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Title IX

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

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Agenda

1. History and Overview of Title IX and when it is applicable
2. Overview of New Proposed Regulations
3. Comparison of New Proposed Regulations with Current Regulations
4. Review of the Current Title IX Regulations
5. Discussion Questions

History of Title IX

• June 23, 1972

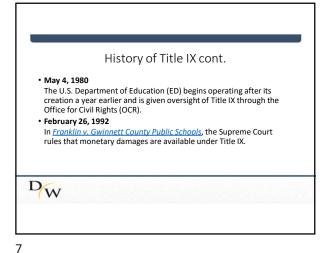
Title IX of the Education Amendments of 1972 is enacted by Congress prohibiting sex discrimination in any educational program or activity receiving any type of federal financial aid.

• May 27, 1975

President signs the final version of Title IX.

• Regulations issued June 1975

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Title IX History cont.

January 20, 2021

President Biden releases Executive Order 13988, "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation," which states, "All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation."

March 8, 2021

President Biden releases Executive Order 14021, "Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity," it states the Biden Administration's objective to guarantee to all students "an educational environment free from discrimination on the basis of sex, including discrimination on the basis of sex, including discrimination on the basis of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity," citing Title IX as applicable governing law.

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# Title IX History cont. • April 4, 2011 ED issues a policy guidance which makes clear that Title IX's protections against sexual harassment and sexual violence apply to all students, including athletes. • April 24, 2013 OCR issues a Dear Colleague letter reminding schools and institutions that retaliation is a violation of federal law.

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Bostock v. Clayton County, US Supreme Court Case
 Interpreted Title VII in employment context to include prohibition against discrimination based on sexual orientation and gender identity.
 Bostock decision used to support analogous prohibition under Title IX and proposed updates to Title IX regulations.

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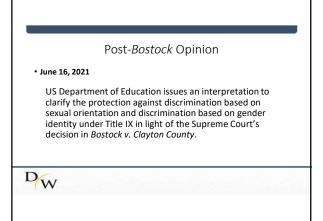
Title IX History cont.

• August 14, 2020

Secretary of Education DeVos enacts several changes to Title IX regarding sexual harassment and misconduct.

Bostock v Clayton County
2020 US Supreme Court Case

Supreme Court concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., which prohibits sex discrimination in employment.



Responsibilities for Staff and Administrators

- CALL THE TITLE IX COORDINATOR IMMEDIATELY.
- Report all knowledge of sexual harassment or alleged sexual harassment.
- DO NOT start the investigation yourself.
- DO NOT impose discipline for alleged sexual harassment without ensuring that the Title IX process is followed or does not apply.



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Responsibilities for Staff and Administrators

- If a report is made to you and you are unable to involve the Title IX Coordinator before details are given by the reporter, immediately pass on all information received from the reporter to the Title IX Coordinator.
- $\bullet\,$  Be familiar with the Title IX definition of sexual harassment.
- Be familiar with the scope of the district's educational program or activity.
- Discuss police involvement with legal and Title IX Coordinator.



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# General Rules for Educators

 $\bullet$  Best practices for all educators based on true objective of Title IX, notwithstanding specific regulations in effect ...

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



Responsibilities for Staff and Administrators

- Assist with emergency removal or administrative leave decisions.
- Assist with supportive measures as requested.
- Assist with any resolutions from informal resolution agreements.
- Assist with remedies as requested.
- Assist with instituting discipline recommended by decision-maker.



# Responsibilities for Staff and Administrators

- Keep parties and information confidential, to extent possible.
- Keep documentation of incidents that occur.
- Keep documentation of supportive measures/remedies that are



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- Notify Title IX Coordinator if a respondent or complainant withdraws
- Direct students/parents to the Title IX policy and Title IX Coordinator when information is requested.
- Recognize and report acts of retaliation.



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# Responsibilities for Staff and Administrators

- Report knowledge of allegations of sexual harassment to the Title IX Coordinator EVEN IF the complainant/reporter does not want you to.
- Know that you may not be told what the final decision is after Title IX proceedings conclude—need to know basis.
- Refer parties to the Title IX Coordinator for status updates on pending grievance procedure.



If you are the witness in a Title IX investigation

• Be honest.

- What you say is being notated and will be shared with the parties and the decision-maker.
- You cannot be retaliated against for participating in the process. Report any retaliation.
- Provide answers based on personal knowledge. Do not guess or give opinions.



