

TITLE IX TRAINING

July 2024

presented by
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INTRODUCTION

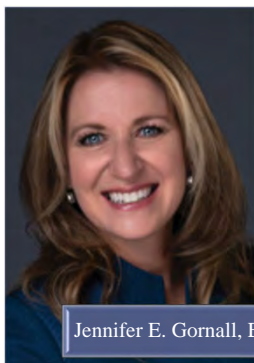


Title IX Training

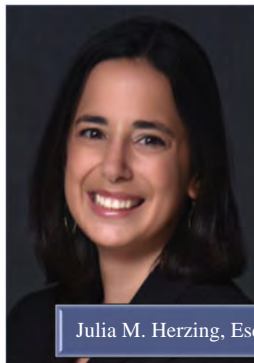
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July 2024

Speakers



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Training Overview

<ul style="list-style-type: none"> ▪ Title IX ▪ Compliance with Title IX Mandates <ul style="list-style-type: none"> – Policy & Notice Requirements <ul style="list-style-type: none"> • Policy • Grievance Procedure • Notice of Non-Discrimination – Title IX Roles and Training Requirements <ul style="list-style-type: none"> • Bias/Conflicts of Interest • Title IX Coordinator • Supportive Measures Review Official • Investigator • Informal Resolution Facilitator • Decisionmaker • Appeal Decisionmaker 	<ul style="list-style-type: none"> ▪ Discrimination On the Basis of Sex <ul style="list-style-type: none"> – Sex Discrimination – Sex-Based Harassment – Pregnancy – Retaliation – Jurisdictional Issues ▪ Required Response to Discrimination ▪ Evaluation Stage <ul style="list-style-type: none"> – Complaint <ul style="list-style-type: none"> • Complainant Initiated • Title IX Coordinator Initiated – Supportive Measures – Informal Resolution – Emergency Removal Process – Dismissal of Complaint – Appeal of Dismissal – Single Investigator Model vs. Separate Officials 	<ul style="list-style-type: none"> ▪ Investigation Stage <ul style="list-style-type: none"> – Conducting an Investigation – Witnesses/Evidence – Relevance – “Otherwise Impermissible” evidence – Access to Evidence – Confidentiality – Investigative Techniques ▪ Determination Stage <ul style="list-style-type: none"> – Questioning Parties and Witnesses – Standard of Evidence – Determination Regarding Responsibility ▪ Appeal Stage ▪ Recordkeeping
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TITLE IX



Title IX – The Law

Title IX of the Education Amendments of 1972 provides the following:

- No person in the United States shall, *on the basis of sex*, be excluded from the 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)

- The statutory text of Title IX has not changed.



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USDOE Regulations

- In 2020, the United States Department of Education (USDOE) issued changes to the Title IX regulations which went into effect August 14, 2020.
- On March 8, 2021, President Biden issued an Executive Order requiring a comprehensive review of the Title IX regulations. A Notice of Proposed Rulemaking was issued in April 2023.
- On April 29, 2024, USDOE published final regulations, with an **effective** date of **August 1, 2024**, at 89 FR 33474.



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Which Regulations Apply?

- With the new regulations taking effect August 1, 2024, it is critical that educational entities know how to process Title IX cases going forward.

Alleged incidents which occurred prior to August 1, 2024 must be processed under the 2020 regulations.

Alleged incidents of sex discrimination occurring after August 1, 2024 must be processed under the 2024 regulations.

“The Department will not enforce these final regulations retroactively.” *Preamble to Final Regulations*, 89 FR 33813.

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Compliance with Title IX Mandates



Compliance with Title IX Mandates

In order to comply with Title IX, schools must:

- ✓ **Designate at least one Title IX Coordinator** to coordinate its efforts to comply with its responsibilities under Title IX and its regulations;
- ✓ Adopt, publish, and implement a **nondiscrimination policy** and **grievance procedures**;
- ✓ Provide students, parents/guardians, employees, applicants, and unions **notice of nondiscrimination**; and
- ✓ Ensure that all employees and designated Title IX officials receive **training** related to their duties under Title IX.

34 CFR §106.8



Policy & Notice Requirements

■ Nondiscrimination Policy

- Each school must adopt, publish, and implement a policy stating that the school **does not discriminate on the basis of sex and prohibits sex discrimination** in any education program or activity that it operates, as required by Title IX and its regulations.

34 CFR §106.8(b)(1)

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Policy & Notice Requirements

■ Grievance Procedures

- Each school must adopt, publish, and implement grievance procedures that provide for the **prompt and equitable resolution** of complaints made by students, employees, or other individuals who are participating or attempting to participate or attempting to participate in the school's education program or activity, or by the Title IX Coordinator, alleging any action that would be prohibited by Title IX or its regulations.

34 CFR §106.8(b)(2)

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Grievance Procedure

- Basic Requirements:

- ✓ Treat Complainants and Respondents equitably;
- ✓ Require that any Title IX officials involved not have a conflict of interest or bias for or against Complainant(s)/Respondent(s);
- ✓ Include a presumption that Respondent is not responsible until a determination at the end of the Grievance Procedures;
- ✓ Establish reasonably prompt timeframes, including allowing for reasonable extension of timeframes;



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Grievance Procedure

- Basic Requirements (continued):

- ✓ Require reasonable steps to protect the privacy of the parties and witnesses without restricting the ability of the parties to:
 - Obtain and present evidence, including by speaking to witnesses;
 - Consult with their family members, confidential resources, or advisors; or
 - Otherwise prepare or participate in the grievance procedures.
- ✓ Require an objective evaluation of all evidence that is relevant and not otherwise impermissible and provide that credibility determinations must not be based on a person's status as a Complainant, Respondent, or witness.

34 CFR §106.45(b)

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Policy & Notice Requirements



- **Notice of nondiscrimination** – Each school must provide a notice of nondiscrimination to:
 - Students;
 - Parents, guardians, or other authorized legal representatives of elementary or secondary school students;
 - Employees;
 - Applicants for admission and employment; and
 - All unions and professional organizations holding collective bargaining or professional agreements with the school.

34 CFR §106.8(c)

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Notice of Nondiscrimination: Contents

- The notice of nondiscrimination must include the following elements:
 - ✓ A statement that the school does not discriminate on the basis of sex and prohibits sex discrimination in its education programs and activities;
 - ✓ A statement that inquiries about the application of Title IX and its regulations to the school may be referred to the school's Title IX Coordinator, the Office for Civil Rights, or both;
 - ✓ The name or title, office address, email address, and telephone number of the school's Title IX Coordinator;
 - ✓ How to locate the school's nondiscrimination policy and grievance procedures; and
 - ✓ How to report information about and how to make a complaint of sex discrimination.

34 CFR § 106.8(c)(1)

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Notice of Nondiscrimination: Publication

- Either of the following must be ***prominently displayed*** on the school's website **and** in each handbook, catalog, announcement, bulletin, and application form that it makes available to the individuals to whom notice is owed or which are otherwise used in connection with recruitment:
 - Notice of nondiscrimination; or
 - A statement that the recipient prohibits sex discrimination and that individuals may report concerns or questions to the Title IX Coordinator and providing the location of the notice on the school's website.



34 CFR §106.8(c)(2)

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TITLE IX ROLES



Title IX Officials

- Title IX Coordinator
- Supportive Measures Review Official
- Informal Resolution Facilitator
- Investigator
- Decisionmaker
- Appeal Decisionmaker



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Avoiding Conflicts of Interest/Bias

- Title IX officials may not have a conflict of interest or bias for or against Complainant(s)/Respondent(s).

34 CFR §§106.44(k)(4), 106.45(b)(2)

 - Conflicts of Interest arise when one could obtain a personal or unrelated benefit from actions or decisions made in an official or neutral capacity.
 - The fact that the Title IX official knows the parties or witnesses or has worked with them does **not** automatically mean an individual has a conflict of interest if the individual is able to make an unbiased evaluation of the evidence.

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Conflicts of Interest

- Avoiding Conflicts of Interest, or the appearance of them, is critical in Title IX investigations. The Title IX Coordinator should consider the following factors when appointing Title IX officials:
 - Does the person have any relationship with any party (e.g. family or close friend)?
 - Does the person have any relationship with a party's family?
 - Does the individual have any history related to the alleged conduct (e.g. fact witness)?
 - Has any party or other individual raised a concern regarding conflict of interest or bias?
- **The evaluation of conflict of interest must be on-going and regularly reviewed as the investigation proceeds.**

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Lack of Bias / Impartiality

- A Title IX official may not be biased, for or against, an individual Complainant or Respondent or complainants or respondents generally.
- In order to fulfill a Title IX role in an unbiased and impartial manner, a Title IX official must be able to:
 - Prevent sympathy, prejudice, fear or public opinion to influence their approach.
 - Approach the Title IX Grievance Procedures with an open mind and without preconceived notions of what may have occurred.
 - Review all evidence before reaching a determination.
 - Give due regard to the positions of all parties and consider all relevant and not otherwise impermissible evidence, whether inculpatory or exculpatory, when arriving at a decision.

