

Title IX Training

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History and Foundational Principals of Title IX

Before Title IX

- Some schools and universities had separate entrances for male and female students.
- Female students were not allowed to take certain courses, such as auto mechanics or criminal justice; male students could not take home-economics
- Some medical and law schools limited the number of women admitted to 15 or fewer
- Some colleges and universities required women to have higher test scores and better grades than male applicants to gain admission

Before Title IX (cont.)

- Women living on campus were not allowed to stay out past midnight.
- Women faculty members were excluded from faculty clubs and encouraged to join faculty wives' clubs instead.
- After winning two gold medals in the 1964 Olympics, swimmer Donna de Varona could not obtain a college swimming scholarship. For women they did not exist.

Source: *Report Card on Gender Equity*, National Coalition for Women and Girls in Education, (1997)

Title IX: 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 subject to discrimination under any education programs or activity receiving federal financial assistance.

Signed into law by President Richard Nixon on Friday, June 23, 1972.

Title IX: 1972 (cont.1)

- 1973:** Battle of the Sexes - Billie Jean King defeated Bobby Riggs in an exhibition tennis match
- 1975:** First Title IX regulations adopted
- 1976:** NCAA challenged the legality of Title IX regarding athletics in a lawsuit - was dismissed two years later
- 1977:** Three female students at Yale, two graduates, and a male faculty member became the first to sue over sexual harassment under Title IX (Alexander v. Yale). The cause of action failed on appeal.

Title IX: 1972 (cont. 2)

1979: Three-prong test for compliance in athletics established.

1979: Students can sue for sex discrimination (Cannon v. Univ. of Chicago)

1980: Oversight for compliance was given to the Office for Civil Rights (OCR) in the U.S. Department of Education

1982: Employees could sue for sex discrimination

1992: Students can sue for money damages for discrimination by employees (Franklin v. Gwinnett County Public Schools)

Title IX: 1972 (cont. 3)

- 1997:** OCR issued "*Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*" containing the first explicit reference to "gay or lesbian students" as being covered by federal prohibitions against sexual harassment
- 1998:** Student can sue for teacher's sexual harassment only if the school had "actual notice" and acted with "deliberate indifference" (*Gebser v. Lago Vista ISD*)
- 1999:** Title IX covers student-to-student harassment; damages available only if school had actual notice and acted with deliberate indifference (*Davis v. Monroe County*)

Title IX: 1972 (cont. 4)

- 2001:** OCR issued revised guidance on sexual harassment – Gebser and Davis did not apply to OCR enforcement actions
- 2005:** Coaches and teachers have a right of action under Title IX for retaliation (Jackson v. Birmingham Bd of Educ.)
- 2006:** OCR issued guidance allowing single-sex programs/schools
- 2014:** Obama Administration OCR issued DCL saying transgender students should be allowed to use the bathroom or locker room that matches their gender identity

Title IX: 1972 (cont. 5)

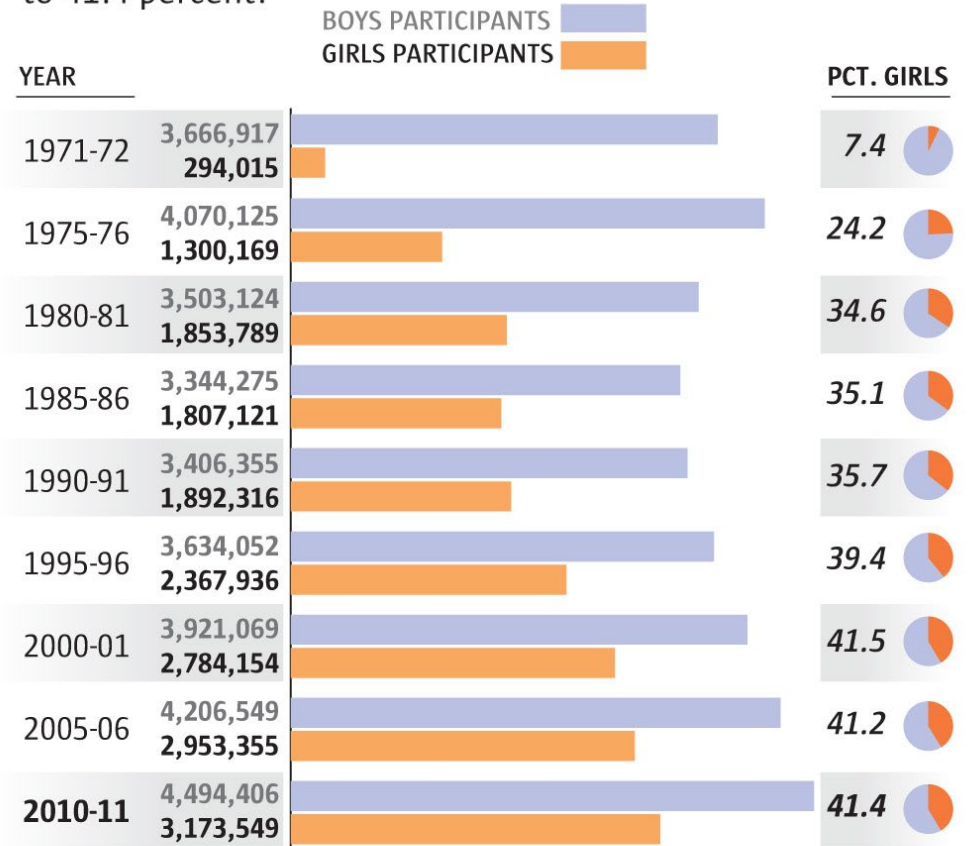
- 2018:** Trump Administration OCR rescinded the 2014 Obama Guidance
- 2020:** Second version of Title IX Regulations adopted - amended to address sexual harassment investigations; defined sexual harassment in a new way; significant burdens on programs to establish procedures, which will be the focus for most of today
- 2021:** Biden Administration – Exec. Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
- 2022:** **Proposed** Title IX Regulations Published
- 2023:** Final Comments due on Biden Administration’s Proposed Regulations

Female High School Sports

Female high school sports participation grew from less than 300,000 to 1.3 million in 1974 (within 2 years of passage)

A dramatic, 40-year rise

In 1971-72, the year before the passage of Title IX, girls represented just 7.4 percent of the participants in high school sports in the United States. By 2010-11, the number had risen to 41.4 percent:

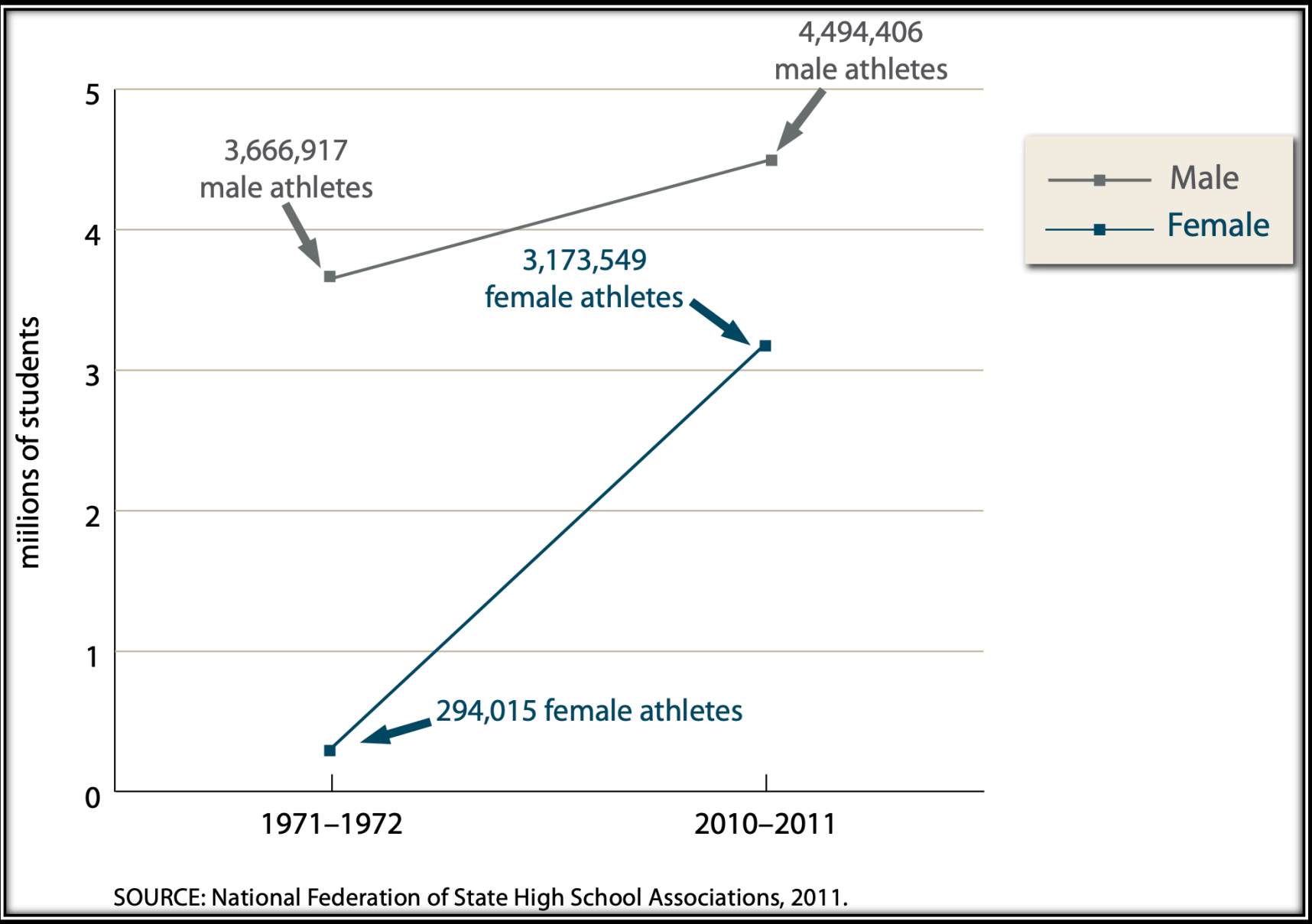


NOTE: Reflects participation rate. An athlete who participated in two sports is counted twice, three sports three times, etc.

Source: National Federation of State High School Associations (nfhs.org).