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2018 "New" Regulations Under Prior Administration

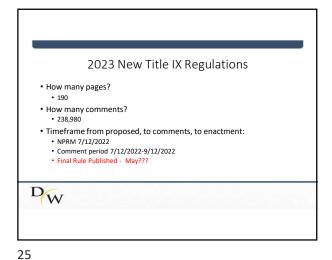
- How many pages?
- 38

23

- How many comments?
- 124,190
- Timeframe from proposed, to comments, to enactment:
  - Notice of Proposed Rulemaking (NPRM) posted 11/29/2018

  - Comment period 11/29/2018-1/28/2019
    Final Rule Published 5/119/2020 (approximately 18 months)





No. 1 Change in New Proposed Regulations

• §106.10 Scope

• Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

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Top 9 Proposed Changes

1. Broaden the Definition of Sexual Harassment and Define "Sex-Based Harassment"

2. Expand Implications of Off-Campus Conduct

3. Responding to Sex Discrimination

4. Define All Employees as "Mandatory Reporters"

5. Provide More Flexibility in the Decision Process on Complaints, Including Removing the Requirement for Live Hearings and Cross-Examination

6. Expand the Boundaries of Supportive Services

7. Clarity and Confirm Protection from Retaliation for Students, Employees, and Others who Exercise their Title IX Rights

8. Prohibit Exclusion Based on Sexual Orientation, Gender Identity, and Sex Characteristics

9. Clarify that Recipients Must Protect Students and Employees from Discrimination Based on Pregnancy or Related Conditions

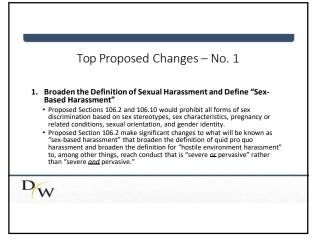
No. 1 Change in New Proposed Regulations cont.

§ 106.2

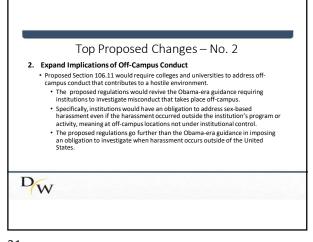
— SewelSex-based horossment prohibited by this part means sexual harassment, harassment on the bases described in § 106.10, and other conduct on the basis of sex that satisfies one or more of the followings:

• (1)440uid pro que harassment. An employee of, 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 of the recipient on an individual on a person's participation in unwelcome sexual conduct:

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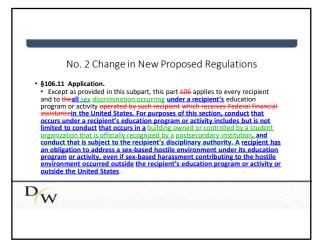


No. 3 Proposed Change
Responding to Sex Discrimination

• \$106.44 Recipient's response to sexual harassment. Action by a recipient to operate its education program or activity free from sex discrimination.

• (a) General response to sexual harassment. A recipient with actual knowledge of sexual harassment must take prompt and effective action to end any sex discrimination that has occurred in an its education program or activity of the recipient against a personn in the United States, must respond promptly in a manner that is not expensive the control of the recipient service of the section of the recipient service of the section of the sectio

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Top Proposed Changes — No.4

4. Define All Employees as "Mandatory Reporters"

Proposed Section 106.44(c) would require that recipients require certain employees to notify the recipient's Title IX and the proposed Section 106.44(c) would be obligated to notify the Title IX conditated. (Proposed Section 106.44(c)[1]).

Allegations that a student may have been subjected to see discrimination under Title IX must be reported to the proposed to the Title IX must be reported to the Title IX must

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Top Proposed Changes — No. 3

3. Responding to Sex Discrimination

• Proposed Section 106.44(a) would require recipients to take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its occurrence, and remedy its effects.

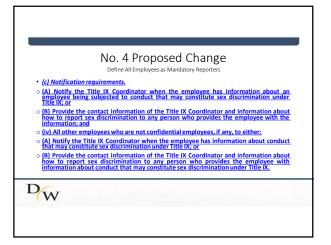
No. 4 Proposed Change

Define All Employees as Mandatory Reporters

• (c) Notification requirements.

• (a) An elementary school or secondary school recipient must require all of its employees who information about conduct that may constitute sex discrimination under Title R. employee has information about conduct that may constitute sex discrimination under Title R. employee has information about conduct that may constitute sex discrimination under Title R. coordinator when the corrective measures on behalf of the recipient to notify the Title IX Coordinator when the corrective measures on behalf of the recipient to notify the Title IX Coordinator when the corrective measures on behalf of the recipient seducation program or activity to notify the Title IX Coordinator when the employee has information about a student being subjected to conduct that may constitute see discrimination under Title IX.

