

THE NEW TITLE IX REGULATIONS

OVERVIEW AND TRAINING ON PROCEDURES

George Joseph, Esquire

Purpose and Effective Date of New Regulations

- Published in the Federal Register on May 19, 2020 [85 F.R. 30026]
- Effective August 14, 2020
- Specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination
- Recipients must address sexual harassment as a form of sex discrimination in education programs or activities
- Regulations obligate recipients to:
 - Respond promptly and supportively to persons alleged to be victimized by sexual harassment
 - Resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process
 - Provide due process protections to alleged victims and alleged perpetrators of sexual harassment
 - Effectively implement remedies for victims

Title IX of the Education Amendments of 1972

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance

20 U.S.C. §1681(a)

Confusion due to conflicting OCR Guidance

- In 2001, OCR issued a Guidance which established a higher standard than the U.S. Supreme Court decisions established
- In 2011, OCR issued a “Dear Colleague Letter” which then lowered the standard
- In September 2017, OCR rescinded the DCL and announced new rulemaking for updated Title IX Regulations
- New regulations were issued for comments in November 2018
- New regulations published in May 2020, effective August 14, 2020

Definitions – Elementary and Secondary School

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

34 C.F.R. §106.30(b)

Definitions – Actual Knowledge

- Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.
- Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.
- This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.
- “Notice” includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).
- 34 C.F.R. §106.30(a)

Definitions – Sexual Harassment

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

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - Means making educational benefits or opportunities contingent on a person's participation in unwelcome conduct
 - Can be expressed or implied
 - Need not be pervasive – can involve a single incident
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;
 - Different standard under Title VII for hostile work environment for employees
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

What is Objectively Offensive?

“It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, **and** objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.” Davis v. Monroe, 526 U.S. 629, 651 (1999)

“We have emphasized, moreover, that the **objective** severity of harassment should be judged from the perspective of a **reasonable person** in the plaintiff's position, considering ‘all the circumstances.’” Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998)

Definitions – Sexual Assault, Dating Violence, Domestic Violence, or Stalking

- “Sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. [20 U.S.C. §1092(f)(6(A)(v))]
 - Includes rape, statutory rape, incest, fondling
- “Dating violence” means violence committed by a person—(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:(i) The length of the relationship; (ii) The type of relationship; (iii) The frequency of interaction between the persons involved in the relationship. [34 U.S.C. §12291(a)(10)]

Definitions – Sexual Assault, Dating Violence, Domestic Violence, or Stalking

- “Domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, 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 by 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. [34 U.S.C. §12291(a)(8)]
- “Stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to— (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress. [34 U.S.C. §12291(a)(30)]

Title IX Non-discrimination Requirements

- (a) General. Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance.

34 C.F.R. §106.31

Title IX Non-discrimination Requirements

(b) Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

- (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- (3) Deny any person any such aid, benefit, or service;
- (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;
- (5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;
- (6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;
- (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. §106.31(b).

New Title IX Regulatory Requirements

- (a) Discrimination on the basis of sex. A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.
- (b) Grievance process. For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

34 C.F.R. §106.45.

THE GRIEVANCE PROCESS

Title IX Grievance Process

Basic requirements for grievance process:

- Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent
- Follow a grievance process before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent
- Remedies must be designed to restore or preserve equal access to the recipient's education program or activity, which may include the same individualized services described as "supportive measures"
- Remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent
- Require an objective evaluation of all relevant evidence — including both inculpatory and exculpatory evidence
- Provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness

34 C.F.R. §106.45(b)(1)

Title IX Grievance Process

- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- Include reasonably prompt time frames for conclusion of the grievance process
- Describe the range of possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility
- State the standard of evidence to be used to determine responsibility
 - Either (1) the preponderance of the evidence standard; or (2) the clear and convincing evidence standard
 - Must apply the same standard of evidence for all formal complaints whether against students, employees, and faculty, and apply the same standard of evidence to all formal complaints of sexual harassment
- Include the procedures and permissible bases for the parties to appeal