Reporting by BILL READER, Graphic by MARK NOWLIN / THE SEATTLE TIMES

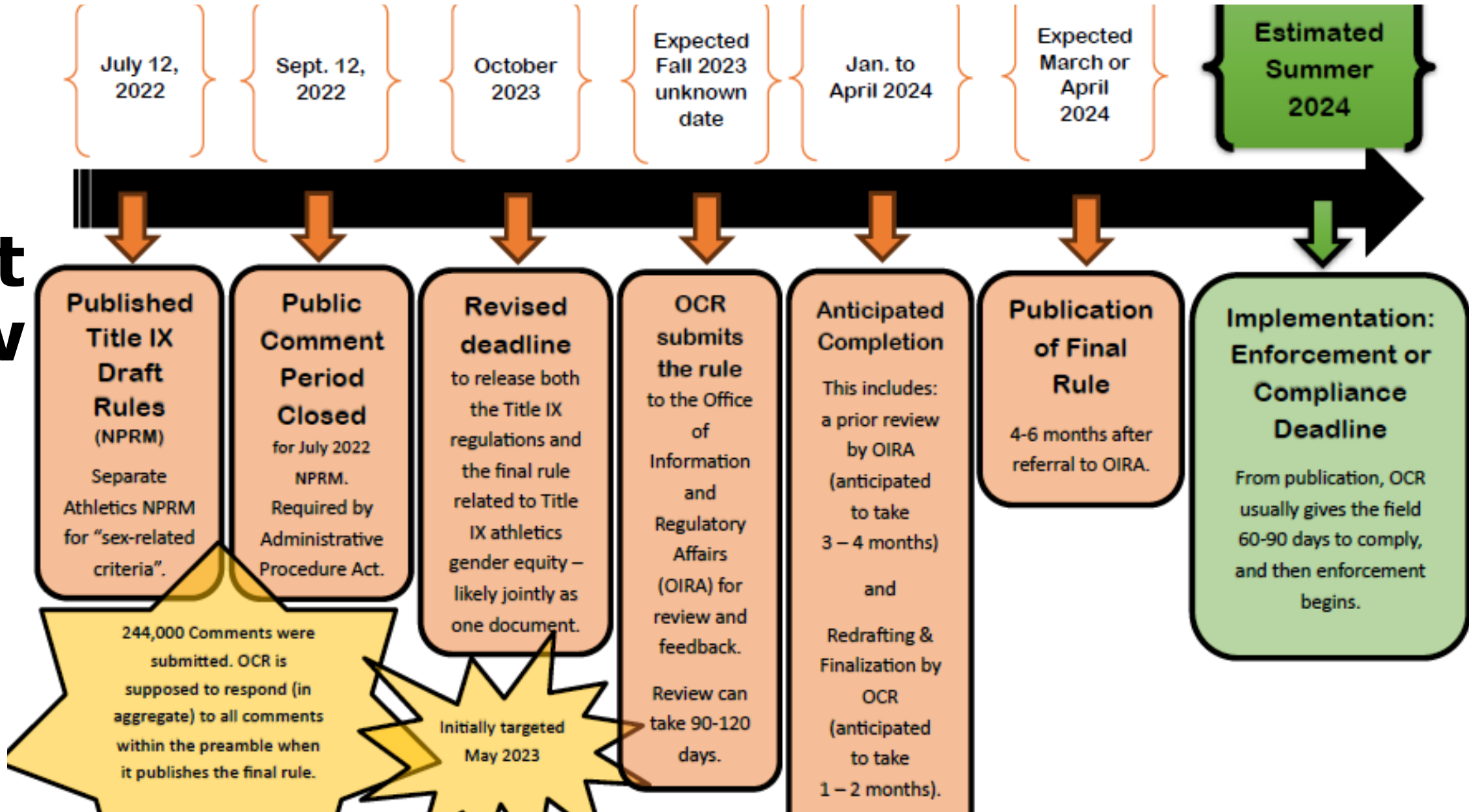
Sports Female vs Male



Shift

- Pre-1990's, Title IX was mostly challenges to following the law, as well as what the law covers.
- In the 1990's, people started using Title IX to sue for personal damages as the courts expanded its interpretation of types of causes of action that could be brought under Title IX.

Shift Flow



Types of Discrimination Under Title IX

- Sexual harassment
 - quid pro quo
 - hostile environment
 - Stalking
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
- Sex-based discrimination
- Retaliation



What is considered “sexual harassment”?

- **Quid Pro Quo** harassment involves an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct
- **Hostile environment** involves 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 recipients education programs or activities.
- **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as those terms are defined under the Federal laws called the Clery Act and the Violence Against Women Act. (These have their own definitions.)

What is considered “sexual harassment”? (cont.)

- “Sexual assault” - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. From the 2019 UCR:
- Sex Offenses (previously forcible) - Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.
 - Rape - (Except Statutory Rape) The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
 - Sodomy - Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sex Offenses (previously forcible) cont.

- Sexual Assault With An Object - To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- Fondling - The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

What is considered “sexual harassment”? (cont.)

- Sex Offenses, Non-Forcible - Unlawful, non-forcible sexual intercourse
 - Incest - Non-Forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law
 - Statutory Rape - Non-Forcible sexual intercourse with a person who is under the statutory age of consent

So, what is sexual harassment?

- “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.

So, what is sexual harassment? (cont.)

- “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.

So, what is sexual harassment? (cont.)

- “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.

Quid Pro Quo Harassment

Noun. kwid-prō-
kwō

***Latin: "a favor
for a favor"***

A favor or
advantage granted
or expected in
return for
something

Scenario: Quid Pro Quo Harassment

Sam tells Sarah he will take her to the party if she sends him a naked photo of herself.

Stalking

Verb.

stôk· ing

To harass or
persecute
someone with
unwanted and
obsessive attention

Scenario: Stalking

Nicole and Ben have broken up, and Nicole told Ben multiple times that she doesn't want to speak with him again. But Ben is waiting outside of Nicole's English class trying to force her to walk with him across campus. Nicole tells her friend to try and distract Ben so she can slip out of class unnoticed, but then Ben appears outside her dorm.

Hostile Work Environment (Employee to Employee)

An intimidating or offensive environment that causes a person to be fearful.

A setting that denies, limits, or interferes with a person's ability to participate in or benefit from a program, activity, or job.

Scenario: Hostile Work Environment

Kevin is known for being the “funny guy” at the office. However, most of his jokes have sexist undertones, and he has started to make Emily the butt of his jokes. Emily has asked him privately to stop, but now in almost every staff meeting Kevin finds a way to crack a joke at Emily’s expense. Often these jokes have to do with what she’s wearing or her voice.



Hostile Environment (student to student)

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 school's education program or activity.



Sex-Based Harassment

Unwelcome conduct does not have to be conduct of a sexual nature, but can be conduct based on a student's sex, including a student's failure to conform to sex stereotypes

Scenario: Sex-Based Harassment

Camilla, Anne, and Elizabeth all believe that David shouldn't have made the cheer team. They make sure that he's barely seen in team photos, is always the spotter and behind the rest of the squad, and they constantly ridicule David's stunts and cheers. David tells the Coach that he no longer wishes to be on the team.



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

Scenario: Dating Violence

Marissa and Ally broke up last spring. Now, in the fall semester, Marissa is sexting Jessica. When Ally asks about it, Marissa denies it. Ally finds out and corners Marissa to try to take her cell phone to find out for herself. Ally and Marissa are in a fight over the phone, and Ally squeezes Marissa's wrists until she drops the phone.

Sexual Assault

An act in which one intentionally sexually touches another person without that person's consent, or coerces or physically forces a person to engage in a sexual act against their will.

Scenario: Sexual Assault

Kelly is student who attends a party with her friends. At the party, she meets someone named Anthony. They talk for a while, and Anthony seems friendly. As the night progresses, Anthony becomes increasingly pushy and starts touching Kelly without her clear and enthusiastic consent. Despite Kelly expressing discomfort and saying "no," Anthony continues to make unwanted advances, including grabbing her breasts.



Domestic Violence

Felony or misdemeanor crimes of violence (including threats or attempts) committed by any person against an adult or youth who is protected from that person's acts under the domestic or family violence laws of the jurisdiction receiving grant monies

Scenario: Domestic Violence

Chris's behavior becomes increasingly controlling, limiting Alex's interactions with friends and family. Chris monitors Alex's social media accounts and demands constant updates on whereabouts. This isolation tactic leaves Alex feeling trapped and dependent on Chris, further perpetuating the cycle of abuse.

Consent

Verb.

kən'sent

Knowing, voluntary,
and clear permission by
words or actions to
engage in sexual
activity

Scenario: Consent

Jade and Alexander's relationship is new, and they haven't told their friends yet. Jade asks Alexander if she can hold his hand on the way to lunch, and Alexander says no.

A word about sex discrimination that is not harassment

- Sexual harassment is a form of sex discrimination.
- As demonstrated much sex-based mistreatment will fall within one of the categories of sexual harassment, so what is discrimination that is not harassment?
 - Differences in treatment between males and females on the basis of sex, e.g., discrimination in athletics.
 - But it could be in other aspects or programs, e.g. if an instructor only gives males A's, while females always make B's or below.
 - Note that this discrimination is almost always going to involve the agency or staff mistreating the students because the students don't generally have the authority to take such adverse actions against their fellow students.
 - Or it could even involve discrimination against employees that we usually think of as an issue under Title VII.