• (a) Coordinator when the employee has information about a student being subjected to conduct that may constitute see discrimination under Title IX or estimation about an employee being subjected to conduct that may constitute see discrimination under Title IX to either:



Top Proposed Changes — No. 5

5. Provide More Flexibility in the Decision Process on Complaints, Including Removing the Requirement for Live Hearings and Cross-Examination

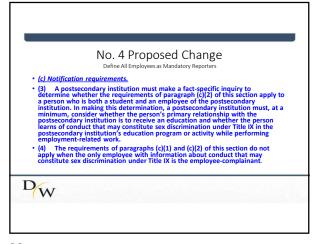
• Proposed Section 106.45 would require all recipients to adopt grievance procedures in writing (proposed Section 106.45(a)(1) that incorporate the following:

• The decision-maker may be the Title IX Coordinator or the investigator (i.e., institutions may re-institute the single investigator model).

• Parties must be given access to all the relevant evidence or an investigative report that one of the second of the propose of the evidence before a decision is made on the allegations, but it is up to the institution to determine just when and how that response is obtained (in writing, at a hearing, etc.).

• Education institutions must employ a process that allows the decision-maker to adequately assess the credibility of parties and witnesses to the extent that credibility is adequately assess the credibility of parties and witnesses to the extent that credibility is adequately assess the credibility of parties and witnesses to the extent that credibility is adequately assess the credibility of parties and witnesses to the extent that credibility is adequately assess the credibility of parties and witnesses to the extent that credibility is adequately assess the credibility of parties and witnesses to the extent that credibility is adequately assess the credibility of parties and witnesses to the extent that credibility is adequately assess the credibility of parties and witnesses to the extent that credibility is adequately assess the credibility of parties and witnesses to the extent that credibility is adequately assess the credibility of parties and witnesses to the extent that credibility is adequated as a second parties and witnesses to the extent that credibility of parties and witnesses to the extent that credibility of parties and witnesses to the extent that credibility of parties and witnesses to the extent that credibility of pa

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No. 5 Proposed Change

Provide More Flexibility in the Decision Process on Complaints

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• \$106.45 Grievance process procedures for formalthe prompt and equitable resolution of complaints of sewal harecoment.

• [a] Discrimination on the basis of sex. A recipient's treatment of a complaination on the basis of sex under title (the process of the proces

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# No. 4 Proposed Change Define All Employees as Mandatory Reporters • (d) Confidential employee requirements. • (2) A recipient must require a confidential employee to explain their confidential status to any person who informs the confidential employee of conduct that may constitute sex discrimination under Title IX and must provide that person with contact information for the recipient's Title IX Coordinator and explain how to report information about conduct that may constitute sex discrimination under Title IX.

No. 5 Proposed Change
Provide More Flexibility in the Decision Process on Complaints

• \$106.45 continued

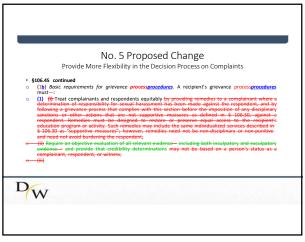
• (i) A complainant;

• (ii) A person who has a right to make a complaint on behalf of a complainant under \$106.6(g);

• (iii) The Title IX Coordinator;

• (iv) With respect to complaints of sex discrimination other than sexbased harassment, any student or employee; or third party participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred.

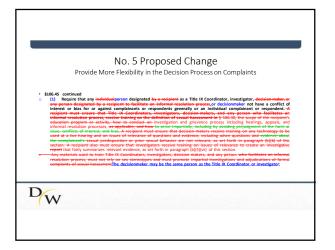
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No. 5 Proposed Change
Provide More Flexibility in the Decision Process on Complaints

• §106.45 continued
• (vii)State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment)
• (viii) Include the procedures and permissible bases for the complainant and respondent to appeal)
• (b) Describe the range of supportive measures available to complainants and respondents; and
• (b) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information

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No. 5 Proposed Change

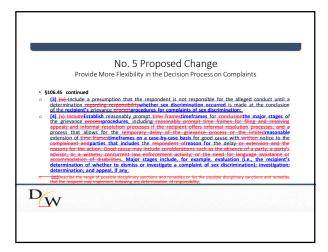
Provide More Flexibility in the Decision Process on Complaints

• \$106.45 continued

(5) Take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures, provided that the steps do not restrict the ability of the parties to obtain and present evidence, including by speaking to witnesses, subject to \$ 106.71; consult with a family member, confidential resource, or advisor; prepare for a hearing, if one is offered: or otherwise defend their interests;

(6) Require an objective evaluation of all relevant evidence, consistent with the definition of relevant in \$ 106.2—including both inculpatory and exculpatory evidence—and provide that credibility determinations must not be based on a person's status as a complainant, respondent, or witness:

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Top Proposed Changes — No. 6

6. Expand the Boundaries of Supportive Services

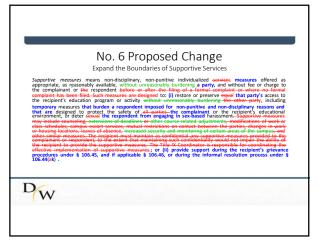
• Proposed Section 106.2 regulations define supportive measures to include responsive measures that any burden as upondent if the measures are temporary and are designed to protect the safety of the complainant or the institution's educational environment or deter the respondent from engaging in sex-based harassment.

