

**Title IX Team Training:  
Introduction**



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- We DO NOT represent individual teachers, students, parents, or district employees.
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 **Title IX**

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

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## Title IX Over the Years

- Enacted in 1972.
- *Franklin v. Gwinnett County Pub. Schs.* (U.S. 1992)
  - An implied private right of action for money damages could be sustained where a teacher allegedly sexually abused a student.

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## Title IX Over the Years

- *Gebser v. Lago Vista Indep. Sch. Dist.* (U.S. 1998)
  - Damages for sexual harassment of a student by a teacher can only be recovered where:
    - An official who has authority to institute corrective measures on the district's behalf
    - Has actual notice of the teacher's misconduct, and
    - Acts deliberately indifferent to such misconduct

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## Title IX Over the Years

- *Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
  - A private damages actions may be sustained against a school board in the case of student-on-student harassment, BUT only where:
    - The District acts with deliberate indifference to known acts of harassment in its programs or activities; AND
    - The harassment is so severe, pervasive, AND objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

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## The New Regulations

"Our Legal Department has seen substantial growth over the last quarter, producing 21% more revenue and 17% more jobs."

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## The New Regulations

- Effective August 14, 2020
- Focus on schools' response to allegations of sexual harassment
- Provide specific procedures and require specific personnel
  - BUT not all alleged Title IX violations are subject to new procedures

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## What hasn't changed?

- Athletic opportunities for boys and girls
  - Equal accommodation (opportunities)
  - Equal treatment (qualitative experiences)
  - 3-part test from courts and OCR

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## What hasn't changed?

- General antidiscrimination and accommodation request issues, such as
  - Gender identity and sexual orientation
    - Courts: transgender students win
  - Third-party misconduct
  - Unequal treatment allegations against the institution that are not sex harassment

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## Responses Under the New Regulations

- Three Categories of Complaints/Allegations
  - Sex discrimination NOT involving sexual harassment
  - Sex harassment WITHOUT formal complaint
  - Sex harassment WITH formal complaint

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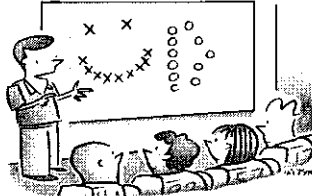
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## The TIX Training Game Plan



WWW.ANDERSTOONS.COM

"OK, it's not that effective, but what a crowd pleaser!"

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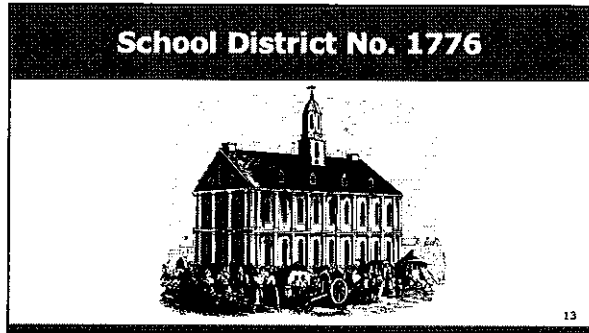
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**Title IX Team Training:  
Sexual Harassment**



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 **Sexual Harassment**

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

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### Sexual Harassment

- “Quid Pro Quo” – district employee conditioning the provision of a district aid, benefit, or service on an individual’s participation in unwelcome sexual conduct

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### Sexual Harassment

- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district’s education program or activity (*Gebser/Davis*)

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### Sexual Harassment

- Unwelcome conduct determined by a reasonable person to be so **severe**, pervasive, and objectively offensive that it effectively denies a person equal access to the district’s education program or activity (*Gebser/Davis*)

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### Sexual Harassment

- Unwelcome conduct determined by a reasonable person to be so **severe, pervasive,** and objectively offensive that it effectively denies a person equal access to the district's education program or activity  
(Gebser/Davis)

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### Sexual Harassment

- Unwelcome conduct determined by a reasonable person to be so **severe, pervasive,** and objectively offensive that it effectively denies a person equal access to the district's education program or activity  
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### Sexual Harassment

- Unwelcome conduct determined by a reasonable person to be so **severe, pervasive,** and objectively offensive that it effectively denies a person equal access to the district's education program or activity  
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## Sexual Harassment

- Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, AND objectively offensive** that it **effectively denies a person equal access** to the district's education program or activity (*Gebser/Davis*)

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## Sexual Harassment:

### Severe, Pervasive, and Objectively Offensive

- Doe v. Univ. of Kentucky* (6th Cir. 2020)
  - Severe = something more than just juvenile behavior;
  - Pervasive = multiple incidents of harassment; and
  - Objectively offensive = behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively.

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## Sexual Harassment:

### Severe, Pervasive, and Objectively Offensive

- Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
  - Fifth-grade classmates in elementary school
  - Dec. 1992: G.F. attempted to touch LaShonda's breasts and genital area
    - "I want to get in bed with you"
    - "I want to feel your boobs."
  - Jan. 1993: Similar conduct on two more occasions

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

- *Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
  - Feb. 1993: G.F. placed a door stop in his pants and acted in a sexually suggestive manner to LaShonda Davis during PE
  - One week later, more harassing behavior
  - Apr. 1993: G.F. rubs his body against LaShonda in the school hallway in what LaShonda considered sexually suggestive manner.
  - May 1993: G.F. is charged with and pleads guilty to sexual batter

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

- *Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
  - G.F.'s misconduct over five months was severe, pervasive, and objectively offensive

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

- *Gabrielle M. v. Park Forest-Chicago Heights* (7th Cir. 2003)
  - Kindergarten
  - Jason jumped on Gabrielle's back at recess
  - Jason leaned against Gabrielle with his hands on his crotch.
  - Jason unzipped his pants and showed other students his underwear while the teacher's back was turned.

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

- **Gabrielle M. v. Park Forest-Chicago Heights**
  - Two days later, Jason again unzipped his pants.
  - Five days later, Jason and another classmate, Ashley, had their hands down each others' pants during story-time.
  - Five children (including Jason and Gabrielle) meet with school psychologist and share that during the previous week they had kissed and jumped on top of each other at recess

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

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

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

- **Gabrielle M. v. Park Forest-Chicago Heights**
  - Court found that children were unaware of the sexual nature of their behavior.
  - The children were not engaging in "knowingly sexual acts."
    - Detracts from the severity and offensiveness of their actions.
  - Gabrielle was not denied access to education
    - Grades remained steady. Absenteeism did not increase

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

▪ ***Bruning v. Carroll Cmty. Sch. Dist.*** (N.D. Iowa 2007)

- Middle School
- Breasts and buttocks were grabbed on multiple occasions by Steven, Jerry, and Chris.
- Laser pointers aimed at plaintiffs' private areas
- Kicked
- Shocked with a shocking pen
- Poked in their crotch areas with pens and pencils

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

▪ ***Bruning v. Carroll Cmty. Sch. Dist.*** (N.D. Iowa 2007)

- Spat on
- Hair pulled
- Scratched by staples
- Had heads pulled down to the boys' crotches
- Spitballs shot at plaintiffs on school bus
- Boys would put their legs between the girls crotches during lunch

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

▪ ***Bruning v. Carroll Cmty. Sch. Dist.*** (N.D. Iowa 2007)

- Boys would look under lunch table to see between the plaintiffs' legs.
- Conduct occurred with some frequency over a period of several months, during two different grades
- S, P, and OO

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

- *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)
  - Between 6<sup>th</sup> and 10<sup>th</sup> grade, Wolfe was ridiculed by fellow students on numerous occasions
  - Several times per week, pushing, shoving, name-calling, and being falsely labeled as homosexual
  - "Faggot," "queer bait," and "homo"
  - 7<sup>th</sup> grade: punched and had head slammed into window while riding the bus

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

- *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)
  - 9<sup>th</sup> grade: Facebook page
    - "Every One That Hates Billy Wolfe"
    - Wolfe's face photo-shopped onto a figure in a green fairy costume with the word "HOMOSEXUAL" written across it.
  - Graffitied highly offensive, homosexual accusations about Wolfe on bathroom walls and in classroom textbooks.

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

- *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)
  - 10<sup>th</sup> grade:
    - Wolfe got into a fight with a classmate
    - Two days later, classmate jumped out of a car and punched Wolfe while Wolfe was walking home

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

- *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)
  - School District did not deny incidents of harassment, BUT
  - Claimed that the motive underscoring the misconduct was not sex-based
  - Students and teachers explained that they did not perceive Wolfe as homosexual

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**KSB**  
KANSAS SCHOOL BOARD

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

- *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)
  - Name-calling was not intended to attach Wolfe's sexuality
    - Was an angered response to Wolfe's mistreatment of other students
  - Classmates suggested that they accosted Wolfe b/c he had previously bullied a friend of theirs suffering from cerebral palsy.

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**KSB**  
KANSAS SCHOOL BOARD

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

- *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)
  - Case is TRIED to a jury
  - Jury Verdict in favor of the School District
  - Wolfe challenged the jury instruction requiring that the harasser be motivated by Wolfe's sex
  - 8th Circuit Disagreed:
    - Proof "of sex-based motivation is required for a Title IX deliberate indifference claim."

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**KSB**

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

- *Wolfe v. Fayetteville Ark. Sch. Dist.* (8th Cir. 2011)
  - Name-calling, by itself, does not amount to sex-based harassment, even if the words are gender-specific, unless the underlying motivation for the harassment is hostility toward the person's gender (or failure to conform with gender stereotypes).

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**KSB**

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

- *Carmichael v. Galbraith* (5th Cir. 2014)
  - Jon Carmichael was a 13-yr old middle school student
  - Committed suicide after allegedly being bullied by his fellow students
  - On "numerous occasions," accosted by a group of boys in the locker room
    - Oftentimes having his underwear removed

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**KSB**

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

- *Carmichael v. Galbraith* (5th Cir. 2014)
  - During the last incident, shortly before suicide:
    - Members of the football team stripped Jon nude and tied him up
    - Placed Jon in a trashcan calling him "fag," "queer," and "homo"
    - A number of students observed the behavior
    - Once student videotaped the attack and uploaded it to YouTube

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

- *Carmichael v. Galbraith* (5th Cir. 2014)
  - Complaint alleged that harassment was based on gender or gender-based stereotypes
  - District Court dismissed complaint
    - Single instance of student-on-student harassment was not pervasive

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

- *Carmichael v. Galbraith* (5th Cir. 2014)
  - Fifth Circuit Reversed
    - District court ignored “multiple” instances of boys in locker room harassing Jon, including removing underwear
    - “The removal of a person’s underwear without their consent on numerous occasions plausibly constitutes pervasive harassment of a sexual character.”

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

- *Carmichael v. Galbraith* (5th Cir. 2014)
  - Fifth Circuit Reversed
    - Depending on the “constellation of surrounding circumstances, expectations, and relationships,” uninvited contact with the private parts of either the victim’s or harasser’s body has often been held to constitute sexual harassment under Title IX.”
    - Series of incidents where Jon’s underwear was forcibly removed could constitute numerous acts of objectively offensive touching.

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

▪ ***I.F. v. Lewisville Indep. Sch. Dist.*** (5th Cir. 2019)

- HS freshman I.F. raped at an off-campus, private party
- Following Monday, classmates bully I.F.
  - "Whore," "Slut,"
  - Asked whether she had sex with multiple people
  - "How did it feel to be f\*\*\*\*d in every single hole of your body"

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

▪ ***I.F. v. Lewisville Indep. Sch. Dist.*** (5th Cir. 2019)

- Assailant wore pants that he raped I.F. in, which had blood on them from intercourse, and stood on the lunch table and said, these are the pants that I took I.F.'s virginity in
- One student asked I.F. the race of the baby she would be having

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

▪ ***I.F. v. Lewisville Indep. Sch. Dist.*** (5th Cir. 2019)

- Multiple football players called I.F. a liar and told her she was going to ruin everything
- Online harassment; students commenting on I.F.'s alleged assault on Twitter and Instagram
- I.F. felt suicidal and depressed, began cutting herself, had nightmares, and experienced panic attacks

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

▪ *I.F. v. Lewisville Indep. Sch. Dist.* (5th Cir. 2019)

- Severe, Pervasive, and Objectively Offensive

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

▪ *Doe v. Dardanelle Sch. Dist.* (8th Cir. 2019)

- Jane Doe claims R.C. sexually assaulted her twice:
  - October 2014. During kickball,
    - o Jane is standing on second base.
    - o R.C. runs into Jane, bumps Jane's breast with upper arm, calls Jane a bitch.

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

▪ *Doe v. Dardanelle Sch. Dist.* (8th Cir. 2019)

- Jane claims R.C. sexually assaulted her twice:
  - October 2015. Seated next to each other while watching a movie with lights off in Home Economics class.
    - o R.C. reached up Jane's shorts and touched outside of her "private parts."
    - o Jane pushed R.C. away.
    - o R.C. attempted to force Jane to touch his groin.
    - o Jane pulled her arm away.
    - o R.C. grabbed Jane's breast over her shirt.