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Title IX Officials – Title IX Coordinator

■ Title IX Coordinator: General Obligations

- Coordinate the school’s compliance with its obligations under Title IX and its regulations;
- Take action to promptly and effectively end any sex discrimination in a school’s education program or activity, prevent its recurrence, and remedy its effects when “notified of conduct that reasonably may constitute sex discrimination under Title IX.”

34 CFR §106.44(f)

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Title IX Officials – Title IX Coordinator

If the Title IX Coordinator concludes that the conduct may reasonably constitute sex discrimination under Title IX, they must do the following:

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| <ul style="list-style-type: none">■ Treat Complainant and Respondent equitably;■ Offer and coordinate Supportive Measures;■ Notify Complainant (or Reporter) of Grievance Procedures and Informal Resolution Process;■ Determine whether to initiate and initiate the Grievance Procedures or Informal Resolution Process when appropriate;■ Notify Complainant prior to initiating a Complaint and revisit safety concerns and Supportive Measures; | <ul style="list-style-type: none">■ Notify Respondent of Grievance Procedures and Informal Resolution Process if Complaint is made;■ Emergency Removal Determination 34 C.F.R. §106.44(h);■ Consult with members of the Complainant’s or Respondent’s IEP and/or 504 Team to determine how to comply with IDEA/Section 504 through the Grievance Procedures 34 C.F.R. §106.8(e); and■ Take prompt and effective steps to ensure that sex discrimination does not continue or recur. |
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34 C.F.R. §106.45(f)
except as otherwise noted



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Title IX Officials – Title IX Coordinator

- The **Title IX Coordinator** is also responsible for coordinating a school's efforts to comply with the school's responsibilities under Title IX and its regulations in the following areas:
 - Training
 - Monitoring for “barriers to reporting”
 - Prevention
 - Recordkeeping Requirements
- The final regulations make clear that a school may have more than one Title IX Coordinator and allow a school or Title IX Coordinator to delegate specific duties to one or more designees, ***provided one*** Title IX Coordinator must “retain ultimate oversight” over the school's Title IX compliance.

34 CFR §106.8(a)(1)

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Title IX Officials – Title IX Coordinator Monitoring for Barriers to Reporting

- A **Title IX Coordinator** must:
 - Monitor the school's education program or activity for “***barriers to reporting***” information about conduct that reasonably may constitute sex discrimination; and
 - Take steps reasonably calculated to address such barriers.

34 CFR §106.44(b)

- Examples:

Students with disabilities	Inaccessible complaint procedures
Historically marginalized communities	Difficulty to reach Title IX Coordinator
Individuals with limited English proficiency	Lack of transparency

89 FR 33564

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Title IX Officials – Supportive Measures Review Official

- A school must provide a Complainant or Respondent with a “timely opportunity to seek, from an appropriate and impartial employee, modification or reversal of the [] decision to provide, deny, modify, or terminate supportive measures to them.” 34 CFR §106.44(g)(4)
- The **Supportive Measures Review Official** must:
 - Be someone other than the employee who made the challenged decision; and
 - Have authority to modify or reverse the decision if determined to be inconsistent with supportive measures under the regulations or if circumstances have changed materially.

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Title IX Officials – Informal Resolution Facilitator

The **Informal Resolution Facilitator** must:

- Must be free from conflicts of interest, bias and trained to be impartial.
- Must have completed the Title IX training.
- Must not be the same person as the Investigator or the Decisionmaker, **but** may be the Title IX Coordinator as long as:
 - Title IX Coordinator has the Informal Resolution Facilitator training as set forth in 34 CFR §106.8(d)(3).
 - Title IX Coordinator does not act as the Investigator or Decisionmaker.

34 CFR §106.44(k)(4)

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Title IX Officials - Investigator

The Title IX **Investigator**:

- May be the Title IX Coordinator and/or Decisionmaker but cannot be the Informal Resolution Facilitator or the Appeal Decisionmaker.

34 CFR §106.45(b)(2)

- Must have an understanding of investigative techniques and issues of relevance.

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Title IX Officials - Decisionmaker

The Title IX **Decisionmaker**:

- May be the Title IX Coordinator and/or Investigator but cannot be the Informal Resolution Facilitator or the Appeal Decisionmaker.

34 CFR §106.45(b)(2)

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Title IX Officials - Decisionmaker

Title IX Appeal Decisionmakers:

- There are two types of Appeal Decisionmakers:
 - Appeals from dismissals of complaints; and
 - Appeals from final determinations.

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Title IX Officials – Appeal Decisionmaker(s)

- Appeal Decisionmakers
 - Appeals from dismissals of Complaint
 - May *not* be anyone who “[took] part in an investigation of the allegations or dismissal of the complaint.” This would likely always include the Title IX Coordinator, Informal Resolution Facilitator, Investigator, or Initial Decisionmaker.

34 CFR §106.45(d)(3)(iii)

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Title IX Officials – Appeal Decisionmaker(s)

- **Appeal Decisionmakers**
 - Appeals from final determinations
 - The new regulations do not specify who should fill this role. It will differ based on “comparable procedures” in each individual school.
 - We recommend that the Appeal Decisionmaker not be any individual who took part in the Grievance Procedures.

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TRAINING REQUIREMENTS



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Training Requirements: ALL Employees

- Schools must ensure that **ALL** employees receive training (**promptly upon hire and annually thereafter**) on the following topics:



- The school’s obligation to address sex discrimination;
- The scope of conduct that constitutes sex discrimination, including sex-based harassment;
- Each employee’s notification and information requirements under the Title IX regulations.

34 CFR §106.8(d)(1)

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Training Requirements: ALL Employees

- **Employees’ Notification and Information requirements**, on which ALL employees must be trained, include:
 - The employee’s responsibility to provide a student or guardian who informs the employee of the student’s **pregnancy** with the Title IX Coordinator’s contact information and inform the student or guardian that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student’s equal access to the school’s education program or activity (34 CFR §106.4(b)(2)); and
 - The employee’s responsibility to notify the Title IX Coordinator when the employee has information about **conduct that reasonably may constitute sex discrimination** under Title IX and the alternate notice requirements for certain “confidential employees.” (34 CFR §106.44).

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Training Requirements: Title IX Officials

- In addition to the training requirements for all employees, each **Title IX official** must receive training on specific enumerated topics related to their duties under Title IX **promptly upon hire, or change of position that alters their duties under Title IX and its regulations, and annually thereafter.**
- When possible, we recommend providing the full training to all Title IX officials to allow for greater flexibility.

Note – The 2024 regulations allow for the same person to fill multiple roles (i.e. the “Single Investigator Model**”). We recommend this decision be made on a case-by-case basis.*

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Training Requirements: Title IX Officials

Title IX Coordinator

- | | |
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| <ul style="list-style-type: none">▪ The school’s obligations in responding to allegations of sex discrimination, including sex-based harassment;▪ The school’s grievance procedures;▪ How to serve impartially, including by avoiding prejudgment of the facts at issue, conflict of interest, and bias;▪ The meaning and application of the term “relevant” in relation to questions and evidence;▪ The types of evidence that are impermissible regardless of relevance; | <ul style="list-style-type: none">▪ The rules and practices associated with the school’s informal resolution process;▪ Responsibilities specific to Title IX Coordinators’ role (see Title IX Coordinator slides);▪ The school’s recordkeeping system and the recordkeeping requirements under Title IX and its regulations; and▪ Any other training necessary to coordinate the recipient’s compliance with Title IX. |
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34 CFR §106.8(d)(4)

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Training Requirements: Title IX Officials

Investigator, Decisionmaker, Appeals Decisionmaker(s), and Supportive Measures Review Official

- The school's obligations in responding to allegations of sex discrimination, including sex-based harassment;
- The school's grievance procedures;
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflict of interest, and bias;
- The meaning and application of the term "relevant" in relation to questions and evidence;
- The types of evidence that are impermissible regardless of relevance;

- The rules and practices associated with the school's informal resolution process;
- Responsibilities specific to Title IX Coordinators' role (see Title IX Coordinator slides);
- The school's recordkeeping system and the recordkeeping requirements under Title IX and its regulations; and
- Any other training necessary to coordinate the recipient's compliance with Title IX.