• The new regulations clarify that supportive measures may include "voluntary or involuntary changes in class, work, housing or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative."

• Any supportive measures that burden a respondent may only be in place during the pendency of a complaint.

• An educational institution must provide a party with the ability to obtain a timely review of the imposition of supportive measures by "an appropriate, impartial employee."

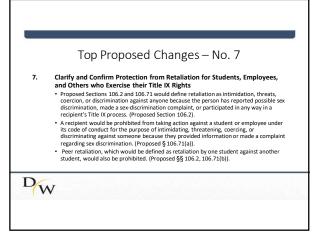
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No. 7 Proposed Change
Clarify and Confirm Protection from Retaliation

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No. 7 Proposed Change
Clarify and Confirm Protection from Retaliation

(b) Specific circumstances.

(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

(b) Peer retaliation.

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# No. 7 Proposed Change Clarify and Confirm Protection from Retaliation • Retaliation means intimidation, threats, coercion, or discrimination against any person by a student, employee, person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity, or recipient 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 \$ 106.44(k), in grievance procedures under \$ 106.45, and if applicable \$ 106.64, and in any other appropriate steps taken by a recipient in response to sex discrimination under \$ 106.44(f)(6).

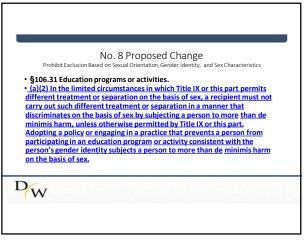
Top Proposed Changes — No. 8

8. Prohibit Exclusion Based on Sexual Orientation, Gender Identity, and Sex Characteristics

• Proposed regulations §§ 106.10, 106.31(a)(2), and 106.41(b)(2) would address discrimination based on sexual orientation, gender identity, and sex characteristics by:

• Prohibiting recipients from separating or treating any person differently based on sex in a manner that subjects that person to more than minimal harm (unless otherwise permitted by Title IX). This includes policies and practices that prevent a student from participating in a recipient's education program or activity consistent with their gender identity. This rule would not apply in contexts in which a particular practice is otherwise permitted by Title IX, such as admissions practices of traditionally single-sex postsecondary institutions or when permitted by a religious exemption. (Proposed § 106.31(a)(2)).

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No. 9 Proposed Changes

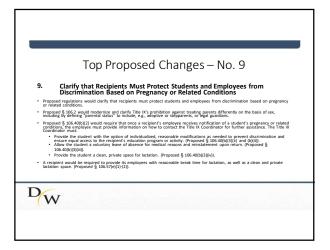
Clarify that Recipients Must Protect Students and Employees from Discrimination Based on Pregnancy or Related Conditions

\$106.40 continued

[2] —— A recipient may require such a student to obtain the certification of a physician that the required of all students for other physicial or emotional conditions requiring the attention of a physician (3) A recipient which presents a portion of its decuction program or activity separately for pregnant students, section shall environ proposed the recipient ensures that the separate portion is comparable to that offered to non-students who are not pregnant students, and, do not have related conditions (4) A recipient shall treat pregnant students, and, do not have related conditions (4) A recipient shall treat pregnancy, childhirth, false pregnancy, termination of pregnancy and recovery(2) informed of a student of a presion which has a leafing to accomplish of the student of a presion which has a falsel right to accomplish the student of a presion which has a falsel right to accomplish of the student of the student of a presion which has a falsel right to accomplish of the student of the student of a presion which has a falsel right to accomplish the first proposed to the student of a presion which has a falsel right to accomplish the student of a presion which has a falsel right to accomplish the student of a presion of how the person may notify the light proposed to the student of a presion which has a falsely been notified.

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No. 9 Proposed Changes

Clarify that Recipients Must Protect Students and Employees from Discrimination Based on Pregnancy or Related Conditions

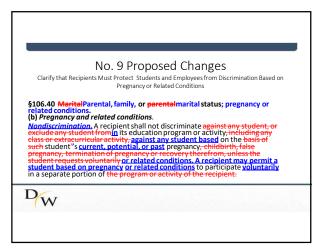
\$106.40 continued

(3) Specific actions to prevent discrimination and ensure equal access. Once a student, or a person who has a legal right to act on behalf of the student, notifies the Title IX Coordinator of the student's pregnancy or related conditions, the Title IX coordinator must promptly. The practices, or procedures because of pregnancy or related conditions, under paragraph (b)(4) of this section.

