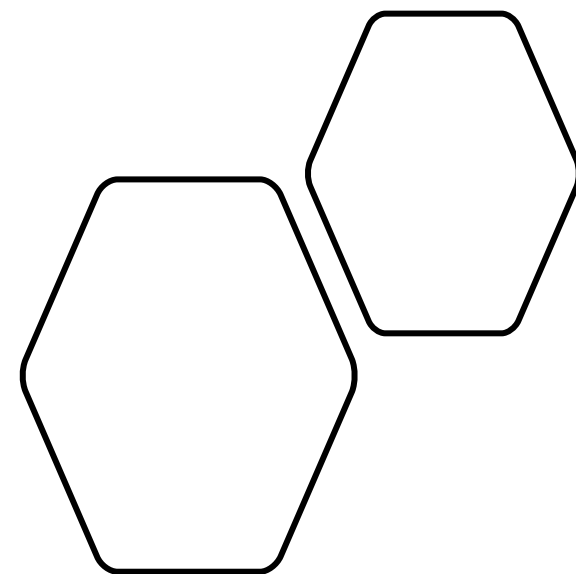
- 1. What is sexual harassment?
- 2. When is a school on Notice?
- 3. What must a school do to support alleged victims?
- 4. What personnel and policies do schools need?
- 5. What grievance process must a school follow before making findings and disciplining?
- 6. What are other features of the new regulations?
- 7. How do the new regulations protect free speech?
- 8. Who needs to be trained?
- 9. What forms do we need?

3. What kind of response must the school provide?

- A recipient with actual knowledge of sexual harassment in an educational program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not **deliberately indifferent.**
- A recipient is only deliberately indifferent if its response to sexual harassment is **unreasonable in light of known circumstances.**



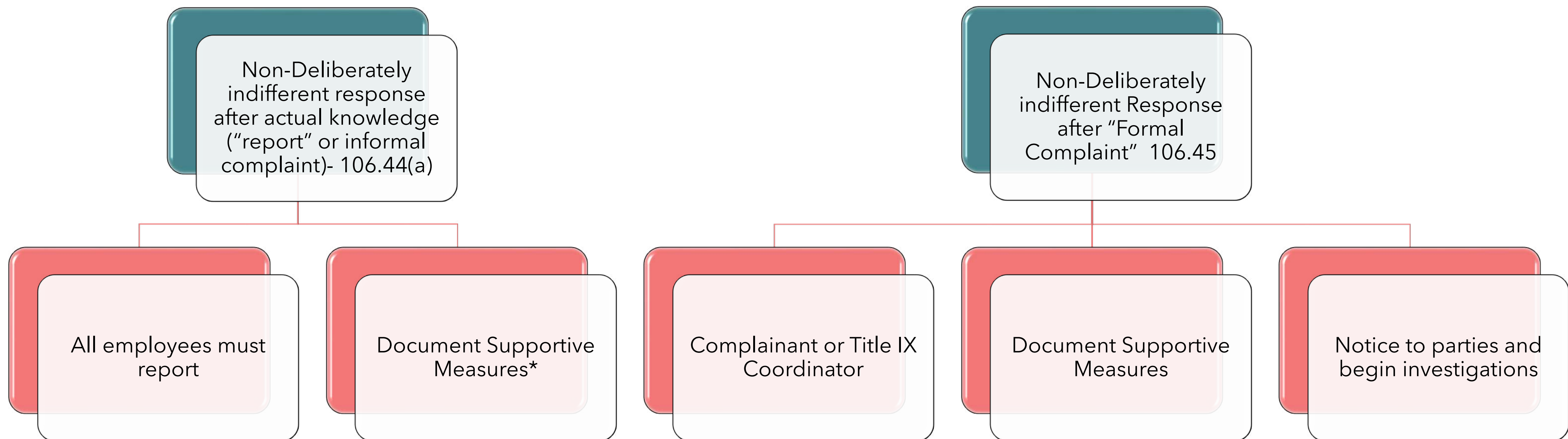
Break it
Down...



Deliberate Indifference:

"[T]he response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation."