34 C.F.R. §106.45(b).

Title IX Grievance Process

- Describe the range of supportive measures available to complainants and respondents
- Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the privilege is waived
- A recipient must identify several different parties with responsibilities for implementation of the Grievance Process, including Title IX Coordinator, investigator, decision-maker (both initial and appeal), or any person designated to facilitate an informal resolution process
- These individuals must not have a conflict of interest or bias for or against complainants or respondents
- 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

34 C.F.R. §106.45(b)

Title IX Training Requirements

1. The definition of sexual harassment
2. The scope of the recipient's education program or activity
3. How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
4. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
5. Use of relevant technology
6. 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
7. Issues of relevance, weight of evidence and application of standard of proof and an investigative report that fairly summarizes relevant evidence
8. How to address complaints when the alleged conduct does not qualify as Title IX sexual harassment but could be addressed under another complaint process or school policy

Title IX Coordinator

The Title IX Coordinator shall ensure adequate nondiscrimination procedures are in place, recommend new procedures or modifications, and monitor the implementation of the nondiscrimination procedures:

1. Review of personnel practices and actions for discriminatory bias and compliance with laws
2. Provide training for supervisors and staff to prevent, identify and alleviate problems of employment discrimination.
3. Maintain and provide information to staff on resources available to alleged victims in addition to the school complaint procedure or Title IX procedures, such as making reports to the police, and available supportive measures such as assistance from domestic violence or rape crisis programs, and community health resources including counseling resources.
4. Monitor and provide technical assistance to individuals involved in managing informal reports and formal complaints.

Title IX Complaints

- Any person, whether the alleged victim or not, may report Title IX sexual harassment verbally or in writing
- A report may be made at any time, including during nonbusiness hours.
- Verbal reports shall be documented by the Title IX Coordinator or employee receiving the report
- Parents/Guardians of students have the right to act on behalf of the complainant, the respondent, or other individual at any time.
- When the School/System has actual knowledge of Title IX sexual harassment, it is required to respond promptly and in a manner that is not deliberately indifferent
- All sexual harassment reports and complaints shall be promptly directed to the Title IX Coordinator to determine if the allegations meet the definition and parameters for Title IX sexual harassment.
- The Title IX Coordinator shall promptly contact the complainant regarding the report to gather additional information as necessary, and to discuss the availability of supportive measures
- The Title IX Coordinator shall consider the complainant's wishes with respect to supportive measures.

Title IX Complaints

The Title IX Coordinator shall initially assess whether the reported conduct:

1. Meets the definition of Title IX sexual harassment
2. Occurred in a school program or activity under the control of the school and against a person in the United States
3. Involves other school policies or the Code of Student Conduct
4. Indicates, based on an individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of an individual

If the result of this initial assessment determines that none of the allegations fall within the scope of Title IX sexual harassment, but the matter merits review and possible action under the Code of Student Conduct and other school policies, then the Title IX Coordinator shall redirect the report to the appropriate administrator to address the allegations

Supportive Measures

- Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. **Such measures are designed to restore or preserve equal access** to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.
- Supportive measures may include: (1) counseling, (2) extensions of deadlines or other course-related adjustments, (3) modifications of work or class schedules, (4) campus escort services, (5) mutual restrictions on contact between the parties, (6) changes in work or housing locations, (7) leaves of absence, (8) increased security and monitoring of certain areas of the campus, and (9) other similar measures.
- Must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

34 C.F.R. §106.30(a)

Formal Complaints

- A complainant or a complainant's parent/guardian may file a formal complaint
- The Title IX Coordinator is also authorized to initiate this process despite a complainant's wishes when actions limited to supportive measures are not a sufficient response to alleged behavior, or when a formal complaint process is necessary to investigate and address the situation adequately
- For example, if disciplinary action would be warranted if allegations are true, if the respondent is an employee, or if further investigation is needed to assess the extent of the behavior and impact on others, it may be clearly unreasonable not to initiate the formal complaint process. Only the Title IX Coordinator is authorized to initiate the formal complaint process despite a complainant's wishes, but the Title IX Coordinator may consult with the school's legal counsel and other school officials in making this decision
- Remember, the School/System may not be "deliberately indifferent"