34 CFR §106.8(d)(2)

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Training Requirements: Title IX Officials

Informal Resolution Facilitator

- The school's obligations in responding to allegations of sex discrimination, including sex-based harassment;
- The school's grievance procedures;
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflict of interest, and bias;
- The meaning and application of the term "relevant" in relation to questions and evidence;
- The types of evidence that are impermissible regardless of relevance;

- The rules and practices associated with the school's informal resolution process;
- Responsibilities specific to Title IX Coordinators' role (see Title IX Coordinator slides);
- The school's recordkeeping system and the recordkeeping requirements under Title IX and its regulations; and
- Any other training necessary to coordinate the recipient's compliance with Title IX.

34 CFR §106.8(d)(3)

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DISCRIMINATION ON THE BASIS OF SEX



What is “Sex”?

- Title IX does not define “sex.”
- The United States Supreme Court has interpreted prohibitions against discrimination “because of... sex” in non-Title IX contexts to include gender identity and sexual orientation. President Biden and the USDOE have issued similar interpretations.

Bostock v. Clayton County, Georgia (June 2020),
Executive Order (January 2021),
USDOE “*Notice of Interpretation*” (June 2021)
* *Enforceable in our jurisdiction as of this training.*
- The 2024 regulations now ***expressly*** incorporate gender identity, sexual orientation, and pregnancy and related conditions into the scope of discrimination on the basis of sex. 34 C.F.R. §106.10



What is “Sex”?

- Per the 2024 regulations, the phrase “on the basis of sex,” as used in Title IX, includes all of the following:
 - Sex stereotypes
 - Sex characteristics
 - Pregnancy or related conditions
 - Gender identity
 - Sexual orientation

34 C.F.R. §106.10

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What is “Sex Discrimination”?

- Discrimination on the basis of “sex” – i.e. sex characteristics, sex stereotypes, pregnancy or related condition, gender identity, and/or sexual orientation.
 - Complaints of “sex discrimination other than sex-based harassment” include all complaints of sex discrimination that do not involve sex-based harassment. For example:
 - Allegations of retaliation.
 - Allegations that a school failed to make reasonable modifications for pregnant students or students with pregnancy related conditions.
 - Allegations that a school’s policy or procedures discriminate on the basis of sex.

89 FR 33654

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What Is “Harassment?”

- Harassment is a form of unlawful discrimination in that it is characteristic-based treatment that adversely affects the school program or activity and/or the workplace.
 - Harassment can include actions, words, jokes, or comments based on or because of an individual’s protected characteristic(s).
 - Harassment also can include passive acts, such as alienating someone through omission or withholding necessary information or assistance.
- “Sex-based harassment... is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex.” 39 C.F.R. §106.2

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What is “Sex-Based Harassment”?

Sex-based harassment prohibited by Title IX means sexual harassment and other harassment on the basis of sex, that is:

1. **Quid pro quo Harassment:** An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient’s education program or activity explicitly *or impliedly* conditioning the provision of such an aid, benefit, or service on a person’s participation in unwelcome sexual conduct; or
2. **Hostile environment harassment:** Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively *and* objectively offensive and is so severe *or* pervasive that it *limits* or denies a person’s ability to participate in or benefit from the recipient’s education program or activity (i.e., creates a hostile environment); or
3. **Specific offenses:** Sexual assault, dating violence, domestic violence, stalking.

34 C.F.R. §106.2 (Definitions)

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Sex-Based Harassment – Quid Pro Quo Harassment

Quid pro quo Harassment – “An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient’s education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person’s participation in unwelcome sexual conduct.”

34 CFR §106.2

- **Employee, agent, or other person authorized by the school.**
“[Q]uid pro quo sex-based harassment covers harassment by members of a [school’s] leadership, including board members, paid or unpaid, to the extent those individuals are authorized by the recipient to provide an aid, benefit, or service under the [school’s] education program or activity.” 89 FR 33496.
- **Explicitly or impliedly.**
- **Unwelcome conduct.**
“[A]cquiescence to the conduct or the failure to complain, resist, or object to the conduct does not mean that the conduct was welcome, and the fact that a person may have accepted the conduct does not mean they welcome it.” 89 FR 33496

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Sex-Based Harassment – Hostile Environment

Hostile Environment Harassment – Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity (i.e. creates a hostile environment).

34 C.F.R. §106.2

- **Subjectively and objectively offensive.**
- **Severe or pervasive.**
- **Limits or denies.**

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Sex-Based Harassment – Hostile Environment

Subjectively & Objectively Offensive

- **Objectively Offensive:** The “Reasonable Person”
 - Does the conduct create an environment that a **reasonable person** would find hostile or abusive?”
 - “[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the [victim’s] position, **considering all the circumstances.**” *Oncale v. Sundower Offshore Services, Inc.*, 523 U.S. 75, 81 (1998).
- **Subjectively Offensive**
 - If the victim does not subjectively perceive the environment to be abusive, even if a reasonable person would, no hostile environment exists. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

89 FR 33606

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Sex-Based Harassment – Hostile Environment

Severe or Pervasive

- The USDOE adopted the use of the term “severe *or* pervasive” in an effort to take a “more uniform approach” to hostile environment claims by aligning the standard with other civil rights laws, including Title VII. 89 FR 33508.
- The frequency, severity, and nature of the conduct are all relevant in determining whether a specific case is serious enough to rise to the level of hostile environment harassment.
 - A single incident may be enough if it is sufficiently severe.
 - Conversely, conduct which is not severe on a one-time basis may create a hostile environment if repeated on multiple occasions.

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Sex-Based Harassment – Hostile Environment

Limits or Denies

- “Title IX states that 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 education program or activity receiving Federal financial assistance. If Title IX only covered exclusion from participation or denial of access, there would have been no reason for Congress to add ‘be denied the benefits of.’ **A limitation on equal access constitutes a denial of benefits.**” *Preamble*, 89 FR 33618.
- A fact-specific inquiry. Evidence may include, for example:
 - Skipping class to avoid a harasser.
 - Decline in GPA.
 - Difficulty concentrating in class.
 - Quitting a sports team to avoid the harasser.
 - Bed-wetting and crying at night.

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Sex-Based Harassment – Hostile Environment

- **Hostile Environment Factors to Consider:** According to the 2024 regulations, whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following factors:
 1. The degree to which the conduct affected the complainant’s ability to access the recipient’s education program or activity.
 2. The type, frequency, and duration of the conduct.
 3. The parties’ ages, roles within the recipient’s education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct.
 4. The location of the conduct and the context in which the conduct occurred.
 5. Other sex-based harassment in the recipient’s education program or activity.

39 C.F.R. §106.2

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Hostile Environment – Factors to Consider

- **Factor #1** – The degree to which the conduct affected the complainant’s ability to access the recipient’s education program or activity.
- ***Caution*** – The fact that a complainant is still able to access the program or activity is not, on its own, dispositive.
 - In the *Preamble* to the 2024 regulations, the USDOE clarified that “equal access” “neither requires nor permits school officials to impose notions of what a ‘perfect victim’ does or says, nor may a [school] refuse to respond to sexual harassment because a complainant is ‘high-functioning’ or not showing particular symptoms following a sexual harassment incident. School officials turning away a complainant by deciding the complainant is ‘not traumatized enough’ would be impermissible.” 89 FR 33641

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Hostile Environment – Factors to Consider

- **Factor #2** – The type, frequency, and duration of the conduct.
 - “The Department acknowledges that type, frequency, and duration may overlap with the meanings of ‘severe’ and ‘pervasive’ in some respects, but a reference to type, frequency, and duration will help guide decisionmakers in their evaluation of the severity and pervasiveness of the conduct.” 89 FR 33645

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Hostile Environment – Factors to Consider

- **Factor #3** – The parties’ ages, roles, previous interactions, and other factors.
 - Early elementary vs. secondary students.
 - Previous interactions could impact the analysis of whether the alleged conduct was subjectively offensive to the complainant.
 - “Other factors” would include developmental levels, including cognitive abilities.

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Hostile Environment – Factors to Consider

- **Factor #4** – The location of the conduct and the context in which the conduct occurred.
 - “Location and context are important to consider in determining whether a hostile environment has been created because they provide information that is relevant to each of the hostile environment elements: unwelcomeness, objective and subjective offensiveness, and severity and pervasiveness and effect on a complainant's ability to access or benefit from the education program or activity... Each instance of alleged harassing conduct must take into account the totality of the circumstances, including consideration of the location and context.” 89 FR 33653.