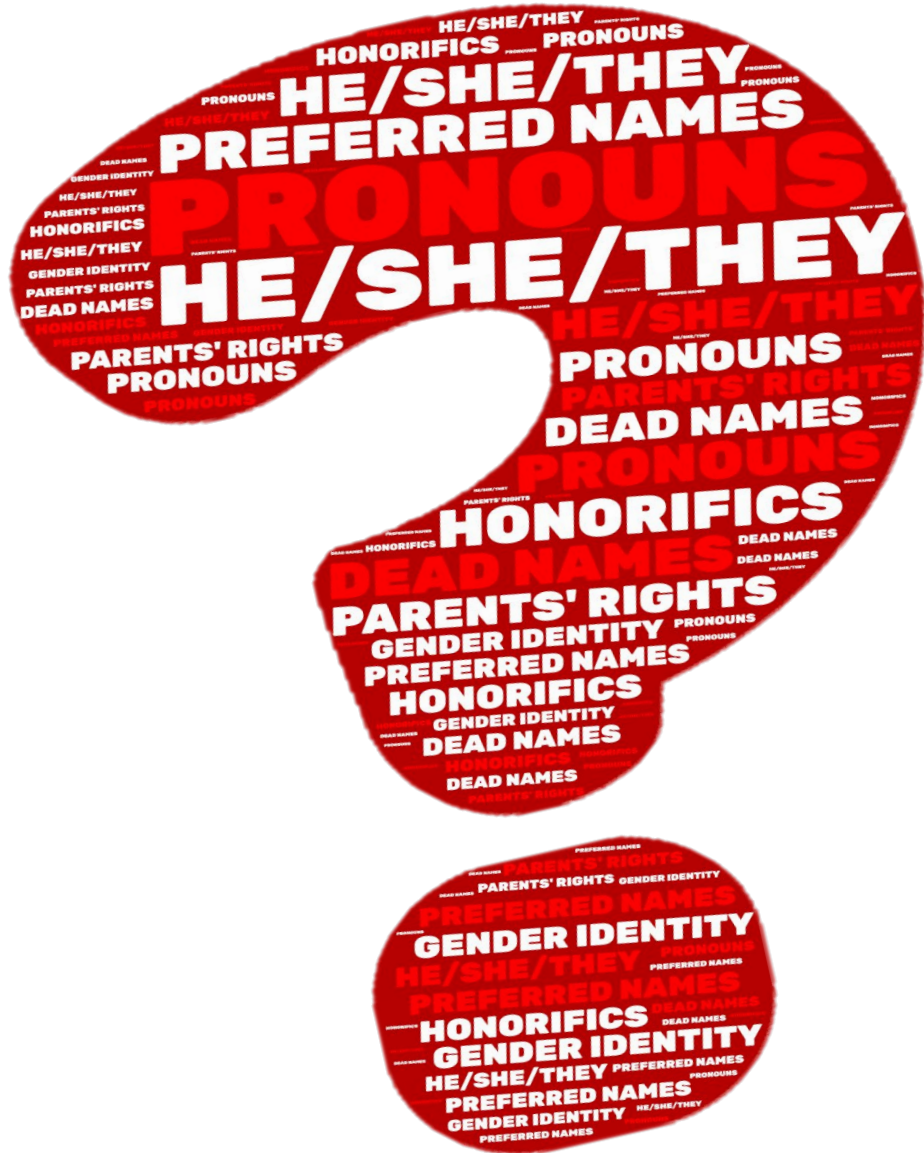
LGBTQIA+ Issues Under Title IX

01

Bathroom use

Across the Circuits

	3d	4th	5th	6th	7th	9th	11th
Bathroom Use Across Circuits	May use bathroom consistent with gender identity	May use bathroom consistent with gender identity	No caselaw	May use bathroom consistent with gender identity	Transgender students may bring claims of sex discrimination under Title IX	May use bathroom, locker room, and showers consistent with gender identity	Not applicable
	<i>Doe by & through Doe v. Boyertown Area Sch. Dist.</i> , 897 F.3d 518, 538 (3d Cir. 2018)	<i>Grimm v. Gloucester County Sch. Bd.</i> , 972 F.3d 586 (4th Cir. 2020), as amended (Aug. 28, 2020) *SCOTUS declined to hear	Not applicable	<i>Dodds v. United States Dep't of Educ.</i> , 845 F.3d 217, 221 (6th Cir. 2016)	<i>Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.</i> , 858 F.3d 1034, 1055 (7th Cir. 2017)	<i>Parents for Privacy v. Barr</i> , 949 F.3d 1210, 1217–18 (9th Cir. 2020), cert. denied, 20-62, 2020 WL 7132263 (U.S. Dec. 7, 2020)	Not applicable



02 Pronouns

Name Changes

Pronouns and Names for Adults

According to the EEOC, unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army*, the EEOC explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

Pennsylvania biology teacher suspended for refusing to follow pronoun policy, reinstated after backlash

At the meeting, the school board not only reinstated the teacher, but suspended the policy, with plans to rewrite it, according to WXPI.

South Side School District Superintendent Alan Fritz did not immediately respond to a request for comment from Fox News. However, he defended the decision to local paper Beaver County Times.

Wisconsin parents sue school district over gender pronoun policy

One set of parents said they had their child removed from the district after the school started using male pronouns for the student without their consent

A group of parents sued a [Wisconsin school district](#) on Wednesday over a policy that allows students to change their names and gender pronoun preference without their parents' consent while they're at school.

One student's parents said they had their daughter removed from the Kettle Moraine School District to "protect her [mental health](#) and preserve their parental role" after the student asked to be called a different name and go by male pronouns at school, according to WFRV-TV in Green Bay.

The parents claimed the school had violated their [constitutional](#) rights because parents have an "inherent right" to be the primary decision-makers in their children's lives.



CNN

US

Crime + Justice

Energy + Environment

Extreme Weather

Space + Science

Teacher gets \$95,000 to settle lawsuit over refusal to use student's preferred name



By [Rebekah Riess](#) and Alaa Elassar, CNN

Published 4:45 PM EDT, Thu September 1, 2022

(CNN) — A Kansas teacher who argued she had a religious belief that prevented her from calling transgender or nonbinary students by their preferred names and pronouns reached a \$95,000 settlement with school district officials, according to a release from the teacher's attorneys.

Pamela Ricard, who teaches math at Fort Riley Middle School, had been suspended for violating the Geary County Schools' Diversity and Inclusion Policy that requires educators to refer to students by their preferred names and pronouns. In the lawsuit, she said she refuses to use the preferred names and pronouns of transgender and nonbinary students because it violates her religious beliefs.

EDUCATION · Published September 8, 2022 3:37pm EDT

Ohio school district tells teachers they don't have to inform parents of students' name, pronoun changes

Teachers 'can just use those preferred pronouns/name with the student, and there is no need to share the info,'
Mentor Public Schools advised

[Ohio school district tells teachers they don't have to inform parents of students' name, pronoun changes | Fox News](#)

An [Ohio school district](#) recently informed teachers they have no obligation to inform parents if a transgender or transitioning student as young as 11 requests to be called by a different name or pronoun.

On Aug. 31, Mentor Public Schools Assistant Superintendent Timothy Hamman sent an email to [teachers in grades 6-12](#) saying they don't have to notify parents of a name or pronoun change if the student only requests it informally and does not ask for it to be changed in Google or the Infinite Campus parent portal.

"If a student shares with a teacher what preferred name they would like to be called, and the student does not want it changed in IC or Google, there really is no need to go any further," the email, obtained by Parents Defending Education (PDE) and shared exclusively with Fox News Digital, stated.



Rulings on Identity

	1st	4th	5th	7th	9th	10th
	Pending: Court currently upheld practice of sharing information on student's identity only if the student consents.	Parents cannot challenge district policies against telling parents if a child identifies as transgender or gender non-conforming.	Schools cannot keep information regarding their children from parents, including gender identity	Case pending.	Can't make up their mind.	District employee shall respond to any minor student's parent's inquiry regarding their requested name or pronoun
	<i>Foot v. Town of Ludlow</i> , 2022 WL 18356421, at *1 (D. Mass. Dec. 14, 2022) (on appeal)	<i>John and Jane Parents 1, et al, v. Montgomery County Board of Education, et al.</i> , 4th U.S. Circuit Court of Appeals, No. 22-2034.	No case law – only Education Code guidance	<i>B.F. et al v. Kettle Moraine School District</i> , Circuit Court, WI	Various cases.	<i>Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees</i> , No. 23-CV-069-SWS, 2023 WL 4297186, at *26 (D. Wyo. June 30, 2023)

State Law Requirements

In Texas, an individual can change the first or middle name on a birth certificate through the Texas Vital Statistics office by submitting one of these documents:

- Hospital or medical record at birth (admission/discharge or worksheet);
- Letter from hospital or medical facility explaining correction needed;
- Baptismal certificate - must be within first 5 years of birth;
- Numident printout from the Social Security Administration (SSA);
- Certified copy of a court order affecting the information shown on the birth certificate;
- Elementary school record - must be signed by custodian of school records based on earliest attendance;
- Federal census record;
- School census record; OR
- Armed forces discharge papers (form DD 214) – photocopy accepted.

<https://www.dshs.texas.gov/vital-statistics/requirements-requesting-changing-vital-records/supporting-documentation-record-changes#nameAfter>

State Law Requirements (cont.)

To legally change the sex on a birth certificate requires one of these:

- Hospital or medical record at birth (admission/discharge or worksheet);
- Letter from hospital or medical facility explaining correction needed; OR
- Certified copy of a court order affecting the information shown on the birth certificate.

See, <https://www.dshs.texas.gov/vital-statistics/requirements-requesting-changing-vital-records/supporting-documentation-record-changes#nameAfter>

Procedural Considerations

When can a student request that records be changed?

Nothing currently in state or federal law prescribes a deadline for changing a student's official records to reflect a preferred name, pronouns, or sex. You could consider and implement such requests at any time or could limit changes to records to the end of a grading period for administrative purposes.

Procedural Considerations (cont.)

Would the District be required to change the records of former students?

It is possible that a transgender adult may request that school records be changed to retroactively protect their privacy in the context of future inquiries by schools or employers. In a 1991 opinion letter regarding a former male student who had graduated and thereafter transitioned to female, the U.S. Department of Education's Family Policy Compliance Office (now SPPO—Student Privacy Policy Office), advised the FERPA did not require districts to amend former students' education records to reflect a name and gender other than that of the students' name and gender during their attendance, because the request was "not based on allegations that their records contain recordkeeping errors but on the students' desire to have their education records changed to reflect the results of a surgical gender change." U.S. Dep't of Educ., Family Policy Compliance Office, Letter from FPCO Director Leroy S. Rooker to Karol Johnson, Superintendent, Great Falls Public Schools (Nov. 13, 1991). Therefore, FERPA does not require a change in the record due to inaccuracy, but it also does not prohibit a district from deciding to change the record in the interests of protecting a current or former student's privacy. However, evolving case law in this area may impose an obligation to amend records based on an Equal Protection or Title IX claim.

Break



The Title IX Complaint Process and Reporting Requirements



Title IX: 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 subject to discrimination under any education programs or activity receiving federal financial assistance.

Signed into law by President Richard Nixon on Friday, June 23, 1972.

Outline for 2020 Model You Still Need to Know

1. What is sexual harassment? [We have covered]
2. What notice must a program give and when is program on notice of sexual harassment? [We will cover in next segment]
3. What must a program do to support alleged victims?
4. What personnel and policies do programs need?
5. What grievance process must a program generally follow before making findings and disciplining?
6. What are other features of the 2020 regulations?
7. How do the 2020 regulations “protect” free speech?
8. Who needs to be trained?

Notice

Title IX Coordinator's Contact Information must be given to:

- Students
- Employees
- Applicants for Admission
- Employee Applicants
- Parents/Legal Guardians

Contact Information: Name, title, office address, email address, and telephone number. Must be "**prominently displayed**" on website.

Notice (cont.)