3. What kind of Response? A Bifurcated Response



Outline of Points

- 1. What is sexual harassment?
- 2. When is a school on Notice?
- 3. What must a school do to support alleged victims?
- 4. What personnel and policies do schools need?
- 5. What grievance process must a school follow before making findings and disciplining?
- 6. What are other features of the new regulations?
- 7. How do the new regulations protect free speech?
- 8. Who needs to be trained?
- 9. What forms do we need?

▼

4. What personnel and policies do schools need to have?

- Title IX Coordinator - In policy and handbooks have specific information on how to contact Coordinator
- Non-discrimination policy
- Written Grievance procedures
- Information on How to file a formal complaint regarding sexual harassment

New Terminology

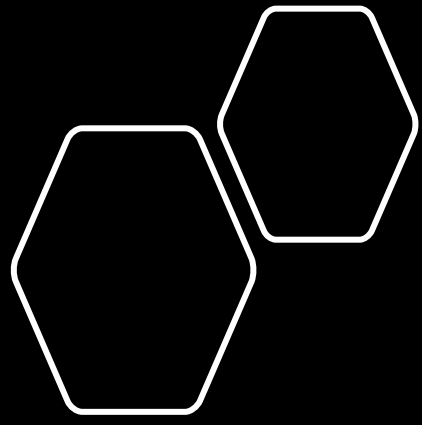
Applies to parties in both reports and formal complaints of sexual harassment

Complainant: A person who is alleged to be the victim of conduct that could constitute sexual harassment

- NOT a third party who reports alleged sexual harassment perpetrated against someone else
- NOT the Title IX Coordinator, even if the Coordinator "signs" a formal complaint

Respondent: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment

- Student or employee



New:
Initial
Response
34 C.F.R.
106.44(a),
.30(a)

- Must treat complainants and respondents equitably:
 - Offer supportive measures to both
 - Follow a grievance process before disciplining or sanctioning respondent

New: Initial Response 34 CFR 106.30(a), .44(a)

- **Title IX Coordinator must promptly, even if no formal complaint is filed:**

- Contact the complainant to discuss the availability of “supportive measures”
- Consider the complainant’s wishes with respect to supportive measures
- Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a formal complaint





Supportive Measures: What Changed?

- New Term (Final Rule)
- 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 C.F.R. 106.30(a))
- Should be designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party

Examples of Supportive Measures



COUNSELING



COURSE MODIFICATIONS



SCHEDULE CHANGES



INCREASED MONITORING OR SUPERVISION



A SUPPORTIVE MEASURES THAT COMPLETELY REMOVES A RESPONDENT FROM AN ACTIVITY WOULD LIKELY BE CONSIDERED PUNITIVE, EXCEPT FOR "EMERGENCY REMOVALS" FOR STUDENTS AND "ADMINISTRATIVE LEAVES" FOR EMPLOYEES.

Confidentiality

Prior OCR guidance instructed schools to investigate even when the Complainant did not want the school to investigate.

The new regulations obligate schools to initiate the grievance process when a Complainant files or a Title IX Coordinator signs a formal complaint, so that the Title IX Coordinator takes into account the wishes of a complainant and only initiates a grievance process against the complainant's wishes if doing so is not clearly unreasonable in light of the known circumstances.

The New Formal Grievance Response Procedures:

The term “grievance process” by OCR refers to the investigative process by a school.

A RECIPIENT MUST ADOPT AND PUBLISH GRIEVANCE PROCEDURES THAT PROVIDE FOR THE PROMPT AND EQUITABLE RESOLUTION OF STUDENT AND EMPLOYEE COMPLAINTS ALLEGING ANY ACTION THAT WOULD BE PROHIBITED BY THIS PART AND A GRIEVANCE PROCESS THAT COMPLIES WITH § 106.45 for FORMAL COMPLAINTS AS DEFINED IN § 106.30.