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Hostile Environment – Factors to Consider

- **Factor #5** – Other sex-based harassment in the recipient’s education program or activity.
 - Comment made by one person vs. one comment made by multiple different people.
 - Recall that this factor must tie back to whether the alleged conduct created a hostile environment for the complainant(s).

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Hostile Environment – Technology

When does online harassment create a “hostile environment” at school?

- “When a recipient has information about sex-based harassment among its students that took place online and created a hostile environment in the recipient’s education program or activity, the recipient has an obligation to address that hostile environment.” 89 FR 33661.
 - USDOE does not expect schools to actively monitor online activity of students outside of the education program or activity.
 - However, if a school has information about online activity which limits or denies a student’s ability to participate in or benefit from the its education program or activity, it has an obligation to address it.

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Sex-Based Harassment – Specific Offenses

Sexual Assault

- Defined as a **forcible or nonforcible sex offense** under the uniform crime reporting system of the Federal Bureau of Investigation.
34 C.F.R. §106.2.
- The FBI UCR currently... defines sex offenses as “[a]ny **sexual act including Rape, Sodomy, Sexual Assault With An Object, or Fondling** directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent; **also unlawful sexual intercourse** [i.e. statutory rape and incest].” *FBI, Uniform Crime Reporting Program: National Incident-Based Reporting System* (2018).
- Includes statutory rape as a “nonforcible” sex offense.

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Sex-Based Harassment – Specific Offenses

Fondling is a specific type of sexual assault that is defined as “the touching of the private 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 their age or because of their temporary or permanent mental incapacity.”

FBI, Uniform Crime Reporting Program:
[National Incident-Based Reporting System](#) (2018).

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Sex-Based Harassment – Specific Offenses

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 a relationship is determined based on consideration of the following factors:
 - length of the relationship,
 - the type of relationship, and
 - the frequency of interaction between the persons involved in the relationship.

34 CFR §160.2

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Sex-Based Harassment – Specific Offenses

Domestic Violence

- A felony or misdemeanor crime of violence committed by a person who:
 - Is a current or former spouse or intimate partner of the victim; or a person similarly situated to a spouse of the victim;
 - Is a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
 - Is a person with whom the victim shares a child in common; or
 - Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

34 CFR §160.2

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Sex-Based Harassment – Specific Offenses

Stalking

- A course of conduct directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others or suffer substantial emotional distress.
34 CFR §160.2

PREGNANCY OR RELATED CONDITIONS

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Pregnancy or Related Conditions: Preventing Discrimination and Ensuring Equal Access

- The 2024 regulations expressly prohibit discrimination in a school's education program or activity against any student based on a **student's current, potential, or past pregnancy or related conditions**.*
- The regulations also require that schools take specific actions to **prevent discrimination and ensure equal access** to the educational program once they are notified by the student or a parent, guardian, or other person who has the legal right to act on behalf of the student of the student's pregnancy or related condition.

34 CFR §106.40



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Pregnancy or Related Conditions: Employees

- **Note* – Section 106.40 of the regulations is specific only to **students**. However, Title IX's general prohibition against sex discrimination prohibits pregnancy discrimination against **employees**.
- Schools also have an obligation to provide reasonable accommodations to employees for pregnancy and related conditions under the Pregnant Workers Fairness Act (PWFA). 42 U.S.C. §2000gg.

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Pregnancy or Related Conditions Defined

- The phrase “*pregnancy or related conditions*” includes any of the following:
 - Pregnancy, childbirth, termination of pregnancy, or lactation;
 - Medical conditions related to any of the above; or
 - Recovery from any of the above.

34 CFR §160.2
- In publishing the 2024 regulations, USDOE made clear that the definition is intended to include “**the full spectrum of processes and events connected with pregnancy.**” 89 FR 33755

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Pregnancy or Related Conditions: Notification Requirements

■ **REMINDER:**

When a student, or a person who has a legal right to act on behalf of the student, informs **any employee** of the student’s pregnancy or related condition, **the employee must** promptly:

- Provide that person with the Title IX Coordinator’s contact information; and
 - Inform that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student’s equal access to the school’s education program or activity.
- 34 CFR §106.40(2)

- In addition, the **Title IX Coordinator must:**

- Notify the student and, if applicable, the parent or guardian who notified the Title IX Coordinator of the student’s pregnancy or related conditions, of the school’s obligations to prevent discrimination and ensure equal access; and
- Provide them with the school’s notice of nondiscrimination.

34 CFR §106.40(3)(i)

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Reasonable Modifications

- The school must make “*reasonable modifications*” to its policies, practices, and procedures **as necessary to prevent sex discrimination and ensure equal access** to the school’s education program or activity. 34 CFR §106.40(3)(ii)
 - Each reasonable modification must be based on the student’s individualized needs.
 - In determining modifications, the Title IX Coordinator must consult with student.

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Reasonable Modifications

- Reasonableness.
 - A modification is not reasonable if the school can demonstrate that it would ***fundamentally alter*** the nature of its education program or activity. This does not relieve the school of its burden to provide a reasonable modification. The school must then consider whether alternative modifications exist.
 - Inherently “reasonable” – A school **must** allow students to **voluntarily access** any **separate and comparable portion** of the school’s education program or activity as a “reasonable modification.” 34 CFR §106.40(3)(iii).
 - Note the use of the term “voluntarily.” Coercing or pressuring a student to participate in a separate portion of a school’s education program or activity on the basis of the student’s pregnancy or pregnancy-related condition is sex discrimination.

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Reasonable Modifications

- The student has discretion to accept or decline each reasonable modification offered by the school. If the student accepts the offered reasonable modification, the school must implement it.
- Examples of potential “reasonable modifications” include:
 - Breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions.
 - Access to online or homebound education.
 - Permission to eat, drink, or use the restroom.
 - Changes in schedule.
 - Counseling.
 - Intermittent absences to attend medical appointments.
 - Elevator Access.



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Pregnancy or Related Conditions: Supporting Documentation

- Schools may not require supporting documentation of pregnancy or related conditions *unless* it is **necessary and reasonable** for the school to determine what reasonable modifications to make or whether to take additional specific actions.
- Situations when it is **not** reasonable and necessary to require supporting documentation include, but are not limited to:
 - When the need for reasonable modifications is obvious.
 - When the student has previously provided the district with sufficient supporting documentation.
 - When the student has lactation needs.
 - When the reasonable modification is allowing a student to carry or keep water nearby and drink, use a bigger desk, sit or stand, take breaks to eat, drink, or use the restroom.
 - When the specific actions are available to students for reasons other than pregnancy or related conditions.



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Voluntary Leaves of Absence

- A school must allow a student to voluntarily take a leave of absence from school:
 - To cover, at a minimum, the period of time the student's medical provider deems necessary, or
 - If the district maintains a policy that would allow for a longer leave for the student, leave consistent with that policy.
- Upon a student's return they must be reinstated to the academic status and, to the extent practicable, the extracurricular status the student held prior to the leave.

34 CFR §106.40(3)(iv)

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Lactation Space



- A school must ensure students have access to a **lactation space** which is:
 - Not a bathroom;
 - Clean, shielded from view, and free from intrusion from others; and
 - May be used by the students for expressing breast milk or breast feeding as necessary.

34 CFR §106.40(3)(v)

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RETALIATION



Retaliation Prohibited

- A school must prohibit retaliation, *including peer retaliation*, in its education program or activity.
- When a school has information about conduct that reasonably may constitute “retaliation” under Title IX or its regulations, the school must respond in the same manner as it responds to information of sex discrimination and sex-based harassment.
- This means that the obligation to report to the Title IX Coordinator, to provide supportive measures, and to initiate grievance procedures or, as appropriate, an informal resolution process apply equally to complaints of retaliation.

34 C.F.R §106.71



Retaliation

- Definition of Retaliation
 - **WHAT** - *intimidation, threats, coercion, or discrimination* against any person
 - **WHO** - by the *recipient, a student, or an employee* or other person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity
 - **WHY** - for the purpose of *interfering with* any right or privilege secured by Title IX or this part, *or because the person has reported information*, made a *complaint, testified, assisted, or participated or refused to participate** in any manner in an investigation, proceeding, or hearing under this part, including in an informal resolution process under, in grievance procedures under and in any other actions taken by a recipient.

34 C.F.R. §106.2

*Note: A school is **not** precluded from, and it has not retaliated by, mandating that its **employees** participate in Title IX investigations.

89 FR 33830

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Peer Retaliation

Loser!

Everyone hates you!

If you testify, I will make sure you don't make the team.