- Once a program has **actual knowledge** of sexual harassment or allegations of sexual harassment, the program has to respond and take action.
- A program has **actual knowledge** when it has notice that a person may have been the victim of sexual harassment.
- Thus, all staff have the duty to report and should be trained.
- Any person, whether the alleged victim or a parent, friend, or bystander, has the right to report sexual harassment to put the program on notice.
- Report should be made to Title IX coordinator



What kind of response must the program provide?

The program cannot be “**deliberately indifferent.**” Deliberate indifference = liability. That also means that it cannot be “**clearly unreasonable**” in light of the known circumstances. The clearly unreasonable standard may protect programs who “do not do enough, but were not clearly unreasonable”

The **Title IX Coordinator** must provide information to **Complainant:**

- The availability of **supportive measures** regardless of whether formal complaint filed;
- The **right to file a complaint**, and
- How to file a complaint and the process.



What personnel and policies must schools have?

- **Title IX Coordinator;**
 - Specific information about how to contact the Title IX Coordinator must be provided by the school.
 - Currently also need Investigator, Decision-Maker, Appellate Decision Maker.
- **Non-Discrimination policy;**
- Written **grievance procedures;**
- Information about how to file a **formal complaint** regarding sexual harassment.

Formal Complaints

- A formal complaint is an official document alleging sexual harassment.
- It's filed and signed by the student (or parent/legal guardian) or in some cases the Title IX Coordinator.
- In cases where an alleged victim doesn't file a formal complaint, a Title IX Coordinator might initiate grievance procedures where discipline is appropriate.
- Discipline for Title IX-sexual harassment will be difficult without using procedure.

Scenario: Formal Complaints

Taylor sends an email to the Title IX Coordinator detailing an incident that occurred between her and Harry at a party. The Title IX Coordinator believes this is an issue that falls under the Title IX umbrella and invites Taylor into her office the next morning. Taylor comes in but refuses to file a formal complaint.



Written Grievance Procedures

- For now, grievance procedures dealing with sexual harassment must abide by the 2020 regulations.
- The 2020 regulations refer to alleged victims as **complainants** and alleged perpetrators as **respondents**, whether or not the grievance process has begun.
- The grievance procedures cannot discriminate on the basis of sex, and provisions **must apply equally** to complainants as respondents.
- Written grievance procedures need to include 10 other specific items.

Requirement 1: Treat Parties “Equitably”

- The school’s grievance process must treat complainants and respondents equitably by providing **remedies** to a complainant if a respondent is found responsible, and by following the prescribed **grievance process before** imposing **discipline** on a respondent.
- The **remedies** for a complainant must be **designed to restore or preserve equal access** to the school’s education program or activity.
- Unlike supportive measures in place with or without a grievance process pending, a complainant’s **remedies CAN be punitive** or disciplinary against the respondent.

Requirement 2: Objective Evaluation of Evidence

- The school's grievance process must ensure an **objective evaluation** of **all relevant evidence** – including inculpatory and exculpatory evidence.
- **Credibility determinations** cannot be made on the basis of a person's status as a complainant, respondent, or witness.

The term "grievance process" by OCR refers to the process of resolving a formal complaint, including the investigative process, by a school.

Requirement 3: Training; No Conflicts of Interest

- The individuals involved in the process - the **Title IX Coordinator, investigators, decision-makers, or facilitators of informal, voluntary resolution efforts** – must not have any **bias** or **conflict of interest**.
- These individuals must also be **trained**. The materials used to train Title IX personnel cannot rely on sex stereotypes, must promote impartial investigations and adjudications, and must be **posted on each school's website**. (Must have copyright permission to publish.)

Scenario: Requirement 3

Scarlett has been “volun-told” to be the Investigator in a Title IX investigation. The first day, she realizes that the complaint is against Michael, her husband Colin’s best friend. Can Scarlett still serve as the Investigator?

Requirement 4: Presumption of Innocence

- Under the school's grievance procedures, **the respondent must be initially presumed not responsible**, so that any finding of responsibility only comes at the conclusion of a grievance process.

Requirement 5: Reasonably Prompt Time Frames

- The grievance process must include **reasonably prompt time frames** for resolving formal complaints of sexual harassment.
- **Temporary delays** are permitted only for **good cause**. Good cause can include law enforcement activities, the absence of a party or witness, the absence of a party's advisor of choice, or the need to provide language assistance or accommodation of disabilities. Agency policy and handbooks should include these reasons along with any other reason deemed good cause.

Scenario: Requirement 5

The Center has begun investigating an allegation of dating violence, when they get a call from the police department. The police officer on the phone informs them that they are looking into one of the parties for assault and ask that the Center cease their investigation until the police finish their own work. What should the Center do?

Requirement 6: Description of Outcomes

The grievance process must describe or list the range of possible remedies and disciplinary sanctions that could occur following a determination of responsibility.

This means “the range” should be listed in handbook and any administrative regulations.

Requirement 7: Standard of Evidence

- The grievance process must state which standard of evidence the program will use to reach a determination regarding responsibility.
- Programs can choose between the **preponderance of the evidence** standard and the **clear and convincing evidence** standard.
- Whichever standard the program chooses, it has to use that standard for all formal complaints of sexual harassment, whether the respondent is a student or employee.
- All sexual harassment proceedings must have the same standard of evidence.

Requirement 8: Right to Appeal

- The grievance procedures must contain the **right to appeal the result of the grievance process.**
- Appeal process should be explained in handbooks and administrative regulations

Requirement 9: Description of Range of Supportive Measures

The grievance process must describe the **range of supportive measures** available to complainants and respondents.

Examples need to go into handbooks and administrative regulations that are published.

Supportive Measures

Supportive measures may include:

- individualized services that are non-punitive, non-disciplinary, and do not unreasonably burden the other party yet are designed to restore or preserve a person's equal access to education;
- placing students immediately in separate classes pending the results of the school's investigation;
- notify the complainant of the options to avoid contact with the respondent and allow students to change academic situations as appropriate;
- counseling.

Requirement 10: Privileges

- No information protected by a legal privilege (such as the attorney-client privilege or the doctor-patient privilege) can be used during an investigation unless the person holding that privilege has waived it.
- Neither a party nor the school is allowed to seek, permit questions about, or allow the introduction of evidence that is protected by a recognized privilege.
- Individuals can always opt to waive their own privileges.

Scenario: Requirement 10

Haley and Justin are involved in an investigation into Justin repeatedly calling Haley names and making fun of her. Haley provides to the Title IX Coordinator her notes from her therapist in which she details the name-calling. Justin requests a copy of the notes.

What is required in this Grievance Process?

- The process is triggered when a **report** is filed.
- An investigation is triggered when a **formal complaint** is filed
- A formal complaint can be filed by an individual or the Title IX Coordinator.

The "Grievance Process" contains multiple parts, including the "investigation," which must be conducted before you come to any "conclusions," and before any "appeal."

Written Notice to the Parties

- When the program begins an investigation, it must provide the parties with written notice of certain information before anyone is questioned.

Details of Written Notice

1. The actual allegations and facts that would constitute sexual harassment.
2. The presumption of innocence.
3. A statement that the parties are entitled to advisor of their choice.
4. A statement that the parties can request to inspect and review certain evidence.
5. Information regarding the code of conduct and false statements.



Emergency Removals

- A program may remove a respondent from its education programs or activities on an emergency basis if the respondent poses an immediate threat to anyone's physical health or safety.
- If the respondent is an employee, the final regulations do not prevent a program from placing that employee on administrative leave during the investigation.

Mandatory Dismissal

A program must dismiss a complaint:

- that does not describe conduct that meets the definition of sexual harassment;
- that alleges sexual harassment that did not occur in its education program or activity;
- that alleges sexual harassment that did not occur in the United States (e.g., schools trips out of U.S.).*

*These complaints can still be addressed under their code of conduct, even if the misconduct is not sexual harassment under Title IX.

Discretionary Dismissals

A program may dismiss a complaint:

- if the complainant notifies the Title IX Coordinator in writing that they wish to withdraw the formal complaint or some of its allegations;
- if the respondent is no longer enrolled or employed by the program; or
- if specific circumstances prevent the program from gathering evidence sufficient to reach a determination about the allegations.

Scenario: Discretionary Dismissals

Kim has filed a formal complaint against Kanye for sending around her naked photos to his friends without her consent. A week into the investigation, Kim comes to the Title IX Coordinator and states she wishes to dismiss the complaint for the safety of her new boyfriend, Pete. Should the complaint be dismissed?

Dismissal Procedures

- Whenever a program dismisses a formal complaint, or any allegations in it, the program must promptly send written notice of the dismissal and the **reasons to the parties.**
- Both parties have the right to appeal a dismissal decision (more later).

Gathering Evidence: Schools and Parties

- The school must give both parties equal rights and protections. These protections apply whether the complainant filed the formal complaint or whether the Title IX Coordinator began the investigation by signing the formal complaint.
- The school is not allowed to access a party's personal records if they are maintained by a physician, psychiatrist, psychologist, or other professional for the purpose of treatment to the party, without consent.



Gathering Evidence: Schools and Parties (cont.)

- The program must provide an equal opportunity for the parties to present witnesses and evidence, including expert witnesses, as well as inculpatory or exculpatory evidence.
- The program cannot restrict the ability of either party to discuss allegations under investigation or to gather and present relevant evidence. (Note: This is for parties, not witnesses.)
- The school has to provide the same opportunities to the parties to have others present during the grievance proceedings, including access to an **advisor of choice** for **any meetings** or hearings. Both complainant and respondent are entitled to an “advisor” of their choice.

Gathering Evidence: Schools and Parties (cont.)

- The program has to provide to parties written notice of the date, time, location, participants, and purpose of all hearings, interviews, or other meetings they are expected to attend, with sufficient time for the party to prepare.
- The program must also provide equal opportunities for the parties and their advisors to inspect and review the evidence obtained by the school as part of its investigation, if the information is directly related to the allegations raised in the formal complaint.
- The program must also give the parties a meaningful opportunity to respond to the evidence.

Investigative Reports

- After gathering evidence, the program must prepare an investigative report on the allegations of the formal complaint.
- A program must give the parties at least 10 days to respond to the evidence in writing. If a response is submitted, it must be considered before finalizing the investigative report. The investigative report can then be finalized and provided to the parties.
- That report must be circulated to the parties at least another 10 days before any determination of responsibility. This means before there can be a conclusion, at least 20 days will occur.

Participation

- Every person has the right to choose to participate or not participate in any part of a grievance process. No one may be forced, threatened, coerced, or discriminated against for choosing not to be part of the school's grievance process.
- The decision-maker is not supposed to make inferences about the determination regarding responsibility based on the fact that a party or witness did not fully participate in the process.