(iii) Allow the student a voluntary leave of absence from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's policy for students that allows a greater period of time than the medically necessary by the student's policy for students that allows a greater period of time than the medically necessary period, the recipient must permit the student to take leave under that policy instead if the student conditions are considered in the student to take leave under that policy instead if the student conditions are considered in the student to access the program or activity, the student metal the student to take a new paragraph (a) the extracurricular status that the student to take a new paragraph (a), the extracurricular status that the student to take a new paragraph (a), the extracurricular status that the student to take a new paragraph (a).

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No. 9 Proposed Change

Clarify that Recipients Must Protect Students and Employees from Discrimination Based on Pregnancy or Related Conditions

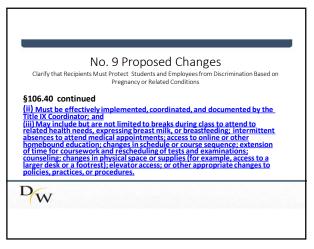
\$106.40 continued

(iv) Ensure the availability of a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.

(4) Reasonable modifications for students because of pregnancy or related conditions. Reasonable modifications to the recipient's spolices, practices, or procedures for a student because of pregnancy or related conditions, for purposes of this section;

(i) Must be provided on an individualized and voluntary basis depending on the student's, needs when necessary to prevent discrimination and cisure equal access to the recipient, section on program or activity, unless the recipient, sections of the provided of the control of the recipient's education and cisure activity. A fundamental alteration is a change that is so significant that it alters the essential nature of the recipient's seducation program or activity.

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Title IX Regulations

• Provide detailed grievance procedure for Title IX sexual harassment allegations and are adopted by district policy.

• Per district policy, allegations of all other forms of sex discrimination should be addressed under the District's applicable non-discrimination or antiharassment policies.

• For example: gender identity issues, facilities issues, salary issues, hiring issues

• Focus today is on the Title IX sexual harassment regulations and grievance procedure.

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Title IX Sexual Harassment Team Members

Position

Scope of Responsibility

Title IX Coordinator

Ferson designated to coordinate and conduct intake reports and complaints, initiate formal compliants in Gesessary, and implement supportive measurers and remedies, as necessary.

Investigator

Person designated to investigate, gather evidence, and compile an investigation report. Dismisses if mandatory or permissive.

Decision-Maker

Person who conducts an objective evaluation of all relevant evidence, administers question and answer period and rules on relevancy, issues a written determination regarding responsibility, dismisses if required.

Appeal Designee

Person designated to handle appeal, if any.

Must not be the same person as the Title IX Coordinator, investigator, or Decision-Maker.

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Title IX

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

Title IX Sexual Harassment Parties

Complainant

An individual who is alleged to be the victim of conduct that could constitute sexual harassment

An individual who has been reported to be the perpeturator of conduct that could constitute sexual harassment.

Advisor

An individual that accompanies the complainant or respondent to any related meeting or proceeding in order to offer them support. The reporting party chooses their advisor, who may be, but is not required to be, an attorney.

Witness

An individual that have or could potentially have information related and/or relevant to the alleged incident.

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# Scope of "Educational Program or Activity"

- "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination <u>under any education program or activity</u> receiving Federal financial assistance."
- Jurisdictional trigger
- "Locations, events, or circumstances over which the recipient [the school/district] exercised substantial control over both the respondent and the context in which the sexual harassment occurs  $\ldots$ "



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- Title IX obligations for sexual harassment in K-12 institutions include incidents that occur off campus if:
  - the off-campus incident occurs as part of the school's "operations" or
  - the school exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus.



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# Definition of "Sexual Harassment"

- Conduct on the basis of sex that satisfies one or more of the following:
  - (1) An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct (quid pro quo sexual harassment);
  - (2) <u>Unwelcome conduct</u> determined by a <u>reasonable person</u> to be <u>so severe</u>, <u>pervasive</u>, <u>AND objectively offensive</u> that it <u>effectively denies a person equal access</u> to the school's education program or activity; or
  - (3) "Sexual assault", "dating violence", "domestic violence", or "stalking" (as defined under Clery Act)



 "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

Sexual assault" means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the

(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 type of relationship.

Federal Bureau of Investigation.



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- "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 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.

  \*\*Stalking\*\* means engaging in a course of conduct directed the account.
- "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.