- Peer retaliation means retaliation by a student against another student.
 - “[T]o constitute ‘peer retaliation’ under the final regulations, conduct must be undertaken for the purpose of interfering with Title IX rights or because the person participated in some way in Title IX grievance procedures.”
89 FR 33833.
- Schools are obligated to respond to and address peer retaliation as you would any instance of non-peer retaliation or sex-based harassment.

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Retaliation – Discipline Outside Title IX

- A school may **not** initiate discipline against a student or employee for the purpose of interfering with Title IX rights or because the student or employee participated in Title IX grievance procedures.
 - The 2024 regulations no longer specify that initiating a code of conduct violation for conduct arising out of the same facts underlying a Title IX complaint is *per se* retaliation.
 - The 2024 regulations “clearly restrict a [school] from initiating a disciplinary process **only when** it does so” for retaliatory reasons. “The prohibition on retaliation would not prevent a [school] from enforcing its code of conduct for legitimate, nondiscriminatory reasons” 89 FR 33827
- Whether specific conduct constitutes retaliation is a **case-by-case analysis** based on all of the facts and circumstances.

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Retaliation – Specific Issues

- The exercise of rights protected under the First Amendment does not constitute “retaliation.” 89 FR 33828
 - “The Department appreciates the opportunity to clarify that merely criticizing another student’s decision to participate in Title IX grievance procedures would not alone constitute peer retaliation under the final regulations. The final retaliation provisions do not require or authorize a recipient to punish students who exercise their First Amendment rights to speech and association.” 89 FR 33828
- A school may still discipline a student or employee for making a false statement in bad faith in connection with a Title IX report, complaint, or investigation, provided, however, that such a determination is not based solely on the Decisionmaker’s determination regarding responsibility for sex discrimination.

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JURISDICTIONAL ISSUES



Application – Expansion to Some Off-Campus Behavior

- The requirements of Title IX and the 2024 regulations apply to “all sex discrimination occurring under a [school’s] education program or activity in the United States.” 34 CFR §106.11
 - **Practical application** – If the conduct occurred in connection with an education program or activity in the United States (even if the conduct itself occurred outside the United States) and the school has disciplinary authority, the Title IX process applies.

Application – Expansion to Some Off-Campus Behavior

- A school “should not focus its analysis on whether alleged conduct happened ‘on’ or ‘off’ campus but rather **whether the [school] has disciplinary authority over the Respondent’s conduct in the context in which it occurred.**” 89 FR 33429
- The 2024 regulations specifically state that schools have an obligation “to address a sex-based hostile environment under its education program or activity, even when **some conduct** alleged to be **contributing to** the hostile environment occurred outside the recipient’s education program or activity or outside the United States.”

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REQUIRED RESPONSE TO KNOWLEDGE OR INFORMATION OF SEX DISCRIMINATION



Knowledge

A school with “**knowledge** of conduct that **reasonably may** constitute sex discrimination in its education program or activity must respond **promptly and effectively**.” 34 CFR §106.44(a)(1)

How does a school gain “knowledge?”

- When employees who are not “confidential employees” have information about conduct that may reasonably constitute sex discrimination; or
- Upon receipt of a “complaint.”

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“Confidential Employees” Under Title IX

- The 2024 regulations define “confidential employees” as a school employee:
 - “whose communications are privileged or confidential under Federal or State law;” or
 - “whom the [school] has designated as confidential.” 34 CFR §106.2
- In both categories, the employee’s “confidential” status only applies when they are acting in the scope of their duties as a “confidential employee.”



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“Confidential Employees” – Notice Requirements

A school must:

- Notify all students and employees of how to contact its “confidential employees,” *if any*.

If anyone informs a “confidential employee” of conduct that may reasonably constitute sex discrimination, the confidential employee must:

- Notify the report of the employee’s status as “confidential” under Title IX, including the circumstances in which the employee is not required to notify the Title IX Coordinator;
- Explain how to contact the Title IX Coordinator;
- Explain how to make a complaint of sex discrimination; and
- Explain that the Title IX Coordinator may be able to (1) offer supportive measures; (2) Initiate informal resolution proceedings; and (3) Initiate investigation under grievance procedures.

34 CFR §106.44(d)

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All Other Employees – Notification Requirement

- **All** employees who are not “confidential employees” are required to notify the Title IX Coordinator when they have *information* about conduct that *may reasonably constitute* sex discrimination.
- School “employee” includes: teachers, teacher’s aides, bus drivers, cafeteria workers, counselors, school resource officers, maintenance staff, coaches, athletic trainers and any other school employee.

USDOE July 2021 Guidance, Q.14

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When Does an Employee Have “Information”?

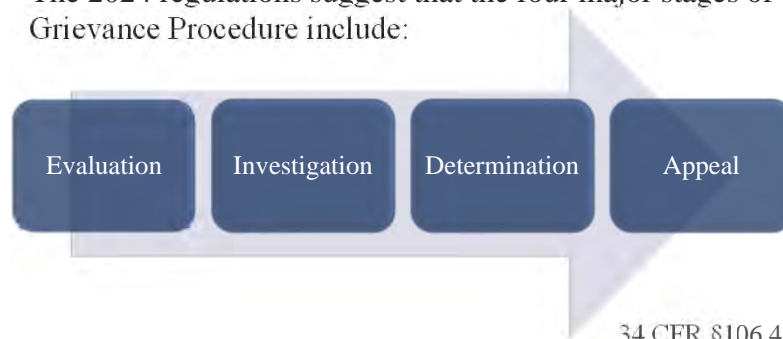
- Examples include:
 - If the employee observed or witnessed sex discrimination or sex-based harassment (a specific incident or a series of incidences).
 - If the employee is told that sex discrimination or sex-based harassment has occurred by the Complainant, the Complainant’s parents or friends or another 3rd party.
 - If the employee receives a voice mail or an email or any other written or verbal complaint alleging sex discrimination or sex-based harassment has occurred.
 - If the employee receives multiple reports that, taken together, provide a different picture of a person’s conduct than each incident standing alone.

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Grievance Procedure

- Once notice and/or a complaint has been made to the Title IX Coordinator of conduct that may reasonably constitute sex discrimination, the Grievance Procedure has been triggered.
- The 2024 regulations suggest that the four major stages of the Grievance Procedure include:



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EVALUATION STAGE



Evaluation Stage

- The USDOE describes the “evaluation stage” as a school’s “initial evaluation of whether to dismiss or investigate a complaint of sex discrimination.”

89 FR 33669



- Includes:
 - Receipt/Initiation of Complaint
 - Supportive Measures
 - Informal Resolution
 - Emergency Removal
 - Potential Dismissal / Appeal of Dismissal
 - Appointment of Title IX Officials



Complaint

A “complaint” is defined as

- “an oral or written request to the [school] that objectively can be understood as a *request* for the [school] *to investigate* and make a determination about alleged discrimination under Title IX or [its regulations].”

34 CFR §160.2

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When Notice and/or Complaints DO NOT Trigger Title IX Requirements

- The Title IX Coordinator’s responsibilities are not triggered if the Title IX Coordinator reasonably determines that the conduct as alleged (even if presumed to be true) could *not* constitute sex discrimination under Title IX or its regulations.

34 CFR § 106.44(f)(2).

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Who Can Make a Complaint?

- A complaint of sex-based harassment may be made by any of the following:
 - A “**Complainant**”, *i.e.* a current or former student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or its regulations in connection with the school’s education program or activity.
 - A **parent, guardian, or other authorized legal representative** with the legal right to act on behalf of a Complainant.
 - The **Title IX Coordinator** after making the determination to proceed (discussed in greater detail below).

34 CFR §106.45(a)(2)

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Who Can Make a Complaint?

- A complaint of sex discrimination other than sex-based harassment may be made by any of the individuals identified on the previous slide *or* any of the following:
 - **Any** student or employee;
 - Any other person who was participating or attempting to participate in the school’s education program or activity at the time of the alleged sex discrimination.

34 CFR §106.45(a)(2)

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Title IX Coordinator's Determination Whether to Initiate a "Complaint"

In the absence of a request to investigate, the **Title IX Coordinator** must decide to **whether to initiate a "complaint"** by making a fact-specific determination which considers the following factors:

- The Complainant's request not to proceed;
- The Complainant's reasonable safety concerns;
- The risk of additional sex discrimination occurring;
- The severity of the alleged sex discrimination;
- The age and relationship of the parties;
- The scope of the alleged sex discrimination;
- The availability of evidence; and
- Whether the school could end the alleged sex discrimination without initiation of the grievance procedures.

