

Title IX Team Training




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Title IX

- Prohibits discrimination “on the basis of sex” in education programs or activities that receive federal financial assistance.
 - 20 U.S.C. § 1681(a)
- Title IX applies to the entire school district.
 - 20 U.S.C. § 1687(2).

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Title IX Over the Years

- Enacted in 1972.
- *Franklin v. Gwinnett County Pub. Schs.* (U.S. 1992)
 - An implied private right of action for money damages could be sustained where a teacher allegedly sexually abused a student.

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Title IX Over the Years

- *Gebser v. Lago Vista Indep. Sch. Dist.* (U.S. 1998)
 - Damages for sexual harassment of a student by a teacher can only be recovered where:
 - An official who has authority to institute corrective measures on the district's behalf
 - Has actual notice of the teacher's misconduct, and
 - Acts deliberately indifferent to such misconduct

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Title IX Over the Years

- *Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
 - A private damages actions may be sustained against a school board in the case of student-on-student harassment, BUT only where:
 - The District acts with deliberate indifference to known acts of harassment in its programs or activities; AND
 - The harassment is so severe, pervasive, AND objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

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 **The New Regulations**



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 **The New Regulations**

- Effective August 14, 2020
- Focus on schools' response to allegations of sexual harassment
- Provide specific procedures and require specific personnel
 - BUT not all alleged Title IX violations are subject to new procedures

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 **What hasn't changed?**

- Athletic opportunities for boys and girls
 - Equal accommodation (opportunities)
 - Equal treatment (qualitative experiences)
 - 3-part test from courts and OCR

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What hasn't changed?

- General antidiscrimination and accommodation request issues, such as
 - Gender identity and sexual orientation
 - Courts: transgender students win
 - Third-party misconduct
 - Unequal treatment allegations against the institution that are not sex harassment

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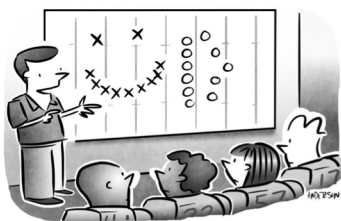
Responses Under the New Regulations

- Three Categories of Complaints/Allegations
 - Sex discrimination NOT involving sexual harassment
 - Sex harassment WITHOUT formal complaint
 - Sex harassment WITH formal complaint

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The TIX Training Game Plan



"OK, it's not that effective, but what a crowd pleaser!"

Game Plan

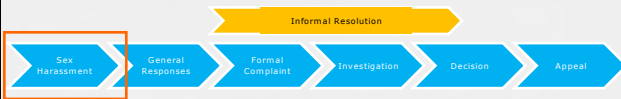
- What is sexual harassment under Title IX?
- What is the timeline for the process?
- What do the new regs require for administering Title IX generally?
- How should schools respond to complaints?
- How do we investigate complaints?
- How do we make decisions on responsibility?
- How do we avoid conflicts of interest and biases?
- How do students appeal?
- What confidentiality concerns do we have?
- How does special education factor into the Title IX process?


Title IX Team Training: Sexual Harassment





Overview of Grievance Process






Sexual Harassment

- Quid Pro Quo
- "Severe, Pervasive, AND Objectively Offensive"
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking


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Sexual Harassment

- "Quid Pro Quo" – district employee conditioning the provision of a district aid, benefit, or service on an individual's participation in unwelcome sexual conduct

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Sexual Harassment

- 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 district's education program or activity (*Gebser/Davis*)

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Doe v. Univ. of Kentucky* (6th Cir. 2020)
 - Severe = something more than just juvenile behavior;
 - Pervasive = multiple incidents of harassment; and
 - Objectively offensive = behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively.

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
 - Fifth-grade classmates in elementary school
 - Dec. 1992: G.F. attempted to touch LaShonda's breasts and genital area
 - "I want to get in bed with you"
 - "I want to feel your boobs."
 - Jan. 1993: Similar conduct on two more occasions

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
 - Feb. 1993: G.F. placed a door stop in his pants and acted in a sexually suggestive manner to LaShonda Davis during PE
 - One week later, more harassing behavior
 - Apr. 1993: G.F. rubs his body against LaShonda in the school hallway in what LaShonda considered sexually suggestive manner.
 - May 1993: G.F is charged with and pleads guilty to sexual battery

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
 - G.F.'s misconduct over five months was severe, pervasive, and objectively offensive

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Gabrielle M. v. Park Forest-Chicago Heights* (7th Cir. 2003)
 - Kindergarten
 - Jason jumped on Gabrielle's back at recess
 - Jason leaned against Gabrielle with his hands on his crotch.
 - Jason unzipped his pants and showed other students his underwear while the teacher's back was turned.

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Gabrielle M. v. Park Forest-Chicago Heights*
 - Two days later, Jason again unzipped his pants.
 - Five days later, Jason and another classmate, Ashley, had their hands down each others' pants during story-time.
 - Five children (including Jason and Gabrielle) meet with school psychologist and share that during the previous week they had kissed and jumped on top of each other at recess

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Gabrielle M. v. Park Forest-Chicago Heights*
 - School Psychologists Notes:
 - It was "becoming apparent that these Kindergartners were not fully aware of the seriousness of their actions."

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Gabrielle M. v. Park Forest-Chicago Heights*
 - Court found that children were unaware of the sexual nature of their behavior.
 - The children were not engaging in "knowingly sexual acts."
 - Detracts from the severity and offensiveness of their actions.
 - Gabrielle was not denied access to education
 - Grades remained steady. Absenteeism did not increase

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Bruning v. Carroll Cmty. Sch. Dist.* (N.D. Iowa 2007)
 - Middle School
 - Breasts and buttocks were grabbed on multiple occasions by Steven, Jerry, and Chris.
 - Laser pointers aimed at plaintiffs' private areas
 - Kicked
 - Shocked with a shocking pen
 - Poked in their crotch areas with pens and pencils

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

▪ *Bruning v. Carroll Cmty. Sch. Dist.* (N.D. Iowa 2007)

- Spat on
- Hair pulled
- Scratched by staples
- Had heads pulled down to the boys' crotches
- Spitballs shot at plaintiffs on school bus
- Boys would put their legs between the girls crotches during lunch

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

▪ *Bruning v. Carroll Cmty. Sch. Dist.* (N.D. Iowa 2007)

- Boys would look under lunch table to see between the plaintiffs' legs.
- Conduct occurred with some frequency over a period of several months, during two different grades
- S, P, and OO

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

▪ *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)

- Between 6th and 10th grade, Wolfe was ridiculed by fellow students on numerous occasions
- Several times per week, pushing, shoving, name-calling, and being falsely labeled as homosexual
- "Faggot," "queer bait," and "homo"
- 7th grade: punched and had head slammed into window while riding the bus

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)
 - 9th grade: Facebook page
 - “Every One That Hates Billy Wolfe”
 - Wolfe’s face photo-shopped onto a figure in a green fairy costume with the word “HOMOSEXUAL” written across it.
 - Graffitied highly offensive, homosexual accusations about Wolfe on bathroom walls and in classroom textbooks.

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)
 - 10th grade:
 - Wolfe got into a fight with a classmate
 - Two days later, classmate jumped out of a car and punched Wolfe while Wolfe was walking home

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)
 - School District did not deny incidents of harassment, BUT
 - Claimed that the motive underscoring the misconduct was not sex-based
 - Students and teachers explained that they did not perceive Wolfe as homosexual

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)
 - Name-calling was not intended to attach Wolfe’s sexuality
 - Was an angered response to Wolfe’s mistreatment of other students
 - Classmates suggested that they accosted Wolfe b/c he had previously bullied a friend of theirs suffering from cerebral palsy.

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)
 - Case is TRIED to a jury
 - Jury Verdict in favor of the School District
 - Wolfe challenged the jury instruction requiring that the harasser be motivated by Wolfe’s sex
 - 8th Circuit Disagreed:
 - Proof “of sex-based motivation is required for a Title IX deliberate indifference claim.”

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)
 - Name-calling, by itself, does not amount to sex-based harassment, even if the words are gender-specific, unless the underlying motivation for the harassment is hostility toward the person’s gender (or failure to conform with gender stereotypes).

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Carmichael v. Galbraith* (5th Cir. 2014)
 - Jon Carmichael was a 13-yr old middle school student
 - Committed suicide after allegedly being bullied by his fellow students
 - On “numerous occasions,” accosted by a group of boys in the locker room
 - Oftentimes having his underwear removed

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Carmichael v. Galbraith* (5th Cir. 2014)
 - During the last incident, shortly before suicide:
 - Members of the football team stripped Jon nude and tied him up
 - Placed Jon in a trashcan calling him “fag,” “queer,” and “homo”
 - A number of students observed the behavior
 - Once student videotaped the attack and uploaded it to YouTube

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Carmichael v. Galbraith* (5th Cir. 2014)
 - Complaint alleged that harassment was based on gender or gender-based stereotypes
 - District Court dismissed complaint
 - Single instance of student-on-student harassment was not pervasive

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Carmichael v. Galbraith* (5th Cir. 2014)
 - Fifth Circuit Reversed
 - District court ignored “multiple” instances of boys in locker room harassing Jon, including removing underwear
 - “The removal of a person’s underwear without their consent on numerous occasions plausibly constitutes pervasive harassment of a sexual character.”

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *Carmichael v. Galbraith* (5th Cir. 2014)
 - Fifth Circuit Reversed
 - Depending on the “constellation of surrounding circumstances, expectations, and relationships,” uninvited contact with the private parts of either the victim’s or harasser’s body has often been held to constitute sexual harassment under Title IX.”
 - Series of incidents where Jon’s underwear was forcibly removed could constitute numerous acts of objectively offensive touching.