Decision-Making: Objective and Unbiased

- The decision-maker must allow the parties to submit written questions to each other.
- The decision-maker must objectively evaluate the relevant evidence and reach conclusions about whether the respondent is responsible for the alleged sexual harassment.
- A decision-maker needs to use independent judgment: cannot be the same person who conducted the investigation or the Title IX Coordinator.
- Decision-makers must be free from conflicts of interest or bias for or against complainants or respondents and must receive special training about how to be impartial and how to decide what evidence is relevant.
- The decision-maker will weigh the relevant evidence and decide whether it meets the standard of evidence for sexual harassment allegations.

Decision-Making: Written Decisions

After the evidence has been weighed, DM must issue a **written decision**. It must include:

1. The **portion** of the program's **policies** that was **violated**.
2. A description of the steps that were taken on the way to getting to that point, including **procedural steps**
3. A **findings of fact** section
4. A section that draws **conclusions** after applying the facts to the portion of the policy that applies
5. A **statement and rationale** for the ultimate **determination of responsibility**.

Decision-Making: Written Decisions (cont.)

6. **Any disciplinary sanctions** that the program will impose on the respondent and state whether the program will provide remedies to the complainant.
7. A statement and rationale for any remedies for the complainant, addressing **how** those **remedies** will **restore or preserve equal access**.
8. A statement of the recipient's procedures, a statement that the parties have a **right to appeal** the initial determination regarding responsibility, and the permissible bases for appeal.

Decision-Making: After the Decision

- The program must **send the written determination to the parties simultaneously, along with information about how to appeal the determination.**
- A program has discretion to set deadlines of when an appeal must be filed, bearing in mind the obligation to conclude the entire grievance process and bring resolution to the situation for both parties, within a reasonably prompt time frame.
- The **Title IX Coordinator is responsible for ensuring that the remedies contained in the written decision are carried out.**

Remedies

The remedies are designed to “restore or preserve equal access to the school’s education program or activity.” Possible “range of remedies” - verbal warning to expulsion. Consider:

- training program for those involved in the complaint
- comprehensive education program for the school community
- counseling to the complainant and the respondent who engaged in prohibited conduct
- increasing staff monitoring of areas where prohibited conduct has occurred
- reaffirming the program’s policy against discrimination and harassment.

Respondents who are employees may be subject to a range of discipline from a written warning up to and including termination of employment.

Appeals

- **Both parties have the right to appeal.**
- Appeals can be taken from two different steps in the process.
 - After a dismissal before the grievance process, whether mandatory or discretionary
 - At the end of the grievance process

Grounds for Appeal

1. A **procedural irregularity** affected the outcome of the matter.
2. **New evidence** has been discovered that was not reasonably available at the time of the determination of responsibility or dismissal.
3. A **conflict of interest** on the part of a Title IX Coordinator, an investigator who compiled the evidence, or a decision-maker, and the conflict of interest affected the outcome.
4. Programs can offer additional grounds for appeals, if they want to, so long as the grounds apply on an equal basis to the parties.

Scenario: Grounds for Appeal

Blake's Title IX complaint against Ryan was just completed. However, after the decision was rendered, Blake finds out that the Decision-Maker is actually best friends with Ryan's mother. Blake sees an email from the Decision-Maker to Ryan's mother stating that they wouldn't let anything happen to her son. Can Blake appeal?

Appellate Process

- The recipient must notify the parties in writing and implement appeal procedures equally.
- Both parties must have equal opportunity to submit a written statement supporting or challenging the outcome
- The person who decides the appeal cannot be the same person who reached the determination regarding responsibility, or the same person as the investigator or Title IX Coordinator.*
- After considering the parties' written statements, the decision-maker on appeal must issue a written decision and send it to the parties simultaneously.
- The determination about whether the respondent is responsible for the sexual harassment allegations **becomes final after appeal**. Final does not mean an employee is denied due process if the program wishes to terminate.

Informal Resolution

- Programs can offer informal resolution in appropriate cases:
 - Exception: Where the respondent is an employee
- Informal resolution only if voluntary by each party.
- A program can never force, threaten, or require informal resolution.
- If informal resolution proceeds, the program must provide a facilitator who is unbiased and who has received special training.
- The program still needs to provide complainant and respondents with notice of the allegations, notice of their rights, information about whether an informal process is confidential, and about withdrawing from the process.

Other Issues: Record-Keeping

This duty extends for **7 years** and includes several categories of documents:

1. Records of investigation.
2. Records of any appeal/materials associated with an appeal.
3. Records of any informal resolution process
4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution (and remain posted on website).
5. Records of the supportive measures that they took in response to a report or complaint of sexual harassment.

Other Issues: Retaliation

- No school or person is allowed to retaliate against anyone for exercising rights under Title IX.
- Any person **retaliated** against may file a complaint with the program, and the program must have procedures in place for the prompt and equitable resolution of such complaints.
- The program should keep the identities of parties and witnesses confidential, unless disclosure of someone's identity is required under other laws (e.g. FERPA) or is necessary in order to conduct the grievance process.

How does this process protect free speech?

- The 2020 regulations prohibit a program from telling complainants and respondents that they cannot talk about the allegations, investigation, or grievance process.
- When OCR investigates a program for possible Title IX violations, OCR will never view a program's attempt to suppress free speech as an appropriate response to sexual harassment.



Who needs to be trained?

- Title IX Coordinator
- Investigators
- Informal Resolution Facilitators
- Decision Makers
- Appellate Decision Makers

More on Training:

Training must include:

- Definition of sexual harassment
- The scope of the school's education program/activity (what is included)
- How to conduct an investigation/grievance process
- Hearing (if you have them – you don't)
- Appeals
- Informal Resolution Process
- Avoiding prejudgment of the facts at issue, conflicts of interest, bias
- Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence

Record Keeping - Training

A recipient must maintain for a period of **seven** years records of:

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.
- Training materials must be made publicly available on a district's website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

Office for Civil Rights Technical Support

- To learn more about OCR visit:
www.ed.gov/OCR
- If you have questions for OCR, you may contact OCR at the OPEN Center at
T9questions@ed.gov

Harassment and Discrimination Prevention

Establish / Publicize the Protocols

- At the highest levels, a covered entity must take steps to:
 - Designate a Title IX Coordinator
 - Publicize the identity and contact information for that person
 - Establish the Title IX policies and procedures, including the grievance process required by the 2020 regulations
 - Publicize those, including on the website
 - Ensure training of all staff and especially those with roles in the grievance process

Ensure Reporting

- Any person may make a report of an alleged Title IX violation
- The person who makes the report does not have to be the Complainant, and if the Complainant does not wish to file a formal complaint, the Title IX Coordinator may do so on their behalf.

Reports May be Made by:

- **Filling out form**
- **Verbal**
- **Mail**
- **Telephone**
- **Email**

Reports may be made at any time, including non-school hours.

Scenario - Reporting

The Center is sent a Direct Message on X via an account called "CenterRumors." The message states that student Lavonte has been hitting his girlfriend Amelia.

Scenario – Reporting (cont.)

Mrs. Gomez comes into the Title IX Coordinator's office and states that her son Felix has been bullied. She claims his friends keep making fun of him for his high voice and wanting to sing in the school plays. Mrs. Gomez provides screen shots of messages proving her allegation. When the Coordinator talks to Felix about this, Felix states he doesn't know what the Coordinator is talking about and to leave him alone.

Notice

- A program has **actual knowledge** when it has notice that a person may have been the victim of sexual harassment.
- Thus, all staff have the duty to report.
- Any person, whether the alleged victim or a parent, friend, or bystander, has the right to report sexual harassment to put the program on notice.

Scenario - Notice

Alexa, an instructor, is using the restroom. In the stall beside hers she overhears Chelsea on the phone to her mother crying about Tanner grabbing her butt in the hallway. Alexa waits until Chelsea leaves, washes her hands, then goes back to work as if nothing happened.

Scenario 1: Notice

Ms. Julie sees Leslie crying in the lunchroom. She pulls Leslie aside, and Leslie tells her that Caroline has been telling the other students that Leslie slept with John and gave John an STD. Caroline is also telling other students that Leslie may be pregnant. Ms. Julie asks Leslie if she'll come report this to Mr. Carl, the Title IX Coordinator, and Leslie refuses.

Scenario 2: Notice

Coach Donovan hears the boys on the baseball team calling Joey "Fairy Boy." When Coach pulls freshman Eric aside, he asks why the team is calling Joey that name. Eric tells Coach it's because Joey paints his nails under his glove and the team thinks it looks like a girl.

Scenario – Notice (cont.)

Rumors have been spreading around the office that Daniel and Rebecca broke up. Daniel has been telling people that Rebecca cheated with a student. Anna, Lexie, and Samantha all hear the rumor at the same time from Daniel.



General Staff's Role

- Staff members may be the ones who have to report discrimination or harassment if the students involved are unable to recognize the behavior or do not wish to file a formal complaint themselves.
- All staff members must be able to recognize these behaviors, and once they notice something awry the school is on notice of the behavior.
- Therefore, the staff must report to the Title IX Coordinator immediately.

Scenario 1: General Staff's Role

Annie comes into the Title IX Coordinator's office. She tells the Coordinator that her friend Luis is being bullied by his ex-girlfriend Hana. She says that Hana is threatening to send the entire class naked photos of Luis unless he pays for Hana and her friends' tickets to a concert. Luis hasn't been to class all week because of this.

Scenario 2: General Staff's Role

Penny and Sadie had a falling out as friends when Penny dated Devon after Sadie. Sadie still has the key to Penny's dorm room. She keeps sneaking into Penny's dorm and writing messages on Penny's mirror like, "Only sluts sleep with Devon!" and "Once a whore, always a whore." Ms. Jenny, who is monitoring the halls, overhears Penny's roommate Ashley telling her friends about Sadie's messages.

Scenario 3: General Staff's Role

Mr. Drake tells Isabella that he'll give her an A on the project he's assigned if she gives him a back rub. It makes Isabella uncomfortable, but she really needs an A, so she does it.

Take Appropriate Action

Deliberate Indifference Standard - A school must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances.

**Since 2020 this has meant following the grievance procedures

Scenario – Deliberate Indifference

Coach Reid hears the football players complaining about Johnny for sending around a topless photo of Jessica. Coach Reid confronts Johnny, who confesses to the actions, then makes Johnny run bleachers after practice, then moves on.

Scenario – Deliberate Indifference (cont.)