34 CFR §106.44(f)(1)(v)(A)

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Title IX Coordinator's Determination Whether to Initiate a "Complaint"

- If, after considering the above and other relevant factors, the Title IX Coordinator determines that the alleged conduct presents an **imminent and serious threat** to the **health and safety of the complainant or other person**, or the alleged conduct would **prevent the school from ensuring equal access** to its educational program or activity, the Title IX Coordinator may initiate a complaint.

34 CFR §106.44(f)(1)(v)(B).

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Title IX Coordinator Initiated Complaint

- If the Title IX Coordinator makes the determination to initiate a Complaint, the Title IX Coordinator must notify the Complainant prior to doing so and appropriately address safety concerns, including by providing supportive measures.
- Regardless of whether a Complaint is initiated, the Title IX Coordinator must take other appropriate and effective steps to ensure that sex discrimination does not continue or recur.

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Consolidation of Complaints

- A school may consolidate complaints of sex discrimination arising out of the same facts or circumstances:
 - By one Complainant against more than one Respondent;
 - By more than one Complainant against one or more Respondents; or
 - By one party against another party.

34 CFR §106.45(e)

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Initiation of Grievance Procedures

- If a Complaint is made/initiated (and if the conduct, as alleged, could constitute sex discrimination), the Title IX Coordinator must:
 - Offer and coordinate supportive measures, as appropriate, for the Complainant and Respondent;
 - Notify the Complainant or, if the Complainant is unknown, the individual who reported the conduct and the Respondent of the grievance procedures and the informal resolution process, if available and appropriate; and
 - Initiate the grievance procedures or the informal resolution process, if available and appropriate and requested by all parties.

34 CFR §106.44(f)(1)(ii)-(iii)

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Notice of Allegations

Upon initiation of the Grievance Procedures, the Title IX Coordinator must provide written notice to the parties, including all of the following information:

Notice of the school's grievance procedures and the informal resolution process, if available;	Notice of the allegations, including <u>sufficient information</u> known at the time to allow the parties to respond to the allegations.	A statement that retaliation is prohibited.	A statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence.
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*Sufficient information includes the identities of parties involved, if known; the conduct alleged to constitute Title IX sex discrimination; and the date and location of the alleged incident(s), if known.

34 CFR §106.45(c)

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Supportive Measures



What Are “Supportive Measures”?

- The Title IX Coordinator must offer supportive measures to both the Complainant and Respondent. 34 C.F.R. §106.44(f-g)
- **Supportive measures** are:
 - ✓ Individualized services offered as appropriate and reasonably available;
 - ✓ Non-disciplinary and non-punitive;
 - ✓ Offered without fee or charge to the Complainant or Respondent
 - ✓ Designed to:
 - Restore or preserve equal access to the school district’s education program or activity, including measures designed to protect the safety of all parties or the school’s educational environment; or
 - Provide support during the Grievance Procedures or informal resolution process.

34 CFR §106.2



What Are “Supportive Measures”?

- Supportive measures may include the following:
 - Counseling
 - Extensions of deadlines or other course-related adjustments
 - Campus escort services
 - Increased security and monitoring of certain areas of the campus
 - Restrictions on contact applied to one or more parties
 - Leaves of absence
 - Changes in class, work, extracurricular, or any other activity
 - Training and education programs related to sex-based harassment

34 CFR §106.44(g)(1).

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What Are “Supportive Measures”?

- A school may, as appropriate, modify or terminate supportive measures at the conclusion of the grievance procedures or the informal resolution process or continue them at that point.
- A school must maintain as confidential any supportive measures provided to the Complainant or Respondent unless necessary to provide the supportive measure or restore or preserve a party's access to the education program or activity or as otherwise permitted under Title IX regulations.

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What Are “Supportive Measures”?

- The school must provide a Complainant or Respondent a timely opportunity to seek, from an appropriate and impartial employee, modification or reversal of the district’s decision to provide, deny, modify, or terminate supportive measures.
- The school must also allow parties the opportunity to seek additional modification or termination if circumstances change materially.

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What Are “Supportive Measures”?

- If the Complainant or Respondent is a student with a disability, the Title IX Coordinator must consult with one or more members of the student’s Individualized Education Program Team or 504 Team to determine how to comply with IDEA or Section 504 in the implementation of supportive measures.



34 CFR §106.44(g)(6)(i).

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Informal Resolution Process



Informal Resolution

- A school may offer the parties an “**informal resolution**” to resolve a complaint at any time prior to determining whether sex discrimination occurred under the grievance procedure when:
 - ✓ The school determines that an informal resolution would be appropriate under the circumstances; and
 - ✓ Both parties provide fully informed written consent for informal resolution.

34 CFR §106.44(k)



Informal Resolution

- A school may **not** :
 - **Require or pressure** the parties to participate in an informal resolution process or to waive the right to an investigation and determination of a Complaint;
 - Offer or facilitate informal resolution **to resolve allegations that an employee sexually harassed a student.**

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Informal Resolution Process

- Before initiation of an informal resolution process, the school must provide **notice** to the parties that explains:
 - ✓ The allegations;
 - ✓ The requirements of the informal resolution process;
 - ✓ That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the grievance procedures;
 - ✓ That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;
 - ✓ The potential terms that may be requested or offered, including notice that an informal resolution agreement is binding only on the parties; and
 - ✓ What information the school will maintain and whether and how the school could disclose such information for use in grievance procedures if initiated or resumed.

34 CFR §106.44(k)(3).

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Informal Resolution Agreement

- The Informal Resolution Process concludes with the execution of an Informal Resolution Agreement by the parties.
- Potential terms that may be included in an Informal Resolution Agreement include, but are not limited to:
 - Restrictions on contact;
 - Restrictions on the Respondent's participation in one or more program or activity or attendance at specific events, including restrictions the school could have imposed as disciplinary sanctions had a determination been reached.

34 CFR §106.44(k)(5)

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EMERGENCY REMOVALS



Emergency Removal Process

Schools “may not impose discipline on a respondent for sex discrimination prohibited by Title IX unless there is a determination at the conclusion of the [school]’s grievance procedures that the respondent engaged in prohibited sex discrimination.”

34 CFR §106.45(h)

Schools may initiate an “**Emergency Removal**” of Respondent during the pendency of the Grievance Procedures if the school (we read this to mean the Title IX Coordinator):

- ✓ Undertakes an individualized safety and risk analysis.
- ✓ Determines that an “imminent and serious threat” to the health or safety of a Complainant, any students, employees or other persons arising from allegations of sex discrimination justifies removal.
- ✓ Provides the Respondent with notice and an opportunity “to challenge” the decision immediately following the removal. 34 CFR §106.44(h)

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Emergency Removal Process & Interplay with State Disciplinary Due Process Requirements

If, after having taken an individualized safety and risk analysis, the school and Title IX Coordinator determine that supportive measures and other non-punitive actions *voluntarily agreed to* by the parties (mutual no contact agreements; agreeing to participate in virtual education options, etc.) do not alleviate the imminent and serious threat to the health or safety of individuals, then the Title IX Coordinator/school may emergency remove the respondent from school.

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Emergency Removal Process – Challenge Process

- Schools must offer the Respondent an emergency removal “challenge” process immediately after the removal.
- Suggested process: Since students already have a right to “challenge” removals (i.e., suspensions) from school under Pennsylvania law, we recommend utilizing the informal hearing process outlined in 22 Pa. Code §12.8(c) to comply with the Title IX “challenge” requirement mandate. You already use this procedure when you suspend students for more than three consecutive days.

34 CFR §106.44(h)

Emergency Removal Process – Disabled Students

Any proposed emergency removal is still subject to IDEA and Section 504 – and, thus, an emergency removal may not be imposed if the threat posed by the Respondent is determined to be a manifestation of the Respondent’s disability.

34 CFR §106.44(h)

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July 2024

Emergency Removal Process & Interplay with State Disciplinary Due process Requirements

REMEMBER:

- If the emergency removal results in the Respondent being suspended, transferred to alternative education or referred for expulsion, the school still must provide the Respondent with the level of due process otherwise required to be afforded to students who are being suspended, transferred to an alternative placement and/or expelled under:
 - Applicable Pennsylvania and federal law, including but not limited to 22 Pa. Code §12.6 (regarding exclusions from school) and §12.8 (regarding hearings);
 - The school's Student Handbook and Code of Conduct;
 - Applicable board policies; and
 - IDEA and Section 504.