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

▪ *Doe v. Dardanelle Sch. Dist.* (8th Cir. 2019)

- NOT severe, pervasive, and objectively offensive such that it deprived Jane of access to education or benefits of the school.
- Jane's GPA increased in both her junior and senior years
- Jane graduated on time

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

▪ Examples of S, P, and OO:

- Each time female kindergarten student wears a dress to school, high school student on bus bullies kindergarten into lifting her skirt, pulling down her pants, and spreading her legs.
- *Fitzgerald v. Barnstable Sch. Comm.* (1st Cir. 2007)

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

▪ Examples of S, P, and OO:

- Head soccer coach persistently and openly pried into and discussed the sex lives of his players and made sexually charged comments, creating a hostile environment in the women's soccer program.
- *Jennings v. Univ. of N.C.* (4th Cir. 2007)

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

- Examples of **NOT** S, P, and OO:
  - One incident of non-consensual kissing.  
– *Doe v. Miami Univ.* (6th Cir. 2018)
  - One incident of a male student briefly flicking the chest of female complainant (and complainant kneeling him in the groin in response).  
– *Sanchez v. Brawley Elem. Sch. Dist.* (9th Cir. 2018)

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

- Examples of **NOT** S, P, and OO:
  - Two isolated instances—one student touching the plaintiff's shoulder and another student touching the plaintiff's breast—which ceased immediately after they occurred.  
– *Adusumilli v. Ill. Inst. of Tech* (7th Cir. 1999)

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 **Sexual Harassment**

- **Sexual Assault**
  - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation

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## Sexual Harassment: Sexual Assault

▪ **Sex Offenses, Forcible**

- Any sexual act directed against another person, without the **consent** of the victim including instances where the victim is incapable of giving consent

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## Consent

- The willingness in fact for conduct to occur.
- An individual may be incapable of providing consent to some or all sexual conduct or activity.
  - E.g., Age, Incapacity, disability, lack of information, or other circumstances.

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## Consent

- Neither verbal nor physical resistance is required to establish that an individual did not consent.
- Consider the totality of the circumstances in determining whether there was consent for any specific conduct.
- Consent may be revoked or withdrawn at any time.

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**Sexual Harassment:**  
**Sexual Assault, Sex Offenses Forcible**

- **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.

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**Sexual Harassment:**  
**Sexual Assault, Sex Offenses Forcible**

- **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

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**Sexual Harassment:**  
**Sexual Assault, Sex Offenses Forcible**

- **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

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**Sexual Harassment:  
Sexual Assault, Sex Offenses Forcible**

▪ **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

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**Sexual Harassment:  
Sexual Assault, Sex Offenses Forcible**

▪ **Fondling?**

- *Gabrielle M. v. Park Forest-Chicago Heights* (7th Cir. 2003)
  - Kindergartners touching classmates private parts
  - Unaware of sexual nature of conduct
  - Probably not for the purpose of sexual gratification
  - Probably not sexual assault

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**Sexual Harassment:  
Sexual Assault, Sex Offenses Forcible**

▪ **Fondling?**

- *Doe v. Dardanelle Sch. Dist.* (8th Cir. 2019)
  - High school setting
  - Reaching up girl's shorts and touched outside of her "private parts."
  - Grabbing girl's breast over her shirt.
  - Probably for purposes of sexual gratification
  - Probably sex assault
  - Notice different outcome from prior standard

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**Sexual Harassment:  
Sexual Assault**

**•Sex Offenses, Non-Forcible** (Except Prostitution Offenses)

- Unlawful, non-f forcible sexual intercourse.

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**Sexual Harassment:  
Sexual Assault, Sex Offenses Non-Forcible**

**•Incest**

- Non-Forcible sexual intercourse
- Between persons who are related to each other within the degrees wherein marriage is prohibited by law

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**Sexual Harassment:  
Sexual Assault, Sex Offenses Non-Forcible**

**•Statutory Rape**

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

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 **Sexual Harassment:  
Dating Violence**

- Violence committed by a person—
  - who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - The length of the relationship.
    - The type of relationship.
    - The frequency of interaction between the persons involved in the relationship.

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 **Sexual Harassment:  
Domestic Violence**

- Includes felony or misdemeanor crimes of violence committed by a
  - Current or former spouse or intimate partner of the victim,
  - Person with whom the victim shares a child in common,
  - Person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,

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 **Sexual Harassment:  
Domestic Violence**

- Includes felony or misdemeanor crimes of violence committed by
  - A person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or
  - 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.

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**Sexual Harassment:  
Stalking**

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - Fear for his or her safety or the safety of others; or
  - Suffer substantial emotional distress.

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**Title IX Team Training:  
A Bad Situation in School District No. 1776**



KTZ 11/16/18 11:11:11

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KTZ 11/16/18 11:11:11

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 **Welcome to School District 1776**



KTZ 11/16/18 11:11:11

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### District Buildings



Patriot Elementary School



Minuteman Middle School



Lincoln High School

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### Title IX Parties

- Complainant
  - An individual who is alleged to be the victim of conduct that could constitute sexual harassment
  - Must be an individual participating or attempting to participate in district's programs at the time of formal complaint
    - Formal complaint may be lodged by complainant (or parent/guardian) or Title IX Coordinator

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### Title IX Parties

- Respondent
  - An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
  - Recipient has discretion to dismiss a formal complaint where the respondent is not enrolled or employed by the recipient
    - 34 CFR § 106.45(b)(3)(ii)

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**Title IX Roles**

- Title IX Coordinator
- Investigator
- Decision Maker
- Appellate Decision Maker

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**Title IX Coordinator**



**Activities Director Dolley Madison**

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**Title IX Coordinator (TixC)**

- Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under Title IX
- Responsible for:
  - Overseeing Title IX compliance
  - Receiving formal complaints
  - Ensuring any remedies are carried out
- May serve as investigator in grievance process
- May not serve as decision-maker or appellate decision-maker

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### Who can serve as Title IX Coordinator?

- Must be an "employee" 34 C.F.R. § 106.8(a)
- Should report directly to board or superintendent
- Should be able to have input into policies
- Should be able to conduct fair and efficient investigations
- Should be able to document investigations and other compliance efforts by the school
- Should be invested in gender equality

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### Core Responsibilities of Title IX Coordinators

- Develop and maintain a working knowledge of Title IX and relevant state laws.
- Monitor school district's compliance with legal requirements.
  - Ensure school district has required policies and procedures in place.
  - Conduct evaluations of school compliance.
  - Arrange for training for staff and students.
  - Provide and update resources.
  - Ensure prompt and effective processing of complaints.

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### Investigator



Guidance Counselor Aaron Burr

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### Investigator

- New role for sex harassment only
- Responsible for investigation of formal complaint
- Must follow regulatory requirements in conducting investigation
- Not required to be an employee
- May be Title IX Coordinator
- May not be decision-maker or appellate decision-maker

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### Decision-Makers



High School  
Principal Thomas  
Jefferson



Elementary  
Principal Sally  
Hemmings



Middle School  
Principal John  
Adams

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### Decision-Maker

- Again, new role for sex harassment only
- Issues written determination in grievance procedure after receiving investigative report from investigator and facilitate opportunity for parties to submit questions
- Not required to be an employee
- May not be Title IX Coordinator, Investigator, and Appellate Decision-Maker
- Recommended that you align decision-maker role with similar roles in general disciplinary processes

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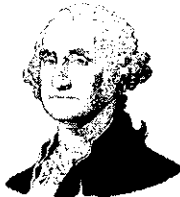
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**Appellate Decision-Maker**



**Superintendent George Washington**

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**Appellate Decision-Maker**

- For sex harassment only: recipient must offer both parties an appeal on specific bases
- For other Title IX issues: appellate decision-maker is still a good idea
- Appellate decision-maker not required to be an employee
- May not be Title IX Coordinator, Investigator, or Decision-Maker

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**Hypothetical**

- Alexander Hamilton is in his senior year at Lincoln High School. His favorite coach is the assistant hockey coach, Ms. Abigail Adams.
- Dolley Madison is the Activities Director and TixC and has arranged for all staff, including Coach Adams, to be trained in recognizing sex harassment.
- Alex is dating Maria Reynolds and the pair is elected homecoming King and Queen. After the dance, Coach Adams hears rumors that "something bad" happened between them in Alex's truck in the parking lot after the dance.
- Maria has Coach Adams for English, a class in which students are required to journal. In her journal Maria writes that Alex forced her to have sex with him in his truck but she doesn't mention where.

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Hypothetical

- Does Coach Adams have to report?
  - Can she pull Alex and Marla into her room to ask them what is going on?
  - Can she call Alex's parents?
- If so, to whom?
- After getting the report, what does Dolley Madison do?
  - Can she talk things over with Aaron Burr, the guidance counselor?
  - Can she talk things over with Thomas Jefferson, the high school principal?
  - Can she talk things over with George Washington, the superintendent?
- If Dolley files a TIX complaint, who does what?
  - Burr - investigation
  - Jefferson - wait for report
  - Washington - wait for possible appeal

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**Title IX Team Training:  
Responding to ALL Allegations of Sex Harassment**



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 **Overview of Grievance Process**

Informal Resolution



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 **General Response to  
ALL Allegations of Sexual Harassment**  
(with or without formal complaint)

- If the district has:
  - actual knowledge
  - of sexual harassment
  - in an education program or activity
  - against a person in the United States
- The district must respond
  - promptly
  - in a manner that is not deliberately indifferent

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 **General Response to  
ALL Allegations of Sexual Harassment**  
(with or without formal complaint)

- District is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances
- Rejects the "known or reasonably should have known" standard imposed by rescinded guidance

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 **Actual Knowledge**

- Notice of **sexual harassment** or allegations of **sexual harassment** to:
  - Title IX Coordinator
  - Any official of the respondent who has authority to institute corrective measures
  - Any employee

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### Actual Knowledge

- Notice of **sexual harassment** or allegations of **sexual harassment** to:
  - Title IX Coordinator
  - ~~Any official of the respondent who has authority to institute corrective measures~~
  - Any employee

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### Actual Knowledge

- **Actual knowledge** will not be imputed to the district *based solely* on vicarious liability or constructive notice
- **No Actual Knowledge** when the only district employee with **actual knowledge** is the **respondent**

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### Education Program or Activity

- Includes locations, events, or circumstances over which the district exercised
  - (1) substantial control over both the respondent, AND
  - (2) the context in which the sexual harassment occurs
- Electronic or in person
- Does not say "on campus" or "off campus"

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## Duty to Respond?



Lincoln High School

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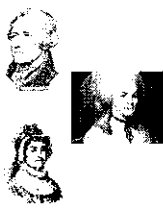
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## Duty to Respond?



- Alexander Hamilton (HS Student)
- Maria Reynolds (HS Student)
- After the dance, Coach Adams hears rumors that "something bad" happened between them in Alex's truck in the parking lot after the dance
- Maria's Journal: Alex forced her to have sex with him in his truck but she doesn't mention where

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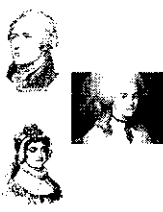
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## Duty to Respond?



- Actual Knowledge ✓
- Allegations of Sexual Harassment ✓
- Education Program or Activity?
- In the U.S. ✓

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### Duty to Respond?



- Truck in school parking lot ✓
- Truck parked in cornfield outside of county, unrelated to any school activity ✗
- Truck parked on side of road when students are returning from golf practice ✓

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### General Response to ALL Allegations of Sexual Harassment (with or without formal complaint)

▪ Title IX Coordinator MUST

- Promptly contact the complainant to discuss the availability of supportive measures
  - Consider the complainant's wishes with respect to supportive measures
  - Supportive measures are available whether a formal complaint is filed or not
- Explain to the complainant the process for filing a formal complaint

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### General Response to ALL Allegations of Sexual Harassment (with or without formal complaint)

▪ Must treat parties equitably:

- Offer supportive measures to complainant
- Follow the formal grievance process **before imposing any disciplinary sanctions against respondent**

▪ Until the end of the grievance process,

- No Student Discipline
- No Adverse Employment Action

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**General Response to  
ALL Allegations of Sexual Harassment**  
(with or without formal complaint)

- Respondents are presumed to be “not responsible for the alleged conduct until a determination regarding responsibility is made *at the conclusion of the grievance process.*”
  - 34 C.F.R. § 106.45(b)(1)(iv) (emphasis added)

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**Supportive Measures**

- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available, and without fee or charge to the **complainant** or the **respondent**
- Offered before or after the filing of a **formal complaint** or where no **formal complaint** has been filed

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**What CAN the school do?**

- **Emergency Removal**
  - BUT, district **MUST**
    - undertake an individualized safety and risk analysis,
    - determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and
    - provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.
  - Doesn't modify rights under IDEA, Section 504, or the ADA

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**What CAN the school do?**

- **Administrative Leave for Non-Student Employees**
  - Doesn't modify rights under Section 504 or the ADA
  - Check state law processes for forced leaves of employees

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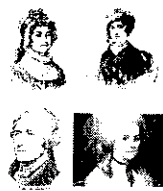
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**Back to Lincoln HS**





- Coach/Teacher Adams reports allegations of sexual harassment to Title IX Coordinator Dolley Madison (GOOD!)

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**Back to Lincoln HS**



- **Can Title IX Coordinator Dolley Madison**
  - Offer counseling to Maria ✓
  - Extend Maria's deadlines for coursework ✓
  - Grant Maria a leave of absence ✓
  - Suspend Alexander during preliminary fact-gathering ⊘
  - Emergency remove Alexander ?
  - Exclude Alexander from Maria's calculus class ?