Kendall tells Mr. Peyton that she was hazed by her club. The hazing ritual included drinking until she passed out and making her streak across the library at midnight. Mr. Peyton immediately calls the police.



Simple Steps of Prevention

1. Be able to identify what you're dealing with – be able to recognize the behavior you're experiencing or witnessing is not okay
2. Know who to speak to – who is the Title IX Coordinator? Can you talk to another adult who can show you where to report?
3. Assure people that they will not be punished for asking questions, sharing their concerns, or reporting someone else's behavior
4. Respond to harassment questions or concerns, and investigate complaints, promptly and effectively
5. Ensure that staff members understand their responsibility to stop, address, and prevent discrimination and harassment

**Throwing it all
together...**

Scenario 1

Teacher Connie is approached by student Patrick. Patrick tells her that Daphne spread a rumor that he has "big dick energy." Patrick states that all of the girls in his English class keep looking at him and laughing. When Connie asks Patrick to accompany her to Logan, the Title IX Coordinator's office he refuses. Connie insists that she'll give Daphne detention.

Scenario 2

Betty tells her instructor that Willow called her a slut this afternoon. After asking further questions, Betty admits that it only happened once and not in front of anyone else. When asked if Betty can go to the next class, she says yes and goes on her way.

Scenario 3

Molly and Monica are stepsisters. They end up in a physical fight in the hallway. When asked what the fight was about, Monica says that Molly stole her favorite skirt. Does the fight fall under the Title IX umbrella?

Lunch Break

Overview of Title IX Players and Their Responsibilities

Title IX Coordinator

Who best serves in the role of the Title IX Coordinator?

- Someone trained
- Has good record-keeping skills
- Empathetic person who others feel comfortable confiding in
- Typically a higher-level administrator who is accustomed to heavy responsibilities and is trained more consistently

Title IX Coordinator Responsibilities

- Receive reports of violations of Title IX
- Potentially draft a formal complaint yourself
- Determine whether a report rises to the level of a formal complaint and whether to dismiss
- Record keeping
- Assign the roles for an investigation
- Offer supportive measures whether or not a formal complaint is filed
- Be able to articulate the entirety of an investigation to both sides before it begins

Scenario 1 – Coordinator Responsibilities

Kat comes into the Title IX Coordinator's office and tells them she's being harassed by Bianca. Kat says that Bianca is calling her "butch" and "lezbo" and making fun of her shoes. Kat tells the Coordinator that she doesn't want to make a formal complaint.

Scenario 2 – Coordinator Responsibilities

Mrs. Patterson comes to the Title IX office and tells the Coordinator her daughter Penny was assaulted on the class trip to Japan. Mrs. Patterson is furious and states she'll call the newspaper and anyone who will listen if the school doesn't do something.

Scenario 3 – Coordinator Responsibilities

Jonah puts in a public information act request for all of the training materials the district has undergone under Title IX. Rumi, the public information officer, doesn't know where to go to get these materials.

Investigator

Who best serves in the role of the Investigator?

- Someone other than Decision-Maker, Facilitator of Voluntary Resolution
- Title IX Coordinator is not prohibited but not best choice
- Administration or Management
- Can be outside investigator
- Train more than one
- Can assign more than one investigator/team

Investigator Must-Haves

- No bias
- Sufficient training
- Not involved in any incidents which prompted the investigation
- Someone good at reading other people and determining someone's credibility
- Wholly disinterested in the incident and the people involved
- Someone who can treat the parties equally
- Someone who is good at taking notes and summarizing their findings

Investigator Responsibilities

- Interview all parties
- Review all provided evidence
- Invite parties to interviews, share all evidence with both sides
- Ask for any evidence they believe was not provided
- Write a lengthy, detailed report of their findings for the Decision-Maker
- Confidentiality

Decision-Maker

Who best serves in the role of the Decision-Maker?

- Someone other than Title IX Coordinator, Investigator, or Facilitator of Voluntary Resolution
- Again, administration and management
- Must have training - train more than one
- Must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

Decision-Maker Must-Haves

- No bias
- Sufficient training
- Not involved in any incidents which prompted the investigation
- Someone who can treat the parties equally
- Wholly disinterested in the incident and the people involved
- Someone who is good at analysis and applying policy to facts
- Someone who is good at reading for context clues and making a firm decision even if it doesn't feel perfect

Decision-Maker Responsibilities

- Review the Investigator's report and any responses from the parties
- Consider all aspects of the report and the evidence presented
- Give the parties the opportunity to ask questions
- Draft a thorough decision document
- Send the decision to both parties at the same time
- Give your decision to the Title IX Coordinator for safe-keeping

Appellate Decision-Maker

Appellate Decision-Maker Must-Haves and Role

- No bias
- Sufficient training
- Not involved in any incidents which prompted the investigation
- Someone good at reading other people and determining someone's credibility
- This person must review the investigation report and the decision to determine if any of the legally allowed reasons for appeal exist
- If they do exist, they must decide whether or not to uphold or overturn the Decision-Maker's decision

Appellate Decision-Maker Responsibilities

- Confidentiality
- Making the decision quickly
- Drafting an appellate decision document
- Sending the decision to both parties simultaneously and providing a copy to the Title IX Coordinator
- No bias

Facilitators

Who best serves in the role of the Facilitator?

- Could be the Title IX Coordinator
- Someone trained
- Wholly unbiased
- Able to communicate the outcome of the voluntary resolution session to the Title IX Coordinator, parents, and anyone else who may need to be involved
- Confidentiality

Facilitator Must-Haves

- No bias
- Sufficient training
- Not involved in any incidents which prompted the investigation
- Someone good at keeping others calm and on-track
- Someone who can treat the parties equally
- Can help the parties come to terms that they can both agree with

Facilitator Responsibilities

- Facilitators help the parties informally come to a solution without a full investigation, meaning they mediate the conflict between the parties until a compromise is reached
- Allow both sides to make their points
- Assign supportive measures for both parties
- Not assume guilt/innocence throughout the entire proceeding

Advisor

Advisor's Role

- Assists the respondent or the complainant throughout the process
- Invited to all interviews
- Provided a copy of all evidence considered
- Receives all email and other communications received by respondent and complainant
- *Could be* an attorney, but does not need to be

Scenario – Conflict of Interest

Gretchen is serving as the investigator. As she investigates, she finds out that her nephew, Grant, was involved in the incident in which she's investigating. Grant is neither the Complainant nor the Respondent, but he helped instigate the situation and likely should be brought in as a witness. Should Gretchen recuse herself as the investigator?

Scenario – Conflict of Interest (cont.)

Sam is tasked with being the decision maker for a Title IX appeal. When he's given the situation, he finds out that the Complainant's mother is the childhood best friend of his wife. Should he recuse himself?

Title IX Investigations

Terms

- **Complainant** is an individual alleged to be the victim of conduct that could be sexual harassment.
- **Respondent** is an individual alleged to have engaged in conduct that could be sexual harassment against the Complainant.
- Title IX (Student or Employee)

Confidentiality

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

Confidentiality of Complainant's Identity

- A Complainant can report anonymously.
- A Complainant cannot file a Formal Complaint anonymously.
- Filing a Formal Complaint means that the Respondent will know the Complainant's identity.
- People outside the grievance process should not know of the Complainant's identity, unless required by law, or as necessary to conduct the grievance process.

Training an Investigator

- Topics:
 - impartial investigations
 - standards of evidence
 - how to equitably and meaningfully include both parties in the process including inculpatory and exculpatory evidence
 - how to write an investigative report
 - the role of expert witnesses
 - legal privileges

Impartiality

- Unbiased, disinterested
- No conflict of interest: a real or seeming incompatibility between one's private interests and one's public duties

Standards of Evidence

- The degree or level of proof demanded in a specific case.
- Program choice: preponderance of evidence, clear and convincing evidence

Preponderance of Evidence

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Clear and Convincing Evidence

- Evidence indicating that the thing to be proved is highly probably or reasonably certain.
- This is a greater burden than preponderance of evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.

Equitable Treatment of Parties

- Providing remedies to Complainants where a determination of responsibility for sexual harassment has been made
- Following a grievance process before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a Respondent
- Presumption that Respondent is not responsible for the alleged conduct until the conclusion of the grievance process

Equitable Treatment of Parties (cont.)

- Not making credibility determinations based on a party's status as a Complainant, Respondent, or Witness
- Not restrict the ability of either party to discuss "the allegations under investigation" or to gather and present relevant evidence

Equitable Treatment of Parties (cont.)

- Equal opportunities for supportive measures
- Equal opportunity to review evidence
- Equal opportunity to present witnesses and other evidence
- Considering inculpatory and exculpatory evidence
- Objective evaluation of evidence

Evidence: Inculpatory & Exculpatory

- Inculpatory evidence: showing or tending to show one's involvement in a crime or wrong
- Exculpatory evidence: tending to establish a person's innocence

Investigator: Initial Steps

- Confirm whether allegation reported to law enforcement, if appropriate
- Find out whether there is an on-going criminal investigation

Law Enforcement Investigation

- The program may abate* its investigation **temporarily**, if request by law enforcement officials.
- **Document the request.**
- **Get a timeframe.**
- **Check with law enforcement on a weekly basis to determine status of investigation.**
- **You will be expected to resume your investigation.**

*May also want to temporarily abate for voluntary informal resolution process.

Investigation Timelines

- The regulations do not dictate any timelines for initiating or completing investigations but policy might.
- They should be initiated and completed **promptly**.
- It will depend on the nature of the allegations and scope of the investigation.

Notice to Parties

The parties will have been sent a notice from the Title IX Coordinator:

- Grievance process
- Informal resolution options
- Details of allegations
- Identity of the parties
- Date/location of alleged incident(s)
- Statement that Respondent presumed not responsible
- Right to an Advisor, who may be, but is not required to be, an attorney

Notice of Interviews

Party whose participation is invited or expected is entitled to written notice of the following for any meeting in the grievance process, including interviews, with sufficient time to prepare:

- Date
- Time
- Location
- Participants
- Purpose of meeting

Notice of Interviews (cont.)

- Parties may be accompanied by an advisor to interviews/any meeting in the grievance process that they are expected to participate.
- Minors may have a parent and an additional advisor.

Confidentiality of Process - Parties

- Programs cannot prohibit parties from discussing the “allegations under investigation” or from gathering their own evidence.
- This does not apply to information that does not consist of “the allegations under investigation,” (e.g., the evidence provided to the parties or the investigative report).

Party Evidence

- Parties have the right to submit their own evidence (e.g., text messages, photographs, medical reports, psychological reports).
- Parties should be told that any evidence submitted will be shared with the other party.