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *I.F. v. Lewisville Indep. Sch. Dist.* (5th Cir. 2019)
 - HS freshman I.F. raped at an off-campus, private party
 - Following Monday, classmates bully I.F.
 - “Whore,” “Slut,”
 - Asked whether she had sex with multiple people
 - “How did it feel to be f****d in every single hole of your body”

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *I.F. v. Lewisville Indep. Sch. Dist.* (5th Cir. 2019)
 - Assailant wore pants that he raped I.F. in, which had blood on them from intercourse, and stood on the lunch table and said, these are the pants that I took I.F.'s virginity in
 - One student asked I.F. the race of the baby she would be having

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *I.F. v. Lewisville Indep. Sch. Dist.* (5th Cir. 2019)
 - Multiple football players called I.F. a liar and told her she was going to ruin everything
 - Online harassment; students commenting on I.F.'s alleged assault on Twitter and Instagram
 - I.F. felt suicidal and depressed, began cutting herself, had nightmares, and experienced panic attacks

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**Sexual Harassment:
Severe, Pervasive, and Objectively Offensive**

- *I.F. v. Lewisville Indep. Sch. Dist.* (5th Cir. 2019)
 - Severe, Pervasive, and Objectively Offensive

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Examples of S, P, and OO

- Each time female kindergarten student wears a dress to school, high school student on bus bullies kindergartner into lifting her skirt, pulling down her pants, and spreading her legs.
 - *Fitzgerald v. Barnstable Sch. Comm.* (1st Cir. 2007)
- Head soccer coach persistently and openly pried into and discussed the sex lives of his players and made sexually charged comments, creating a hostile environment in the women's soccer program.
 - *Jennings v. Univ. of N.C.* (4th Cir. 2007)


Examples of NOT S, P, and OO

- One incident of non-consensual kissing
 - *Doe v. Miami Univ.* (6th Cir. 2018)
- One incident of a male student briefly flicking the chest of female complainant (and complainant kneeling him in the groin in response)
 - *Sanchez v. Brawley Elem. Sch. Dist.* (9th Cir. 2018)
- Two isolated instances—one student touching the plaintiff's shoulder and another student touching the plaintiff's breast—which ceased immediately after they occurred
 - *Adusumilli v. Ill. Inst. of Tech* (7th Cir. 1999)



Sexual Harassment: Sexual Assault


- **Sexual Assault**
 - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation



Sexual Harassment: Sexual Assault

- **Sex Offenses, Forcible**
 - Any sexual act directed against another person, without the **consent** of the victim including instances where the victim is incapable of giving consent


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Definition of "Consent"

- The willingness in fact for conduct to occur.
- An individual may be incapable of providing consent to some or all sexual conduct or activity.
 - E.g., Age, incapacity, disability, lack of information, or other circumstances.

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Definition of "Consent"

- Neither verbal nor physical resistance is required to establish that an individual did not consent.
- Consider the totality of the circumstances in determining whether there was consent for any specific conduct.
- Consent may be revoked or withdrawn at any time.

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Sexual Harassment: Forcible Sexual Assault

- **Rape** (Except Statutory Rape)
 - The carnal knowledge of a person,
 - Without the consent of the victim,
 - Including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

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Sexual Harassment: Forcible Sexual Assault

- **Sodomy**
 - Oral or anal sexual intercourse with another person
 - Without the consent of the victim,
 - Including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity


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Sexual Harassment: Forcible Sexual Assault


- **Sexual Assault With An Object**
 - To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person
 - Without the consent of the victim
 - Including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity

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 **Sexual Harassment:
Forcible Sexual Assault**


- **Fondling**
 - The touching of the private body parts of another person
 - For the purpose of sexual gratification
 - Without the consent of the victim
 - Including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity

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 **Sexual Harassment:
Forcible Sexual Assault**


- **Fondling?**
 - *Gabrielle M. v. Park Forest-Chicago Heights* (7th Cir. 2003)
 - Kindergartners touching classmates private parts
 - Unaware of sexual nature of conduct
 - Probably not for the purpose of sexual gratification
 - Probably not sexual assault

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 **Sexual Harassment:
Forcible Sexual Assault**


- **Fondling?**
 - *Doe v. Dardanelle Sch. Dist.* (8th Cir. 2019)
 - High school setting
 - Reaching up girl's shorts and touched outside of her "private parts."
 - Grabbing girl's breast over her shirt.
 - Probably for purposes of sexual gratification
 - Probably sex assault
 - Notice different outcome from prior standard

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 **Sexual Harassment:
Non-forcible Sexual Assault**


- **Sex Offenses, Non-Forcible** (Except Prostitution Offenses)
 - Unlawful, non-forcible sexual intercourse.

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 **Sexual Harassment:
Non-forcible Sexual Assault**

- **Incest**
 - Non-Forcible sexual intercourse
 - Between persons who are related to each other within the degrees wherein marriage is prohibited by law

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 **Sexual Harassment:
Non-forcible Sexual Assault**

- **Statutory Rape**
 - Non-Forcible sexual intercourse with a person
 - Who is under the statutory age of consent

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Sexual Harassment: Dating Violence

- Violence committed by a person—
 - who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship.
 - The type of relationship.
 - The frequency of interaction between the persons involved in the relationship.

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Sexual Harassment: Domestic Violence

- Includes felony or misdemeanor crimes of violence committed by a
 - Current or former spouse or intimate partner of the victim,
 - Person with whom the victim shares a child in common,
 - Person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,

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Sexual Harassment: Domestic Violence

- Includes felony or misdemeanor crimes of violence committed by
 - A person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or
 - Any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

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Sexual Harassment: Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - Fear for his or her safety or the safety of others; or
 - Suffer substantial emotional distress.

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Welcome to School District 1776



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District Buildings



Patriot Elementary School



Minuteman Middle School



Lincoln High School



Title IX Parties

- Complainant
 - An individual who is alleged to be the **victim** of conduct that could constitute sexual harassment
 - Must be an individual participating or attempting to participate in district's programs at the time of formal complaint
 - Formal complaint may be lodged by complainant (or parent/guardian) or Title IX Coordinator



Title IX Parties

- Respondent
 - An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
 - Recipient has discretion to dismiss a formal complaint where the respondent is not enrolled or employed by the recipient
 - 34 CFR § 106.45(b)(3)(ii)




Title IX Roles

- Title IX Coordinator
- Investigator
- Decision Maker
- Appellate Decision Maker
- Informal Mediator

 **Title IX Coordinator**



Activities Director Dolley Madison

 **Title IX Coordinator (TixC)**

- Each recipient must designate and authorize at least one **employee** to coordinate its efforts to comply with its responsibilities under Title IX
- Responsible for:
 - Overseeing Title IX compliance
 - Receiving formal complaints
 - Ensuring any remedies are carried out
- May serve as investigator in grievance process
- May **not** serve as decision-maker or appellate decision-maker

Who can serve as Title IX Coordinator?

- Must be an "employee" 34 C.F.R. § 106.8(a)
- Should report directly to board or superintendent
- Should be able to have input into policies
- Should be able to conduct fair and efficient investigations
- Should be able to document investigations and other compliance efforts by the school
- Should be invested in gender equality

Core Responsibilities of Title IX Coordinators

- Develop and maintain a working knowledge of Title IX and relevant state laws
- Monitor school district's compliance with legal requirements
 - Ensure school district has required policies and procedures in place
 - Conduct evaluations of school compliance
 - Arrange for training for staff and students
 - Provide and update resources
 - Ensure prompt and effective processing of complaints



Investigator



Guidance Counselor Aaron Burr



Investigator


- New role for sex harassment only
- Responsible for investigation of formal complaint
- Must follow regulatory requirements in conducting investigation
- Not required to be an employee
- May be Title IX Coordinator
- May not be decision-maker or appellate decision-maker

KSB
SCHOOL BOARD

Decision-Makers



**High School
Principal Thomas
Jefferson**



**Elementary
Principal Sally
Hemmings**



**Middle School
Principal John
Adams**


KSB
SCHOOL BOARD

Decision-Maker

- Again, new role for sex harassment only
- Issues written determination in grievance procedure after receiving investigative report from investigator and facilitate opportunity for parties to submit questions
- Not required to be an employee
- May not be Title IX Coordinator, Investigator, and Appellate Decision-Maker
- Recommended that you align decision-maker role with similar roles in general disciplinary processes

KSB
SCHOOL BOARD

Appellate Decision-Maker



Superintendent George Washington



Appellate Decision-Maker

- For sex harassment only: recipient must offer both parties an appeal on specific bases
- For other Title IX issues: appellate decision-maker is still a good idea
- Appellate decision-maker not required to be an employee
- May not be Title IX Coordinator, Investigator, or Decision-Maker

Hypothetical

- Alexander Hamilton is in his senior year at Lincoln High School. His favorite coach is the assistant hockey coach, Ms. Abigail Adams.
- Dolley Madison is the Activities Director and TixC and has arranged for all staff, including Coach Adams, to be trained in recognizing sex harassment.
- Alex is dating Maria Reynolds and the pair is elected homecoming King and Queen. After the dance, Coach Adams hears rumors that "something bad" happened between them in Alex's truck in the parking lot after the dance.
- Maria has Coach Adams for English, a class in which students are required to journal. In her journal Maria writes that Alex forced her to have sex with him in his truck but she doesn't mention where.

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Hypothetical

- Does Coach Adams have to report?
 - Can she pull Alex and Maria into her room to ask them what is going on?
 - Can she call Alex's parents?
- If so, to whom?
- After getting the report, what does Dolley Madison do?
 - Can she talk things over with Aaron Burr, the guidance counselor?
 - Can she talk things over with Thomas Jefferson, the high school principal?
 - Can she talk things over with George Washington, the superintendent?
- If Dolley files a TIX complaint, who does what?
 - Burr - investigation
 - Jefferson - wait for report
 - Washington - wait for possible appeal

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Title IX Team Training: Administration of the Title IX Program



"The buck does stop here. Then the buck and I have some coffee, chat for a bit, and I send it down to Simmons. Let him deal with it."

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Administration Overview

- Policy Requirements
- Notice Requirements
- Publication Requirements
- Training Requirements
- Documentation and Record-Keeping
- Complaints of Harassment/Discrimination not Sexual Harassment



Heavy is the Head...

- Each recipient designates at least one Title IX Coordinator to "coordinate its efforts to comply with its responsibilities" under the regulations
- Explicitly mentioned
 - Ensure grievance procedure is followed
 - Respond to harassment, complaints and inquiries
 - Coordinate provision of supportive measures
 - Implement remedies
- Implicit
 - Coordinate to fulfill all the other obligations (training, policies, notices, etc.)