Title IX Complaints

- Upon receipt of a formal complaint, the School/System must provide the written notice to the parties
 - Of the grievance process, including any informal resolution process.
 - Of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview
 - Provide sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment and the date and location of the alleged incident, if known
 - Including a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process

Title IX Complaints

- The written notice must inform the parties
 - That they may have the right to an advisor of their choice, who may be, but is not required to be, an attorney
 - Of the right to inspect and review evidence
 - Of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
- If, in the course of an investigation, the School/System decides to investigate allegations about the complainant or respondent that are not included in the original notice, it must provide notice of the additional allegations to the parties.

School's Response to Title IX Complaint

- A School/System with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
- A recipient is deliberately indifferent only if its response to sexual harassment is **clearly unreasonable in light of the known circumstances**.
- A recipient's response must treat complainants and respondents equitably by offering supportive measures and by following a grievance process
- The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint
- 34 C.F.R. §106.44(a)

School's Response to Formal Complaint

- In response to a formal complaint, a School/System must follow the grievance process
- With or without a formal complaint, a School/System must comply with Section 106.44(a)

Emergency Removals

- A School/System may act to remove a respondent from the education program or activity on an emergency basis, provided that it:
 - Undertakes an individualized safety and risk analysis
 - Determines 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
 - Provides the respondent with notice and an opportunity to challenge the decision immediately following the removal
- This provision does not modify any rights under the IDEA, Section 504, or the ADA
 - Regulation provides this; not applicable to non-public schools
- 34 C.F.R. §106.44(c)

Administrative Leaves

- A School/System may place a non-student employee respondent on administrative leave during the pendency of the grievance process
- This provision may not be construed to modify any rights under Section 504 or the ADA
 - This provision can apply to non-public school employers
- 34 C.F.R. §106.44(d)

Dismissals of Formal Complaints

- If the conduct alleged in the formal complaint would not constitute sexual harassment even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint
- such a dismissal does not preclude action under another provision of the School/System's code of conduct
- The School/System may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: (1) complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; (2) the respondent is no longer enrolled or employed by the School/System; or (3) specific circumstances prevent the School/System from gathering evidence sufficient to reach a determination
- Upon a dismissal, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties
- 34 C.F.R. §106.45(b)(3)

Informal Resolution

- A School/System may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment
- A School/System may not require the parties to participate in an informal resolution process
- A School/System may not offer an informal resolution process unless a formal complaint is filed
- At any time prior to reaching a determination regarding responsibility, a School/System may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided:
 - The School/System provides to the parties (1) written notice disclosing the allegations; (2) the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations; (3) the right to withdraw from the informal resolution process and resume the grievance process
 - The School/System obtains the parties' voluntary, written consent to the informal resolution process
 - The School/System does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student
- 34 C.F.R. §106.45(b)(9)

Title IX Investigations

- The School/System must ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the School/System and not on the parties
 - Provided that the School/System cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the School/System obtains that party's voluntary, written consent
 - For a party who is not an "eligible student," then the recipient must obtain the voluntary, written consent of a "parent"
- The School/System must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
- The School/System may not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

Title IX Investigation

- The School/System must 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,
 - May be, but is not required to be, an attorney
 - School/System may not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding
 - The School/System 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;
- The School/System must 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;

Title IX Investigations

- The School/System must provide both parties an equal opportunity to inspect and review any evidence
 - Including the evidence upon which the School/System does not intend to rely in reaching a determination
- Prior to completion of the investigative report, the School/System must send to each party the evidence subject to inspection and review, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
 - The School/System must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing
- The School/System must make an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (not required for K-12 schools) or other time of determination regarding responsibility, 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
- 34 C.F.R. §106.45(b)(5)

Hearings

- Required for post-secondary institutions only
- 34 C.F.R. §106.45(b)(6)