Interviewing Witnesses

- No one can be required to participate in an investigation.
- The regulations prohibit retaliation against any person for participating or refusing to participate in a Title IX proceeding.

Witnesses

Witnesses are not entitled to written notice before being interviewed or to be accompanied by an advisor.

Research Before Interviewing

- Review the policy and be familiar with the burden of proof and definition of sexual harassment
- Who are the parties?
- Employee? History....time with the District?
- Student disciplinary history?
- Relationship between the parties?
- Prior complaints?
- Prior claims made by others?

**But avoid prejudgment of the facts at
issue**

Look at Documents You Have

- Discipline records
- Academic records
- Personnel records
- Correspondence between Complainant and Respondent

Make Decisions on Note-taking and Recording

- Who takes the notes?
- Do we sign the notes?
- Do we want to record?
- Be consistent.
- Test your equipment.

Open Your File

- **Assign a case number, if not already**
- All notes, memoranda, written statements, letters, policies, and other matters related to the investigation should be in the file.
- File should be marked as **“CONFIDENTIAL.”**
- **Access must be limited.**

Interviewing

- Generally, meet with the Complainant first.
- Provide enough time.
- Make it a neutral area.
- Do not rush. Remember this may be embarrassing.
- You want as much detail as possible. Provide time to think and opportunity to return.
- Tell them there will be no retaliation and to report any retaliation to you immediately.

Written Statement

- Determine whether it's appropriate to obtain a written statement from a student.
- Written statements:
 - Shows seriousness
 - Helps assure later testimony
 - Solidifies testimony
 - Helps determine requested outcome

Questions for the Complainant

- What happened – exactly?
- When – date and time?
- Where – specific (room, trip, outdoor)?
- Happen online?
- Why were you and this other person together?
- What happened or was said just before?

Questions

- What exactly was said?
- What was the tone?
- Expression when said?
- Gestures or motions?
- Touch you in anyway?
- Did you touch them?

Questions (cont.)

- Can you describe the type of touching?
- What did you say in response to any touching?
- How did the words or conduct make you feel?
- Have you had conversations or interactions with this person before?
- Was the tone or atmosphere different?

Questions (cont.)

- How long have you known the person?
- Was anyone else present?
- Who?
- Have you told anyone else about this?
- Who, and when, and what did you say?
- Has anything similar happened before?
- If yes, ask the same type of questions about each prior incident.

Questions (cont.)

- Do you have any written documentation?
- Anything on social media such as Instagram, Snapchat, Facebook, X, or other evidence for me to review?
- Are there any other individuals you would like me to interview?

Remember:

Do not ask about prior sexual behavior or sexual predisposition, unless to establish that another person committed the alleged conduct or that the conduct was consensual

Thoroughness

- **Do not interview only the Complainant and the Respondent.**
- Who else was there? [Corroboration]
- Who else knows about this? How? [Contemporaneous discussions]
- Is there anyone else you would like me to interview about this? [Thoroughness; other victims]
- Are there any other documents you would like me to review?
- Must thoroughly document procedures

Questions for Corroborating Witnesses

- Where were you at on (fill in the date and time of the incident as alleged)?
- If online – have you seen the online material?
- Who else was there at the time, or does anyone else know about this?
- Did you see the parties in that place or at that time?
- Did you see or hear any interactions/conversations between the parties?

Questions for Corroborating Witnesses (cont. 1)

- Please tell me in your own words what you saw or heard.
- What exactly did you hear – the precise words?
- What exactly did you see – and from how far/angle/obscured?
- How did complainant look?
- Did the respondent make any motions or gestures?
- What response did you see or hear from the complainant?

Questions for Corroborating Witnesses (cont. 2)

- What impressions do you have about what you saw or heard?
- Do you have personal knowledge of prior interactions?
- Do you know either party? How well, and in what capacity?
- How long have you known either?
- Is there any current or former relationship with either?
- Do you have opinions about trustworthiness? What led you to that opinion?

Questions for Corroborating Witnesses (cont. 3)

- Do you know either of the parties?
- How well do you know them?
- How do you know?
- Is there an official relationship?
- Description of their character, personality, nature?
- Know of any similar past events?

Questions for Corroborating Witnesses (cont. 4)

- Have you observed either or both interact with persons of different sex?
- What were your observations or impressions?
- Do you know if either is generally truthful or deceptive?
- Do you know anyone else that may know about any of these issues?
- Have you heard others talking about it – who?

Issues for Students

- Consider interviewing in environment comfortable to them
- Classroom or library, other than office
- Who will be present?

Issues for Students (cont.)

- Do not ask leading questions: Isn't it true that you did X because of Y?
- What did you do? Why did you do it?
- Consider audio recording with consent if student cannot write statement.

Issues for Students (cont.)

- Never interview together
- Always take students one at a time - protects against duplication, false memories
- Provides a clearer picture of events

Issues for Students (cont.)

- Start with small talk* – developing trust
- Learn what the student has told others about incident
- Determine how others have reacted
- Ask questions many times in different ways
- Don't have an agenda. Students often say what they think you want to hear.

*The Investigator should assess the credibility of witnesses, so observe how witnesses respond to simple questions to learn the baseline of behavior of a witness.

Interviewing Respondents

- Do you know the Complainant?
- How and for how long?
- What type of relationship, conversations, interactions in the past?
- Where were you on the date and time alleged?
- Why were you there?
- Who else was there?

Interviewing Respondents (cont.)

- Was the Complainant there?
- Did you do or say anything in relation to the Complainant?
- What exactly did you say or do?
- Tone of voice?
- Did you make any gestures or motions while speaking?
What type? Show me.

Interviewing Respondents (cont.)

- What did the Complainant say or do then?
- Did they make any gestures or motions? What? Demonstrate.
- Did they say or do anything in response to your statements or actions? What?
- Expression on their face?
- Did you touch them in any way? Demonstrate how.

Interviewing Respondents (cont.)

- How did the words or conduct overall make you feel?
- Have you talked to anyone else about this matter?
- Who, when, where? Do you mind if I talk to them?
- Do you have anything else that you feel is important for me to know?

Things to Tell All Witnesses*

- We will try to keep this confidential, but we cannot guarantee. You should not speak to others about what we have discussed.
 - Remind all about the anti-retaliation provisions.
- *Remember that parties cannot be prohibited from discussing the allegations raised in the Complaint.

Body Language

- Read the body language and demeanor
- Rate of speaking
- Volume of speaking
- Stuttering
- Getting sidetracked
- Avoiding questions

Body Language (cont.)

- Not answering the question asked
- Hands – moving, still, tapping?
- Feet?
- Playing with anything?
- Arms crossed?
- Standing up? Moving around?

Body Language (cont.)

- Eye contact?
- Head movement when speaking?
- Changes in patterns when changes in subjects or persons?
- Off the baseline?

The Three F's of Nonverbals

Freeze

Flight

Fight

Playing Dead/Possum

Freeze Response

- Hold breath
- Turtle look – shoulders up, lower head – like dejected team after football game walking to locker room
- Arms not moving freely when walking

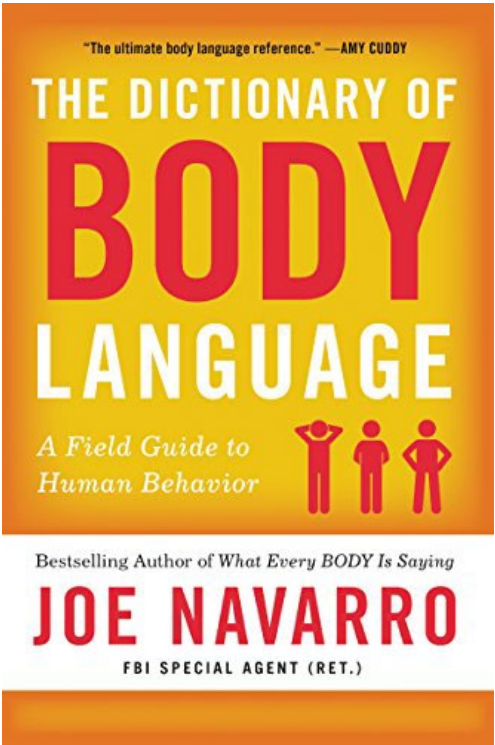
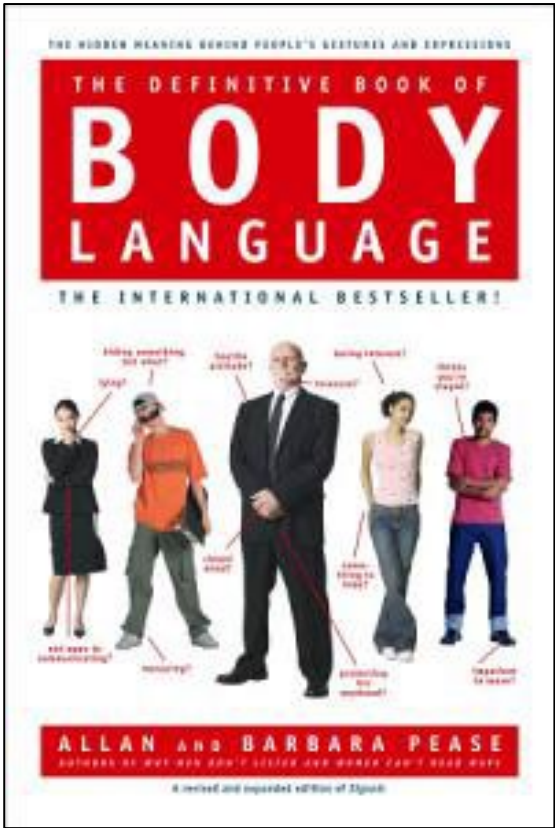
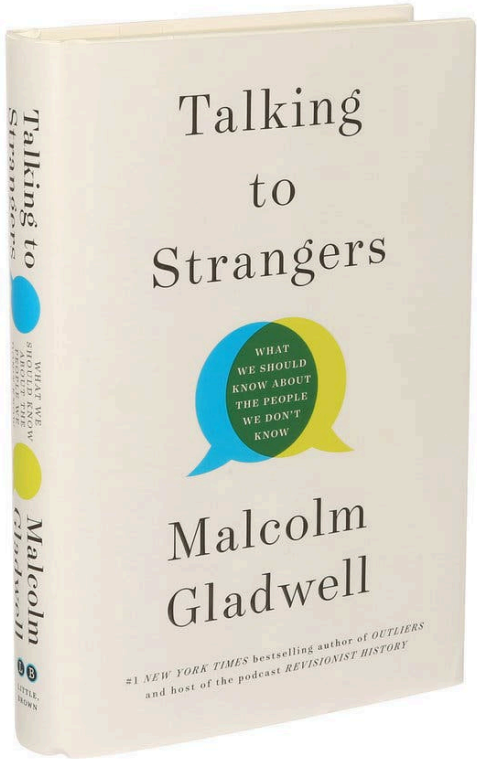
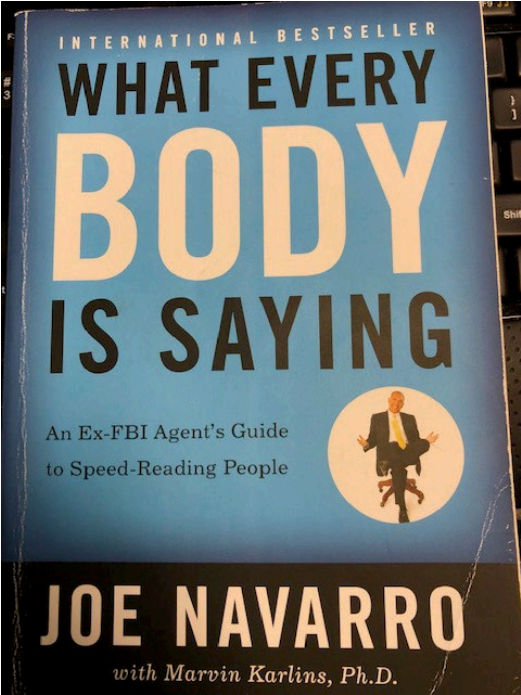
Flight Response