Policy Requirements

- Must have Title IX policy prohibiting discrimination on the basis of sex in any education program or activity it operates, and that it is required by Title IX not to discriminate in such a manner
 - Policy should specify that requirement not to discriminate extends to admission and employment
 - Should state that inquiries about Title IX may be referred to Coordinator or assistant secretary
 - 34 C.F.R. § 106.8(b)(1)



Grievance Procedures

- Required to adopt "grievance procedures"
 - Not necessarily in "policy" but we recommend it
- Grievance procedures must:
 - Provide for the prompt and equitable resolution of student and employee complaints alleging **any** action that would be prohibited by this part
 - Think general complaint process
 - Provide processes that comply with § 106.45 to address formal complaints



Notice Requirements

- Provide notice of:
 - Title IX Policy
 - Grievance Procedures
 - Including how to file a complaint
 - Including processes undertaken in response to complaint
 - Notice of nondiscrimination
 - Including extension to admission/employment
 - Including ability to make inquiries to coordinator and ED Assistant Secretary
 - Notice of designated coordinator and contact information



Notice Requirements

- Notices must be provided to:
 - Applicants for admission and employment
 - Students
 - Parents or legal guardians of elementary and secondary school students
 - Employees
 - All unions or professional organizations holding collective bargaining or professional agreements with the recipient



Handbooks and Catalogs

- Handbooks and catalogs must prominently display:
 - Grievance procedures
 - Including how to file a complaint
 - Including processes undertaken in response to complaint
 - Notice of nondiscrimination
 - Including extension to admission/employment
 - Including ability to make inquiries to coordinator and ED Assistant Secretary
 - Notice of designated coordinator and contact information



Website

- Website must **prominently display** (i.e., its own page)
 - Grievance Procedures
 - Including how to file a complaint
 - Including processes undertaken in response to complaint
 - Notice of nondiscrimination
 - Including extension to admission/employment
 - Including ability to make inquiries to coordinator and ED Assistant Secretary
 - Notice of designated coordinator and contact information
- Website must have available ALL materials used to train TIX Coordinators, investigators, decision-makers, and informal resolution facilitators
- We recommend including a link to submit complaint



Be Consistent

"A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part."
 • 34 C.F.R. § 106.8(b)(2)(ii)



Training Requirements

- Title IX Coordinator, investigator, decision-maker and any informal resolution facilitator must receive training on:
 - Definition of sexual harassment in § 106.30
 - Scope of the recipient's program or activity
 - How to conduct an investigation and grievance process – including hearings, appeals, and informal resolution processes
 - How to serve impartially and avoid prejudgment, conflicts, and bias



Training Requirements

- Decision-makers must receive training on:
 - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- Investigators must receive training on:
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section



Training Requirements

"Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment."

- 34 C.F.R. 106.45(1)(iii)



Documentation and Record Keeping

- Must maintain for a period of seven years records of:
 - Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
 - Any appeal and the result therefrom;
 - Any informal resolution and the result therefrom; and
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process



Documentation and Record Keeping

- Must maintain for a period of seven years records of:
 - Any action in taken in response to a report or formal complaint of sexual harassment
 - Document the basis for its conclusion that its response was not deliberately indifferent
 - Document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
 - If no supportive measures provided, document the reasons why such a response was not clearly unreasonable in light of the known circumstances



Clarifications

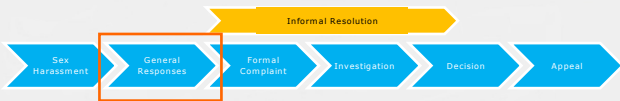
"Any record that the recipient creates to investigate an allegation, regardless of later dismissal or other resolution of the allegation, must be maintained for seven years. Therefore, recipients must preserve all records, even those records from truncated investigations that led to no adjudication because the acts alleged did not constitute sex discrimination under Title IX and the formal complaint (or allegation therein) was dismissed. The Department also wishes to clarify that the date of the record's creation begins the seven year retention period."
• 85 FR 30026


Title IX Team Training: Responding to ALL Allegations of Sex Harassment






Overview of Grievance Process



 **General Response to ALL Allegations of Sexual Harassment**
(with or without formal complaint)


- If the district has:
 - actual knowledge
 - of sexual harassment
 - in an education program or activity
 - against a person in the United States
- The district must respond
 - promptly
 - in a manner that is not deliberately indifferent

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 **General Response to ALL Allegations of Sexual Harassment**
(with or without formal complaint)


- District is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances
- Rejects the "known or reasonably should have known" standard imposed by rescinded guidance

101

 **Actual Knowledge**


- Notice of **sexual harassment** or allegations of **sexual harassment** to:
 - Title IX Coordinator
 - Any official of the respondent who has authority to institute corrective measures
 - Any employee

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 **Actual Knowledge**


- **Actual knowledge** will not be imputed to the district *based solely* on vicarious liability or constructive notice
- No **Actual Knowledge** when the only district employee with **actual knowledge** is the **respondent**




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 **Education Program or Activity**

- Includes locations, events, or circumstances over which the district exercised
 - (1) substantial control over both the respondent, AND
 - (2) the context in which the sexual harassment occurs
- Electronic or in person
- Does not say "on campus" or "off campus"

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 **Duty to Respond?**






- Alexander Hamilton (HS Student)
- Maria Reynolds (HS Student)
- After the dance, Coach Adams hears rumors that "something bad" happened between them in Alex's truck in the parking lot after the dance
- Maria's Journal: Alex forced her to have sex with him in his truck but she doesn't mention where

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SCHOOL LAW

Duty to Respond?




- Actual Knowledge ✓
- Allegations of Sexual Harassment ✓
- Education Program or Activity ?
- In the U.S. ✓

106

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Duty to Respond?



- Truck in school parking lot ✓
- Truck parked in cornfield outside of county, unrelated to any school activity ✗
- Truck parked on side of road when students are returning from golf practice ✓


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SCHOOL LAW

General Response to ALL Allegations of Sexual Harassment (with or without formal complaint)


- Title IX Coordinator MUST
 - Promptly contact the complainant to discuss the availability of supportive measures
 - Consider the complainant's wishes with respect to supportive measures
 - Supportive measures are available whether a formal complaint is filed or not
 - Explain to the complainant the process for filing a formal complaint

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 **General Response to ALL Allegations of Sexual Harassment**
(with or without formal complaint)


- Must treat parties equitably:
 - Offer supportive measures to complainant
 - Follow the formal grievance process **before imposing any disciplinary sanctions against respondent**
- Until the end of the grievance process,
 - **No Student Discipline**
 - **No Adverse Employment Action**

109

 **General Response to ALL Allegations of Sexual Harassment**
(with or without formal complaint)


- Respondents are presumed to be "not responsible for the alleged conduct until a determination regarding responsibility is made *at the conclusion of the grievance process.*"
 - 34 C.F.R. § 106.45(b)(1)(iv) (emphasis added)

110

 **Supportive Measures**


- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available, and without fee or charge to the **complainant** or the **respondent**
- Offered before or after the filing of a **formal complaint** or where no **formal complaint** has been filed

111

 **What CAN the school do immediately?**



- Emergency Removal
 - BUT, district MUST
 - undertake an individualized safety and risk analysis,
 - determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and
 - provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.
 - Doesn't modify rights under IDEA, Section 504, or the ADA

112


 **What CAN the school do?**

- Administrative Leave for Non-Student Employees
 - Doesn't modify rights under Section 504 or the ADA
 - Check state law processes for forced leaves of employees

113

 **Back to Lincoln HS** 

- Coach/Teacher Adams reports allegations of sexual harassment to Title IX Coordinator Dolley Madison (GOOD!)



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Back to Lincoln HS

- Can Title IX Coordinator Dolley Madison
 - Offer counseling to Maria ✓
 - Extend Maria's deadlines for coursework ✓
 - Grant Maria a leave of absence ✓
 - Suspend Alexander during preliminary fact-gathering ⓧ
 - Emergency remove Alexander ?
 - Exclude Alexander from Maria's calculus class ?

Title IX Team Training: Formal Complaints

"Stop calling it a 'head scratcher!' I know it's a 'head scratcher!' Stop saying 'head scratcher!!!"

Overview of Grievance Process



Formal Complaint

- A document filed by a **complainant** or signed by the Title IX Coordinator alleging **sexual harassment** against a **respondent** and requesting that the district investigate the allegation of **sexual harassment**
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Formal Complaint

- May be filed with the Title IX Coordinator in person, by mail, by email, and "by any additional method designated" by the district

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Formal Complaint

- Is a document or electronic submission that includes **complainant's** digital or physical signature or otherwise indicates that the **complainant** is the person filing the **formal complaint**
- A Title IX Coordinator who signs the **complaint** IS NOT a **complainant** or a party

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Formal Complaint

- At the time of filing, a **complainant** must be participating in or attempting to participate in the district's education program or activity
- September 4, 2020 OCR Q & A

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OCR Q & A: Question 5 September 4, 2020

- "If a complainant either withdraws from school because of sexual harassment and then files a complaint, or files a complaint but then withdraws as a result of the sexual harassment or stress of the grievance process, how would the regulations affect the complainant's ability to pursue a formal complaint?"

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OCR Q & A: Answer 5 September 4, 2020

- Leave of Absence
 - May still be enrolled
 - May intend to re-apply after LOA
- "By way of further example, 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."

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OCR Q & A: Answer 5 September 4, 2020

- TixC may also sign formal complaint regardless of whether complainant is "participating or attempting to participate" in the school's education program or activity
- TixC's decision is evaluated under the deliberate indifference standard
 - Whether the decision was clearly unreasonable in light of the known circumstances

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Formal Complaints Hypo

- Alexander Hamilton is in his senior year at Lincoln High School. His favorite coach is the assistant hockey coach, Ms. Abigail Adams
- Dolley Madison is the Activities Director and TixC and has arranged for all staff, including Coach Adams to be trained in recognizing sex harassment
- Coach Adams would regularly text with her players to communicate regarding practices and when the rink would be open
- In the middle of the season in January, Alexander abruptly decides to drop out of school the day after he turns 18
- In February, he sends the following text message to Coach Adams:
 - Hey Coach, I wanted to tell you I'm sorry I quit right after the season. I just didn't think I could do school anymore. My ex-girlfriend Maria Reynolds and I broke up and she got really upset when I ended it. She was a bit needy and I just couldn't do it anymore, but she got way worse after we broke up. She has stalked me on snap and insta ever since, saying she's watching me and that she can't wait for me to come back to school so we can get back together. It really freaked me out the way she said some stuff and I just couldn't come to school anymore. I'm sorry

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Is this a "formal complaint?"

- Is a document or electronic submission that includes **complainant's** digital or physical signature or otherwise indicates that the **complainant** is the person filing the **formal complaint**
 - Here: no signature, no request for action
 - Probably not a "complaint"

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Is this "Sexual Harassment?"

- Remember: 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 district's education program or activity (*Gebser/Davis*)

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What should Abigail Adams do?

- Benefits and costs of initiating a complaint
 - Complaint triggers new TIX procedures
 - No complaint: has Maria violated code of conduct?
 - Our advice: probably file

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Formal Complaints Hypo

- What if Alex's text asks Coach Adams to help him come back to school?
- What if Alex's mom is the one who reaches out to Coach Adams?
- What if Alex was still enrolled?
- What if Alex hadn't texted Coach Adams, but she saw that he posted this on Instagram?
- What if Maria posts nasty things about Alex on her Snapchat story and Coach Adams sees the story?
- What if Coach Adams doesn't say anything to AD Madison?