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**Title IX Team Training:  
Formal Complaints**



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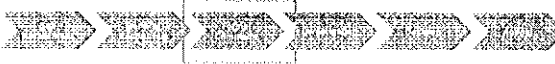
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**Overview of Grievance Process**

Informal Resolution



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### Formal Complaint

- A document filed by a **complainant** or signed by the Title IX Coordinator alleging **sexual harassment** against a **respondent** and requesting that the district investigate the allegation of **sexual harassment**

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### Formal Complaint

- May be filed with the Title IX Coordinator in person, by mail, by email, and "by any additional method designated" by the district

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### Formal Complaint

- Is a document or electronic submission that includes **complainant's** digital or physical signature or otherwise indicates that the **complainant** is the person filing the **formal complaint**
- A Title IX Coordinator who signs the **complaint** IS NOT a **complainant** or a party

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**Formal Complaint**

- At the time of filing, a **complainant** must be participating in or attempting to participate in the district's education program or activity
- September 4, 2020 OCR Q & A

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**OCR Q & A: Question 5  
September 4, 2020**

- "If a complainant either withdraws from school because of sexual harassment and then files a complaint, or files a complaint but then withdraws as a result of the sexual harassment or stress of the grievance process, how would the regulations affect the complainant's ability to pursue a formal complaint?"

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**OCR Q & A: Answer 5  
September 4, 2020**

- Leave of Absence
  - May still be enrolled
  - May intend to re-apply after LOA
- "By way of further example, a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is 'attempting to participate' in the recipient's education program or activity."

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### OCR Q & A: Answer 5 September 4, 2020

- TixC may also sign formal complaint regardless of whether complainant is "participating or attempting to participate" in the school's education program or activity
- TixC's decision is evaluated under the deliberate indifference standard
  - Whether the decision was clearly unreasonable in light of the known circumstances.

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### Formal Complaints Hypo

- Alexander Hamilton is in his senior year at Lincoln High School. His favorite coach is the assistant hockey coach, Ms. Abigail Adams.
- Dolley Madison is the Activities Director and TixC and has arranged for all staff, including Coach Adams to be trained in recognizing sex harassment.
- Coach Adams would regularly text with her players to communicate regarding practices and when the rink would be open
- In the middle of the season in January, Alexander abruptly decides to drop out of school the day after he turns 18
- In February, he sends the following text message to Coach Adams:
  - Hey Coach. I wanted to tell you I'm sorry I quit right after the season. I just didn't think I could do school anymore. My ex-girlfriend Maria Reynolds and I broke up and she got really upset when I ended it. She was a bit needy and I just couldn't do it anymore, but she got way worse after we broke up. She has stalked me on snap and insta ever since, saying she's watching me and that she can't wait for me to come back to school so we can get back together. It really freaked me out the way she said some stuff and I just couldn't come to school anymore. I'm sorry

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### Is this a "formal complaint?"

- Is a document or electronic submission that includes **complainant's** digital or physical signature or otherwise indicates that the **complainant** is the person filing the **formal complaint**.
  - Here: no signature, no request for action
  - Probably not a "complaint"

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**Is this "Sexual Harassment?"**

- Remember: Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district's education program or activity (*Gebser/Davis*)

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**What should Abigail Adams do?**

- Benefits and costs of initiating a complaint
  - Complaint triggers new TIX procedures
  - No complaint: has Maria violated code of conduct?
  - Our advice: probably file

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**Formal Complaints Hypo**

- What if Alex's text asks Coach Adams to help him come back to school?
- What if Alex's mom is the one who reaches out to Coach Adams?
- What if Alex was still enrolled?
- What if Alex hadn't texted Coach Adams, but she saw that he posted this on Instagram?
- What if Maria posts nasty things about Alex on her Snapchat story and Coach Adams sees the story?
- What if Coach Adams doesn't say anything to AD Madison?

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**Title IX Coordinator's Role in Responding to Formal Complaint**




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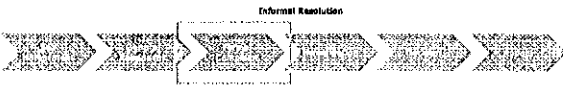
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**Overview of Grievance Process**




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## Title IX Coordinator's Role in Responding to Formal Complaint

- Title IX Coordinator
  - Posting required notices
  - Receive formal complaints
  - Consider factors for dismissal

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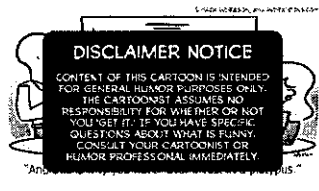
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## General Notice Obligations



CONTENT OF THIS CARTOON IS INTENDED FOR GENERAL HUMOR PURPOSES ONLY. THE CARTOONIST ASSUMES NO RESPONSIBILITY FOR WHETHER OR NOT YOU GET IT. IF YOU HAVE SPECIFIC QUESTIONS ABOUT WHAT IS FUNNY, CONSULT YOUR CARTOONIST OR HUMOR PROFESSIONAL IMMEDIATELY.

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## General Notice Obligations

- TixC must be designated formally by district
- Must notify the following of the name or title, office address, email address, and telephone number of the employee or employees designated as the TixC:
  - applicants for admission and employment
  - students
  - parents or legal guardians of elementary and secondary school students
  - employees
  - all unions or professional organizations holding collective bargaining or professional agreements with the recipient

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### General Notice Obligations

- TixC contact info must be "prominently displayed" on website and in student/employee handbooks
- Updated policy with grievance procedure must be prominently displayed on website and included in handbooks

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### General Notice Obligations

- Notice to persons above must state the district does not discriminate on the basis of sex in the education program or activity that it operates, and that the district is required by Title IX not to discriminate in such a manner
- The notice must also state that the requirement not to discriminate in the education program or activity extends to admission and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator

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### General Notice Obligations

- District must also provide to persons above notice of the grievance procedures and grievance process discussed below, including:
  - how to report or file a complaint of sex discrimination,
  - how to report or file a formal complaint of sexual harassment, and
  - how the district will respond

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**Required Notices During Grievance Process**

- Before Investigation Begins-
  - Initial notice of investigation to *BOTH parties*
  - As soon as practicable after formal complaint received
- After Dismissal
  - Notice of Dismissal to both parties
- During Investigation
  - Notice of Interview to parties
  - Notice of Evidence to Parties (from investigator)

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**When to Dismiss?**

"Counsel, please advise your client to knock off the striking and conspicuous winking while entering his plea."

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**Title IX Coordinator's Role—When to Dismiss?**

- District **must** dismiss the complaint if the allegations:
  - Would not constitute sexual harassment even if proved
  - Did not occur in the district's education program or activity
  - Did not occur against a person in the United States

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 **Title IX Coordinator's Role—  
When to Dismiss?**

- District **may** dismiss if
  - Complainant requests (in writing to TixC) to withdraw the formal complaint\*\*;
  - Respondent is no longer enrolled or employed by the district
  - Specific circumstances prevent district from gathering evidence sufficient to reach a determination

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 **Title IX Coordinator's Role—  
When to Dismiss?**

- If the district dismisses, must provide notice of dismissal to both parties
- Notice must contain rationale for dismissal
- Whether it was mandatory or permissive

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 **Title IX Coordinator Response Hypo—  
More Trouble at Lincoln High**

- Title IX Coordinator Dolley Madison receives three separate emails regarding sexual harassment
  1. Angelica Church, 17, alleges Mr. Franklin, a physics teacher, slapped her butt last year when she saw him at a restaurant.
  2. Maria Reynolds alleges John Laurens sexually assaulted her after marching band practice a month ago in his car in the school parking lot. John is no longer enrolled in the district.
  3. Peggy Schuyler alleges Mark Lafayette sent her constant social media messages for about a month over a year ago. The messages stated he was always watching her, and she had to seek counseling. The messages stopped about a year ago.

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### Title IX Coordinator Response Hypo— Angelica and Mr. Franklin

- Give initial notices to both parties first
- Dismissal? Go through the steps
  - Would it constitute sex harassment if proved? Probably (see fondling definition).
- Educational Program or Activity?
  - Happened off-campus, outside school hours, not as part of any sanctioned activity
- Dismissal probably required (might want to consider when deciding to renew contract, though)

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### Title IX Coordinator Response Hypo— Maria and John

- Give initial notices to both parties first
- Dismissal? Go through the steps
  - Would it constitute sex harassment if proved?
- Educational Program or Activity?
  - Happened outside of school hours, but on school grounds right after school activity
- In United States?
- Respondent still enrolled?
- Does the time matter?
- Dismissal probably not required but allowed
  - We'd recommend dismissal (no way to punish respondent) but ensure you're providing supportive measures

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### Title IX Coordinator Response Hypo— Peggy and Mark

- Give initial notices to both parties first
- Dismissal? Go through the steps
  - Would it constitute sex harassment if proved? Probably (Severe, pervasive, and objectively offensive to the degree it denies access to the educational program or activity)
- Educational Program or Activity?
  - In United States?
  - Respondent still enrolled?
  - Any specific circumstances preventing a determination?
- Dismissal not required and likely not possible
  - Time elapsed does not compel dismissal

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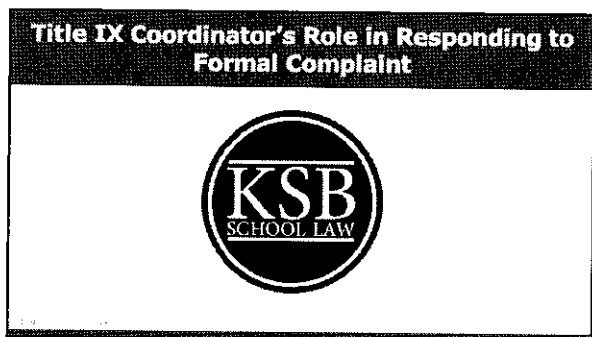
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## Investigations



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## Disclaimers

- KSB School Law represents only public schools and related entities (like Educational Service Units).
  - We DO NOT represent teachers, students, parents, or district employees.
- This presentation and these slides DO NOT constitute legal advice.
- Neither this presentation nor these slides shall be construed to create an attorney-client relationship between you and KSB School Law or between you and us.
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## Overview of Grievance Process



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### Investigator



Guidance Counselor Aaron Burr

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### Investigation Best Practices

I DIDNT REALIZE I WAS  
SUPPOSED TO KNOW HOW  
TO DO EVERYTHING BY  
MY SECOND RODEO

SEEMS LIKE A VERY LOW  
AMOUNT OF RODEOS

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### The Investigation

- Must be *prompt, thorough, impartial, and without bias*
- Treat all with respect and dignity
- Make no assumptions
- At a minimum should include interviews with the victim, the alleged harasser, and anyone else who can provide relevant information
- DOCUMENT, DOCUMENT, DOCUMENT

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### The Investigation

- Coordinate investigation with law enforcement or others as necessary or appropriate
  - School has the legal obligation to conduct a prompt investigation
  - 34 C.F.R. § 106.45 includes "law enforcement activity" as a "good cause" to delay "reasonably prompt" timelines
- Keep criminal, child abuse, and professional reporting obligations in mind

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### Understand the Claim

- Conduct a thorough interview of the complainant and identify specific allegations made
- Identify specific provisions of law or parts of school policy alleged to have been violated
- Conduct a thorough interview of the complainant and identify defenses

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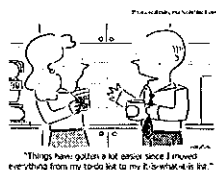
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### Create a Plan

- Written list of witnesses
- Written list of questions
- Written list of documents




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### Time for investigation?