Determinations of Responsibility

- The decision-makers cannot be the same persons as the Title IX Coordinator or the investigators
- Decision-makers must issue a written determination regarding responsibility
- In reaching the determination, the School/System must apply the standard of evidence – either the preponderance or the clear-and-convincing evidence standard
- The written determination must include: (1) Identification of the **allegations**; (2) A description of all **procedural steps** taken; (3) **Findings of fact** supporting the determination; (4) **Conclusions** regarding the application of the School/System's code of conduct to the facts; (5) A **statement of, and rationale for, the result** as to each allegation, including a determination regarding responsibility, any disciplinary sanctions, and whether remedies designed to restore or preserve equal access to the School/System's program or activity will be provided to the complainant; and (6) The procedures and permissible bases for **appeal**
- The written determination must be provided to the parties simultaneously
- The determination regarding responsibility becomes final either on the date that the School/System provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- The Title IX Coordinator is responsible for effective implementation of any remedies
- 34 C.F.R. §106.45(b)(7)

Appeals

- The School/System must offer both parties an appeal from a determination regarding responsibility, and from a dismissal of a formal complaint or any allegations therein, on the following bases:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias
- The School/System may offer an appeal equally to both parties on additional bases
- For all appeals, the School/System must:
 - Notify the other party in writing and implement appeal procedures equally
 - Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the initial determination, the investigator(s), or the Title IX Coordinator
 - Ensure that the decision-maker(s) for the appeal complies with training requirements
 - Give both parties a reasonable, equal opportunity to submit a written statement
 - Issue a written decision describing the result of the appeal and the rationale for the result
 - Provide the written decision simultaneously to both parties
- 34 C.F.R. §106.45(b)(8)

Record-keeping

- The School/System must maintain for a period of 7 years records of—
 - Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript (for any hearings), 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
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process
- The School/System must create, and maintain for a period of 7 years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment
 - The School/System must document the basis for its conclusion that its response was not deliberately indifferent
 - The School/System must document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
 - If the School/System does not provide a complainant with supportive measures, then the School/System must document the reasons why such a response was not clearly unreasonable in light of the known circumstances
- 34 C.F.R. §106.45(b)(10)

Retaliation Prohibited

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX . . . or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under [title IX].
- Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX . . . constitutes retaliation.
- The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under §106.8(c).
- Retaliation complaints would follow the same grievance process.
- 34 C.F.R. §106.71(a)

Grievance Process Compliance

- Must designate a Title IX Coordinator
 - Must prominently display the Title IX Coordinator's name, title, office address, email address and telephone number on School/System's website
- Must notify all applicants, students, employees, parents/guardians, unions, that the School/System does not discriminate on the basis of sex
 - Must prominently display the policy on the School/System's website
- Must have a Title IX policy which establishes a grievance process and provides prompt resolution of complaints
 - Must train all staff to identify sexual harassment and understand their duty to report it
- All materials used to train Title IX officials must be posted on the School/System's publicly accessible website [34 C.F.R. §106.45(b)(10)(i)(D)]
- USDOE Q&A on Title IX Regulations, posted July 20, 2021 at <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

TITLE IX OFFICIALS

Title IX Officials – Title IX Coordinator

- Overall responsibility for compliance with Title IX regulations
- School/System may appoint more than one Title IX Coordinator
- Title IX Coordinator's name, title, office address, email address, and telephone number must be included on School/System's website, all handbooks and applicable policies
- Title IX Coordinator may also be an investigator
- Title IX Coordinator may not be an initial decision-maker or appeal decision-maker

Title IX Officials – Title IX Coordinator

- The Title IX Coordinator must:
 - Upon receipt of a report of sexual harassment, promptly contact the complainant
 - Discuss the availability of supportive measures whether or not a formal complaint is/will be filed
 - Explain the process for filing a formal complaint
 - Consider complainant's wishes regarding same
 - Offer supportive measures to the respondent
 - Coordinate the effective implementation of supportive measures
 - Treat complainants and respondents equitably
- The Title IX Coordinator may initiate a formal complaint process even if complainant decides not to do so
- The Title IX Coordinator is responsible to effectively implement remedies

