

Title IX Team Training



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The New Regulations



"Our Legal Department has seen substantial growth over the last quarter, producing 21% more mumbo and 17% more jumbo."
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Title IX

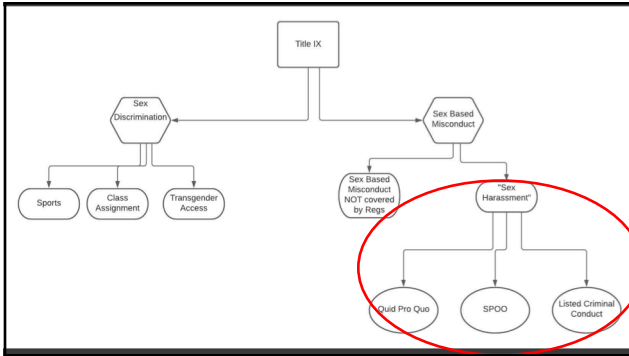
- Prohibits discrimination “on the basis of sex” in education programs or activities that receive federal financial assistance.
 - 20 U.S.C. § 1681(a)
- Title IX applies to the entire school district.
 - 20 U.S.C. § 1687(2).

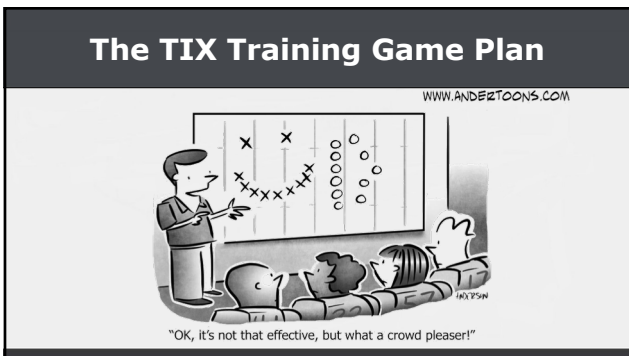
The New Regulations

- 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

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





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?

What is Sexual Harassment?



"Now I know that's a lot of acronyms, so here's an acronym to help you remember..."

Overview of Grievance Process



Sexual Harassment

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

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

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*)

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.

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

- *Gabrielle M. v. Park Forest-Chicago Heights* (7th Cir. 2003)
 - 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

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

- *Gabrielle M. v. Park Forest-Chicago Heights* (7th Cir. 2003)
 - School Psychologists Notes:
 - It was "becoming apparent that these Kindergartners were not fully aware of the seriousness of their actions."

**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

**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

**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

**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

**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”

**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

**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

Sexual Harassment: Severe, Pervasive, and Objectively Offensive

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

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 kneeing 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

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.

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.

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.

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

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

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

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

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

Sexual Harassment: Non-forcible Sexual Assault

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

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

Sexual Harassment: Non-forcible Sexual Assault

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

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.

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

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
 - 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

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.

New Cast of Characters



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 (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

Who can serve as Title IX Coordinator?

- Perfect Role for Guidance Counselor?
 - Maybe in other states
- State evidence law prevents school counselors from disclosing information obtained in their capacity as counselors
- Makes it difficult for them to be a part of the team at all

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

- 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

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

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

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."

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

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

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

**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

Avoiding "Deliberate Indifference"

- *S.C. v. Metro. Gov't of Nashville*
 - Female middle schooler, S.C., alleges she was raped by classmate (J.J) in an empty classroom
 - During the alleged assault, another female student (S.D.) walked into the classroom and began recording
 - S.D. then sent the recording to many others
 - S.C. remained in school after the assault and alleged she was bullied by many classmates
 - School officials found out via Facebook that evening, called an early morning meeting the next day to discuss
 - Head Principal never notified Title IX coordinator, but did involve Director of Schools

Avoiding "Deliberate Indifference"

- *S.C. v. Metro. Gov't of Nashville cont.*
 - Administrators interviewed S.C. that morning and law enforcement interviewed her at the school
 - Detective more concerned about child pornography and threatened to charge S.C.
 - After the interview, Principal is heard saying on the recording to the Detective "Please, I cannot have this be a rape., OK? It's not a rape."
 - Detective responded that S.C. acknowledged it was consensual, which was untrue
 - S.C., her mother, and sister received death threats

Avoiding "Deliberate Indifference"

- *S.C. v. Metro. Gov't of Nashville cont.*
 - School Suspended S.C. for three days for violating school rules
 - S.C. did not return to school but continued enrollment through remote learning before transferring the following year
 - Grades dropped significantly and continued receiving threats from classmates