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Title IX Coordinator's Role in Responding to Formal Complaint

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Overview of Grievance Process

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Title IX Coordinator's Role in Responding to Formal Complaint

- Title IX Coordinator
 - Posting required notices
 - Receive formal complaints
 - Consider factors for dismissal

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Required Notices During Grievance Process

- Before Investigation Begins-
 - Initial notice of investigation to *BOTH parties*
 - As soon as practicable after formal complaint received
- After Dismissal
 - Notice of Dismissal to both parties
- During Investigation
 - Notice of Interview to parties
 - Notice of Evidence to Parties (from investigator)

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When to Dismiss?



"Counsel, please advise your client to knock off the smirking and conspicuous winking while entering his plea."

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Title IX Coordinator's Role— When to Dismiss?

- District ***must*** dismiss the complaint if the allegations:
 - Would not constitute sexual harassment even if proved
 - Did not occur in the district's education program or activity
 - Did not occur against a person in the United States

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Title IX Coordinator's Role— When to Dismiss?

- District **may** dismiss if
 - Complainant requests (in writing to TixC) to withdraw the formal complaint**;
 - Respondent is no longer enrolled or employed by the district
 - Specific circumstances prevent district from gathering evidence sufficient to reach a determination

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Title IX Coordinator's Role— When to Dismiss?

- If the district dismisses, must provide notice of dismissal to both parties
- Notice must contain rationale for dismissal
- Whether it was mandatory or permissive

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Title IX Coordinator Response Hypo— More Trouble at Lincoln High

- Title IX Coordinator Dolley Madison receives an email regarding sexual harassment
 1. Angelica Church, 17, alleges Mr. Franklin, a physics teacher, slapped her butt last year when she saw him at a restaurant.

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Title IX Coordinator Response Hypo— Angelica and Mr. Franklin

- Give initial notices to both parties first
- Dismissal? Go through the steps
 - Would it constitute sex harassment if proved? Probably (see fondling definition).
- Educational Program or Activity?
 - Happened off-campus, outside school hours, not as part of any sanctioned activity
- Dismissal probably required (might want to consider when deciding to renew contract, though)



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Investigations



"You're not getting warmer. You're not getting colder either. You gave up like a half hour ago, didn't you."

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Overview of Grievance Process



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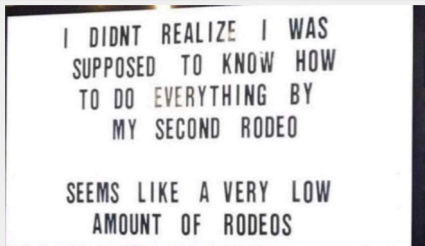
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Investigator



Guidance Counselor Aaron Burr

Investigation Best Practices



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The Investigation

- Must be *prompt, thorough, impartial, and without bias*
- Treat all with respect and dignity
- Make no assumptions
- At a minimum should include interviews with the victim, the alleged harasser, and anyone else who can provide relevant information
- DOCUMENT, DOCUMENT, DOCUMENT

The Investigation

- Coordinate investigation with law enforcement or others as necessary or appropriate
 - School has the legal obligation to conduct a prompt investigation
 - 34 C.F.R. § 106.45 includes "law enforcement activity" as a "good cause" to delay "reasonably prompt" timelines
- Keep criminal, child abuse, and professional reporting obligations in mind

Understand the Claim

- Conduct a thorough interview of the complainant and identify specific allegations made
- Identify specific provisions of law or parts of school policy alleged to have been violated
- Conduct a thorough interview of the complainant and identify defenses

Create a Plan

- Written list of witnesses
- Written list of questions
- Written list of documents



Time for investigation?

- Review time line and plan accordingly
 - In addition to time taken to actually compile evidence, the parties must have **at least ten days** to review all evidence before a decision can be made by the decision maker
- Time limit?
 - Regulations say the grievance process must have "reasonably prompt time frames for conclusion of the grievance process"
 - Investigation should take less time if facts are straightforward

Keep Parties Informed

- No specific requirements to update parties at every step (other than notice of interviews and submission of evidence at end of investigation)
- However, keeping parties informed can make the process run more smoothly

Credibility determinations and decision-making

- Credibility determinations
 - Cannot be made based on status of complainant, respondent, or witness
 - Generally left to the D-M, especially when they impact responsibility determinations
 - Investigator should report facts regarding physical behavior and indicators of reliability and truthfulness during interviews
- Decision-making left to decision maker
 - Investigator should include facts that would bear towards responsibility or non-responsibility, but notes and report should not state any determination by the investigator

Interviews



Interviews

- "Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with **sufficient time** for the party to prepare"
- 34 CFR 106.45(b)(5)(v)

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Witness Interviews

- Review any documents, videos, and other tangible evidence prior to interviews as appropriate
- Bring relevant documents to interview
- Outline and develop standard questions before the interview
 - Write out key questions and ask them the same way to every witness

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Witness Interviews

- Interviews should be somewhere private with limited interruptions
- Record? Take notes?
 - Taking notes during the interview—may slow down the interview but this is not necessarily a negative as it can help detect deception if party is nervous about your note taking
 - Should take place throughout interview, not just at incriminating or deceptive moments

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Witness Interviews

- Take your time!
- Introduce yourself and explain your role
- Explain purpose of interview and how information will be used
- Make clear they are not obligated to participate and the school can't retaliate against that decision
- Employ empathy while maintaining professionalism

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Witness Interviews

- Interview witnesses separately
- Tell the person he or she must tell the truth, even if it is difficult
- Don't promise confidentiality
 - But, limit the disclosure of information to people who really need to know
- Gather facts, not opinions or guesses
- Use "who, what, where, when, why, and how" questions

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Witness Interviews

- Investigate any bias the complainant or witnesses may have against the respondent
- Ask simple questions, not compound questions
- Let witnesses answer your questions in their own words
 - Do not suggest answers and do not help them with their answers
- Start with broad open-ended questions and get more specific as needed

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Witness Interviews

- Don't use leading questions
- Don't shy away from uncomfortable questions
- Question with empathy and understanding
 - It's not an interrogation

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Witness Interviews

- Have witnesses tell you what they know from personal knowledge and what they know from other sources
- Listen to "hearsay" but record it as hearsay
- Try to obtain information in chronological order to the extent possible
- Identify potential witnesses

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Witness Interviews

- Be comfortable with silence
- Consider obtaining legibly written (or typed) and signed statements
- Retaliation is prohibited
 - If they are threatened, harassed, etc., come to you
- Don't make promises about outcomes

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Witness Interviews

- Review your notes before the interview concludes; clarify anything you are unclear about
- Notes should be complete and detailed
 - Important for assessing credibility
 - Decision may turn on small details
- Where possible, include verbatim statements on critical issues – paraphrasing can later become problematic

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Witness Interviews

- Ask if there is anything the complainant wants to tell you that you didn't ask
- Contact you if they think of anything else
- Gather any additional documents, videos, or other tangible evidence
- Conduct as many follow-up interviews as are needed

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Dangerous Words

While interviewing complainant, be careful that these words don't come out of your mouth:

- It's just teasing- no big deal.
- The people in our school would never do...
- I know he/she didn't mean anything like that.
- You need to learn to handle these things.
- If you won't file a written complaint our hands are tied
- When it is he said she said I can't do anything
- Boys will be boys or Kids will be kids



Dangerous Words

While interviewing respondent, be careful that these words don't come out of your mouth:

- Why are you lying?
- You're in trouble
- You should not have done this
- How do you think this made her feel?



Investigation Hypo



- Maria Reynolds brings a complaint against Alexander Hamilton, alleging he sexually assaulted her in school
- She brings a formal complaint to Title IX Coordinator, Abigail Adams, who assigns Guidance Counselor Aaron Burr to investigate the complaint
- Ms. Adams reports the behavior as a crime and provides Maria and Alexander with the initial notice that the complaint has been filed



Investigation Hypo: Starting off



- What should Burr's first steps be?
 - Outline interview process/steps
 - Notice parties of interviews
 - Consider who else to interview
 - Consider other possible evidence
 - Prepare interview questions



Investigation Hypo: Approaching interviews



- Notice of Interviews
 - Must give sufficient time to prepare
- What to ask Reynolds?
 - Get as many specifics as possible
 - Consider facts and evidence needed to allow decision maker to make responsibility determination, such as
 - What exact words did Hamilton use?
 - Where and when did this happen?
 - How has this affected her education?
 - What's her history with Hamilton?



Investigation Hypo: Approaching interviews



- What to ask Hamilton?
 - Confront on the specific allegations made by Reynolds and keep asking until the response is clear
 - May ask about respondent's prior sexual behavior or predisposition, but not complainant's



Investigation Hypo: No stone unturned



- Other evidence?
 - Staff member witness interviews?
 - Student witness interviews?
 - Don't need to be direct witnesses to the incident to be relevant
 - Video evidence?
 - Evidence from law enforcement investigation?



Investigation Hypo: Parallel Investigations



- Police involvement
 - Police conduct an investigation over the next few days and school is notified the state's attorney does not plan on bringing charges against Hamilton
 - Any affect on school's obligations?



Parties' Rights During Investigation—Right to Present Witnesses

- Parties must have the opportunity to present witnesses during investigation
 - Can be both fact and expert witnesses if they wish
- The investigation must "[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence" 34 CFR 106.45(b)(5)(ii)

**Parties' Rights During Investigation—
Discussion of Allegations**

- "Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence"
 - 34 CFR 106.45(b)(5)(iii)
- Parties must be able to discuss allegations with anyone
 - Limited to the allegations themselves
 - Can place limits on discussion of the evidence outside of the Tix process
 - Regulations allow for school to require NDAs if no formal complaint is filed

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**Parties' Rights During Investigation—
Discussion of Allegations**

- Exceptions
 - No contact directives as part of supportive measures
- Possible First Amendment concerns?

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**Parties' Rights During Investigation—
Right to Advisor**

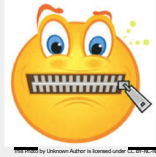
- "Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties"
 - 34 CFR 106.45(b)(5)(iv)

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Parties' Rights During Investigation— Protection from Retaliation

- Prohibition against retaliation
 - Cannot hold a party's (or a witness's) refusal to participate in the process against them
 - "Right to remain silent"
 - Applies both to investigation and employment



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Investigation Hypo: Dead to Rights?



- Burr issues a notice to Hamilton that his interview will take place in two days in the school conference room
- Hamilton responds that his attorney cannot attend that day, and he refuses to proceed without his attorney present
- Burr has already obtained video footage confirming Reynolds' allegations
- What next?