Title IX Officials – Informal Resolution Facilitator

- Must complete Title IX training
- Must be free from conflicts of interest and bias
- May be the Title IX Coordinator
- May be an investigator
- Informal Resolution Facilitator should not thereafter serve as the investigator if the matter is not resolved

Title IX Officials - Investigator

- The Title IX Coordinator may be an investigator (may be necessary in small schools)
- Investigators must receive training on how to conduct an investigation
 - Objectivity and impartiality
 - Relevance of Evidence
 - Weight of evidence and application of standard of proof
 - Preparation of an investigative report that fairly summarizes relevant evidence
 - How to address complaints when the alleged conduct does not qualify as Title IX sexual harassment but could be addressed under another complaint process or school policy

Title IX Officials - Investigator

- Must ensure that the Burden of Proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the School/System and not on the parties
 - If the School/System cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional, and which are made and maintained in connection with the provision of treatment, the School/System should obtain voluntary, written consent to do so
 - For students, written consent of a “parent”
- Must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- May not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

Title IX Officials - Investigator

- Must provide the parties with the same opportunities to have others present during any grievance proceeding
 - May be accompanied by the advisor of their choice (including an attorney)
 - School/System may establish restrictions regarding the extent to which the advisor may participate, but they must apply equally to both parties
- Must provide a party written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time to prepare to participate
- 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
 - This includes evidence upon which the School/System does not intend to rely, and inculpatory or exculpatory evidence, whether obtained from a party or other source
 - This allows each party to meaningfully respond to the evidence

Title IX Officials - Investigator

- Prior to completion of the investigative report, the School/System must send to each party and the party's advisor, if any, the evidence subject to inspection and review
 - Must give parties at least 10 days to review and submit a written response
 - Investigator must consider the response prior to completion of the investigative report.
 - Must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination

Title IX Officials – Initial Decision-maker

- May not be the Title IX Coordinator or an investigator
- Must be free of conflict of interest or bias
- Must complete Title IX training
- Receives the investigative report from the investigator
- Is responsible to send the investigative report to the complainant and respondent and allow for the exchange of relevant questions
- Prepared the written determination regarding responsibility

Title IX Officials – Initial Decision-maker

- Must issue a written determination regarding responsibility
- To reach this determination, the Initial Decision-maker must apply the standard of evidence established by the School/System

Title IX Officials – Initial Decision-maker

- The written determination must include—
 - Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination
 - Including any notifications to the parties
 - Interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the School/System’s Code of Conduct and/or policies to the facts;
 - A statement of, and rationale for, the result as to each allegation
 - Including a determination regarding responsibility
 - Any disciplinary sanctions the School/System imposes on the respondent
 - Whether remedies designed to restore or preserve equal access to the School/System’s education program or activity will be provided by the School/System to the complainant
 - The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

Title IX Officials – Initial Decision-maker

- The School/System must provide the written determination to the parties simultaneously
- The determination regarding responsibility becomes final either on the date that the School/System provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely
- The Title IX Coordinator is responsible for effective implementation of any remedies

Title IX Officials – Appeal Decision-maker

- May not be the Title IX Coordinator or an investigator or initial decision-maker
- Must be free of conflict of interest or bias
- Must complete Title IX training
- Must give all parties a reasonable, equitable opportunity to submit written statements supporting or challenging the initial decision
- Must issue a written decision, describing the result of the appeal and the rationale for the decision

Title IX Officials – Appeal Decision-maker

- School/System must offer both parties an appeal from a determination regarding responsibility, and from a School/System’s dismissal of a formal complaint or any allegations therein, on the following bases:
 - Procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents
- A School/System may offer an appeal equally to both parties on additional bases

Title IX Officials – Appeal Decision-maker

- For all appeals, the School/System must:
 - Notify the other party in writing when an appeal is filed
 - Implement appeal procedures equally for both parties
 - Ensure that the appeal decision-maker(s) is not the same person as the initial decision-maker(s), the investigator(s), or the Title IX Coordinator
 - Ensure that the appeal decision-maker(s) has completed Title IX training as required
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
 - Issue a written decision describing the result of the appeal and the rationale for the result
 - Provide the written decision simultaneously to both parties

RESPONDING TO SEXUAL HARASSMENT

When must a School/System respond?