- Leaning Away
- Eye Blocking with hands
- Placing objects between oneself and threat (purse in lap)
- Feet – are they turned away?

Fight Response

- Aggression
- Insults, sarcasm
- Posture, puffing out chest, stern eyes, violating one's personal space

To Learn More About these Techniques...



Discomfort Signals

People under stress give tells:

- Rubbing neck when asked a question, pulling on collar
- Touches hair
- Touches mouth
- Looks away
- Touching neck dimple
- Presses or strokes legs or arms, tapping
- Chew gum, play with objects, jewelry, play with pencil
- Yawning can be a sign of stress –dry mouth

Discomfort Signals (cont.)

People under stress give tells:

- Tightening of jaw muscles
- Flaring of nose wings
- Crinkle of nose
- Squinting of eyes
- Quivering of the mouth
- Stiff neck, no head tilt

Dealing With Hostile People

- People become hostile or confrontational when talking about uncomfortable things.
- Appreciate and respect hostility.
- Understand where their concern comes from.
- Also understand that such behavior is ultimately counter-productive.

Dealing With Hostile People (cont.)

- Do not respond in kind
- Think and talk positively
- First impressions are critical
- Show you are listening by repeating
- Speak softly, and they may do the same
- Give praise where you can

Dealing With Hostile People (cont.)

- Acknowledge frustration
- Take time-outs
- Don't allow things to get personal
- Walk away when you need to

Expert Witnesses

- Parties must also be permitted to present expert witnesses.
- An expert witness is someone who is permitted to give their opinions as to such matter on account of their special training, skill, or familiarity with it.
- The investigator should consider not only the qualifications of the expert, but also the facts relied upon to reach their opinion.
- If either is lacking, their opinions can be given less weight.

Legal Privileges

- As stated previously, a party cannot be required to share privileged information.
- In Texas, those legal privileges are:
 - Attorney-client
 - Physician-patient
 - Communications to members of the clergy
- However, parties can voluntarily waive privilege through disclosure.

After the Interviews and Evidence Collection

- It's time to share the evidence
- **All** evidence must be provided to the parties and their advisors with 10 days to respond before report is issued.
- Includes evidence not intended to be relied upon.

Prepare the Investigative Report

- Investigator must prepare a written investigative report that “fairly summarizes the relevant evidence”
- As to the format of the report, you will utilize a form that will guide you.
- Report must be provided to the parties and their advisors at least 10 days before the determination of responsibility is issued by the decision-maker.
- The report will also be delivered to the decision-maker, who again, must be someone else and cannot be the Title IX Coordinator or a facilitator.

Break

**Serving in the Role
of Decisionmaker
or Appellate
Decisionmaker**

Impartiality

- Unbiased, disinterested
- No conflict of interest: a real or seeming incompatibility between one's private interests and one's public duties

Standards for Recusal of Judges

1. Personal bias or prejudice concerning a party
2. Personal knowledge of disputed evidentiary facts
3. Material witness in the matter in controversy
4. Spouse or minor child residing in household has a financial interest in the subject matter in controversy or in a party
5. Any other interest that could substantially affect the outcome of the proceeding
6. Relative is a party

28 U.S.C. § 455 (Disqualification of federal justice, judge, or magistrate).

Standards for Recusal of Judges (cont.)

Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

Rippo v. Baker, 137 S.Ct. 905 (2017).

Determination of Responsibility

34 C.F.R. 106.45(b)(7)

Decision = Determination of Responsibility

- Decision-maker makes determination of responsibility on a formal complaint
- Must provide the written determination to the parties simultaneously
- Title IX Coordinator is responsible for effective implementation of any remedies

Decision Based on What?

Investigator will provide decision-maker with an investigative report that “fairly summarizes relevant evidence”

- Assume this will occur when the parties receive the report
- Which must be at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided, which we don't recommend) or other time of determination regarding responsibility
- The parties have the opportunity to provide a written response to the report, which the decision-maker will also review.

Hearing v. Questions

Opportunity for Parties to Submit Questions

- Live hearing with live cross by party advisors required for higher ed, optional for others
- **We recommend NO live hearing.**
- With or without a hearing, after the investigative report has been sent and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.
- Questions about a complainant's prior sexual behavior or sexual predisposition only possible to establish that another person committed the alleged conduct or that the conduct was consensual.

The Questions

- Who asks the questions of the parties?
- If the decision-maker refuses to ask a question because it is improper or not relevant, they must provide written rationale to the party proposing the question why the question is being excluded.

The Questions (cont.)

- The decision-maker may not draw any inference from a party's or witness's refusal to answer the questions.
- Where a party or witness refuses to answer the questions, the decision-maker must disregard statements of that party or witness but must reach a determination without drawing any inferences regarding responsibility based on the party or witness's refusal to answer.

The Questions (cont.)

For example, where a Complainant refuses to answer the questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence in making a determination.

**It's important not to
pre-judge the facts until you
have seen all the evidence!**

Standards of Evidence

- The degree or level of proof demanded in a specific case.
- District choice: preponderance of evidence, clear and convincing evidence

Standards of Evidence (cont.)

The burden of proof and the burden of gathering evidence sufficient to reach a determination of responsibility rests on the program and not on the parties.

Preponderance of Evidence

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Clear and Convincing Evidence

Evidence indicating that the thing to be proved is highly probably or reasonably certain.

This is a greater burden than preponderance of evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.

Evidence: Inculpatory & Exculpatory

Inculpatory evidence: showing or tending to show one's involvement in a crime or wrong

Exculpatory evidence: tending to establish a person's innocence



Evidence: Direct & Circumstantial

Direct evidence: Evidence that, if believed, proves the fact without inference or presumption.

Circumstantial evidence: Circumstantial evidence, on the other hand, refers to evidence that requires an inference to be made.

Circumstantial evidence and direct evidence can be equally probative, and responsibility can be established by circumstantial evidence alone.

Evidence: Credibility

The investigator should provide information about the credibility of the parties and witnesses.

Evidence: Hearsay

**An out-of-court statement offered for
the truth of the matter asserted**

There are multiple exceptions, e.g., statement of then-existing state of mind.

This isn't a court, and the Rules of Evidence don't apply.

But remember, hearsay may be less probative than a non-hearsay statement made directly to the investigator.

Expert Witnesses

A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact finder.

E.g., medical doctor, psychologist, law enforcement officer/investigator

Privileged Information

Cannot be used unless the party agrees to waive the privilege

Elements of Decision

The decision-maker must issue a written determination simultaneously to the parties addressing:

- Allegations
- Procedural steps taken
- Findings of fact
- Application of code of conduct to facts



Elements of Decision

- The decision-maker must issue a written determination addressing:
 - Statement of and rationale for result as to each allegation including:
 - Determination of responsibility
 - Any disciplinary sanctions
 - Whether remedies to restore or preserve equal access to the educational program or activity will be provided
 - Procedures and permissible bases for either party to appeal.

Confidentiality – Sanctions and Remedies

The result at the end of a grievance process under § 106.45, including any sanctions and whether remedies will be provided to a Complainant, impact both parties and can (and should) be part of the written determination simultaneously sent to both parties. The Complainant should know what sanctions the Respondent receives because knowledge of the sanctions may impact the Complainant's equal access to the education program and activity.

Confidentiality – Remedies to Complainant

The final decision must state *whether* remedies will be provided to the Complainant but not what remedies will be provided. Thus, the decision may note in the written determination only that a Complainant will receive remedies but should not note in the written determination that the program, for example, will change the Complainant's housing arrangements as part of a remedy. A Respondent should know whether the district will provide remedies to the Complainant because the Respondent should be aware that the Respondent's actions denied the Complainant equal access to the district's education program or activity. Similarly, the parties should both know the rationale for the result as to each allegation, including a determination regarding responsibility because due process principles require the program to provide a basis for its determination.

Possible Remedies

- Remedies are required after a Respondent has been determined responsible under the grievance process
- No list of appropriate remedies in regulations
- Left to discretion of educators
- Designed to restore or preserve the right to equal access to education
- Remedies need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent

Possible Remedies (cont.)

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

APPEALS

34 C.F.R. 106.45(b)(8)

Appeals - Must offer both parties an appeal from a determination regarding responsibility, and from a District'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 generally or the individual Complainant or Respondent that affected the outcome of the matter.

Appeals

- May offer for other reasons equally to both
- Must have a different decision-maker, but still cannot be investigator or Title IX Coordinator, and same rules about bias apply
- Must give other party reasonable, equal opportunity to submit written statement
- Appellate decision-maker must issue decision in writing and provide simultaneously to both parties

Appeals (cont.)

The program should establish a deadline for filing an appeal and may require appeals be filed on a form provided by the program.

OCR Reviews

The Department assures schools that when enforcing these new regulations, it will refrain from second-guessing a program's determination regarding responsibility based solely on whether the Department would have weighed the evidence differently.

A Word About Dismissals

- A recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing:
 - a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - the respondent is no longer enrolled or employed by the recipient; or
 - specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- So, a decision-maker could recommend dismissal if one of these circumstances is met.

QUESTIONS? - Contact

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