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Parties' Rights During Investigation— Reviewing All Evidence

- Review of all compiled evidence
 - Once the investigator has compiled the evidence, ALL of the evidence, including that which he doesn't plan to use, must be disclosed to both parties
 - Parties must then have the chance to meaningfully respond to the evidence before the investigator drafts final report
- 34 CFR 106.45(b)(5)(vi)

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Parties' Rights During Investigation— Reviewing All Evidence

- Review of all compiled evidence
 - Can be submitted electronically
 - Parties must have **at least ten days** to submit a written response to evidence, which investigator must consider prior to drafting report

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Consider Dismissal?

- Once evidence is gathered, investigator should convene with Title IX coordinator to see if dismissal is either permitted or mandated
- Recall permissive vs. mandatory grounds for dismissal

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Burden of Proof

- School is the party responsible for figuring out what happened.
 - Not complainant's job to prove the claims
 - Not the respondent's job to exonerate themselves

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How much needs to be proved?

- Preponderance of the evidence
 - More likely than not
- Clear and convincing evidence
 - When the evidence "instantly tilts the scales in the affirmative when weighed against the evidence in opposition and if it causes the fact finder to have an abiding conviction that the evidence is true," it is considered clear and convincing. *Trickey v. Kaman Indus. Techs. Corp.*, 705 F.3d 788, 799 (8th Cir. 2013).
 - In other words, something highly and substantially more probable to be true than not
- 34 CFR 106.45(1)(vii)

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Report Writing

- 34 CFR 106.45(b)(5)(vii)
- Report must "fairly summarize the relevant evidence"



"Instead of writing my own book report, I've curated the results of previous reports, calculated the consensus opinion, and presented the average score with a cute graphic. I figured it'd save us both some time."

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Report Writing

- Report should include:
 - The names of the parties
 - The parties' representatives, if any
 - Allegations investigated
 - Individuals interviewed and dates of interviews
 - List of exhibits/evidence considered
 - Attach copies

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Report Writing

- Report should include:
 - Summary of facts
 - Include your reasoning for a controversial or contested fact determination
 - Discuss facts related to credibility of witnesses, witness reluctance, witness tampering or retaliation, etc.
 - Statement of Jurisdiction (control over respondent, control over context of allegations, reasons for no mandatory dismissal)
 - Burden of proof (preponderance of the evidence or clear and convincing)

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Report Writing

- Use their words as much as possible
- Should describe any prior relationships between the parties
- Must be sent to each party or the party's advisor
- Can be either in a hard copy or electronically

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Report Writing

- What evidence to put in report?
- Relevant Evidence
 - Relevant evidence means 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
- Who, what, when, how of allegations in the complaint

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Report Writing

- Motive or bias of witnesses and parties
- Objective indications of truthfulness or deceit (e.g. witness looked down during entire interview, witness was sweating and would start and stop sentences frequently, sobbing, etc.)
- Relevant evidence can be both inculpatory (showing responsibility) and exculpatory (showing non-responsibility)

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Investigation Hypo: Evidence Concluded



- Burr has conducted interviews with both parties
- Hamilton alleges he wasn't at school that day but can't remember what he was doing
- Burr submits his evidence to both parties and believes he's ready to draft report
- On the eighth day after he submits evidence to both parties, Hamilton contends it is not him in the video and demands Burr interview a friend of his who can corroborate an alibi
- What are Burr's obligations?



Investigation Hypo: Evidence Concluded



- If Burr drafts report in spite of Hamilton's protests, could invite an appeal
- Desire to wrap investigation up quickly notwithstanding, should probably just do the interview
- Regulations are unclear on whether additional evidence after initial evidence review requires a restart




The Boundary between Investigations and Decision-Making



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Overview of Grievance Process



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Decision-Maker

- Thomas Jefferson is principal and has training as a decision-maker
- Decision maker is a new role for Title IX complaints in sex harassment only
- Determines final responsibility or non-responsibility
- Issues written determination at culmination of grievance procedure

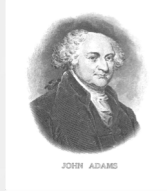


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Boundaries for Decision-Maker and Investigator

- D-M not required to be an employee
- May not be Title IX Coordinator, Investigator, Appellate Decision-Maker, or informal mediator
- Recommended that you align decision-maker role with similar roles in general disciplinary processes
 - Usually the building principal





Investigator/Decision-Maker Boundary—Credibility

- Credibility determinations
 - Cannot be made based on status of complainant, respondent, or witness
 - Generally left to the D-M, especially when they impact responsibility determinations
 - Investigator should report facts regarding physical behavior and indicators of reliability and truthfulness during interviews
- Decision-making left to decision maker
 - Investigator should include facts that would bear towards responsibility or non-responsibility, but notes and report should not state any determination by the investigator

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Credibility Determinations

- Things Investigator can (and should) put into notes and subsequent investigative report:
 - "The complainant's eyes were moving constantly while he spoke."
 - "The respondent made several hand gestures when he was done speaking."
 - "Complainant's voice shook and faltered while she told the story."
 - "Respondent would respond with a raised voice when questioned."



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Credibility Determinations

- Things investigator SHOULD NOT put into notes and subsequent report
 - "The complainant did not appear truthful"
 - "The respondent was believable"
 - "Because of facts x,y, and z, the witness is likely lying"
 - The decision-maker should conclude

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The Investigative Report

- Decisions are the purview of the decision-maker
- Investigator should avoid credibility determinations
- Should include in notes facts that would bear towards responsibility or non-responsibility, but notes and report should not state any inferences to be drawn from those facts



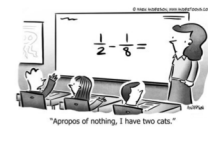
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Relevant Evidence

- Both Investigator and Decision Maker are asked to make determinations about the relevance of evidence
- Decision Maker can only consider relevant evidence for the determination




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 **Relevance**


- Evidence is legally relevant if:
 - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - (b) the fact is of consequence in determining the action.
 - FED. R. EVID. 401
- “A brick is not a wall”
 - The evidence doesn’t have to conclusively prove the case one way or another

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 **Relevance**

- Ultimate Question in a Title IX Grievance Process:
 - Did respondent sexually harass complainant?
- What are some “facts of consequence”?
 - Depends on nature of sexual harassment.

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 **Not Relevant**

- Complainant’s sexual predisposition
 - NEVER
- Complainant’s prior sexual behavior
 - UNLESS
 - Offered to prove that someone other than the respondent committed the alleged misconduct
 - Prior behavior with respect to respondent offered to prove consent

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Investigations/Decision Making Boundary Hypo 1

- Mr. Aaron Burr, the guidance counselor, has been asked by Title IX Coordinator Dolley Madison to investigate a formal complaint
- The complaint was filed by Alexander Hamilton against his former girlfriend, Maria Reynolds, for grabbing his crotch at school

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Investigations/Decision Making Boundary Hypo 1

- In Burr’s interview with Reynolds, she states the following:
 - She had recently broken up with Hamilton
 - She has no memory of the events in the complaint specifically, but admits that she had touched him that way during their relationship with his consent many times

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Investigations/Decision Making Boundary Hypo 1

- In Burr’s interview with Hamilton, Hamilton states:
 - Reynolds had never touched him that way before
 - He broke up with her
 - He threw her hand away as soon as she touched him
- Burr finds video of the incident showing Hamilton kiss Reynolds after she grabs him

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Investigations/Decision Making Boundary Hypo 1

- How should Burr approach his report?
- Once Jefferson gets the report, how should he approach his decision?
- Previous history of Reynolds touching Hamilton?
 - Relevant?
- Credibility?
- Responsibility?

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Title IX Team Training: Informal Resolution Process



"You want informed consent, I want more pudding.
Let's make a deal."

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Overview of Grievance Process



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New Tool in the Belt

- 2001 and 2011 Guidance regarding previous Title IX regulations and procedures discouraged mediation or other informal resolution of complaints
- 2017 Guidance permitted informal resolution, but did not provide guidelines or limitations



Informal Resolution

“. . . At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process that does not involve a full investigation and adjudication. . .”

- 34 C.F.R. § 106.45(b)(9)



Provided That The Recipient. . .

- Provides to the parties a written notice of:
 - Allegations
 - Requirements of the informal resolution process
 - Extent it precludes resumption of grievance procedures/formal complaint regarding same allegations
 - Any party may withdraw from informal resolution and resume grievance procedures at any time prior to informal resolution
 - Consequences of informal resolution process
 - Including records that will be maintained or could be shared
 - Role of facilitator should grievance procedure resume
- Obtains parties’ voluntary, written consent



Discussion of Regulations

85 FR 30026

- Informal resolution options intended to promote autonomy and reporting for complainants
 - Ability to engage in informal resolution "may encourage some complainants to file a formal complaint where they may have been reluctant to do, so if a full investigation and adjudication was the only option"
 - Affords "greater choice and control for complainants"
- Intended to promote recipient discretion and problem solving



What is an Informal Resolution?

- May encompass a broad range of conflict resolution strategies
 - Arbitration
 - Mediation
 - Restorative justice
- Regs intentionally don't define the term, allowing parties the "freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities."
 - 85 FR 30026



Informal Resolution ≠ Supportive Measures

- Informal resolution may result in discipline or other burden on respondent
 - Supportive measures must be non-disciplinary and non-punitive
- Informal resolution can call for provision of service or measures that would otherwise constitute supportive measures
 - Counseling, no contact orders, etc.
- Informal resolution may finally resolve allegations
 - Supportive measures cannot preclude formal complaint initiating grievance procedures and final resolution



Never Mandatory

- Never mandatory for the recipient
 - Informal resolution *may* be facilitated
- Never mandatory for the parties
 - Participation voluntary, shown by written consent
 - May withdraw at any time prior to resolution
- Never incentivized
 - Cannot force parties to waive right to formal process and participate in informal resolution by conditioning any right or benefit upon that waiver



When Appropriate

- After a formal complaint has been filed
- Any time prior to the final determination (if the parties agree)
- As a part of the reasonably prompt resolution of allegations
- Never to resolve allegations that an employee sexually harassed a student



Process

- Must be facilitated by individual free from bias or conflict of interest, trained on how to serve impartially
- Not required to involve the parties confronting each other or even being present in the same room
 - Mediations or other processes may be accomplished by shuttle diplomacy



Outcomes

- Parties must agree to resolution, thus drive the result
- May result in respondent agreeing to accept disciplinary sanctions or other adverse consequences, without completing the grievance process
- May result in apology or acceptance of responsibility
- May result in other accommodations, supports, or services like counseling, no contact orders, etc.