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An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct (quid pro quo sexual harassment)

- Ouid pro quo-#1
  - $\bullet$  Encompasses situations where the quid pro quo nature of the incident is implied from the circumstances
  - Ex: if you do or don't do x, I will or won't do x
  - Applies to all of a school's employees
  - May involve a power differential
  - "Unwelcome," as used in the first and second prongs of the definition of sexual harassment, is a subjective element



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

- "Catch-all"-#2
  - Focus factually on the nature of the misconduct itself not on the victim's response to the misconduct.
  - Determinations of severity, pervasiveness, and objective offensiveness depends on a constellation of factors, including the ages and numbers of parties involved, disability status, positions of authority of involved parties, etc.
- Whether harassing conduct is "objectively offensive" must be evaluated, under a reasonable person standard, as a reasonable person in the complainant's position.
- No intent aspect.
- Does not require that a complainant has already suffered loss of education before being able to report sexual harassment



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- Where conduct is sexual in nature, or where conduct references one sex or another, that suffices to constitute conduct "on the basis of
- Any individual irrespective of sexual orientation or gender identity may be victimized by the type of conduct defined as sexual harassment to which a school must respond under the Title IX regulations.



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- "If the conduct alleged in the formal complaint would not constitute sexual harassment as defined . . . then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual  $% \left( x\right) =\left( x\right) +\left( x\right)$ harassment under title IX.
- BUT such a dismissal does not preclude action under another provision of the recipient's code of conduct.



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- Definition under Title IX is different than interpretation under Title VII-must comply with both.
- Schools may continue to address harassing conduct that does not meet the new definition of sexual harassment under other provisions of the school's own code of conduct.



# Reports of Sexual Harassment

- The school is deemed to have actual knowledge of sexual hara allegations if ANY staff member has knowledge.
- allegations if ANY staff member has knowledge.

  The School is REQUIRED to respond promptly when it has actual knowledge in a way that is not deliberately indifferent.

  Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

  Such a report may be made at any time (including during non-business hours) by using the telephone number, or electronic mail address or by mail to the office.
- using the telephone number, or electronic mail address, or by mail to the office address listed for the Title IX Coordinator.



Actual Knowledge Responsibilities

- . Train ALL staff on what is ACTUAL KNOWLEDGE.
- Notice of sexual harassment or allegations of sexual harassment to:
  - The Title IX Coordinator, OR
  - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient, OR
  - Any employee of an elementary and secondary school
- NOTICE IS NOT JUST A REPORT TO THE TITLE IX COORDINATOR
- REQUIRE that staff report any notice of sexual harassment or allegations of sexual harassment SAME DAY.





Report Received

Title IX Coordinator must promptly reach out to the individual who is alleged to be the victim of conduct that could constitute sexual harassment (a/k/a the complainant) to:

- 1. discuss the availability of supportive measures,
- 2. consider the complainant's wishes with respect to supportive measures,
- 3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
- 4. explain to the complainant the process for filing a formal complaint.



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# Grievance Procedure for Sexual Harassment **Formal Complaints**

- 1. Report
- 2. Supportive measures and information on formal complaint 9. Written determination
- 3. Formal complaint
- 4. Written notice to parties
- Investigation

- 8. Question and Answer period (and hearing if applicable)
- 10. Appeal on certain bases
- 11. Notice of appeal and opportunity to respond
- 5. Investigation
  6. Inspection and review of evidence 12. Final written decision on appeal
- 7. Investigative report with review and written response



Supportive Measures

- Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent.
   Such measures are designed to restore or preserve equal access to the School's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the School's educational environment or deter sexual harassment.
- sexual harassment.

  Supportive measures may include 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 locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

  The School must maintain as confidential any supportive measures provided to the complainant or respondent to the extent that maintaining such confidentiality would not impair the ability of the School to provide the supportive measures.



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# Overarching Requirements for Sexual Harassment Grievance Procedure

- Have Presumption that Respondent is Not Responsible.
  Esclude Privileged Information
  Follow Girlsname Productive Boffor Imposing Sanctions
  No Bias or Conflict of Interest
  Consider All Reviews the Order Imposing Sanctions
  Consider All Reviews the Order Conflict of Interest
  Consider All Reviews the Order Conflict of Interest
  Consider All Reviews of Prompt Impositions
  Remonable And Prompt Timelions
  Remonable And Imposition Conflict of Interest Confli
- Remember Grounds for Dismissal Informal Resolution Process After Formal Complaint is Opt



# Formal Complaint

- "Formal complaint" means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the School investigate the allegation of sexual harassment.
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the School with which the formal complaint is filed.