- Review time line and plan accordingly
  - In addition to time taken to actually compile evidence, the parties must have **at least ten days** to review all evidence before a decision can be made by the decision maker
- Time limit?
  - Regulations say the grievance process must have "reasonably prompt time frames for conclusion of the grievance process"
  - Investigation should take less time if facts are straightforward

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### Keep Parties Informed

- No specific requirements to update parties at every step (other than notice of interviews and submission of evidence at end of investigation)
- However, keeping parties informed can make the process run more smoothly

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### Credibility determinations and decision-making

- Credibility determinations
  - Cannot be made based on status of complainant, respondent, or witness
  - Generally left to the D-M, especially when they impact responsibility determinations
  - Investigator should report facts regarding physical behavior and indicators of reliability and truthfulness during interviews
- Decision-making left to decision maker
  - Investigator should include facts that would bear towards responsibility or non-responsibility, but notes and report should not state any determination by the investigator

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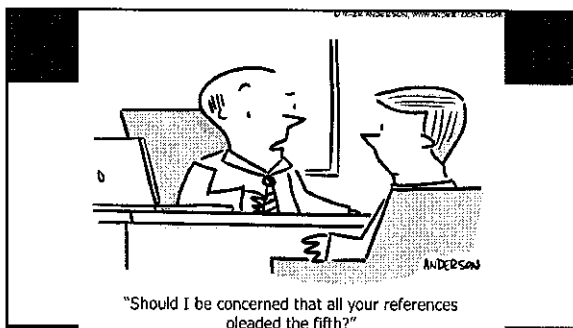
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### Interviews

- "Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with **sufficient time** for the party to prepare to participate"
- 34 CFR 106.45(b)(5)(v)

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### Witness Interviews

- Review any documents, videos, and other tangible evidence prior to interviews as appropriate
- Bring relevant documents to interview
- Outline and develop standard questions before the interview
  - Write out key questions and ask them the same way to every witness

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### Witness Interviews

- Interviews should be somewhere private with limited interruptions
- Record? Take notes?
  - Taking notes during the interview—may slow down the interview but this is not necessarily a negative as it can help detect deception if party is nervous about your note taking
  - Should take place throughout interview, not just at incriminating or deceptive moments

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### Witness Interviews

- Take your time!
- Introduce yourself and explain your role
- Explain purpose of interview and how information will be used
- Make clear they are not obligated to participate and the school can't retaliate against that decision
- Employ empathy while maintaining professionalism

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### Witness Interviews

- Interview witnesses separately
- Tell the person he or she must tell the truth, even if it is difficult
- Don't promise confidentiality
  - But, limit the disclosure of information to people who really need to know
- Gather facts, not opinions or guesses
- Use "who, what, where, when, why, and how" questions

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## Witness Interviews

- Investigate any bias the complainant or witnesses may have against the respondent
- Ask simple questions, not compound questions
- Let witnesses answer your questions in their own words
  - Do not suggest answers and do not help them with their answers
- Start with broad open-ended questions and get more specific as needed

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## Witness Interviews

- Don't use leading questions
- Don't shy away from uncomfortable questions
- Question with empathy and understanding
  - It's not an interrogation

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## Witness Interviews

- Have witnesses tell you what they know from personal knowledge and what they know from other sources
- Listen to "hearsay" but record it as hearsay
- Try to obtain information in chronological order to the extent possible
- Identify potential witnesses

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### Witness Interviews

- Be comfortable with silence
- Consider obtaining legibly written (or typed) and signed statements
- Retaliation is prohibited
  - If they are threatened, harassed, etc., come to you
- Don't make promises about outcomes

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### Witness Interviews

- Review your notes before the interview concludes; clarify anything you are unclear about
- Notes should be complete and detailed
  - Important for assessing credibility
  - Decision may turn on small details
- Where possible, include verbatim statements on critical issues – paraphrasing can later become problematic

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### Witness Interviews

- Ask if there is anything the complainant wants to tell you that you didn't ask
- Contact you if they think of anything else
- Gather any additional documents, videos, or other tangible evidence
- Conduct as many follow-up interviews as are needed

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## Dangerous Words

While interviewing complainant, be careful that these words don't come out of your mouth:

- It's just teasing- no big deal.
- The people in our school would never do...
- I know he/she didn't mean anything like that.
- You need to learn to handle these things.
- If you won't file a written complaint our hands are tied
- When it is he said she said I can't do anything
- Boys will be boys or Kids will be kids




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## Krebs v. New Kensington-Arnold Sch., 2016 U.S. Dist. LEXIS 159059 (W.D. Pa. 2016)

- Harassment and bullying between 7<sup>th</sup> and 9<sup>th</sup> grades

### ▪ 7<sup>th</sup> Grade

- "fat" and "ugly"
- Grades fell from A's to C's
- Lost 30 pounds

### ▪ 8<sup>th</sup> Grade

- Name calling: "slut" "whore" "stupid" "bitch"
- Cutting
- Mom found note from peer expressing concern about behaviors

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## Krebs v. New Kensington-Arnold Sch., 2016 U.S. Dist. LEXIS 159059 (W.D. Pa. 2016)

### ▪ 8<sup>th</sup> Grade

- Mom took note to AP
- "This was just something girls did"
- Teachers observed and reported changes in demeanor and decrease in schoolwork quality
- Mom witnessed classmate threaten Destinee, reported to AP
  - Promised to investigate
  - Did not investigate
  - Prepared no incident report

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**Krebs v. New Kensington-Arnold Sch.,**  
2016 U.S. Dist. LEXIS 159059 (W.D. Pa. 2016)

- 8<sup>th</sup> Grade
  - Meeting with mom, AP, and GC
  - Told Destinee to document and report to AP
  - One week later, PAL said reports would not be enough to stop harassment
- 9<sup>th</sup> Grade
  - Student text to Destinee
    - Picture: bloody wrist
    - Physical assault
    - Mom reported both to APs, PAL, and GC

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**Krebs v. New Kensington-Arnold Sch.,**  
2016 U.S. Dist. LEXIS 159059 (W.D. Pa. 2016)

- 9<sup>th</sup> Grade
  - AP refused request for online school
    - “lacked motivation” and “failing grades”
  - Destinee threatened suicide – hospitalized
    - Mom told school about incident and diagnoses
  - Returned to school, harassment continued
  - School suspended Destinee for skipping school
- Destinee committed suicide

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**Krebs v. New Kensington-Arnold Sch.,**  
2016 U.S. Dist. LEXIS 159059 (W.D. Pa. 2016)

- Court
  - District never followed up with family
  - District never investigated
  - “While infrequent name calling and bullying among adolescent peers at school may not always rise to the level of harassment required under Title IX, the constant and pervasive harassment with sex based terms alleged to have been endured by Destinee does”
  - MTD Title IX complaint denied

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## Dangerous Words

While interviewing respondent, be careful that these words don't come out of your mouth:

- Why are you lying?
- You're in trouble
- You should not have done this
- How do you think this made her feel?




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## Investigation Hypo



- Maria Reynolds brings a complaint against Alexander Hamilton, alleging he sexually assaulted her in school
- She brings a formal complaint to Title IX Coordinator, Abigail Adams, who assigns Guidance Counselor Aaron Burr to investigate the complaint
- Ms. Adams reports the behavior as a crime and provides Maria and Alexander with the initial notice that the complaint has been filed




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## Investigation Hypo: Starting off



- What should Burr's first steps be?
  - Outline interview process/steps
  - Notice parties of interviews
  - Consider who else to interview
  - Consider other possible evidence
  - Prepare interview questions




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### Investigation Hypo: Approaching interviews



- Notice of Interviews
  - Must give sufficient time to prepare
- What to ask Reynolds?
  - Get as many specifics as possible
  - Consider facts and evidence needed to allow decision maker to make responsibility determination, such as
    - What exact words did Hamilton use?
    - Where and when did this happen?
    - How has this affected her education?
    - What's her history with Hamilton?


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### Investigation Hypo: Approaching interviews



- What to ask Hamilton?
  - Confront on the specific allegations made by Reynolds and keep asking until the response is clear
  - May ask about respondent's prior sexual behavior or predisposition, but not complainant's


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### Investigation Hypo: No stone unturned



- Other evidence?
  - Staff member witness interviews?
  - Student witness interviews?
    - Don't need to be direct witnesses to the incident to be relevant
  - Video evidence?
  - Evidence from law enforcement investigation?


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### Investigation Hypo: Parallel Investigations



- Police involvement
  - Police conduct an investigation over the next few days and school is notified the state's attorney does not plan on bringing charges against Hamilton
  - Any affect on school's obligations?




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### King v. Curtis, W.D. Mich (2016)

- Athletic trainer assaults multiple students
- Dispute over when district had "actual knowledge" assault had occurred
- Court finds not until police contacted school about allegations
  - Prior complaints and situations did not rise to the level of actual knowledge

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### King v. Curtis, W.D. Mich (2016)

- Once school has knowledge, still need to demonstrate they were not "deliberately indifferent"
- Superintendent on investigation:
  - "there was no reason to investigate" because the allegations against Defendant Curtis "were being investigated by the police"

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**King v. Curtis,  
W.D. Mich (2016)**

- Superintendent when asked about training:
  - Never attended any training concerning teacher-on-student sexual harassment
  - Never received any training to identify signs of sexual harassment or sexual abuse of children
  - No employee handbook or written materials provide guidance to staff regarding the warning signals that might appear that a child is being sexually abused

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**King v. Curtis,  
W.D. Mich (2016)**

- Court:
  - "These positions reflect a misunderstanding of the school district's obligations under Title IX. As the United States Department of Education had previously informed educators, "the school's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct."

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**King v. Curtis,  
W.D. Mich (2016)**

- Court:
  - Failure to investigate exacerbated hostile environment for students, many in the community believed allegations were fabricated
  - Investigation could have uncovered that Curtis admitted a sexual relationship with a student to a school board member
  - Failure to train staff resulted in violation of plaintiff's constitutional rights

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**Doe v. Forest Hills Sch. Dist.**

2015 U.S. Dist. LEXIS 175321 (W.D. Mich. 2015)

- High school girl alleged boy sexually assaulted her at school
- Security footage inconclusive
- Principal called the cops; cops did not initially charge\*
- Victim alleged she was harassed by peers after report

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**Doe v. Forest Hills Sch. Dist.**

2015 U.S. Dist. LEXIS 175321 (W.D. Mich. 2015)

- Family sued under Title IX
- School: not deliberately indifferent
- Court: "Here, the school admitted that it was waiting for the police investigation to make its determination and did not suspend MM until after he pled guilty to state charges."

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**Doe v. Forest Hills Sch. Dist.**

2015 U.S. Dist. LEXIS 175321 (W.D. Mich. 2015)

- Court: Principal "failed to interview Doe's friends, and waited months for someone else to make a conclusion as to whether the assault happened. Based on the record, a jury could find that the investigation in its scope and the delay to ultimate conclusion was clearly unreasonable and represented deliberate indifference by the school and administrators."

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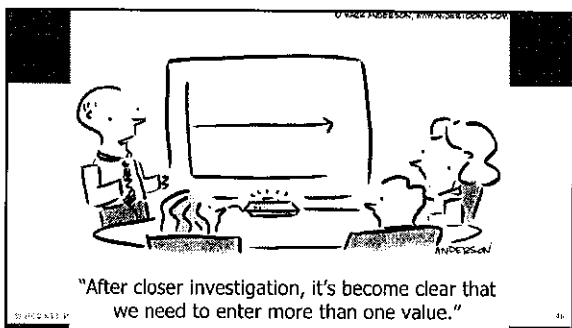
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**Parties' Rights During Investigation—Right to Present Witnesses**

- Parties must have the opportunity to present witnesses during investigation
  - Can be both fact and expert witnesses if they wish
- The investigation must "[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence" 34 CFR 106.45(b)(5)(ii)

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**Parties' Rights During Investigation—Discussion of Allegations**

- "Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence"
  - 34 CFR 106.45(b)(5)(iii)
- Parties must be able to discuss allegations with anyone
  - Limited to the allegations themselves
  - Can place limits on discussion of the evidence outside of the Tix process
  - Regulations allow for school to require NDAs if no formal complaint is filed

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### Parties' Rights During Investigation— Discussion of Allegations

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

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### Parties' Rights During Investigation— Right to Advisor

- "Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties"
- 34 CFR 106.45(b)(5)(iv)

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### Parties' Rights During Investigation— Protection from Retaliation

- Prohibition against retaliation
  - Cannot hold a party's (or a witness's) refusal to participate in the process against them
  - "Right to remain silent"
  - Applies both to investigation and employment
- 34 CFR 106.71(a)



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### Investigation Hypo: Dead to Rights?



- Burr issues a notice to Hamilton that his interview will take place in two days in the school conference room
- Hamilton responds that his attorney cannot attend that day, and he refuses to proceed without his attorney present
- Burr has already obtained video footage confirming Reynolds' allegations
- What next?

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### Parties' Rights During Investigation— Reviewing All Evidence

- Review of all compiled evidence
  - Once the investigator has compiled the evidence, ALL of the evidence, including that which he doesn't plan to use, must be disclosed to both parties
  - Parties must then have the chance to meaningfully respond to the evidence before the investigator drafts final report
- 34 CFR 106.45(b)(5)(vi)

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### Parties' Rights During Investigation— Reviewing All Evidence

- Review of all compiled evidence
  - Can be submitted electronically
  - Parties must have **at least ten days** to submit a written response to evidence, which investigator must consider prior to drafting report

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### Consider Dismissal?

- Once evidence is gathered, investigator should convene with Title IX coordinator to see if dismissal is either permitted or mandated
- Dismissal is mandatory if:
  - The facts would not constitute sexual harassment even if proved;
  - The conduct did not occur in the district's education program or activity; or
  - The conduct did not occur against a person in the United States

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### Consider Dismissal?

- Dismissal is permissive if:
  - Complainant requests (in writing to Title IX Coordinator) to withdraw the formal complaint;
  - Respondent is no longer enrolled or employed by the district; or
  - Specific circumstances prevent district from gathering evidence sufficient to reach a determination

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### Consider Dismissal?

- If we're allowed to dismiss, how do we know if we should?
- Pro: Don't have to deal with investigation anymore
- Con: Unable to punish respondent for sex harassment unless the grievance procedure is followed

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### Burden of Proof

- 34 CFR 106.45(b)(5)
- "When investigating a formal complaint and throughout the grievance process, a recipient must—
  - (i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties"

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### Burden of Proof

- School is the party responsible for figuring out what happened.
  - Not complainant's job to prove the claims
  - Not the respondent's job to exonerate themselves

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### How much needs to be proved?