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Emergency Removal Process & Interplay with State Disciplinary Due process Requirements

If the length of the emergency removal results in the necessity to refer the student for expulsion (e.g., removal for more than 10 consecutive school days), the school board should be informed at the expulsion hearing:

- There is a pending Title IX Grievance Procedure involving the Respondent; and
- The Respondent should be *temporarily* expelled for a period of time necessary to avoid identified health and safety risks associated with the alleged Title IX violation through the pendency of the Title IX Grievance Procedure.

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Emergency Removal Process & Interplay with State Disciplinary Due process Requirements

Board's written adjudication of expulsion must address the pending Title IX process and the impact of the outcome of the Title IX process on the student's emergency removal status and the ultimate length of expulsion.

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Employee Removals: Administrative Leave

- When the respondent is a **non-student employee**, a school may place the employee on **administrative leave** pending the outcome of the grievance process.
 - A school need not identify an immediate threat similar to the “emergency removal” provision for students.

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DISMISSAL OF COMPLAINT



Potential Dismissal of Complaint

- A school (practically speaking, we read this to mean the Title IX Coordinator) may **dismiss** a Complaint for any of the following reasons:
 - The school, after reasonable effort, is unable to identify the Respondent(s);
 - The Respondent is not participating in the school's education program or activity and is not employed by the school;
 - The Complainant voluntarily withdraws any or all allegations, the Title IX Coordinator declines to initiate a Complaint, and the remaining allegations, if any, would not constitute sex discrimination even if presumed to be true; or
 - The Title IX Coordinator determines that the conduct alleged, even if proven, would not constitute sex discrimination, after reasonable efforts to clarify the allegations with the Complainant.

34 CFR §106.45(d)(1)



Post-Dismissal Obligations

- If the school (i.e. Title IX Coordinator) dismisses the Complaint, it must:
 - ✓ Offer supportive measures to Complainant;
 - ✓ Offer supportive measures to Respondent if Respondent had been notified of the Complaint; and
 - ✓ Require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur.

34 CFR §106.45(d)(4)

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Notice of Dismissal

- If a Complaint is dismissed, a school must promptly notify:
 - The Complainant, and
 - The Respondent (if the dismissal occurs after the Respondent has been notified of the allegations).
- Such notification must include notice of the basis for the dismissal and the grounds for appeal.

34 CFR § 106.45(d)(2)-(3)

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Appeal of Dismissal

- Grounds for appeal of dismissal are limited to:
 - Procedural irregularity that would change the outcome;
 - New evidence that would change the outcome and that was not reasonably available when the dismissal was made; and
 - The Title IX Coordinator or investigator had a conflict of interest or bias for or against Complainant or Respondent that would change the outcome.

34 C.F.R. §§106.45(d)(3), 106.46(i)(1)

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Appeal of Dismissal Process

- If the dismissal is appealed, the school (i.e. Title IX Coordinator or Appeal Decisionmaker) must:
 - Notify the parties of the appeal (and the underlying allegations if notice was not previously provided to the Respondent);
 - Implement appeal procedures equally for the parties;
 - Ensure that the Appeal Decisionmaker was not part of the investigation or dismissal of the Complaint;
 - Provide the parties a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome; and
 - Notify the parties of the result of the appeal and the rationale for the result.

34 CFR §106.45(d)(3)

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SINGLE-INVESTIGATOR MODEL VS. SEPARATE OFFICIALS



Staffing Title IX Grievance Procedures

- The 2024 regulations allow schools greater flexibility in deciding how to staff Title IX grievance procedures.

- Regulatory text:

A school's grievance procedure must... "Require that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. The decisionmaker may be the same person as the Title IX Coordinator or investigator."

34 CFR §106.45(b)(2)



Single-Investigator Model: Pros



Streamlined, more efficient process.



Allows schools more flexibility to respond promptly to sex-based harassment.



Potentially less intimidating for student-parties and witnesses; communications flowing through one person vs. multiple Title IX officials.

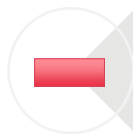


The investigator is likely best positioned to make credibility determinations based on their familiarity with the evidence and their observations during the investigation phase.

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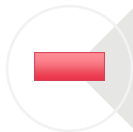
Single-Investigator Model: Cons



Risk of bias.



Arguments that single-investigators may be unable to review their own work for fairness, completeness, neutrality, and lack of bias.



Allegations that single-investigator model violates the Respondent's due process rights.

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Single-Investigator Model vs. Separate Officials

- The 2024 regulations permit, but do not require, the use of a single-investigator model.
- The single-investigator model may be appropriate in some, but not all, scenarios.
- We recommend that schools authorize the use of both models and that the Title IX Coordinator engage in a case-by-case analysis to determine which model to use.

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Single-Investigator Model vs. Separate Officials

- The Title IX Coordinator's analysis should consider the facts and circumstances of each case, including, but not necessarily limited to, the following factors:
 - The severity of the allegations;
 - The complexity of the facts at issue;
 - The degree to which credibility is material to the outcome;
 - The identity of the Complainant(s) and/or Respondent(s);
 - Allegations of bias or conflict of interest.

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INVESTIGATION STAGE



Investigation Stage

Investigation

- A school must provide for “**adequate, reliable, and impartial**” investigations of Complaints.

34 CFR §106.45(f)



Investigation Stage

- The Investigator is required to
 1. **Conduct an investigation** that gathers sufficient evidence to determine whether sex discrimination occurred.
 2. Provide an equal **opportunity for the parties to present** fact **witnesses and** other inculpatory and exculpatory **evidence** that are relevant and not otherwise impermissible.
 3. **Review all evidence** gathered through the investigation and **determine** what evidence is **relevant** and what evidence is **impermissible** regardless of relevance.
 4. **Provide each party with** an equal opportunity to **access** the **evidence** that is relevant and not otherwise impermissible.

34 CFR §106.45(f)

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Investigation Stage – 1. Conduct Investigation

- The **burden** to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred is on the Investigator and **not** the parties.
 - The Investigator is not a passive recipient of information. The Investigator must actively and objectively gather evidence, both inculpatory and exculpatory, upon which a decision can be made.

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Investigation Stage – 2. Opportunity to Present Witnesses/Evidence

- The Investigator must provide the parties with an equal opportunity to present fact witnesses and other inculpatory and exculpatory evidence.
 - Inculpatory
 - Exculpatory

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Investigation Stage – 3. Relevant and Not Otherwise Impermissible

- The Investigator must then review all evidence and determine:
 - What evidence is relevant; and
 - What evidence is impermissible regardless of relevance.
- “Relevant” means “related to the allegations of sex discrimination under investigation.”
 - “Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred.”
 - “Evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.”

34 CFR §106.2

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Investigation Stage – 3. Relevant and Not Otherwise Impermissible

- Otherwise Impermissible
 - Title IX regulations require a school’s grievance procedures to exclude three types of evidence and questions seeking that evidence:
 - Evidence that is protected under a privilege recognized by Federal or State law or evidence provided to a confidential employee, unless waived;
 - Records made or maintained by a physician, psychologist, or other recognized professional in connection with treatment, unless voluntary, written consent has been obtained; and
 - *Some* evidence relating to the complainant's sexual interests or prior sexual conduct (i.e. commonly known as “Rape Shield” protections).
34 CFR §106.45(b)(7)

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Investigation Stage – 3. Relevant and Not Otherwise Impermissible

- Otherwise Impermissible – Evidence Related to the Complainant’s Sexual Interests/Prior Sexual Conduct
 - Evidence that relates to the Complainant’s sexual interests/prior sexual conduct is impermissible *unless*
 - Offered to prove that someone other than the Respondent committed the alleged conduct; or
 - Is evidence of specific incidents of prior sexual conduct between Complainant and Respondent if offered to prove consent.*
 - *Note – The fact of prior consensual sexual conduct does not, by itself, demonstrate or imply consent or preclude a determination that sex-based harassment occurred.

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Investigation Stage – 4. Access to Evidence

- The Investigator is required to provide the parties with equal access to relevant and not otherwise impermissible evidence by either:
 - Providing them access to the evidence itself, including, for example:
 - Copies of interview notes.
 - Screenshots of social media posts or text messages.
 - Videos, pictures, emails, or other communications.
 - Providing them with an “accurate description” of the evidence.

34 CFR §106.45(f)(4)(i)

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Investigation Stage – 4. Access to Evidence

- Whether providing the evidence itself or a summary of the evidence, the Investigator must redact irrelevant or otherwise impermissible evidence before sharing it with the parties.
- If the Investigator elects to provide a summary of the evidence, the parties must be given access to the evidence itself upon request.
- To avoid potentially unnecessary work, we recommend sharing the evidence itself in most cases. However, the Investigator should consider the facts and circumstances of each case.