Avoiding "Deliberate Indifference"

- *S.C. v. Metro. Gov't of Nashville cont.*
 - S.C. claims were twofold:
 - School had an obligation to prevent the incident from happening in the first place
 - School responded improperly after the incident
 - Court: "Before" claims are not ripe under Title IX
 - There must be at least one instance of "actionable" post-incident harassment related to school and was the result of the school's "deliberate indifference"

Avoiding "Deliberate Indifference"

- *S.C. v. Metro. Gov't of Nashville cont.*
 - Court cont.:
 - The widespread circulation of the video and the threats obligated the school to respond
 - School did not do enough to address ongoing threats
 - S.C. entitled to damages, but only for the conduct after the incident
 - \$75,000

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

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**

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"

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

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**

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)

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

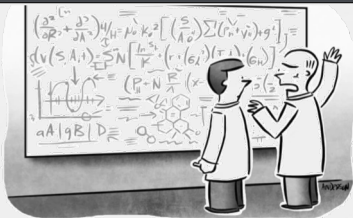
What CAN the school do immediately?

- 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

What CAN the school do?

- Administrative Leave for Non-Student Employees
 - Doesn't modify rights under Section 504 or the ADA
- South Dakota law allows for paid administrative leave
 - Check negotiated agreement as well

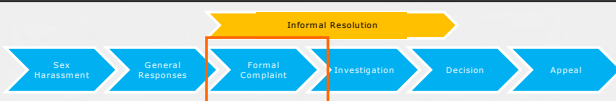
Formal Complaints



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



Overview of Grievance Process



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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."

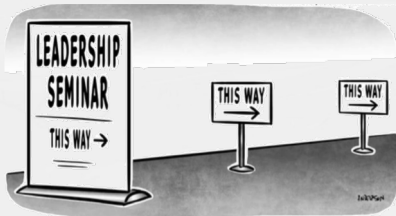
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OCR Q & A: Answer 5 September 4, 2020

- 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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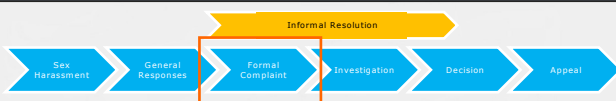
Title IX Coordinator’s Role in Responding to Formal Complaint



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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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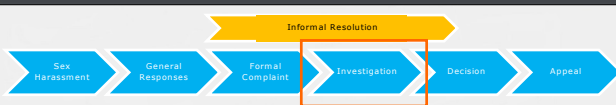
Investigations



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

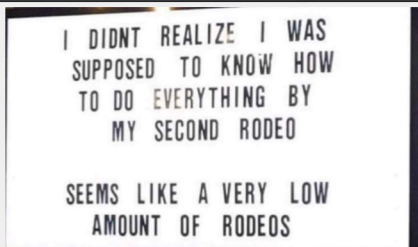
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Overview of Grievance Process



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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

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Interviews



"Should I be concerned that all your references pleaded the fifth?"

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 to participate"
 - 34 CFR 106.45(b)(5)(v)

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Witness Interviews

- Record? Take notes?
- Make clear they are not obligated to participate and the school can't retaliate against that decision
- Don't promise confidentiality
 - But, limit the disclosure of information to people who really need to know

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

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

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

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

Parties' Rights During Investigation— Discussion of Allegations

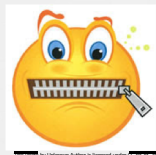
- Exceptions
 - No contact directives as part of supportive measures
- Possible First Amendment concerns?

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)

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



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)

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

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

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

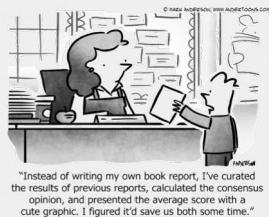
How much needs to be proved?

- 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)

Report Writing

- 34 CFR 106.45(b)(5)(vii)

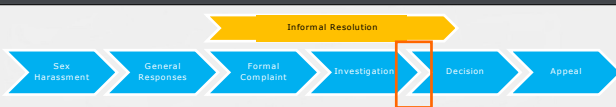
- Report must "fairly summarize the relevant evidence"



The Boundary between Investigations and Decision-Making



Overview of Grievance Process



Boundaries for Decision-Maker and Investigator

- D-M not required to be an employee
- May not be Title IX Coordinator, Investigator, Appellate Decision-Maker
- 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

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."



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

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



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



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

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.