10 other General Requirements for written grievance procedures: Due Process/Fundamental Fairness

- Requirement 1: Treat Parties Equitably
 - Treat complainants/respondents equitably; no sanctions until process complete
- Requirement 2: Objective Evaluation of Evidence
 - Exclude privileged information
- Requirement 3: Training; no conflicts of interest
- Requirement 4: Presumption of Innocence
 - Presumption that respondent is not responsible
- Requirement 5: Reasonably prompt time frames
- Requirement 6: Description of Outcomes
- Requirement 7: Standard of Evidence
 - Evidentiary Standard - Preponderance or Clear and Convincing
 - Same standard applicable to complaints against students and employees
 - Same standard applicable to all complaints of sexual harassment
 - The burden of proof and the burden of gathering evidence sufficient to reach a determination of responsibility rests on the District and not on the parties.
- Requirement 8: Right to Appeal
- Requirement 9: Description of Range of Supportive Measures
- Requirement 10: Privileges No conflict of interest or bias; trained staff

Outline of Points

- 1. What is sexual harassment?
- 2. When is a school on Notice?
- 3. What must a school do to support alleged victims?
- 4. What personnel and policies do schools need?
- 5. What grievance process must a school follow before making findings and disciplining?
- 6. What are other features of the new regulations?
- 7. How do the new regulations protect free speech?
- 8. Who needs to be trained?
- 9. What forms do we need?

New: Formal Complaint Response

34 C.F.R. § 106.45(b)

Defined as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).

Requires a number of specific steps for investigating, dismissing, and determining responsibility in formal complaint

Major shift from previous more deferential stance toward specific policies and practices for complaint resolution

Written Notice to Parties

- 34 C.F.R. 106.45(b)(2)
- Written notice to known parties “upon receipt of written complaint”
- In sufficient time to allow respondent to prepare a response before any initial interview
- Must include:
 - Notice of grievance process, including any informal resolution process
 - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct if known)

Details of the Written Notice to Parties

- Statement that respondent presumed **not responsible** and that responsibility determined at conclusion of grievance process
- Notice of parties' rights to have an attorney or non-attorney **advisor** to inspect and review evidence
- Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during grievance process
- Written notice **MUST** be supplemented if new allegations opened for investigation
- Informal Resolution options

What if safety is a concern?

Immediate Emergency Removal

- 34 C.F.R. 106.44(c)
- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from immediate threat to physical health or safety
- Notice, opportunity to challenge provided “immediately” after the removal
- Consider other laws, e.g., “change of placement” under IDEA and Section 504.

Employee Administrative Leave

- 34 C.F.R. 106.44(d)
- Not prohibited
- Consider state law, board policy, handbooks, and bargaining agreements



Dismissal

- Remember those Dismissal reasons- Mandatory versus Discretionary:
- Keep in communication with Title IX Coordinator
- Dismissal does not preclude other action under other Code of Conduct for non-sexual harassment violations of the Code of Conduct
- Bullying and harassment



Assign an Investigator:

- Someone other than Title IX Coordinator, Decision maker, Facilitator of Voluntary Resolution
 - Campus administrator
 - Central Office Administrator
 - Outside investigator
- Who should not investigate
 - axe to grind
 - no bias
 - must be trained
 - not involved in any incident that prompted investigation
 - not someone under supervision of Respondent, if employee
 - The more serious the allegation, the more experienced and well-trained the investigator may need to be.

Investigations
34 CFR
106.45(b)(5)

Burden of proof and burden of gathering evidence is on recipient

Equal opportunity to present witnesses

May not prohibit parties from discussing allegations or gathering/presenting evidence

Provide same opportunity to have others present including advisor of choice

Written notice of any hearings/interviews/meetings

Investigations

34 CFR

106.45(b)(5)

Provide all evidence to parties

- Both sides are provided time to review
- Both sides are allowed to submit a written response before report is completed
- At least 10 days to respond to evidence in writing

Prepare Investigative Report

- Both sides are provided final report prior to determination of responsibility
- Report circulated to parties at least another 10 days before any determination of responsibility
- Both sides are allowed to submit a response

Decision Making

Decisionmaker makes determination of responsibility

- Reach conclusions

Use Independent Judgment

- Cannot be investigator or Title IX Coordinator, or Facilitator

Weigh all relevant evidence

- Decision on whether evidence meets schools standard of evidence for sexual harassment allegations- POE or C and C

**Written
Determination of
Responsibility
34 CFR 106.45(b)(6)**

Identification of allegations, including portions of school policies allegedly violated

Procedural steps taken by District

Findings of Fact

Conclusions - application of code of conduct to facts

Statement of rationale for result as to each allegation including:

- Determination of responsibility
- Any Disciplinary Sanctions proposed
- Remedies to restore or preserve equal access to educational program or activity