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Investigation Stage – 4. Access to Evidence / Opportunity to Respond

- The Investigator must next provide the parties with a reasonable opportunity to respond to the evidence.
 - When providing the evidence or summary of the evidence to the parties, the Investigator should inform the parties of their right to respond to the evidence and the timeframe for doing so, consistent with the school's Grievance Procedures.

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Investigation Stage – 4. Access to Evidence / Preventing Unauthorized Disclosure

- The Investigator must also take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedure.
 - In connection with providing the parties with the evidence or summary of the evidence and informing them of their right to respond, the Investigator should remind parties of the prohibitions against retaliation and unauthorized disclosure of information.

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Confidentiality

- A school must not disclose “personally identifiable information” obtained in connection with a report, Complaint, or Grievance Procedures under Title IX or its regulations, except in the following circumstances:
 - School has obtained prior written consent from a person with the legal right to consent to the disclosure;
 - When the information is disclosed to a parent, guardian, or other authorized legal representative with the legal right to receive such disclosure;
 - To carry out the requirements of Title IX or its regulations, including action taken to address conduct that reasonably may constitute sex discrimination;
 - As required by federal law, federal regulations, or the terms or conditions of federal funding; or
 - To the extent such disclosures are not otherwise in conflict with Title IX or its regulations, when required by state or local law or when permitted under FERPA. 34 CFR §106.44(j)

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Confidentiality – FERPA v. Title IX

Title IX provides that the school’s obligation to comply with Title IX “is not obviated or alleviated by FERPA.” 34 CFR §106.6(e)

- “...FERPA continues to apply in the context of enforcing Title IX, but if there is a direct conflict between FERPA’s requirements and Title IX’s requirements, such that enforcing FERPA would interfere with Title IX’s primary purpose to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.” 85 FR 30424. Comments, p. 223-224

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Protecting Parties' Privacy

- The regulations also require the school (i.e. the Title IX Coordinator and other Title IX officials) take “*reasonable steps to protect the privacy of the parties* and witnesses during the pendency of” grievance procedures. 34 CFR 106.45(b)(5)
 - “The Department maintains that a [school] is well positioned to determine reasonable steps to protect privacy based on the particular circumstances, including but not limited to the nature of the allegations and the stage of the grievance procedures.” 89 FR 33673
- Examples:
 - Redacting information not relevant to the allegations.
 - Recordkeeping policies that protect sensitive evidence and/or use of software that restricts access and distribution of such evidence.

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Investigative Techniques

- Prepare for the Investigation
 - Have a plan.
 - What are the allegations to be investigated?
 - What are the elements of the alleged violation? What information may be relevant to proving or disproving each element?
 - What evidence do you know about? What other potentially relevant evidence might be available? (e.g. surveillance video, text messages, emails, etc.)
 - Who are the known witnesses to be interviewed?
 - Consider the order and location of interviews.



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Investigative Techniques

Do



Opt for open-ended questions (e.g. “What happened?”; “Who else was present?”)



Ask questions which elicit a chronological series of events; these are typically most helpful.



LISTEN. Ask the follow-up questions.



Consider whether tough or embarrassing questions should be saved until the end.

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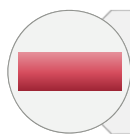


Investigative Techniques

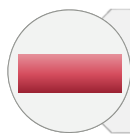
Do Not



Do not use accusatory and compound questions (e.g. “Isn’t it true that ___?”).



Do not be aggressive or deliberately confusing; this is not an interrogation.



Do not set out to prove something – just gather information. Be open to exculpatory and inculpatory evidence and treat both as equally important.

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Investigative Techniques

- Always ask for identities of others who were present or who may have knowledge of relevant information, whether inculpatory or exculpatory.
 - Do not stop with only those witnesses identified by the Complainant and/or Respondent.
 - The universe of potential witnesses is not limited to the school setting. Witnesses may include former students or employees or other third parties.
- Always ask if there is anything else they think you should know. Be open to witnesses providing you with information you did not know about.

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Investigative Techniques

- The art of the follow-up.
 - Ask the difficult / uncomfortable questions.
 - Ask the follow-up questions – who, what, when, where, how.
 - Be open to follow-up interviews. It is often necessary to re-interview a Complainant, Respondent, or witness as new information comes to light.

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Investigative Techniques

- Take detailed notes on witness interviews which record:
 - Questions asked and answers given.
 - Evidence related to each element of the alleged violation, inculpatory and exculpatory.
 - Evidence needed to assess credibility:
 - Witness's behavior / demeanor during the interview;
 - Any information which may suggest a motive to lie or other biases;
 - Inconsistencies; or
 - Information regarding the source and strength of evidence (first hand observations vs. rumor).

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DETERMINATION STAGE



Questioning Parties and Witnesses

- A school must provide a process that enables the *Decisionmaker* to **question parties and witnesses** to adequately **assess a party's or witness's credibility to the extent credibility is in dispute and relevant** to evaluating one or more allegations of sex discrimination. 34 CFR §106.45(g)
 - The credibility assessment requirement at the Determination Stage is more easily satisfied when the Investigator and Decisionmaker are the same person.

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Standard of Evidence

- The 2024 regulations require the use of a “*preponderance of the evidence*” standard in Title IX Grievance Procedures *unless* the school uses the “clear and convincing evidence” standard in all comparable proceedings, including proceedings relating to other discrimination complaints. 34 CFR §106.45(h)(1)
 - Preponderance of the Evidence - “a fact is more likely true than not.”
 - Clear and Convincing Evidence – “concluding that a fact is highly probable to be true”
- We recommend using the “preponderance of the evidence” standard, which is the standard generally used in other school decisions (e.g. expulsion hearings).

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Determination Regarding Responsibility

- Following an investigation and evaluation of all relevant and not otherwise impermissible evidence:
 - The Decisionmaker must apply the standard of evidence (i.e. preponderance of the evidence) in determining whether sex discrimination occurred.
 - In doing so, the Decisionmaker must evaluate all relevant and not otherwise impermissible evidence for its persuasiveness.
 - If the Decisionmaker is not persuaded that sex discrimination occurred (apply the standard of evidence), regardless of the quantity of evidence, the Decisionmaker must not determine that sex discrimination occurred.

34 CFR §106.45(h)(1)

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Determination Regarding Responsibility

- Notice to Parties:
 - The Decisionmaker must notify the parties in **writing** of the determination, including:
 - the **rationale** for such determination, and
 - the **procedures and permissible bases for** Complainant and Respondent to **appeal**, “if applicable.”

34 CFR §106.45(h)(2)

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Title IX Training
Jennifer E. Gornall, Esq. and Julia M. Herzing, Esq.
July 2024

Determination Regarding Responsibility

- If the determination is that sex discrimination occurred, the Title IX Coordinator must:
 - Coordinate the provision and implementation of remedies to the Complainant, and any other persons the school identifies as having been limited in or denied equal access to the school's education program or activity.
 - Coordinate the imposition of any disciplinary sanctions on a Respondent, *including* notifying Complainant of any disciplinary sanctions imposed on Respondent.
 - Take other appropriate, prompt, and effective steps to ensure that sex discrimination does not continue or recur in the school's education program or activity. 34 CFR §106.45(h)(3)

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Disciplinary Sanctions

- A school may not discipline a Respondent **for Title IX sex discrimination unless** there is a determination at the conclusion of the grievance procedures that the Respondent engaged in prohibited sex discrimination. 34 CFR §106.45(h)(3)
- A school may not discipline a party, witness, or others participating in the Grievance Procedures for making a false statement or for engaging in consensual sexual conduct based *solely* on the Decisionmaker's determination whether sex discrimination occurred. 34 CFR §106.45(h)(5)

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APPEAL STAGE



Appeals

- A school must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints. 34 CFR §106.45(i)
- “Schools have discretion regarding the bases for appeal under §106.45(i).” 89 FR 33710
- Recommendation: use the same appeal process utilized in other of the school’s discrimination policies.
- The appeal process should be outlined in the school’s Title IX Grievance Procedures.



RECORDKEEPING



Recordkeeping

- The following must be maintained for a minimum of 7 years:
 - For each Complaint of sex discrimination:
 - Records documenting the Grievance Procedures and the resulting outcome; and/or
 - Records of any Informal Resolution process and the resulting outcome.
 - For each notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination, records documenting the actions the school took in response; and
 - All materials used to provide training required under the Title IX regulations, including training for all employees and Title IX officials.

34 CFR §106.8(f)



Training Materials

- A school must make any training materials used to fulfill the training obligations under the Title IX regulations available for inspection ***upon request*** by members of the public.

34 CFR §106.8(f)(3)

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Thank You!

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