Requirements for Facilitators

- Any person designated to facilitate informal resolution process must:
 - Not have a conflict of interest or bias
 - Receive training on the definition of sexual harassment, the scope of the recipient's education program or activity, how to conduct an informal resolution process, as applicable, and how to serve impartially



Informal Resolution Facilitator

- Work with both parties to reach a mutually agreed upon resolution to the formal complaint
 - Focus not on investigating/fact-finding, but that will likely factor in as parties work from common set of facts
- Utilize informal resolution process/method described in notice to parties



Informal Resolution in Practice

1. Determine whether to offer to facilitate informal resolution.
2. Provide written notice to the parties regarding the available informal resolution process.
3. Obtain the parties' voluntary, written consent to the informal resolution process.
4. Have a qualified facilitator facilitate the informal resolution.
5. Reach a resolution acceptable to each party and reduce to writing or resume grievance procedure.

***Notify TixC if party withdraws from process at any time**



Hypothetical

- John Laurens and Alexander Hamilton are members of the school wrestling team.
- One the first day of practice, Coach Abigail Adams began berating John Laurens for not exerting enough effort in a practice match with Hamilton, culminating with the Coach alleging that Laurens was "taking it easy on his little boyfriend."





Hypothetical

- In every practice after for two months, Coach Adams ridiculed the pair about their relationship and targeted them with homophobic slurs. The behavior continued to escalate through the season with encouragement of other team members.
- Laurens and Hamilton both quit the team a month before the end of the season and filed a formal complaint naming Coach Adams respondent.





Hypothetical

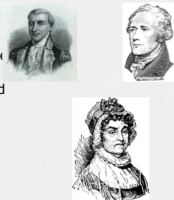
- After complaining, both Hamilton and Laurens express interest in rejoining the wrestling team if the harassment is resolved.
- When Coach Adams received notice of allegations, she was insistent it was an overblown misunderstanding of her intentions, which were never to offend but always in a crass attempt to motivate.





Hypothetical

- Coach Adams is adamant the issue could be resolved quickly and quietly by a team meeting led by the Athletic Director and Title IX Coordinator. She communicates this to both Complainants, assuring them this could even allow them to return to the team in time to compete in regionals. Both Hamilton's and Laurens' representatives would agree to an informal meeting to resolve the complaint.






Sorry, Coach!

- Complaint cannot be resolved through informal resolution where it is alleged an employee engaged in sexual harassment
- No right or benefit should be conditioned on engaging in informal resolution
 - Coach's communication suggests that informal resolution is incentivized by their more prompt return to the team




Title IX Team Training: Decision-Making Process



"I haven't yet decided if I'm staunchly in favor, or staunchly opposed. But rest assured, however I vote, it will be staunchly."

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Recap



Sex Harassment → General Responses → Formal Complaint → Investigation → Decision → Appeal

Informal Resolution

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Review of Investigation

- Parties have presented evidence and witness that Investigator has investigated
- Parties have reviewed Investigator's evidence and had opportunity to provide written feedback
- Investigator has considered parties' written responses

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Review of Investigation

- Investigator finalizes report that fairly summarizes all relevant evidence
- Parties receive Investigator’s Report
- Parties may provide a written response (to whom???)

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Decision-Making Process

- At the outset, Respondent still presumed to be not-responsible
- Decision-Maker cannot be the same person as the Title IX Coordinator or the Investigator
- No live hearing required for K-12 school districts

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Exchanging Written Questions

- The parties may pose written, relevant questions to any party or witness
- Decision-Maker must determine if questions seek relevant information

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Exchanging Written Questions

- Remember:
 - Complainant’s sexual predisposition
 - NEVER
 - Complainant’s prior sexual behavior
 - UNLESS
 - Offered to prove that someone other than the respondent committed the alleged misconduct
 - Prior behavior with respect to respondent offered to prove consent
- Decision-Maker must explain to party posing questions any decision to exclude a question as not relevant

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Exchanging Written Questions

- If questions are permissible, Decision-Maker facilitates the Q&A and provides the answers to the questioner
- Decision-maker(s) must:
 - provide each party with the answers
 - allow for additional, limited follow-up questions from each party
 - What does this mean?

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Timelines

- Regulations are silent about how long Q&A should last
 - Give the parties reasonable deadlines to submit and answer questions and follow up questions (2-3 days?)
 - Only waive Q&A deadlines for good cause shown
- Decision-Maker must wait **at least** 10 days before issuing decision



Required Contents of Written Determination

- **First:** make sure to identify what this document is and the relevant dates
- **Second:** Identify **each one of** the allegations potentially constituting sexual harassment
- **Third:** Describe the procedural steps taken by the district from the time that it received the formal complaint until the determination.

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Written Determination

- **Fourth:** make findings of facts
 - Credibility determinations
 - Who does Decision-Maker believe, disbelieve?
 - Decision-Maker can make credibility determinations
 - Conclude (for the district) what happened
- **Fifth:** go back to each allegation of sex harassment
 - For each allegation, say whether you find the respondent responsible and why.
- **Sixth:** determine whether the district’s code of conduct applies to the facts as you have found them

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Written Determination

- **Seventh:** identify responsive actions
 - Include:
 - whether remedies designed to restore or preserve equal access to the district’s education program or activity will be provided by the district to the complainant.
- **Eighth:** lay out the parties’ right to appeal

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Written Determination

- Provided to the parties simultaneously
- Becomes final either on the date that the district provides the parties with the written determination of the result of the appeal (if one is filed) or on the date that an appeal would no longer be timely

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Imposing Student Discipline

- District still must comply with state law
- When can student discipline be imposed?
 - At the end of the Title IX Grievance process
 - Role of determination of responsibility in student discipline
- Who can impose discipline / start the process?
- What discipline can be imposed?
- What process must be followed?

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Hypothetical

- Peggy Schuler and Maria Reynolds are 8th grade students in Minuteman Middle School.
- Both girls have romantic feelings for Alexander Hamilton, another middle school student.
- Peggy is outraged when Alexander invites Maria to make a TikTok dance video with him.



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Hypothetical

- Peggy Schuler begins to call Maria a "slut" and "whore" every time she sees her. Peggy spreads rumors about Maria engaging in promiscuous sexual relationships, that she has AIDS and is pregnant.
- Other students join in with Peggy



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Hypothetical

- Maria is so distressed by Peggy's taunts that she starts cutting herself and is hospitalized for a brief period of time.
- With the help and encouragement of her therapist, Maria files a Title IX complaint against Peggy



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Hypothetical

- Guidance Counselor Aaron Burr has investigated Maria's complaint, and has completed his written report.
- John Adams is the Minuteman principal and the designated decision-maker for this complaint.
- He is working through the process to make his decision.....



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Hypothetical

- Peggy Schuler submits the following questions for Maria:
 - Isn't it true that you and Alexander's TikTok video was banned by the app for being too explicit?
 - How many sexual partners have you had?
 - Why did Mark LaFayette break up with you earlier this year? Was it because you had sex with Alexander?



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Hypothetical

- Maria submits the following questions for Peggy:
 - Did Angelica Church (another student) obtain a restraining order against you after you threatened her for dating John Laurens, a boy for whom you had feelings?
 - How many disciplinary referrals have you received while a student at Minuteman Middle School?



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Hypothetical

- Which questions should John Adams allow?
 - TikTok video ban?
 - Number of sexual partners?
 - Mark LaFayette breakup?
 - Restraining order?
 - Disciplinary referrals?
- How does John Adams communicate these limits?



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Hypothetical

- John Adams has reviewed Aaron Burr's report and the responses to that report from Peggy and Maria.
- He concludes that it is 51% likely that Peggy did the things Maria alleges.
 - Finding of responsibility or no responsibility?



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Hypothetical

- John Adams thinks it is extremely likely that Peggy engaged in sex harassment of Maria.
- What issues should he make findings of fact about in his report?
 - The TikTok video?
 - The girls' mutual romantic interest in Alexander?
 - Calling Maria "slut" and "whore"?
 - Promiscuity/pregnancy/AIDS rumors?
 - Other students?



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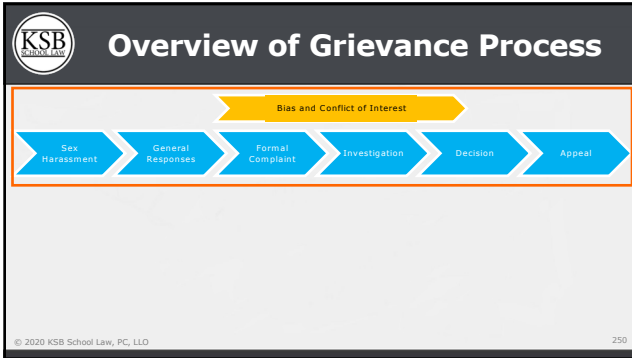
Title IX Team Training: Avoiding Bias and Conflicts of Interest



"Do I have confirmation bias? Yes.
You bet. Absolutely."

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Requirement of Impartiality

- Regulations require any member of Title IX team to be free from:
 - conflicts of interests
 - biases against complainants or respondents generally
 - biases against a individual complainant or respondent
- Members of Title IX team must "serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias"
- Training materials cannot rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

Requirement of Impartiality

- Grievance process must entail an objective evaluation of all relevant evidence
- Credibility determinations may not be based on a person's status as a complaint, respondent, or witness
- Both parties must have equal appeal rights, and parties may appeal on the grounds someone involved was biased or had a conflict of interest
- At each stage, each member of team must comply with these rules



Driving force behind the Regs

One of three main purposes of the regulations in its commentary is for schools to "avoid intentional or unintentional injection of sex-based biases and stereotypes into proceedings that too often have been biased for or against parties on the basis of sex, mostly because the underlying allegations at issue involve issues of sex-based conduct."

- 85 FR 30026



Determining Conflicts and Bias

- Department specifically chose not to further define conflicts of interest or bias despite requests from commenters
 - Indicated that training on serving impartially would ensure that Title IX Team was not impermissibly biased or conflicted
- Generally, in the Title IX context...
 - A **conflict of interest** occurs when an individual's interests raise a serious question as to whether they can act objectively and without bias should they need to act against those interests
 - **Bias** is the inability to maintain objectivity, due to some inclination or prejudice towards or against an individual, characteristic, or circumstance
 - **Prejudgment** refers to passing judgment prematurely or without sufficient objective consideration
- Serving multiple roles (if permitted by the regs) does not create a conflict

Determining Bias

- Regulations require:
 - an "objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased..."
 - Schools to exercise "not to apply generalizations that might unreasonably conclude that bias exists"
 - Training for the team must "provide Title IX personnel with the tools needed to serve impartially and without bias"



Bias or Conflict Issues?