- If you have “actual knowledge” of “sexual harassment” in an “education program or activity” against “a person in the United States”
- School/System must not be “deliberately indifferent”

What is “actual knowledge”?

- Actual knowledge means notice of sexual harassment or allegations of sexual harassment to
 - School/System’s Title IX Coordinator
 - Any School/System official who has authority to institute corrective measures
 - Any employee of an elementary and secondary school
 - Other than the Respondent
- Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient

What constitutes an education program or activity?

- “Education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution
- 34 C.F.R. §106.44(a)
- Consider (a) property owned or leased; (b) school-sponsored off-campus events; (c) cyber activities using School/System networks and equipment

What is the significance of the phrase “a person in the United States”?

- This is a jurisdictional issue – activities outside of the United States are not subject to Title IX scrutiny
- Separate and apart, however, the School/System must assess whether other laws or policies will apply to the conduct

CONDUCTING A TITLE IX INVESTIGATION FREE OF CONFLICT OF INTEREST OR BIAS

The Report of a Title IX Complaint

- Who – anyone can report (student, parent, employee, 3rd party)
- What and Where – accept the report and assess whether it is a Title IX issue
- When – Title IX Coordinator must promptly respond
- How – report can be (a) in person; (b) in writing (whether or not using the School/System's form; (c) by phone; (d) electronically (email); (e) any means that gets the information to the Title IX Coordinator

The Title IX Coordinator must act

- An initial response is required after actual knowledge of a report
- Must contact both the complainant and respondent, treating both “equitably”
- Responsible for coordinating effective implementation of supportive measures
 - Remember, these are non-disciplinary, non-punitive
 - Available to both parties
 - Designed to restore or preserve equal access to the education program or activity
 - Document what is offered
- Must explain the process for filing a formal complaint
- Must respond after the filing of a formal complaint

The Report Form

- Provided in the policy materials
- Once received, contact the parties and discuss confidentiality, supportive measures, explain the formal complaint process
- Remember, these are not the investigative interviews
- Document, Document, Document
- Title IX Coordinator must determine jurisdiction of issue
- Title IX Coordinator must assess whether a formal complaint is required even if the complainant does not wish to pursue
- Title IX Coordinator may consider whether to offer the “informal resolution” process, as appropriate
 - Requires informed written consent

Informal Resolution “Do’s and Don’ts”

- Optional – may be recommended by the Title IX Coordinator any time after a formal complaint is issued, but before a determination is reached
 - Can be before or during the investigation
- Must provide written notice to the parties, including: (1) allegations involved; (2) requirements of the informal resolution process (including possible preclusion from resuming); and (3) consequences of participation in process
- Must get each party’s voluntary, written consent
- May not initiate or offer informal resolution prior to the issuance of a formal complaint
- May not require either party to waive the right to investigation, adjudication of complaint, or to participate in informal resolution process
- May not use informal resolution to resolve complaint that employee sexually harassed a student

Formal Complaint

- Once the formal complaint is filed, the Title IX Coordinator must give written notice of the grievance process. The notice shall
 - Identify all known parties
 - Identify the conduct alleged
 - Identify the date and location of the incident, if known
 - Include a statement that the respondent is presumed not to be responsible and that determination of responsibility is made at the conclusion of the process
 - Inform the parties of their right to an advisor (may be an attorney)
 - Inform of the right to review evidence
 - Inform of the consequences of false statement
- Signed by Complainant or Title IX Coordinator
- Notice should be given to parents
- Notice should note availability of supportive measures

The Investigation

- No one in the process should have any conflict of interest or bias
- Treat all parties equitably
 - This includes a presumption that the respondent is not responsible for the alleged conduct until a determination is made after the investigation is concluded
 - Parties must have equal opportunity to identify witnesses; investigator must follow-up with those who may have relevant evidence
- Requires objective evaluation of all relevant evidence
 - Includes inculpatory and exculpatory evidence
 - Reasonableness standard – not subjective with complainant
- Requires credibility determinations
 - Observe and evaluate witnesses
 - Consider their biases or motives
 - Consider any inconsistencies and whether they can be reconciled