- Preponderance of the evidence
  - More likely than not
- Clear and convincing evidence
  - When the evidence "instantly tilts the scales in the affirmative when weighed against the evidence in opposition and if it causes the fact finder to have an abiding conviction that the evidence is true," it is considered clear and convincing. *Trickey v. Kaman Indus. Techs. Corp.*, 705 F.3d 788, 799 (8th Cir. 2013).
  - In other words, something highly and substantially more probable to be true than not
- 34 CFR 106.45(1)(vii)

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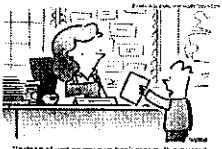
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## Report Writing

- 34 CFR 106.45(b)(5)(vii)
- Report must "fairly summarize the relevant evidence"



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## Report Writing

- Report should include:
  - The names of the parties
  - The parties' representatives, if any
  - Allegations investigated
  - Individuals interviewed and dates of interviews
  - List of exhibits/evidence considered
    - Attach copies

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## Report Writing

- Report should include:
  - Summary of facts
    - Include your reasoning for a controversial or contested fact determination
    - Discuss facts related to credibility of witnesses, witness reluctance, witness tampering or retaliation, etc.
  - Statement of Jurisdiction (control over respondent, control over context of allegations, reasons for no mandatory dismissal)
  - Burden of proof (preponderance of the evidence or clear and convincing)

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### Report Writing

- Use their words as much as possible
- Should describe any prior relationships between the parties
- Must be sent to each party or the party's advisor
- Can be either in a hard copy or electronically

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### Report Writing

- What evidence to put in report?
- Relevant Evidence
  - Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
- Who, what, when, how of allegations in the complaint

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### Report Writing

- Motive or bias of witnesses and parties
- Objective indications of truthfulness or deceit (e.g. witness looked down during entire interview, witness was sweating and would start and stop sentences frequently, sobbing, etc.)
- Relevant evidence can be both inculpatory (showing responsibility) and exculpatory (showing non-responsibility)

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### Investigation Hypo: Evidence Concluded



- Burr has conducted interviews with both parties
- Hamilton alleges he wasn't at school that day but can't remember what he was doing
- Burr submits his evidence to both parties and believes he's ready to draft report
- On the eighth day after he submits evidence to both parties, Hamilton contends it is not him in the video and demands Burr interview a friend of his who can corroborate an alibi
- What are Burr's obligations?

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### Investigation Hypo: Evidence Concluded



- If Burr drafts report in spite of Hamilton's protests, could invite an appeal
- Desire to wrap investigation up quickly notwithstanding, should probably just do the interview
- Regulations are unclear on whether additional evidence after initial evidence review requires a restart

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### Investigations



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**The Boundary between Investigations and Decision-Making**



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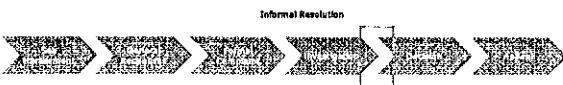
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**Overview of Grievance Process**



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**Separate Roles and all the hats to wear**

- Title IX Coordinator
- Investigator

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- Decision Maker
- Appellate Decision Maker
- Informal Mediator

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**Decision-Makers**

**High School**  
 Principal Thomas Jefferson

**Elementary**  
 Principal Sally Hemmings

**Middle School**  
 Principal John Adams

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**Decision-Maker**

- Thomas Jefferson is principal and has training as a decision-maker
- Decision maker is a new role for Title IX complaints in sex harassment only
- Determines final responsibility or non-responsibility
- Issues written determination at culmination of grievance procedure

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## Boundaries for Decision-Maker and Investigator



- D-M not required to be an employee
- May not be Title IX Coordinator, Investigator, Appellate Decision-Maker, or informal mediator
- Recommended that you align decision-maker role with similar roles in general disciplinary processes
  - Usually the building principal

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## Investigator/Decision-Maker Boundary—Credibility

- Credibility determinations
  - Cannot be made based on status of complainant, respondent, or witness
  - Generally left to the D-M, especially when they impact responsibility determinations
  - Investigator should report facts regarding physical behavior and indicators of reliability and truthfulness during interviews
- Decision-making left to decision maker
  - Investigator should include facts that would bear towards responsibility or non-responsibility, but notes and report should not state any determination by the investigator

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## Credibility Determinations

- Things Investigator can (and should) put into notes and subsequent investigative report:
  - "The complainant's eyes were moving constantly while he spoke."
  - "The respondent made several hand gestures when he was done speaking."
  - "Complainant's voice shook and faltered while she told the story."
  - "Respondent would respond with a raised voice when questioned."



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**KSB** **Credibility Determinations**

- Things investigator **SHOULD NOT** put into notes and subsequent report
  - "The complainant did not appear truthful"
  - "The respondent was believable"
  - "Because of facts x,y, and z, the witness is likely lying"
  - The decision-maker should conclude . . . .

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**KSB** **The Investigative Report**

- Decisions are the purview of the decision-maker
- Investigator should avoid credibility determinations
- Should include in notes facts that would bear towards responsibility or non-responsibility, but notes and report should not state any inferences to be drawn from those facts



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**KSB** **The Investigative Report**

- Include:
  - "The respondent alleges he was in his biology class when the alleged assault occurred in the parking lot. Several witnesses including his teacher corroborate his statements."
  - "Several witnesses saw the respondent enter the locker room where the complainant alleges the assault occurred. Their statements indicate the respondent looked angry."

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**KSB**

## The Investigative Report

▪NOT:

- "It was impossible for the respondent to have committed the assault because he was on the other side of the school in his biology class."
- "The complainant is probably telling the truth because several people saw the respondent follow her."

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**KSB**

## Relevant Evidence

- Both Investigator and Decision Maker are asked to make determinations about the relevance of evidence
- Decision Maker can only consider relevant evidence for the determination




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**KSB**

## Relevance

- Evidence is legally relevant if:
  - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
  - (b) the fact is of consequence in determining the action.
 —FED. R. EVID. 401
- "A brick is not a wall"
  - The evidence doesn't have to conclusively prove the case one way or another

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## Relevance

- Ultimate Question in a Title IX Grievance Process:
  - Did respondent sexually harass complainant?
- What are some "facts of consequence"?
  - Depends on nature of sexual harassment.

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## Relevance

- Quid Pro Quo
  - What was the district aid, benefit, or service at issue?
  - What was the unwelcome sexual conduct that the respondent requested?
  - What were the statements or conduct that communicated that the receipt of the aid/benefit/service were conditioned upon engaging the unwelcome sexual conduct?

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## Relevance

- Severe, Pervasive, and Objectively Offensive
  - What was the misconduct?
  - Who witnessed it?
  - When did it occur?
  - How many times?
  - Over what period of time?
  - Why was complainant offended?
  - Is misconduct severe? Why?

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 **Relevance**

- **Sexual Assault – Rape**
  - Who, what, when, where, how?
  - Did respondent engage in sexual intercourse with complainant?
    - Details of intercourse
  - Did complainant consent?
    - Was consent withdrawn during intercourse?
      - Manifested how?

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 **Relevance**

- **Sexual Assault – Fondling**
  - Did respondent touch complainant's private body parts? Which ones?
  - Was it for the purpose of respondent's sexual gratification?
    - How known?
      - Previous interactions
      - Demeanor.
      - Oral statements.
      - Physical conduct

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 **Not Relevant**

- **Complainant's sexual predisposition**
  - NEVER
- **Complainant's prior sexual behavior**
  - UNLESS
    - Offered to prove that someone other than the respondent committed the alleged misconduct
    - Prior behavior with respect to respondent offered to prove consent

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**KSB** **Investigations/Decision Making**  
**Boundary Hypo 1**

- Mr. Aaron Burr, the guidance counselor, has been asked by Title IX Coordinator Dolley Madison to investigate a formal complaint
- The complaint was filed by Alexander Hamilton against his former girlfriend, Maria Reynolds, for grabbing his crotch at school

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**KSB** **Investigations/Decision Making**  
**Boundary Hypo 1**

- In Burr's interview with Reynolds, she states the following:
  - She had recently broken up with Hamilton
  - She has no memory of the events in the complaint specifically, but admits that she had touched him that way during their relationship with his consent many times

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**KSB** **Investigations/Decision Making**  
**Boundary Hypo 1**

- In Burr's interview with Hamilton, Hamilton states:
  - Reynolds had never touched him that way before
  - He broke up with her
  - He threw her hand away as soon as she touched him
- Burr finds video of the incident showing Hamilton kiss Reynolds after she grabs him

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### Investigations/Decision Making Boundary Hypo 1

- How should Burr approach his report?
- Once Jefferson gets the report, how should he approach his decision?
- Previous history of Reynolds touching Hamilton?
  - Relevant?
- Credibility?
- Responsibility?

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### Investigations/Decision Making Boundary Hypo 2

- Investigator Aaron Burr is assigned another investigation by TixC Dolley Madison
- Angelica Schuyler filed a formal complaint against classmate Hercules Mulligan
- Burr schedules interviews for each student and gives each two days notice

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### Investigations/Decision Making Boundary Hypo 2

- In Burr's interview with the complainant, she alleges the following:
  - For the last month or so, every time Mulligan sees her says "Sup slutty Schuyler?" Their class schedule is similar so this happens several times a day
  - This has caused others to begin calling her "Slutty Schuyler" as well
  - Last week, Mulligan and several others wore t-shirts concealed under other clothes which had an unflattering picture of Schuyler on it with the caption "always open for business"
  - She alleges her friend Abigail Adams was with her for many of the insults
  - She's stayed home sick several times recently because she alleges coming to school was too difficult

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### Investigations/Decision Making

#### Boundary Hypo 2

- In Burr's interview with the respondent, he states as follows:
  - Schuyler was formerly dating his best friend, Alexander Hamilton
  - Hamilton told Mulligan that Schuyler cheated on him with John Church
  - Hamilton told him that she broke up with him after she cheated on him, telling him "I can't be with someone as weak as you."
  - He admits he may have called her a name once or twice but denies he did it everyday
  - He denies the T-shirt allegation entirely
  - He alleges that while she was dating Hamilton, he would good-naturedly tease her and call her "Slutty Schuyler" and she didn't care

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### Investigations/Decision Making

#### Boundary Hypo 2

- Burr then decides to interview the two other witnesses—Hamilton and Adams
  - Hamilton mostly corroborates Mulligan's story, but thought they never actually showed Schuyler the shirts
  - In Adams' interview, Burr asks her generally about the allegations. She proceeds to tell the story almost verbatim to Schuyler's allegations
- Burr is suspicious...

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### Investigations/Decision Making

#### Boundary Hypo 2

- What's relevant?
  - Mulligan's motivations?
  - His denials?
  - Hamilton's testimony?
  - Adams' testimony?
- Go through facts, do they go towards the who, what, when, why, and how of whether the conduct is severe, pervasive, and objectively offensive?
- Credibility determination?

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**Title IX Team Training:  
Decision-Making Process**




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 **Agenda**

- Where are we in the process?
- Review of the investigation
- Exchange of written questions
- Written determination
- Issues to consider when imposing student discipline

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**Recap**

Informal Resolution

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**Review of Investigation**

- Parties have presented evidence and witness that Investigator has investigated
- Parties have reviewed Investigator's evidence and had opportunity to provide written feedback
- Investigator has considered parties' written responses

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**Review of Investigation**

- Investigator finalizes report that fairly summarizes all relevant evidence
- Parties receive Investigator's Report
- Parties may provide a written response (to whom???)

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### Hypothetical

- Peggy Schuler and Maria Reynolds are 8<sup>th</sup> grade students in Minuteman Middle School.
- Both girls have romantic feelings for Alexander Hamilton, another middle school student.
- Peggy is outraged when Alexander invites Maria to make a TikTok dance video with him.



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### Hypothetical

- Peggy Schuler begins to call Maria a "slut" and "whore" every time she sees her. Peggy spreads rumors about Maria engaging in promiscuous sexual relationships, that she has AIDS and is pregnant.
- Other students join in with Peggy



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### Hypothetical

- Maria is so distressed by Peggy's taunts that she starts cutting herself and is hospitalized for a brief period of time.
- With the help and encouragement of her therapist, Maria files a Title IX complaint against Peggy



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### Hypothetical

- Guidance Counselor Aaron Burr has investigated Maria's complaint, and has completed his written report.
- John Adams is the Minuteman principal and the designated decision-maker for this complaint.
- He is working through the process to make his decision.....

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### Decision-Making Process

- At the outset, Respondent still presumed to be not-responsible.
- Decision-Maker cannot be the same person as the Title IX Coordinator or the Investigator.
- No live hearing required for K-12 school districts.

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### Exchanging Written Questions

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

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**Exchanging Written Questions**

- Remember:
  - Complainant's sexual predisposition
    - NEVER
  - Complainant's prior sexual behavior
    - UNLESS
      - Offered to prove that someone other than the respondent committed the alleged misconduct
      - Prior behavior with respect to respondent offered to prove consent
- Decision-Maker must explain to party posing questions any decision to exclude a question as not relevant

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**Exchanging Written Questions**

- If questions are permissible, Decision-Maker facilitates the Q&A and provides the answers to the questioner.
- Decision-maker(s) must:
  - provide each party with the answers
  - allow for additional, limited follow-up questions from each party
    - What does this mean?

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**Hypothetical**

- Peggy Schuler submits the following questions for Maria:
 

- Isn't it true that you and Alexander's TikTok video was banned by the app for being too explicit?
  - How many sexual partners have you had?
  - Why did Mark LaFayette break up with you earlier this year? Was it because you had sex with Alexander?