- HS Principal, and HS Decision-Maker, Thomas Jefferson is the head football coach; respondent in formal complaint is the star quarterback (and yes, it's football season)
- Appellate Decision-Maker and Superintendent George Washington is direct supervisor, and evaluator of, all employees trained to serve as investigator and decision-maker





Bias or Conflict Issues?

- Teacher Abigail Adams is the respondent in a Title IX complaint from a middle school student; Middle School Principal John Adams is generally decision-maker for middle school complaints
- Investigator Burr, months after watching this Title IX training module, is often heard in the staff lounge bemoaning the #MeToo movement and suggesting that "most of the time, they're just making it up."





Other Characteristics

- Biases or assumptions about athletes were prevalent in suits alleging bias in Title IX proceedings
- Social statuses, ability to communicate effectively, appearance all shown to affect credibility determinations and general reactions to an individual
- Biases towards an individual, including those founded on prior history or issues, cannot affect decision-making



Are you biased?

- In the literal sense, yes, we all are... In the Title IX context...
 - Can you objectively serve in your role without predetermination, basing any decisions on the facts and investigating further when necessary?
 - Can you apply the concepts and meet the obligations described in this training while fulfilling your role?
 - Can you consistently apply the definitions and due process rights while fulfilling your role?
 - Will you allow the prescribed grievance process to drive the role you play, and the manner in which the issues are determined?
 - If **yes** to all... serve your role consistent with applicable requirements
 - If **no** to any... recuse yourself from the grievance process



Strategies to Serve Without Bias

- **Individuation:** give individuality to persons in a group
 - Intended to prevent making biased inferences on basis of sex, race, sexual orientation, etc.
 - Requires obtaining information about individual members of a group instead of relying on generalizations
- **Perspective Taking:** take a first-person perspective towards groups to promote empathy and understanding
- **Increased Opportunities for Contact:** seek out opportunities to engage with stigmatized groups in a positive manner



Hypothetical

- Mark Lafayette is a Senior best known for breaking Thomas Topham's school records in weight lifting, and for being the Class A wrestling champion three years straight
- He comes to Title IX Coordinator Madison to talk about an incident where he says his girlfriend, the petite and docile Angelica Church, pinned him down and sexually assaulted him
- Normally, Coordinator Madison would sign a complaint given these facts, but is hesitant because it seems far fetched that Angelica could have taken advantage of Lafayette



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SCHOOL LAW

Appeals

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Overview of Grievance Process

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SCHOOL LAW

Who can appeal?

- Decision must make clear each party has this right
 - Complainant has just as much right to appeal a determination of non-responsibility as vice-versa

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When can a decision be appealed?

- Three mandatory grounds*:
 - Procedural issue
 - New evidence
 - Bias/conflict of interest
- Recipient can add grounds, but must apply them equally to both parties

** Both parties can also appeal a recipient's determination that the allegations were subject to mandatory dismissal under § 106.45(b)(3)(i).*

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When can a decision be appealed?

- Regardless of grounds used, appellant must show the issue actually affected the outcome
- Will be a common reason to dismiss appeals

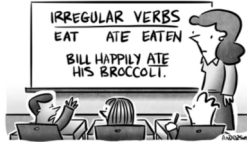
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When a decision can be appealed—procedural issues

- Procedural issues
 - Party appealing must show how the procedural irregularity affected the outcome



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When a decision can be appealed—new evidence

- New evidence
 - Must have been able to alter the outcome
 - Must have not been “reasonably available” at the time of the determination or dismissal
- Example
 - A witness comes forward with testimony after a determination was made that he saw respondent somewhere else at the time of the alleged assault
 - No one was aware of the witness’s testimony until he came forward

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When a decision can be appealed—bias/Conflict

- Bias/conflict of interest
- Must have affected outcome
- Example
 - Complainant becomes aware after decision that respondent is related to the TixC



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Appeal Decision-Maker

- Cannot be the TixC, investigator, or D-M
- Must be free of bias and conflicts of interest
- Must issue written decision and submit it to both parties simultaneously



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Appeal Procedure

- KSB Policy recommends ten days to bring appeal
- Must notify other party when appeal is brought
- Each party must have an opportunity to submit a written statement either in support of or against the decision

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Drafting the Appeal Decision

- Framed similarly to original decision
- More streamlined
 - Less emphasis on all the facts required



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Drafting the Appeal Decision

- **First:** Make sure to identify what this document is and the relevant dates
- **Second:** Identify and describe the arguments for appeal
- **Third:** Describe the procedural steps from time of complaint to time of drafting decision

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Drafting the Appeal Decision

- **Fourth:** Summarize decision and its rational
- **Fifth:** Analyze whether outcome was affected by claimed error:
 - If not, appeal can be dismissed
- **Sixth:** Grant or reject the appeal and state your rationale for doing so

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Appeals Hypothetical

- Angelica Church accused Alexander Hamilton of sexual assault and filed a formal complaint with the TixC
- After the investigation concluded, Lincoln High School Principal Thomas Jefferson submitted his decision to the parties three days ago. He made a finding of non-responsibility



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Appeals Hypothetical

- Angelica wishes to appeal on the following grounds:
 - The investigation yielded a video recording of the assault and the decision does not mention it
 - The school only gave her the notice of her interview only a few hours prior to the scheduled time



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Appeals Hypothetical

- Angelica wishes to appeal on the following grounds (more):
 - A witness came to the complainant after the decision was made. This person claimed may have possibly seen the Respondent somewhere other than where he said he was the night of the complaint



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Appeals Hypothetical

- Angelica wishes to appeal on the following grounds (still more):
 - The investigator submitted his report eight days after the complaint was filed
 - The TixC is in Rotary Club with the respondent's mother



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Appeals Hypothetical

- What should the General do?
- Step 1: Solicit a response from Hamilton
 - 34 C.F.R. 106.45(b)(8)(D) says you must "Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome"
- Step 2: Look at each grounds for appeal
 - Does it fall under one of the three grounds?
 - Did it affect the outcome of the decision?



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Appeals Hypothetical

- The investigation yielded a video recording of the assault and the decision does not mention it
 - Does this fall under one of the three? Did it affect outcome?
- The school only gave her the notice of her interview only a few hours prior to the scheduled time
 - Does this fall under one of the three? Did it affect outcome?



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Appeals Hypothetical

- A witness came to the complainant after the decision was made. This person claimed may have possibly seen the Respondent somewhere other than where he said he was the night of the complaint
 - Does this fall under one of the three? Did it affect outcome?



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Appeals Hypothetical

- The investigator submitted his report eight days after the complaint was filed
 - Does this fall under one of the three? Did it affect outcome?
- The TixC is in Rotary Club with the respondent's mother
 - Does this fall under one of the three? Did it affect outcome?



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Appeals Hypothetical

- Written report could reverse determination of non-responsibility based on:
 - Video?
 - Interview Notice?
- Regardless of his decision, Washington must:
 - Create a written report describing the result of the appeal and the rationale for the result
 - Provide it to both parties simultaneously
 - (and remember, he cannot tell a lie....)



Title IX Team Training: Confidentiality and Retaliation



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Confidentiality and Retaliation

- Medical, Psychological and Other Treatment Records
- Privileged Information
- Confidentiality and Access to Evidence and Records
- Non-Disclosure Agreements
- First Amendment and Retaliation
- Reporting Child Abuse



Confidentiality and Retaliation

- Schools cannot access or disclose a party's medical/psychological records without the party's written consent
- School cannot consider evidence or utilize questions or evidence which results in the disclosure of privileged information unless the party waives the privilege
- School must keep confidential the identity of complainants and respondents both informal and formal, except as allowed under FERPA or if required to carry out Title IX grievance process



Disclosure of Evidence

- Must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
 - Including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility
 - And inculpatory or exculpatory evidence
 - Sent to each party in electronic format or a hard copy



May Limit Downloads and Copies (Under Title IX)

- "The Department acknowledges that a recipient may use, but is not required to use, a file sharing platform that restricts the parties and advisors from downloading or copying evidence."
 - 85 FR 30026
- BUT check state law (which may require copies of education records or personnel records be provided)



Disclosure of Report and Determination

- Must send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response
- Must provide the written determination to each party simultaneously



Hypo

- Alexander Hamilton, an 8th grader, filed a formal complaint against Paul Revere, the janitor, alleging that Paul Revere forcibly fondled him on August 18 in the school stables
- Investigator Aaron Burr pulled Alexander’s attendance records for the day in question, and they show that he was absent on the 18th
 - He also reviewed security footage, which does not show Alexander in the stable area on the day in question
- Alexander’s parents have e-mailed investigator Burr, informing him that their son’s attendance records and any video used in the investigation are protected by FERPA and they will not consent to disclosure





Why?

“The Department is precluded from administering, enforcing, and interpreting statutes, including Title IX and FERPA, in a manner that would require a recipient to deny the parties, including employee-respondents, their constitutional right to due process because the Department, as an agency of the Federal government, is subject to the U.S. Constitution.”

• 85 FR 30026



Non-Disclosure Agreements (NDAs)

"The Department does not interpret Title IX as either requiring recipients to, or prohibiting recipients from, using a non-disclosure agreement, as long as such non-disclosure agreement does not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence under § 106.45(b)(5)(iii). Any non-disclosure agreement, however, must comply with all applicable laws."

• 85 FR 30026



Hypo

- Same facts as before
- To ease the privacy concerns of Mr. and Mrs. Hamilton, Investigator Burr requests that the parties sign a non-disclosure agreement prior to sharing the evidence
- Revere signs the agreement, but subsequently discloses the evidence to each of his witnesses
- Revere also refers to the evidence in detail in a long Facebook post written to publicly "clear his name"



Free Speech Concerns?

• "*Constitutional protections.* Nothing in this part requires a recipient to . . . restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution."

• 34 C.F.R. § 106.6(d)

• "The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment."