# Written Notice to Parties Upon receipt of a formal complaint (or later as additional allegations become known), the School has to provide the following written notice to the parties who are known: Inf), the Sariour has a provide the consuming members of the School's grievance process that compiles with this section, including any informal resolution process. Notice of the allegations of sexual harassment potentially constituting sexual harassment, response before any initial interview. Notice that the respondent is presumed not responsible for the alleged conduct, and that a determination regarding responsibility is made at the conclusion of the grievance process. Notice that the parties that they may have an advisor of their choice who may be, but is not required to be, an attorney, and may inspect and review evidence. Notice of my provision in the School's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

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Conducting the Investigation

• Requirement 1: Trained Investigator

• Requirement 2: Equitable Treatment of Parties

• Requirement 3: Impartial Assessment (no prejudgment, no bias, no conflict of interest)

• Requirement 4: Evidence Review

• Requirement 5: Detailed Written Investigative Report

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Investigative Report

- Prior to completion of their investigative report, send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy.
- The parties must have at least ten (10) business days to submit a written response, which the investigator will consider prior to completion of the investigative report.
- Create an investigative report that fairly summarizes relevant evidence.
- Send investigative report to each party at least 10 days prior to the determination regarding responsibility.
- · All for review and written response.



Timeline and Notices

- "Reasonably prompt" (30 working days to gather the evidence).
- Temporary delays can be granted for good cause.
- · Investigation should start immediately.
- If union involved, expect union reps to be present from the start and review any applicable CBA provisions.
- Written notice of the details regarding investigative meetings, including the purpose.



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The Duty to Investigate

- The thoroughness of the investigation is critical to the school's ability to determine whether or not misconduct or harassment occurred and which type of disciplinary action, if any, is required as a matter of law or organizational policy.
- · Failure to carry out an adequate investigation may contribute to potential liability for the district.



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Evidence

- Objective evaluation of all relevant evidence including both inculpatory and exculpatory evidence.
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness.
- The standard of evidence to be used to determine responsibility must be either the clear and convincing standard or the preponderance of the evidence standard.



# Privileged Evidence Excluded

- Precludes a recipient from using information or evidence protected by a legally recognized privilege unless the holder of the privilege has waived the privilege.
  - Medical records
  - Mental health treatment records
  - Attorney-client communications
  - Spousal privilege



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When investigating, the school "cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional acting in the professional's capacity, or aspirate professional acting in the tendent made animalitatined in connection with the provision of treatment to the party, unless the recipient obtains that party's yoluntary, written consent to do so for a grievance process under this section.

"A recipient's grievance process must... not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege."



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Burden of Proof 106.45(b)(5)(i)

- Schools cannot restrict either party's ability to discuss the allegations or gather and present evidence, HOWEVER:
- Burden of proof sufficient to reach a determination regarding responsibility rests on the school.
- Burden of proof is on school to conduct investigation, interview witnesses, gather evidence.



Hearing and Question and Answer Period

- · Institutions of higher education must hold a hearing prior to a determination of responsibility.
- K-12 schools do not have to hold a hearing, though they may choose to add a hearing to their grievance procedure.
- With or without a hearing, the decision-maker must still 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.



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# Written Determination

- Provided simultaneously to the parties.
- Identification of the allegations potentially constituting sexual harassment.
- A description of the procedural steps taken from the receipt of the formal complaint through the determination.
- Findings of fact supporting the determination.
- Conclusions regarding the application of the School's code of conduct to the facts.
- A statement of, and rationale for, the results as to each allegation:
  - A determination regarding responsibility
     Any disciplinary sanctions the School imposes on the respondent
- Whether remedies designed to restore or preserve equal access to the School's education program or activity will be provided by the School to the complainant
   Procedures and permissible bases for appeal.



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# **Appeal Bases**

- (A) Procedural irregularity that affected the outcome of the matter;
- (B) 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;
- (C) 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; or
- (D) Any other bases allowed equally to either party.



# Appeal

- · Different decision-maker.
- · Notice to the other party.
- Opportunity for both parties to submit a written statement in support of or challenge outcome.
- · Written decision describing the result of the appeal and the rationale for the result and provided simultaneously to the parties.
- · Make sure no conflict of interest or bias.
- Train



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# Good Cause Delay – With Written Notice

- Good cause may include considerations such as:
  - The absence of a party, a party's advisor, or a witness;
  - Concurrent law enforcement activity; or
  - The need for language assistance or accommodation of disabilities.



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# **Emergency Removal**

- BEFORE removal:
  - · Undertake an individualized safety and risk analysis; and
  - Determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment
- Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- Follow the IDEA and Section 504 before any removals.