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### Hypothetical

- Maria submits the following questions for Peggy:
  - Did Angelica Church (another student) obtain a restraining order against you after you threatened her for dating John Laurens, a boy for whom you had feelings?
  - How many disciplinary referrals have you received while a student at Minuteman Middle School?




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### Hypothetical

- Which questions should John Adams allow?
  - TikTok video ban?
  - Number of sexual partners?
  - Mark LaFayette breakup?
  - Restraining order?
  - Disciplinary referrals?




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### Hypothetical

- Which questions should John Adams allow?
  - TikTok video ban?
  - Number of sexual partners?
  - Mark LaFayette breakup?
  - Restraining order?
  - Disciplinary referrals?
- How does John Adams communicate these limits?




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## Timelines

- Regulations are silent about how long Q&A should last
  - Give the parties reasonable deadlines to submit and answer questions and follow up questions (2-3 days?)
  - Only waive Q&A deadlines for good cause shown
- Decision-Maker must wait **at least** 10 days before issuing decision

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## Written Determination

- The Decision-Maker determines whether the Respondent is responsible for the alleged sexual harassment
- What is the timeline for issuing that determination?

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## Required Contents of Written Determination

- First: make sure to identify what this document is and the relevant dates:

### Title IX Written Determination

This report summarizes the decision maker's determination regarding the Title IX reported sexual harassment. This determination was reached based upon the preponderance of the evidence.

**Date grievance procedures initiated:** (Insert the date of the initiation of the investigation.)

**Date written determination issued:** (Insert the date of the issuance of this determination.)

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 <b>Required Contents of Written Determination</b>
<p>▪ <b>Second: Identify each one of the allegations potentially constituting sexual harassment</b></p> <p style="text-align: center;"><u><b>Allegations Investigated</b></u></p> <p><small>[Describe in detail the allegations that served as a basis for opening the investigation. Conclude with a determination that these allegations, if true, would constitute sexual harassment as defined by federal law and board policy.]</small></p>

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 <b>Required Contents of Written Determination</b>
<p>▪ <b>Third: Describe the procedural steps taken by the district from the time that it received the formal complaint until the determination.</b></p> <p style="text-align: center;"><u><b>Procedural History</b></u></p> <p><small>[You must include here a description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence. Include the dates, times, and locations, as appropriate, in describing procedural steps.]</small></p>

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 <b>Written Determination</b>
<p>▪ <b>For procedural steps, include at least:</b></p> <ul style="list-style-type: none"> <li>• any notifications to the parties,</li> <li>• interviews with parties and witnesses,</li> <li>• site visits,</li> <li>• methods used to gather other evidence, and</li> <li>• process of exchanging questions.</li> </ul>

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**KSB**

## Written Determination

- Fourth: make findings of facts:
  - Credibility determinations
    - Who does Decision-Maker believe, disbelieve?
    - Decision-Maker can make credibility determinations

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**KSB**

## Written Determination

- Fourth: make findings of facts:
  - Credibility determinations

**Findings of Fact**

Based upon the evidence presented above, the decision-maker makes the following findings of fact:

**Credibility Determinations:**

For each individual identified as providing an interview, statement or report, the decision-maker should assess whether the individual was credible and whether the information they provided was reliable. In doing so, decision-makers must base their findings of fact on the totality of the evidence. However, remember that credibility determinations cannot be based upon a single statement or complaint or respondent. Additionally, fact-finders are directed to assess the credibility of each individual based upon a specific discussion of its nature and source.

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**KSB**

## Written Determination

- Fourth: make findings of facts:
  - Credibility determinations
  - Conclude (for the district) what happened

**Findings of Fact**

For each individual identified as providing an interview, statement or report, the decision-maker should assess whether the individual was credible and whether the information they provided was reliable. In doing so, decision-makers must base their findings of fact on the totality of the evidence. However, remember that credibility determinations cannot be based upon a single statement or complaint or respondent. Additionally, fact-finders are directed to assess the credibility of each individual based upon a specific discussion of its nature and source.

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**Written Determination**

- Fifth: go back to each allegation of sex harassment
- For each allegation, say whether you find the respondent responsible and why.

**Summary of Findings by Allegation**  
[In this section, you should summarize your findings by summarizing the conclusion for each allegation, including a clear determination of responsibility, and provide a summary of the rationale for that conclusion.]

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**Written Determination**

- Sixth: determine whether the district's code of conduct applies to the facts as you have found them

**Application of Code of Conduct**  
[In this section, you must determine whether the district's code of conduct applies to the facts you found and described above.]

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**Written Determination**

- Seventh: identify responsive actions
- Include:
  - whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the complainant.

**Responsive Actions**

**Corrective Sanctions**  
[Corrective sanctions include actions designed to restore or preserve equal access to the district's education program or activity.]

**Remedies**  
[Remedies include actions designed to restore or preserve equal access to the district's education program or activity.]

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**Written Determination**

▪ Eighth: lay out the parties' right to appeal

**Right to Appeal**

Each party has the right to appeal the determination of the district. The district must provide the parties with the written determination of the result of the appeal. The district must also provide the parties with the written determination of the result of the appeal. The district must also provide the parties with the written determination of the result of the appeal.

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**Written Determination**

- State the district's procedures and permissible bases for the parties to appeal.
- Provided to the parties simultaneously.
- Becomes final either on the date that the district provides the parties with the written determination of the result of the appeal (if one is filed) or on the date that an appeal would no longer be timely.

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**Imposing Student Discipline**

- District still must comply with state law
- When can student discipline be imposed?
  - At the end of the Title IX Grievance process
  - Role of determination of responsibility in student discipline
- Who can impose discipline / start the process?
- What discipline can be imposed?
- What process must be followed?

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### Hypothetical

- John Adams has reviewed Aaron Burr's report and the responses to that report from Peggy and Maria.
- He concludes that it is 51% likely that Peggy did the things Maria alleges.
  - Finding of responsibility or no responsibility?




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### Hypothetical

- John Adams thinks it is extremely likely that Peggy engaged in sex harassment of Maria.
- What issues should he address in his report?
  - The TikTok video?
  - The girls' mutual romantic interest in Alexander?
  - Calling Maria "slut" and "whore"
  - Promiscuity/pregnancy/AIDS rumors?
  - Other students?
  - Psychological effect?




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### Hypothetical

- John Adams thinks it is extremely likely that Peggy engaged in sex harassment of Maria.
- What issues should he make findings of fact about in his report?
  - The TikTok video?
  - The girls' mutual romantic interest in Alexander?
  - Calling Maria "slut" and "whore"
  - Promiscuity/pregnancy/AIDS rumors?
  - Other students?




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## Hypothetical

- John Adams thinks it is extremely likely that Peggy engaged in sex harassment of Maria.
- What issues should he make findings of fact about address in his report?
  - ~~The TikTok video?~~
  - ~~The girls' mutual romantic interest in Alexander?~~
  - Calling Maria "slut" and "whore"
  - Promiscuity/pregnancy/AIDS rumors?
  - ~~Other students?~~




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**Title IX Team Training:  
Appealing the Decision**



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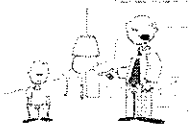
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**Appeals**



"There is no higher court. You're grounded!"

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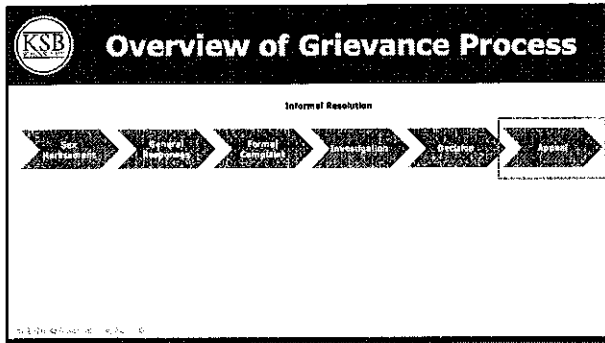
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**KSB** **Who can appeal?**

- Decision must make clear each party has this right
  - Complainant has just as much right to appeal a determination of non-responsibility as vice-versa



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**KSB** **When can a decision be appealed?**

- Three mandatory grounds\*:
  - Procedural issue
  - New evidence
  - Bias/conflict of interest
- Recipient can add grounds, but must apply them equally to both parties

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

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### When can a decision be appealed?

- Regardless of grounds used, appellant must show the issue actually affected the outcome
- Will be a common reason to dismiss appeals

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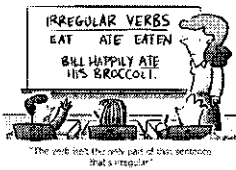
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### When a decision can be appealed—procedural issues

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



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### When a decision can be appealed—new evidence

- New evidence
  - Must have been able to alter the outcome
  - Must have not been "reasonably available" at the time of the determination or dismissal
- Example
  - A witness comes forward with testimony after a determination was made that he saw respondent somewhere else at the time of the alleged assault
  - No one was aware of the witness's testimony until he came forward

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## When a decision can be appealed—Bias/Conflict

- Bias/conflict of interest
- Must have affected outcome
- Example
  - Complainant becomes aware after decision that respondent is related to the TixC



KSB 10/9/20 10:00 AM

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## Appellate Decision-Maker



**Superintendent George Washington**

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## Appeal Decision-Maker

- Cannot be the TixC, investigator, or D-M
- Must be free of bias and conflicts of interest
- Must issue written decision and submit it to both parties simultaneously

KSB 10/9/20 10:00 AM

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## Appeal Procedure

- KSB Policy allows for up to ten days to bring appeal
- Must notify other party when appeal is brought
- Each party must have an opportunity to submit a written statement either in support of or against the decision

KSB Policy Manual, Section 10.1

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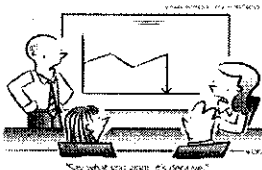
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## Drafting the Appeal Decision

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



"Say what you want, it's a decision."

KSB Policy Manual, Section 10.2

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## Drafting the Appeal Decision

- First: make sure to identify what this document is and the relevant dates:

**Title IX Written Appeal Decision**

This document summarizes the Title IX decision maker's decision regarding the alleged misconduct, findings, and/or disciplinary action. This determination was reached based upon the evidence submitted by the parties.

**Date grievance procedures initiated:** (Insert the date of the initiation of the investigation.)

**Date written determination issued:** (Insert the date of the issuance of this determination.)

**Date written appeal decision issued:** (Insert the date of the issuance of this determination.)

KSB Policy Manual, Section 10.3

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## Drafting the Appeal Decision

### Second: Identify and describe the arguments for appeal

**Basic For Appeal**

**Procedural issues:**

**New evidence:**

**Bias/conflict of interest:**

[These are the three mandatory grounds for allowing an appeal. Describe what the party appealing the determination has identified in the appropriate category.]

**Others:**

[You cannot add grounds, but must apply them equally to both parties. If you cannot, then no added grounds, delete the heading.]

2019-2020, 2020-2021

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## Drafting the Appeal Decision

### Third: Describe the procedural steps from time of complaint to time of drafting decision

**Procedural History**

[You can use the procedural summary from the Decision-Maker's written determination. Then add the steps, if any, you have taken procedurally as the appellate decision-maker.]

2019-2020, 2020-2021

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## Drafting the Appeal Decision

### Fourth: Summarize decision and its rationale.

**Summary of Decision and Its Rationale**

[You can quote from the initial decision or craft your own summary.]

2019-2020, 2020-2021

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## Drafting the Appeal Decision

**Fifth: Analyze whether outcome was affected by claimed error:**

- If not, appeal can be dismissed

**Analysis Of Whether Outcome was Affected by Claimed Error**

**Factual Conclusions**  
 If the appeal alleges new facts, you should carefully, and in detail, describe the factual conclusions that you are drawing about those limited facts without necessarily re-deciding all the factual issues resolved by the initial decision-maker.

**Effect of the Outcome of the Decision**  
 In this section, you must determine whether the outcome of the initial determination was affected by the claimed error. If not, the appeal can be dismissed.

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## Drafting the Appeal Decision

**Sixth: Grant or reject the appeal and state your rationale for doing so.**

**Appellate Decision**

Grant or reject the appeal and state your rationale for doing so.

Appellate Decision-maker

Date

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## Appeals Hypo--

- Angelica Church accused Alexander Hamilton of sexual assault and filed a formal complaint with the TixC
- After the investigation concluded, Lincoln High School Principal Thomas Jefferson submitted his decision to the parties three days ago. He made a finding of non-responsibility

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## Appeals Hypo--

- Angelica wishes to appeal on the following grounds:
- The investigation yielded a video recording of the assault and the decision does not mention it
- The school only gave her the notice of her interview only a few hours prior to the scheduled time



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## Appeals Hypo--

- Angelica wishes to appeal on the following grounds (more):
- A witness came to the complainant after the decision was made. This person claimed may have possibly seen the Respondent somewhere other than where he said he was the night of the complaint



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## Appeals Hypo--

- Angelica wishes to appeal on the following grounds (still more):
- The investigator submitted his report eight days after the complaint was filed
- The TixC is in Rotary Club with the respondent's mother



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## Appeals Hypo--

- What should the General do?
- Step 1: Solicit a response from Hamilton
  - 34 C.F.R. 106.45(b)(8)(D) says you must "Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome"
- Step 2: Look at each grounds for appeal
  - Does it fall under one of the three grounds?
  - Did it affect the outcome of the decision?