• 34 C.F.R. § 106.44(a)



Retaliation and False Statements

- Schools are allowed to punish for lying during a grievance procedure without violating the student’s free speech
 - Provided the school does not use the finding of responsibility/non-responsibility as the basis for determining the person lied
- Schools cannot “intimidate, threaten, coerce, or discriminate against any individual” for the purposes of interfering with the person’s Title IX rights because that person participated or refused to participate in the Title IX process



Avoiding Retaliation Claims


- You may be able to discipline for inappropriate speech even if it doesn’t rise to severe, pervasive, and objectively offensive, but tread lightly
- You may discipline for false statements in grievance process, long as basis is not simply the result/determination
- You may require NDAs, but you cannot restrict protected First Amendment activity or the right to discuss the case and prepare a response



Reporting Child Abuse

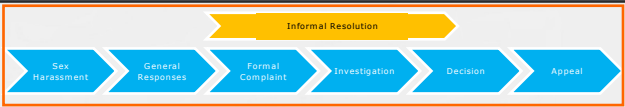
- Reporting child abuse permitted under FERPA
 - Health and Safety (Emergency) exception to consent
- Reporting child abuse may be required by state law
 - Requirements vary by state
 - In some states it is “all persons” and others it may also or in the alternative have special or specific obligations for school officials
 - State law definitions of child abuse may or may not line up with definitions of “sexual harassment” under Title IX

**Title IX Team Training:
Special Education Considerations-Last One!**



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Overview of Grievance Process



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Disproportionate Impact on Students with Disabilities

- Data cited in the comments to the proposed regulations:
 - 22 percent of students with disabilities reported some form of abuse over the last year
 - Nearly 62 percent had experienced some form of physical or sexual abuse before the age of 17
 - Only 27 percent reported the incident
 - Individuals with intellectual disabilities are sexually assaulted and raped at more than seven times the rate of individuals without disabilities



Two Sides of the Coin

- Students with disabilities may exhibit sexually aggressive or inappropriate behaviors
 - Number of Title IX and other cases related to sexual violence in which both aggressor and victim is student with a disability
- Consider school’s obligation to address such behaviors
- Consider school’s limitations in addressing such behaviors
- Regulations make clear schools’ special education obligations are not affected by the new regulations
 - FAPE obligations entirely unaffected



Hypothetical

- The parents of Maria Reynolds, a student with ASD who is nonverbal, submit a formal complaint
 - Alleges that an AngelSense™ device kept in Maria’s backpack captured audio of her being sexually harassed every day for over two months by John Laurens, a student with an IEP due to his diagnosis of Tourette’s Syndrome, and Mark Lafayette, a student with an IEP due to his diagnosis of dyslexia
 - Alleges Mark Lafayette made daily, graphic threats of sexual assault before attempting to rape Maria last week
 - Alleges John Laurens called Maria a “whore” and “slut” several times an hour





Accommodate throughout Process

“The Department also fully encourages recipients to provide whatever reasonable accommodations are necessary for students with disabilities; recipients must comply with applicable disability laws while also complying with these final regulations.”

- 85 FR 30026



Hypothetical

- John Lauren’s father is serving as John’s advisor, and dad is deaf
- Consider accommodations throughout process:
 - Providing transcriptions of audio evidence, such as the AngelSense™ recordings
 - Making available an ASL interpreter in interviews involving the advisor





Hypothetical

- Given Maria’s inability to communicate verbally or engage in any activity for an extended period of time, her advisor requested additional time to prepare responses to written questions, evaluate evidence, and prepare a response to the investigator’s report.





No Magic Words

- Investigate reports of misconduct even if it isn’t initially clear the report is a formal complaint of sexual harassment
 - “Similarly, recognizing whether a student has disclosed a Title IX sexual harassment incident includes taking into account any disability the reporting student may have that may affect how that student describes or communicates about the incident.”



Supportive Measures

- Department commentary emphasizes role of supportive measures in meeting the needs of students with disabilities
- Supportive measures, to the extent they change a student's placement, must be determined/approved by IEP team or written agreement with parents
 - I.e., if counseling services would remove complainant from general education setting, must amend IEP
- The process for offering supportive measures after considering the complainant's wishes is an interactive process that is not unlike the interactive process that the ADA requires.



Running Hypothetical



- Supportive measures for Maria
 - IEP team should be involved in determining appropriate supportive measures, as some may change her placement
 - Any additional counseling services that may remove her from current placement
 - If you determine separating her from respondents is appropriate, consider whether you're changing anyone's *placement* or whether you're changing *location*
 - Changes in placement for Maria, John, and Mark must be made through IEP process
 - Changes in location for Maria, John, and Mark may be made unilaterally
 - Consider whether supportive measures require accommodations or impact ability to access FAPE
- Consent issues? Consider how a student's disability affects his/her ability/capacity to consent to sexual activity
 - For instance, Maria likely lacks the capacity to consent to sexual activity




Respondents with Disabilities

- Consider compliance with IDEA at all stages, including emergency removals, supportive measures, discipline
- Respondent must be provided FAPE irrespective of supportive measures
- Manifestation required prior to *disciplinary* removals of ten days or more
- Contemplate respondent's need for new placement/services
- Consider early whether discipline or a change in placement is more appropriate to address misconduct

KSB

Hypothetical

- Guidance Counselor Aaron Burr is investigating the formal complaint, and believes that Mark Lafayette presents an immediate threat to the safety of his peers
 - May Mark Lafayette be removed from school?
 - Must we conduct an MDR prior to removal?
 - Must his IEP Team meet?
 - Should his IEP Team meet?
- Burr believes that John Laurens is highly likely to continue verbally harass peers during process
 - May John Laurens be removed from school?



KSB

Emergency Removals

- School is allowed to remove a student in an emergency, but only if:
 - It undertakes an individualized safety and risk analysis
 - Determines that an immediate threat to the physical health or safety of any student or individual arising from the allegations justifies removal
 - Provides respondent with notice and an opportunity to challenge decision immediately following removal
- Regulations make clear emergency removals cannot modify any individual's rights under the ADA, IDEA, or § 504
- Schools may convene the IEP team before an emergency removal
- If a situation satisfies the emergency removal parameters of Title IX but the behavior was a manifestation of the student's disability, the school does not have to remove the student

KSB

Running Hypothetical

- Guidance Counselor Aaron Burr is investigating the formal complaint, and believes that Mark Lafayette presents an immediate threat to the safety of his peers
 - May Mark Lafayette be removed from school?
 - Yes, subject to the requirements of notice and due process
 - Must we conduct an MDR prior to removal?
 - Check state law...
 - Required for **disciplinary** removals; emergency removals may not be disciplinary
 - Must his IEP Team meet?
 - Guidance indicates the team **should** meet to consider a revision to his placement/services if he'll be removed for 10+ days
 - Not explicitly required by regulation, but you still owe FAPE



Sticks and Stones

- Burr believes that John Laurens is highly likely to continue to verbally harass peers during process
- May John Laurens be removed from school?
 - No! Verbal harassment does not present an immediate threat to the physical health and safety of others.



Running Hypothetical



- Both respondents verified under the IDEA, will be subject to procedural safeguards
- Title IX Coordinator Dolley Madison is familiar with both respondents
 - She believes that *if* the allegations are true, John's alleged misconduct would have been caused by, or directly related to, his disability
 - She believes that *if* the allegations are true, Mark's alleged misconduct would not be related to his disability
- Why is this important???



Discipline

- Students with disabilities may be disciplined subject to procedural safeguards of the IDEA
- Discipline may only be administered after a final determination of responsibility finds a respondent responsible after the formal grievance procedure



Discipline NOT Required

•OCR will not "second guess whether the recipient imposes a disciplinary sanction on a respondent who is found responsible for sexual harassment" giving schools flexibility to administer appropriate discipline to students with disabilities in light of the particular circumstances



Not more than 10 consecutive school days

- 10 consecutive days per offense
- Additional removals in same school year for separate incidents of misconduct allowable so long as not a "pattern of removals" constituting a "change in placement"



Major Discipline

- Removals for more than 10 days
- "Expulsion"
- Removal for 45 days for special issues
- Requires MDR
 - The MDR must be conducted by "the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA)." 34 CFR 300.530(e)(1)
 - Team must "review all relevant information in the student's file, including the child's IEP, [and] teacher observations ... and any relevant information provided by the parents."



Manifestation Determination

- Questions for MDR:
 - Was this misbehavior caused by the student's disability?
 - Was conduct in question caused by or did it have a direct and substantial relationship to the child's disability?
 - Was the misconduct a direct result of the district's failure to implement IEP?
- If no:
 - Child can be treated like a regular education student consistent with state law...sort of ...
- If yes:
 - Cannot remove
 - Must conduct FBA, implement BIP, OR review existing BIP
 - Must return to prior placement (unless agreement otherwise)



Misconduct is a Manifestation

34 CFR 300.530(f)

- If student's conduct is a manifestation of the student's disability, the IEP team must:
 - Conduct a functional behavioral assessment (provided the district had not conducted such assessment prior to the conduct at issue) and implement a behavioral intervention plan for the child.
 - When a behavioral intervention plan already has been developed, review the plan and modify it as necessary to address the behavior.
 - **Return the child to the placement from which he was removed**, unless the parent and district agree to a change in placement as part of the modification of the behavioral intervention plan.



IAES May Be an Option

- May remove a student to IAES for 45 days (regardless of manifestation) if student . . . has inflicted **serious bodily injury** upon another person while at school.
- The term "serious bodily injury" means bodily injury that involves:
 - a substantial risk of death,
 - unconsciousness,
 - extreme physical pain,
 - protracted and obvious disfigurement, or
 - protracted loss or impairment of the function of a bodily member, organ, or mental faculty



Different Outcomes ≠ Bias

- “Any different treatment between students without disabilities and students with disabilities with respect to emergency removals, may occur due to a recipient’s need to comply with the IDEA, Section 504, the ADA, or other disability laws, but would not be permissible due to bias or stereotypes against individuals with disabilities.”
 - 85 FR 30026
- Same would be true of discipline



Changes in Placement

- If a student’s behavior is likely a manifestation, it may be more appropriate to address behavior via services and placement rather than discipline
- Once discipline is initiated, student’s placement cannot be changed without bilateral agreement if misconduct is a manifestation
 - Can hinder your ability to effectively meet student’s needs
 - Can hinder your ability to ensure safe atmosphere



Running Hypothetical

- Guidance Counselor Burr is in the process of investigating Maria’s claims.
- Principal Tom Jefferson* has emergency excluded John Laurens during the pendency of the investigation
 - Manifestation required?
- Mark LaFayette’s IEP team decided to remove him to an intensive day program which specializes in helping students with disabilities understand healthy sexuality.
 - Manifestation required?



Title IX Team Training: Wrapping Up



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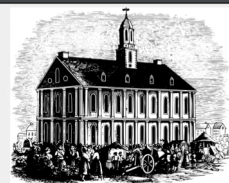
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We get that this was A LOT of material

- Remember, this is really just what the regulations require
- You can (and should) improve on your best practices and your systems as you gain more experience with specific cases
- Reach out to your school's legal counsel early and often as you get familiar with these procedures and how you will handle specific cases
- "Steal" the best ideas that you know/hear about



Parting Thoughts on Sex Equity in Education



- Like your district, District 1776 isn't perfect
- That doesn't mean it is automatically deliberately indifferent
- That doesn't mean it cannot improve its sex equity processes

Title IX Team Training



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