Grounds for Dismissal

- The School MUST investigate the formal complaint.
- If the conduct alleged in the formal complaint:
  - 1. would not constitute sexual harassment even if proved,
  - 2. did not occur in the School's education program or activity, or
  - 3. did not occur against a person in the United States,

Then the School must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX.

However, such a dismissal does not preclude action under another provision of the School's code of conduct.



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# Permissive Grounds for Dismissal

- The School may also dismiss the formal complaint or any allegations therein if at any time during the investigation:
- 1. a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
- 2. the respondent is no longer enrolled or employed by the School; or  $\,$
- 3. special circumstances prevent the School from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.



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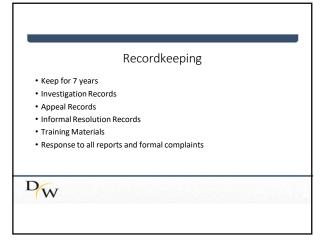
# Informal Resolution

- · Cannot require that the student or employee waive their right to the grievance process.
- Cannot go forward with an informal process for sexual harassment allegations prior to there being a formal complaint.
- Obtain voluntary written consent.
   Not permitted for allegations that an employee sexually harassed a student
- · Written notice to the parties is required, disclosing: 1. the allegations;

2. the requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations;
3. that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint; and

any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.





Rape Shield Law — Complainants

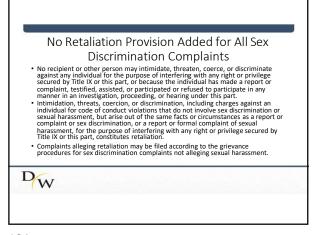
• Evidence and questions regarding complainants' sexual predisposition or prior sexual behavior are not relevant.

• Unless:

• Offered to prove someone else committed alleged conduct.

• Offered to prove past sexual relationship with Respondent to establish consent.

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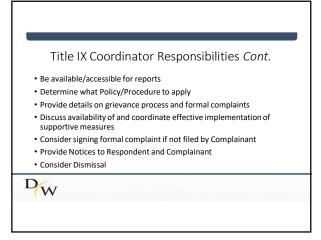
104 107

# Maintain Confidentiality • The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint or sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by [FERPA], or as required by law, or to carry out the purposes of [Title IX], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Title IX Coordinator Responsibilities

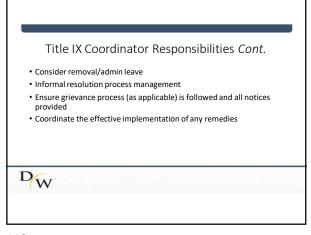
Designations of Title IX team
Posting notices, contact info, and training docs
Notice to school community
Confirm training completion
Actual knowledge responsibilities
Review/Update policies and procedures (including CBAs and Handbooks)
Review form documents
Timely review/handle reports
Keep documentation

105 108



Discussion Questions

109 112



1. Katie and Sarah are 11th graders who snuck into a party held by Charlie, a 12th grader, on a Friday night. After the party, Katie tells Sarah that Charlie cornered her and touched her in a way that made Katie uncomfortable. Sarah is worried about Katie and, on Monday, tells one of her teachers about the incident.

• What should the teacher do?

• Is this conduct covered by Title IX?

• Should any other actions be taken? If so, what?

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Title IX Coordinator MAY Also:

• Coordinate notices, party inspection, and review of evidence and investigative report

• Coordinate appeal process

• Perform investigation

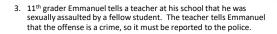
2. High school student Tony accuses fellow student Sam of sexual harassment. Tony has a long disciplinary record, multiple suspensions and has, on at least one occasion, falsely accused another student of theft.

What are some potential concerns that might arise in this scenario?

What should the Title IX Coordinator do?

What should the Investigator do?

111 114



- What else, if anything, does the teacher need to do?
- Does this fall under Title IX?



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- 4. High school principal Lisa overhears teachers discussing an incident where a student inappropriately touched another student while on a school bus. Principal Lisa interviews the students. Both students seem dismissive of the incident and deny that they are bothered or hurt by what occurred.
- Should Principal Lisa investigate further?
- Should Principal Lisa inform the students' parents?
- $\bullet$  Is there anything else Principal Lisa should do in reference to this incident?
- Is there anyone else who might have Title IX reporting or investigating responsibilities in this scenario? Who?



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# Lawyerly Disclaimer ... (we can't help it)

- These training materials are informational in nature and should not be construed as legal advice and are not provided to address specific grievance situations.
- Consult with your legal counsel as necessary to address specific Title IX report and grievance situations and investigations.
- Or email your school law attorney, or Aimee Gibbs. or Angelina Delmastro at:
  - agipps@dickinsonwright.com
     adelmastro@dickinsonwright.com