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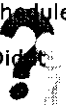
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## Appeals Hypo--

- The investigation yielded a video recording of the assault and the decision does not mention it
  - Does this fall under one of the three? Did it affect outcome?
- The school only gave her the notice of her interview only a few hours prior to the scheduled time
  - Does this fall under one of the three? Did it affect outcome?




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## Appeals Hypo--

- A witness came to the complainant after the decision was made. This person claimed may have possibly seen the Respondent somewhere other than where he said he was the night of the complaint
  - Does this fall under one of the three? Did it affect outcome?




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## Appeals Hypo--

- The investigator submitted his report eight days after the complaint was filed
  - Does this fall under one of the three? Did it affect outcome?
- The TixC is in Rotary Club with the respondent's mother
  - Does this fall under one of the three? Did it affect outcome?




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## So What Does Superintendent Washington Do Here?

- Written report could reverse determination of non-responsibility based on:
  - Video?
  - Interview Notice?
- Regardless of his decision, Washington must:
  - Create a written report describing the result of the appeal and the rationale for the result
  - Provide it to both parties simultaneously
  - (and remember, he cannot tell a lie....)




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**Title IX Team Training:  
Avoiding Bias and Conflicts of Interest**



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 **Session Overview**

- Requirement of Impartiality
- Correcting an Overcorrection
- Conflicts of Interests
- Prejudgment and Bias

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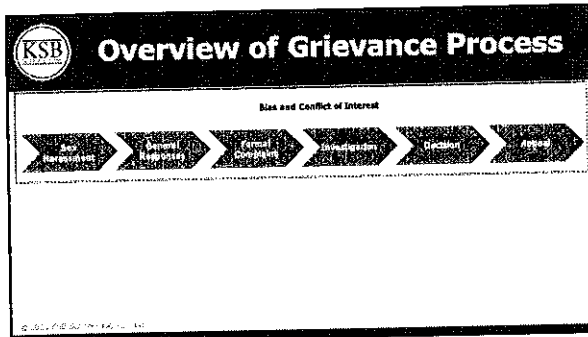
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**Requirement of Impartiality**

"A recipient's grievance process must . . . Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent."

• 34 C.F.R. § 106.45 (b)(1)(iii)

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**Requirement of Impartiality**

". . . A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on . . . how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias."

• 34 C.F.R. § 106.45 (b)(1)(iii)

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### Requirement of Impartiality

"Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment."

- 34 C.F.R. § 106.45 (b)(1)(iii)

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### Requirement of Impartiality

"A recipient's grievance process must . . . require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness."

- 34 C.F.R. § 106.45(b)(1)(ii)

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### Required Basis of Appeal

"A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases . . . 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."

- 34 C.F.R. § 106.45(b)(8)

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## At All Stages

"Every Title IX Coordinator must be free from conflicts of interest and bias and, under revised § 106.45(b)(1)(iii), trained in how to serve impartially and avoid prejudgment of the facts at issue. No recipient is permitted to ignore a sexual harassment report, regardless of the identity of the person alleged to have been victimized, and whether or not a school administrator might be inclined to apply harmful stereotypes against believing complainants generally or based on the complainant's personal characteristics or identity. The Department will enforce the final regulations vigorously to ensure that each complainant receives the response owed to them by the recipient."

• 85 FR 30026

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## Correcting an Overcorrection

Department of Education cited three main purposes of the regulations in its commentary, including to "avoid intentional or unintentional injection of sex-based biases and stereotypes into proceedings that too often have been biased for or against parties on the basis of sex, mostly because the underlying allegations at issue involve issues of sex-based conduct."

• 85 FR 30026

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## Doe v. Columbia Univ.

831 F.3d 46 (2nd Cir. 2016)

- Beginning of 2013-2014 school year, John Doe received notice of allegations of sexual assault against him regarding incident from previous school year
- John Doe called in for meeting; Univ. issued order barring him from contact with victim and restricting access to residence halls
- John Doe alleges Title IX investigator was not gender neutral; responded with hostility when told encounter was consensual and witnesses would corroborate
  - Claims investigator failed to further look into his account or to interview or follow up with witnesses
  - Claims investigator's questioning was like cross examination, and he was not informed of any right to submit a statement or seek an advocate; not provided supports

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### **Doe v. Columbia Univ.**

831 F.3d 46 (2nd Cir. 2016)

- John Doe then reported to admin that Complainant's friends were harassing him and assaulted him, but his complaint wasn't taken seriously
- John Doe met with investigator regarding initial report; attempted to correct what he saw as errors and bias in report
  - Given form to respond
- While investigation/hearing was pending, University was facing complaints that it was not taking complaints of sexual harassment sufficiently seriously and was too lenient on aggressors
- Disciplinary hearing held, but John Doe not given opportunity to prepare

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### **Doe v. Columbia Univ.**

831 F.3d 46 (2nd Cir. 2016)

- After two-hour hearing, John Doe found responsible and suspended 1.5 years, denied credit for Spring
  - John Doe appealed
  - Jane Doe appealed to have sanctions lightened
  - Appeals rejected and sanction upheld; deemed that it was within investigator discretion not to interview witnesses
- John Doe filed suit alleging violation of his rights under Title IX
  - District court granted University's motion to dismiss

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### **Doe v. Columbia Univ.**

831 F.3d 46 (2nd Cir. 2016)

- 2nd Cir.: Plaintiff plead sufficient facts to support plausible inference of sex discrimination
  - "It alleges that Columbia's hearing panel . . . were all motivated . . . by pro-female, anti-male bias. Those alleged biased attitudes were, at least in part, adopted to refute criticisms circulating in the student body and in the public press that Columbia was turning a blind eye to female students' charges of sexual assaults by male students. . . . When the evidence substantially favors one party's version of a disputed matter, but an evaluator forms a conclusion in favor of the other side (without an apparent reason based in the evidence), it is plausible to infer (although by no means necessarily correct) that the evaluator has been influenced by bias."

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### **Determining Conflicts and Bias**

- Department specifically chose not to further define conflicts of interest or bias despite requests from commenters
  - Indicated that training on serving impartially would ensure that Title IX Team was not impermissibly biased or conflicted
- Generally, in the Title IX context...
  - A conflict of interest occurs when an individual's interests raise a serious question as to whether they can act objectively and without bias should they need to act against those interests
  - Bias is the inability to maintain objectivity, due to some inclination or prejudice towards or against an individual, characteristic, or circumstance
  - Prejudgment refers to passing judgment prematurely or without sufficient objective consideration
- Serving multiple roles (if permitted by the regs) does not create a conflict

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### **Determining Bias**

- "Whether bias exists requires examination of the particular facts of a situation . . . . and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased..."
  - 85 FR 30026

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### Determining Bias

"Whether bias exists requires examination of the particular facts of a situation . . . . and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased..."

• 85 FR 30026

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### Determining Bias

"...exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents)..."

• 85 FR 30026

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### Determining Bias

" . . . bearing in mind that the very training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role."

• 85 FR 30026

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## Hypothetical

- Title IX Coordinator Madison receives notice of alleged sexual assault, but no formal complaint filed
  - Dolley determines that an appropriate response requires formal grievance procedure, so she signs formal complaint to initiate the process
- One of several parties to formal complaint is Theodosia Burr (Investigator Aaron Burr's daughter)
  - Investigator Burr recuses himself from grievance procedure;
  - Dolley Madison is assigned to investigate the complaint in Mr. Burr's place

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## Hypothetical

- One of the Respondents complains Dolley Madison cannot investigate because:
  - She has a conflict of interest
  - She is a party to the complaint
- Is the Respondent right?



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## Coordinator Signing Complaint

- Title IX Coordinator has discretion to sign formal complaint initiating grievance procedure
  - Must do so if you would otherwise be deliberately indifferent
- Signing complaint does not indicate predetermination as to truth; must avoid predetermination at that stage
- Signing complaint does not make Title IX Coordinator the complainant
  - Does not preclude Title IX Coordinator from serving as the investigator

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## Hypothetical

- One of the Respondents complains Dolley Madison cannot investigate because:
  - She has a conflict of interest
  - She is a party to the complaint
- Is the Respondent right?



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## Bias or Conflict Issues?

- HS Principal, and HS Decision-Maker, Thomas Jefferson is the head football coach; respondent in formal complaint is the star quarterback (and yes, it's football season)
- Appellate Decision-Maker and Superintendent George Washington is direct supervisor, and evaluator of, all employees trained to serve as investigator and decision-maker

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## Bias or Conflict Issues?

- Teacher Abigail Adams is the respondent in a Title IX complaint from a middle school student; Middle School Principal John Adams is generally decision-maker for middle school complaints
- Investigator Burr, months after watching this Title IX training module, is often heard in the staff lounge bemoaning the #MeToo movement and suggesting that "most of the time, they're just making it up."

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**KSB**

### Bias or Conflict Issues?

- The advocate for a complainant is a well-known women's rights attorney, who very recently represented a high profile client whose claims were proven to be false. In that case, public perception is that the attorney repeatedly misrepresented the underlying facts in order to benefit his client and attempt to force a quick settlement. Decision-maker Sally Hemmings is concerned that the advocate would make similar misrepresentations in this hearing process, and is annoyed the Complainant would bring such a high-profile attorney to put a national spotlight on the district.




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**KSB**

### Bias

- Often considered in terms of implicit and explicit biases
  - Implicit biases are subconscious associations/prejudices/shortcuts/reactions our brains default to in order to more efficiently process information
    - More efficiently, not more effectively or more accurately
    - Not necessarily discriminatory
  - Biases become explicit when you become consciously aware of them and choose to act on them

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**KSB**

### Bias Formation

- Bias formation is a natural neurological response to stimuli
- Begins in the early stages of development
  - Studies show babies show preference for race/ethnicity of caregivers as young as 4 months
  - Bias leads to prejudices towards in-groups and other like individuals
- Biases are then affirmed or disaffirmed through life experiences

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**KSB**

## Requirement of Impartiality

"Department will vigorously enforce the final regulations in a manner that holds recipients responsible for responding to complainants, and treating all parties during any § 106.45 grievance process, impartially without prejudgment of the facts at issue or bias, including bias against an individual's sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic."

• 85 FR 30026

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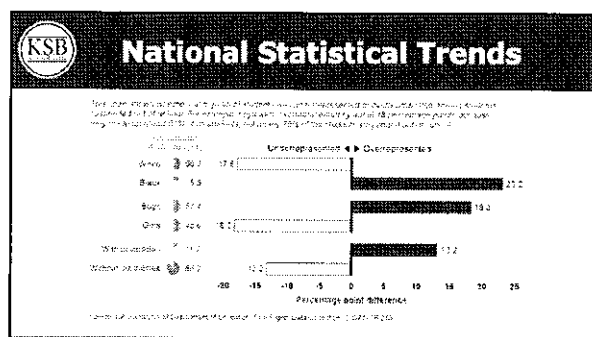
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**KSB**

## Including Bias Against...

"Department will vigorously enforce the final regulations in a manner that holds recipients responsible for responding to complainants, and treating all parties during any § 106.45 grievance process, impartially without prejudgment of the facts at issue or bias, including bias against an individual's sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic."

• 85 FR 30026

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 **Boys be boys...**

"It would be inappropriate for a Title IX Coordinator to evaluate conduct for objective offensiveness by shrugging off unwelcome conduct as simply "boys being boys" or make similar assumptions based on bias or prejudice. To take that approach would risk evidencing sex-based bias in contravention of § 106.45(a) or bias for or against a complainant or respondent in violation of § 106.45(b)(1)(iii), in addition to indicating improper evaluation of the Davis elements under a reasonable person standard."

• 85 FR 30026

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 **Hypothetical**

▪ Title IX Coordinator Madison receives an email from Angelica Church

• "Mrs. Madison, as Activities Director I thought you should know that the lacrosse team is making us underclassmen do some pretty horrible stuff as part of this year's initiations. The coaches just look the other way, but things are getting taken really too far. Last week, Maria held us freshman down while Peggy shoved her crosse up our you know whats and even made Anne bleed. Can you do something? [Signed with Angelica's email signature.]"



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 **Hypothetical**

▪ Mark Lafayette is a Senior best known for breaking Thomas Topham's school records in weight lifting, and for being the Class A wrestling champion three years straight

• He comes to Title IX Coordinator Madison to talk about an incident where he says his girlfriend, the petite and docile Angelica Church, pinned him down and sexually assaulted him

• Normally, Coordinator Madison would sign a complaint given these facts, but is hesitant because it seems far fetched that Angelica could have taken advantage of Lafayette

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### Including Bias Against...

"Department will vigorously enforce the final regulations in a manner that holds recipients responsible for responding to complainants, and treating all parties during any § 106.45 grievance process, impartially without prejudgment of the facts at issue or bias, including bias against an individual's sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic."

• 85 FR 30026

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### Bias and Prejudgments

"The Department shares the concerns of commenters who asserted, and cited to data and articles showing, that some complainants, including or especially girls of color, face school-level responses to their reports of sexual harassment infected by bias, prejudice, or stereotypes."