Procedures and Basis for Appeal

Provided Simultaneously to parties

Possible Remedies

Remedies are required after a Respondent has been determined responsible under the grievance process

No list of appropriate remedies in regulations

- Left to discretion of educators

Designed to restore or preserve the right to equal access to education

Remedies need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent

Remedies may include the same individualized services described as "supportive measures"

- Supportive measures: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus and other similar measures
- Other possibilities: tutoring for student, removal of student from class/team/campus, policy/procedure changes, staff or student training

After the Decision: Appeals

New Requirements

- Send Written determination along with information on how to appeal
- Must offer to both parties for dismissals and final determinations in the following circumstances:
 - **Procedural irregularity** that affected the outcome of the matter;
 - **New evidence** not reasonably available that could affect the outcome
 - **Conflict of interest** or **bias** for or against Title IX Coordinator, Investigator, Decisionmaker
- Can offer for other reasons on equal terms
- Different Decisionmaker
- Must issue appeal decision in writing and provide simultaneously to both parties
- Recommendation: The District should establish a deadline for filing an appeal and may require appeals be filed on a form provided by the District

Outline of Points

- 1. What is sexual harassment?
- 2. When is a school on Notice?
- 3. What must a school do to support alleged victims?
- 4. What personnel and policies do schools need?
- 5. What grievance process must a school follow before making findings and disciplining?
- 6. What are other features of the new regulations?
- 7. How do the new regulations protect free speech?
- 8. Who needs to be trained?
- 9. What forms do we need?

Informal Resolution

34 C.F.R. 106.45(b)(9)

- Prohibited unless formal complaint is filed
- Allowed at any time during formal complaint process if:
 - Both parties provided written notice of rights
 - Both parties' written, voluntary consent obtained
 - **Not** for a complaint alleging that an **employee** harassed a student





This Photo by Unknown Author is licensed under [CC BY-SA](#)

- Specifically prohibited in the final rules
- Retaliation defined in part: "No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part..." 34 C.F.R. § 106.71
- What is it?
 - Adverse action against an individual
 - Abuse, violence, threats, and intimidation
 - More than just someone expressing their opinion

Retaliation

- Report this immediately to the Title IX Coordinator
- Is there already a no-contact order and, if not, do you want one?
- No school or person is allowed to retaliate against anyone for exercising rights under Title IX.
- Any person retaliated against can file a complaint with the school and the school must have procedures in place for the prompt and equitable resolution of such complaints.
- The school should keep the identities of parties and witnesses confidential, unless disclosure of someone's identity is required under other laws (e.g. FERPA) or is necessary in order to conduct the grievance process.
- It is retaliation to charge a person with code of conduct violation for the purpose of discouraging the person from pursuing a sexual harassment report or formal complaint, or exercising any other Title IX rights.
- It may be prohibited retaliation if a code of conduct charge is for a violation unrelated to sexual harassment yet arises from the same facts as a sexual harassment allegation.

Other Requirements

Designated "Title IX Coordinator"

Policy and Notice Requirements

- Title IX Coordinator's Name or title and contact information (including email address)
- Nondiscrimination policy
- Grievance procedures including how to file or report sexual harassment and how the school will respond.

Recordkeeping

- 106.45(b)(10)
- Records related to alleged sexual harassment must be maintained for a minimum of **7 years**
- Investigation records
- Disciplinary sanctions
- Remedies
- Appeals
- Records of any actions taken, including supportive measures
- Must document for every instance:
 - Why response was not deliberately indifferent
 - That measures were taken to restore or preserve equal access to the educational program or activity
 - If no supportive measures provided, why that was not deliberately indifferent

Other Requirements: Advisors (optional)

- The role of advisors will depend largely on whether the district allows live hearings as part of its grievance process
- Advisors are any individual who can assist in the investigation and grievance process
- Accompany party to interviews; represent party in live hearing; help[prepare a case to present to the investigator
- Assist during ten day period in submitting written response to investigator or before the decision maker determines responsibility
- Advisors may be an adult of the party's choosing
 - Parent
 - Attorney

Outline of Points

- 1. What is sexual harassment?
- 2. When is a school on Notice?
- 3. What must a school do to support alleged victims?
- 4. What personnel and policies do schools need?
- 5. What grievance process must a school follow before making findings and disciplining?
- 6. What are other features of the new regulations?
- 7. How do the new regulations protect free speech?
- 8. Who needs to be trained?
- 9. What forms do we need?