The Investigation

- Investigator should understand the standard of evidence established by the policy
 - Preponderance of the evidence (more likely than not)
 - Clear and convincing evidence (highly probable to be true)
- Investigator should understand the time lines established for completion of the investigation (or need to extend timeline)
- Investigator should understand the range of possible disciplinary actions that can be recommended in the report
- Investigator should describe the procedures that will be followed
- Investigator should understand and explain the supportive measures that are available to both parties
- Investigator may not require the disclosure of information or evidence protected by a lawful privilege, unless the privilege is waived

The Investigation

- Investigator must provide advance written notice of any interviews, meeting, or hearing to allow for preparation
- Investigator must allow the party's advisor to be present at interviews, meetings, or hearings
- The Title IX Coordinator should remain involved
 - Make sure the process is proceeding in a timely manner
 - Ensure that supportive measures were offered and status of same
 - Will transmit the investigator report, the parties' responses, the initial determination and any appeal determination
 - Is responsible for implementing any remedies
 - Must preserve all materials related to the investigation, determination and appeal for 7 years

How to conduct an Investigation

- Ask open-ended questions (Don't lead)
- Ask follow-up questions, exploring the witness's answer
- Ask questions that will help to uncover evidence
- Take your time and take detailed notes
 - Identify other witnesses and evidence to explore
- Avoid the rabbit holes
 - Understand what is important and relevant to the complaint
- Look for circumstances that may change the nature of the complaint

The Report of Investigation

- The Investigator must give each party an equal opportunity to review any evidence obtained as part of the investigation
 - Including inculpatory and exculpatory evidence
 - Including evidence that the investigator does not intend to rely upon
 - Parties must be given 10 days to review and provide any written response prior to completion of the investigation
 - Investigator must consider these responses when finalizing the report
- The Report must summarize all relevant evidence
 - Include a summary of all relevant interviews, documentary evidence
 - Explain any credibility determinations made
- Must be sent to the parties at least 10 days before any decision
 - Allow for review and written response

The Initial Decision

- When the investigation report is complete, and provided to each party for review, it is also sent to the Initial Decision-maker
- Initial Decision-maker must have all evidence that was subject to the parties' inspection and review available
- Initial Decision-maker must give the parties reasonable time to submit written, relevant question that they would like to have asked of any party or witness
 - Then provide responses to all questions and allow opportunity for limited follow-up
 - If any question is deemed not relevant, must explain that decision to the party proposing it
- Initial Decision-maker then makes determination regarding responsibility
 - Provide determination to both parties simultaneously

The Written Determination

- Must include the identification of the allegations which may give give to a finding of sexual harassment
- Must include and describe in detail the following:
 - All notifications to the parties
 - All interviews conducted
 - All site visits made
 - Description of the methods for gathering the evidence
 - Findings of fact supporting the determination made
 - Conclusions reached on the application of policy to the facts determined
 - Rational for the results reached, including the determination of responsibility, discipline imposed, remedies
 - Procedures for appeal of the determination

Appeal

- Minimum bases for appeal:
 - Procedural error
 - New evidence
 - Conflict of interest or bias
- Required elements for appeal:
 - Notification of the other party
 - Ensuring that the Appeal Decision-maker is not the Title IX Coordinator, Investigator, or Initial Decision-maker
 - Give parties a reasonable and equal opportunity to submit written statements
 - Issue a written decision
- Appeal determination should follow the format of the Initial determination

Conflict of Interest or Bias

- The Ethics act defines “Conflict of Interest” as:
 - Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated.
- Conflict or bias would arise when there is a private or personal benefit to be derived from an action or decision
- Need to avoid actual or perceived conflicts or bias

How to Assess Conflict or Bias

- Is there any existing or former relationship with any party
- Is there any existing or former relationship with a party's family members
- Does the School/System personnel have a personal issue related to the alleged conduct
- Has any party raised a question of conflict or bias
- Questions of conflict or bias may arise at any time, so School/System personnel must continually be aware of the issues and concerns

What evidence is relevant?