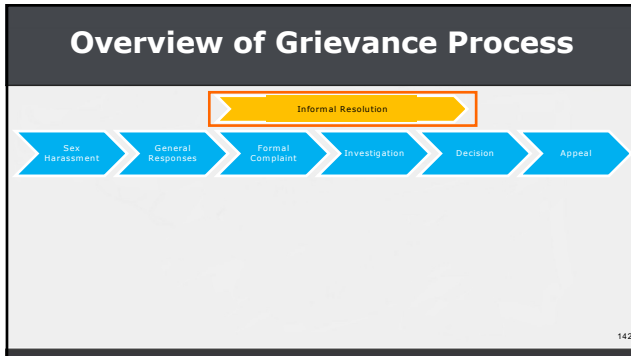
Not Relevant

- 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

Informal Resolution Process



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



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 in 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

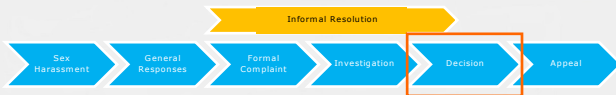
Decision-Making Process



"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



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

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???)

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

Exchanging Written Questions

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

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

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?

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.

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

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

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

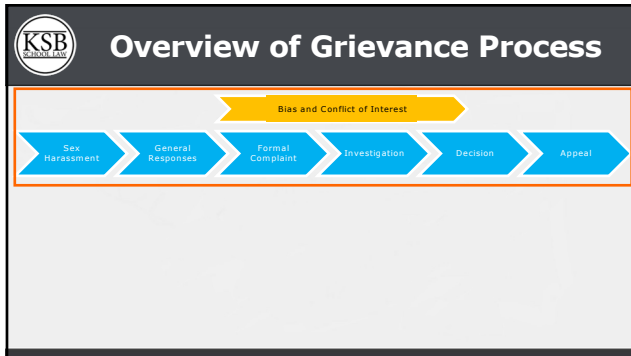
Imposing Student Discipline

- 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?

Avoiding Bias and Conflicts of Interest



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



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"

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

Appeals



Overview of Grievance Process



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



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

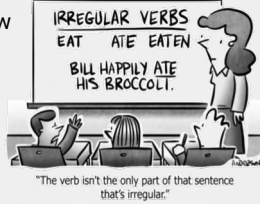
* Both parties can also appeal a recipient's determination that the allegations were subject to mandatory dismissal under § 106.45(b)(3)(i).

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

When a decision can be appealed— procedural issues

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



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

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



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

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

Drafting the Appeal Decision

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



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

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

Confidentiality and Retaliation



"Before I tell you what happened at recess, is there such a thing as student-school nurse confidentiality?"

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
- Make sure you're complying with South Dakota law:
- Must produce personnel records to employee respondent upon request but do not disclose to complainants
- Avoid FERPA issues wherever possible

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

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

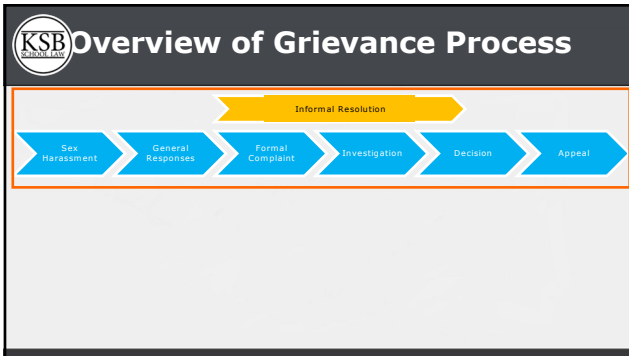
- Schools are allowed to punish for lying during a grievance procedure without violating the student's free speech
 - Provided the school does not use the finding of responsibility/non-responsibility as the basis for determining the person lied
- Schools cannot "intimidate, threaten, coerce, or discriminate 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

Reporting Child Abuse

- Reporting child abuse permitted under FERPA (Health and Safety (Emergency) exception to consent)
- Reporting may be required by South Dakota mandatory reporting law:
 - Teachers, counselors, administrators, nurses all mandatory reporters
 - If there is "reasonable cause" to believe a child has been abused
 - Includes possible sexual abuse by any adult responsible for the child's care
 - Must report to principal or superintendent, who will then report to state's attorney
 - NOT necessarily required to report in all cases of sexual harassment

Special Education Considerations-Last One!





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

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

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.**

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

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

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

Wrapping Up



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

Slides Available

- Slides will be available on [KSB's Website](#)



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