Title IX and the First Amendment



This Photo by Unknown Author is licensed under CC BY-SA-NC

- OCR says they can never require a school to violate the First Amendment.
- When OCR investigates a school for possible Title IX violations, OCR will never view a school's attempt to suppress free speech as an appropriate response to sexual harassment.
- What this means:
 - Title IX is intended to protect students from sex discrimination, not to regulate the content of speech.
 - OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX.
 - In order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program.
 - Moreover, in regulating the conduct of its students and its employees to prevent or redress discrimination prohibited by Title IX (e.g., in responding to harassment that is sufficiently serious as to deny access), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights.

Outline of Points

- 1. What is sexual harassment?
- 2. When is a school on Notice?
- 3. What must a school do to support alleged victims?
- 4. What personnel and policies do schools need?
- 5. What grievance process must a school follow before making findings and disciplining?
- 6. What are other features of the new regulations?
- 7. How do the new regulations protect free speech?
- 8. Who needs to be trained?
- 9. What forms do we need?

Other requirements:

- Training
 - 106.45(b)(1)(III)
 - Title IX Coordinators
 - Investigators
 - Decision-Makers and
 - Any person who facilitates an informal resolution process

Outline of Points

- 1. What is sexual harassment?
- 2. When is a school on Notice?
- 3. What must a school do to support alleged victims?
- 4. What personnel and policies do schools need?
- 5. What grievance process must a school follow before making findings and disciplining?
- 6. What are other features of the new regulations?
- 7. How do the new regulations protect free speech?
- 8. Who needs to be trained?
- 9. What forms do we need?

Forms

- Reporting Forms for Employees and/or Students
- Formal Complaint Form
- Notice of Receipt of Informal Report offering supportive measures
- Notice of Formal Complaint
- Investigation Guidance Forms
- Determination of Responsibility
- Interview Forms? Checklists?
- Appeal Forms



The Intersection of Title IX, the IDEA, and Section 504



- Title IX Grievance Process does not modify the rights of students with disabilities
 - Removals under IDEA or 504 used to satisfy Title IX obligations
- Special education and 504 Coordinators communicate with Title IX investigator and Coordinator
- Emergency removal of a special education student, but conduct is also manifestation of disability?
- Title IX process takes 20 plus days at a minimum (only 10 days under IDEA and 504)
- Supportive Measures
 - Written into IEP/504?
 - Are those services now required for FAPE?
 - Are they changes in placement?
 - Must the team meet PRIOR to any interim measures being implemented?
 - Is Title IX coordinator now part of IEP team?
- Will Title IX process be delayed while IEP/504 teams meet?



Next Steps...

What do schools need to do?

- **Identify or hire key personnel responsible for Title IX**
- **Create or Revise Title IX policies and procedures**
 - Non-discrimination policy
 - Written Grievance Procedures
 - Information on how to file a formal complaint regarding sexual harassment
- **Train key personnel**
- **Publish the Title IX Coordinator and all training materials on their website**

When do schools need to do it?

- **August 14, 2020**

Who is responsible?

- **The key personnel = Those who must be trained**
- Title IX Coordinator
- Investigator
- Decision-Maker/Adjudicator
- Appeal Decision-Maker (i.e. School Board, Principal, External Resource)
- Possible other involved personnel:
 - HR Director (if school personnel are involved)
 - School Counselor

Costs of Implementation

- Determine how to allocate in the District's budget what is fiscally required to implement the Department's directives
- Hiring or reassignment of personnel
- Retaining external support (consultants, trainers, counselors)
- IT needs to improve and preserve record-keeping

Board

— Obligations

- Know who the District Title IX Coordinator is (their information needs to be posted on the school's website)
- Recognize a potential Title IX violation: new definitions
- Review your district's anti-discrimination and antiharassment policies as soon as they are updated
- Act in a manner that lessens the harm
- Make sure policies and procedures are updated to reflect new regulations
- If you are made aware, reach out to Title IX Coordinator and document knowledge and who you have spoken to
- Confidentiality
- Provide support and \$ for training of coordinators, investigators, and appeal decision makers