- Requires evaluation of both inculpatory and exculpatory evidence
- Requires evaluation of party and witness credibility
- PA Rule of Evidence 401 defines the test for relevant evidence:
Evidence is 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.
- Federal rule is similar
- Exceptions – Evidence subject to a lawful privilege (unless waived)
- Remember that relevancy determinations can be the basis of an appeal

What is subject to an exception?

- Complainant's sexual predisposition or prior sexual behavior
 - Rape Shield Law, 18 Pa.C.S.A. §3104(a) recites the general rule:

Evidence of specific instances of the alleged victim's past sexual conduct, past sexual victimization, allegations of past sexual victimization, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions of any offense listed in subsection (c) except evidence of the alleged victim's past sexual conduct with the defendant where the rules of evidence. consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to
 - Applies only to complainants
- Prior sexual behavior may be relevant only if offered to show someone else is the offender or to prove consent
 - Must consent be affirmatively stated or can it be implied?
 - PA law is unclear; School/System can define it

What does not constitute “consent”?

- The PA Crimes Code, 18 Pa.C.S.A. §3121(a) defines “rape”:
A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant:
 - (1) By forcible compulsion.
 - (2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.
 - (3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.
 - (4) Where the person has substantially impaired the complainant’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance.
 - (5) Who suffers from a mental disability which renders the complainant incapable of consent.
- The Model Penal Code defines consent to mean that a person’s behavior, including words and conduct – both action and inaction- that communicates the person’s willingness to engage in a specific act of sexual penetration or sexual contact

So what evidence is not relevant?

- Information that will not assist in leading to a determination
- Information that is subject to a privilege
- Even relevant evidence may be excluded if its probative value is outweighed by a danger that it may: (1) involve unfair prejudice; (2) confuse the issues; (3) be misleading; (4) cause undue delay; (5) waste time; or (6) needlessly present cumulative evidence. Pa.R.Evid. 403
- Evidence that cannot assist in the finding of a fact of consequence in an action.
 - Irrelevant evidence is evidence that has no likelihood of assisting a trier of fact in ascertaining any fact in issue in an action. Bouvier Law Dictionary

Emergency Removals

- Even though School/Systems may not impose any disciplinary sanctions before completion of the grievance process, the Title IX regulations , 34 C.F.R. §106.44(c), provide:
Emergency removal. Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an **individualized safety and risk analysis**, determines 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 provides the respondent with **notice and an opportunity to challenge** the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.
- Must provide respondent with notice and opportunity to challenge the decision
- If Title IX complaint involves a non-student employee, the employee may be placed on administrative leave pending the outcome

Emergency Removals and Expulsion

- PA does not permit student exclusions from school for more than 10 consecutive days or 15 total days in a school year without due process. 22 Pa. Code §12.6
- Student expulsion hearings are clearly disciplinary
 - Depending on the length of the investigation, may have to conduct informal hearing or formal hearing procedures
 - Inform school of pending Title IX process; limit exclusion accordingly
 - May need to reconvene expulsion hearing at conclusion of Title IX process
- Consider non-punitive supportive measures
 - No contact agreements
 - Virtual education option

Retaliation and Confidentiality

- Reminder that retaliation is prohibited. 34 C.F.R. §106.71
- Reminder that the School/System must keep confidential the identity of:
 - any individual who has made a report or complaint of sex discrimination
 - any individual who has been reported to be the perpetrator of sex discrimination, any respondent
 - any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law
 - Remember that, if a formal complaint is filed, a notice of the allegations must be sent to both parties, precluding confidentiality; of course, the determination is sent to both parties as well
- Be aware, however, that the exercise of rights protected under the First Amendment does not constitute retaliation. 34 C.F.R. §106.71(b)(1)
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation. 34 C.F.R. §106.71b)(2)
 - A determination regarding responsibility is not sufficient to conclude that any party made a materially false statement in bad faith.

QUESTIONS?