• 85 FR 30026

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### Disciplinary Discrepancies

- Compared to white children, data from OCR in 2016 indicates that black children are:
  - 3.6x more likely to receive an out-of-school suspension in preschool
  - 3.8x more likely to receive an out-of-school suspension in K-12
  - 2.2x more likely to be referred to law enforcement or subject to a school-related arrest
- Data continually corroborated by state reports

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**Related to Bias**

- Research from 2019 by the Proceedings of the National Academy of Sciences
  - Engaged in psychological measurements of racial biases (implicit and explicit) by population group to determine associations with disparate outcomes
  - Found county-level rates of implicit and explicit bias are highly correlated
  - The more biased an area was, the higher the disproportionality in discipline
  - The less explicit bias, the more effect of implicit bias

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**Other Discrepancies**

- Research from Children and Youth Services Review found that the discrepancies on the basis of race/ethnicity are pervasive in non-disciplinary and non-exclusionary interventions
  - Black students less likely than White students to be warned about behavior
  - Black boys are less likely to be warned than White boys or girls
  - Consequences escalated at faster rate for these students

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**Including Bias Against...**

“Department will vigorously enforce the final regulations in a manner that holds recipients responsible for responding to complainants, and treating all parties during any § 106.45 grievance process, impartially without prejudgment of the facts at issue or bias, including bias against an individual’s sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic.”

- 85 FR 30026

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### Sexual Orientation and Gender Identity

- *Bostock* indicates that discrimination/harassment on the basis of one's sexual orientation or gender identity constitutes discrimination on the basis of sex
- These characteristics subject to unique biases and prejudices
- You cannot treat claims differently simply because all parties are members of the same sex

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### Including Bias Against...

"Department will vigorously enforce the final regulations in a manner that holds recipients responsible for responding to complainants, and treating all parties during any § 106.45 grievance process, impartially without prejudgment of the facts at issue or bias, including bias against an individual's sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic."

• 85 FR 30026

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### Including Bias Against...

"Department will vigorously enforce the final regulations in a manner that holds recipients responsible for responding to complainants, and treating all parties during any § 106.45 grievance process, impartially without prejudgment of the facts at issue or bias, including bias against an individual's sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, or other characteristic."

• 85 FR 30026

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 **Income Disparities**

- Researchers in several states find disparities in discipline for students with lower family income
  - Not commensurate to, but also not unlike, the disparities on the basis of race and ethnicity
    - In fact, research indicates lower family income exacerbates disparities for minority students
  - Occurs on the micro and macro levels
    - Schools with high poverty rates overall engage in harsher disciplinary practices
    - Within schools, students of lower income treated with harsher disciplinary practices

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• 85 FR 30026

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 **Other Characteristics**

- Biases or assumptions about athletes were prevalent in suits alleging bias in Title IX proceedings
- Social statuses, ability to communicate effectively, appearance all shown to affect credibility determinations and general reactions to an individual
- Biases towards an individual, including those founded on prior history or issues, cannot affect decision-making

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## Are you biased?

- In the literal sense, yes, we all are... In the Title IX context...
  - Can you objectively serve in your role without predetermination, basing any decisions on the facts and investigating further when necessary?
  - Can you apply the concepts and meet the obligations described in this training while fulfilling your role?
  - Can you consistently apply the definitions and due process rights while fulfilling your role?
  - Will you allow the prescribed grievance process to drive the role you play, and the manner in which the issues are determined?
  - If **yes** to all... serve your role consistent with applicable requirements
  - If **no** to any... recuse yourself from the grievance process

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## Strategies to Serve Without Bias

- Improve decision-making with Title IX's systematic approach
  - Slow down and remove the discretion, ambiguity, and subjectivity from decision making processes
  - Implement grievance procedure processes and definitions with fidelity and consistency
    - In doing so, abide by roles and associated limitations, such as leaving all credibility determinations to the decision maker
  - Carefully document decision making processes and considerations for later steps and potential review

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## Strategies to Serve Without Bias

- **Stereotype Replacement:** replace automatic stereotypical response with new, automatic, non-stereotypical response
  - Recognize a response as stereotypical;
  - Label response as stereotypical and consider source/reason underlying response;
  - Consider alternate responses
- **Counter-Stereotypic Imaging:** create an opposite image of a stereotype in your mind
  - Intended to challenge stereotype and make a positive association with counter-stereotype

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**KSB** **Strategies to Serve Without Bias**

- **Individuation:** give individuality to persons in a group
  - Intended to prevent making biased inferences on basis of sex, race, sexual orientation, etc.
  - Requires obtaining information about individual members of a group instead of relying on generalizations
- **Perspective Taking:** take a first-person perspective towards groups to promote empathy and understanding
- **Increased Opportunities for Contact:** seek out opportunities to engage with stigmatized groups in a positive manner

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**KSB** **General Recommendations**

- Carefully follow grievance process
- Consistently apply definitions
- Rely only on objective interpretations of documented evidence
- Actively assess and consider your implicit and explicit biases and correct as necessary with strategies
  - <https://implicit.harvard.edu/implicit/selectatest.html>
- Take an objective approach to determining conflicts and bias

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**KSB** **Hypothetical**

- Title IX Coordinator Madison receives an email from Angelica Church
  - "Mrs. Madison, as Activities Director I thought you should know that the lacrosse team is making us underclassmen do some pretty horrible stuff as part of this year's initiations. The coaches just look the other way, but things are getting taken really too far. Last week, Maria held us freshman down while Peggy shoved her crosse up our you know whats and even made Anne bleed. Can you do something? [Signed with Angelica's email signature.]"




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## Hypothetical

- Mark Lafayette is a Senior best known for breaking Thomas Topham's school records in weight lifting, and for being the Class A wrestling champion three years straight
- He comes to Title IX Coordinator Madison to talk about an incident where he says his girlfriend, the petite and docile Angelica Church, pinned him down and sexually assaulted him
- Normally, Coordinator Madison would sign a complaint given these facts, but is hesitant because it seems far fetched that Angelica could have taken advantage of Lafayette

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**Title IX Team Training:  
Confidentiality and Retaliation**




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- Material discussed in this training is explicit.

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**Plan for Today**

- Medical, Psychological and Other Treatment Records
- Privileged Information
- Confidentiality and Access to Evidence and Records
- Non-Disclosure Agreements
- First Amendment and Retaliation
- Reporting Child Abuse in Nebraska

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 **Medical, Psychological and Other Treatment Records**

"[T]he recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not [a student who has reached 18 years of age or is attending an institution of postsecondary education] then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3)."

- 34 C.F.R. § 106.45(b)(5)(i)

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 **Privileged Information**

"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."

- 34 C.F.R. § 106.45(b)(1)(x)

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 **Title IX Confidentiality Requirements**

The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

- 34 C.F.R. § 106.71(a)

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- 34 C.F.R. § 106.71(a)

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### FERPA Confidentiality Requirements

- FERPA requires school districts to maintain the confidentiality of personally identifiable information
  - Generally requires written parental consent prior to disclosure, unless an exception applies to permit disclosure
    - School official exception
    - Emergency exception

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**Education Records**

▪ An education record is defined by FERPA to include, with limited exemptions, any records that contain personally identifiable information directly related to a student and are maintained by an educational agency or institution

- Parents and students 18 and older have the right to access the education records of their children
- May seek amendment of records

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### Disclosure of Evidence

- Must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
  - Including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility
  - And inculpatory or exculpatory evidence
  - Sent to each party in electronic format or a hard copy

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### May Limit Downloads and Copies (Under Title IX)

- "The Department acknowledges that a recipient may use, but is not required to use, a file sharing platform that restricts the parties and advisors from downloading or copying evidence."
  - 85 FR 30026
- BUT check state law (which may require copies of education records or personnel records be provided)

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### Disclosure of Report and Determination

- Must send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response
- Must provide the written determination to each party simultaneously

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## No Inherent Conflict

- The Department argues that there is no inherent conflict between Title IX and FERPA obligation with respect to the requirements to disclose evidence, reports, and determinations
  - Because everything required to be disclosed "directly relates" to both parties to the dispute (if parties are students)
    - Consistent with long standing guidance on video footage of altercations

85 FR 30026

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## But...

- "The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99."
  - 34 C.F.R. § 106.6(e)
- "To the extent that there may be unusual circumstances, where a true conflict between Title IX and FERPA may exist (such as a student's formal complaint against an employee), the Department includes a provision in § 106.6(e) to expressly state that the obligation to comply with these final regulations under Title IX is not obviated or alleviated by the FERPA statute or regulations."
  - 85 FR 30026

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## Hypo

- Alexander Hamilton, an 8th grader, filed a formal complaint against Paul Revere, the janitor, alleging that Paul Revere forcibly fondled him on August 18 in the school stables
- Investigator Aaron Burr pulled Alexander's attendance records for the day in question, and they show that he was absent on the 18th
  - He also reviewed security footage, which does not show Alexander in the stable area on the day in question
- Alexander's parents have e-mailed Investigator Burr, informing him that their son's attendance records and any video used in the investigation are protected by FERPA and they will not consent to disclosure




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### Why?

"The Department is precluded from administering, enforcing, and interpreting statutes, including Title IX and FERPA, in a manner that would require a recipient to deny the parties, including employee-respondents, their constitutional right to due process because the Department, as an agency of the Federal government, is subject to the U.S. Constitution."

• 85 FR 30026

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### Non-Disclosure Agreements (NDAs)

"The Department does not interpret Title IX as either requiring recipients to, or prohibiting recipients from, using a non-disclosure agreement, as long as such non-disclosure agreement does not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence under § 106.45(b)(5)(iii). Any non-disclosure agreement, however, must comply with all applicable laws."

• 85 FR 30026

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### Hypo

- Same facts as before
- To ease the privacy concerns of Mr. and Mrs. Hamilton, Investigator Burr requests that the parties sign a non-disclosure agreement prior to sharing the evidence
- Revere signs the agreement, but subsequently discloses the evidence to each of his witnesses
- Revere also refers to the evidence in detail in a long Facebook post written to publicly "clear his name"

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 **Subject to the First Amendment...**

*"Constitutional protections.* Nothing in this part requires a recipient to . . . restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution."

- 34 C.F.R. § 106.6(d)

*"The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment."*

- 34 C.F.R. § 106.44(a)

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 **First Amendment Generally**

- *"Congress shall make no law . . . abridging the freedom of speech."*
  - Incorporated to apply to public schools and other state/local government bodies under 14th Amendment
- *Tinker:* Students do not shed first amendment rights at school
  - School cannot suppress student expression unless school officials reasonably conclude that it has or will "materially and substantially disrupt the work and discipline of the school"
  - Conduct which involves "invasion of the rights of others" may be regulated

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 **Retaliation Prohibited**

*"Retaliation prohibited.* No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. . . The exercise of rights protected under the First Amendment does not constitute retaliation. . . ."

- 34 C.F.R. § 106.71

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### Retaliation and the First Amendment

"To address the commenter's concerns, the final regulations also provide that the exercise of rights protected under the First Amendment does not constitute retaliation pursuant to § 106.71. Threatening to publicize or make a written determination public for the purpose of retaliation, however, is strictly prohibited under § 106.71 of these final regulations."

• 85 FR 30026

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### False Statements not Protected

"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."

• 34 C.F.R. § 106.71(b)(2)

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### First Amendment and Defining Sex Harassment

"The Davis definition of sexual harassment as 'severe, pervasive, and objectively offensive' comports with First Amendment protections, and the way in which a broader definition, such as severe, persistent, or pervasive (as used in the 1997 Guidance and 2001 Guidance), has led to infringement of rights of free speech and academic freedom of students and faculty."

• 85 FR 30026

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### Bethel Sch. Dist. v. Fraser

478 U.S. 675 (1986)

- Student disciplined for innuendo-filled speech
- Circuit Court ruled discipline violated First Amendment
  - Attendance at event was voluntary
  - No material or substantial disruption
- Supreme Court: Schools may encourage "the fundamental values of habits and manners of civility by insisting that certain modes of expression are inappropriate and subject to sanction."

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### In Practice

- You may be able to discipline for inappropriate speech under *Bethel* even if it doesn't rise to severe, pervasive, and objectively offensive, but tread lightly
- You may discipline for false statements in grievance process, long as basis is not simply the result/determination
- You may require NDAs, but you cannot restrict protected First Amendment activity or the right to discuss the case and prepare a response

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### Reporting Child Abuse

- Reporting child abuse permitted under FERPA
  - Health and Safety (Emergency) exception to consent
- Reporting child abuse may be required by state law
  - Requirements vary by state
  - In some states it is "all persons" and others it may also or in the alternative have special or specific obligations for school officials
  - State law definitions of child abuse may or may not line up with definitions of "sexual harassment" under Title IX

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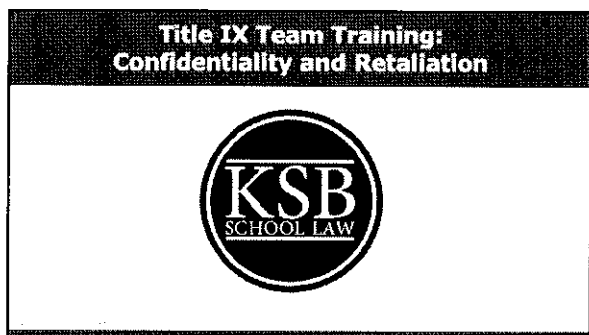
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**Title IX Team Training:  
Special Education Considerations**



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**Overview of Grievance Process**

Informal Resolution



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 **Plan For Today**

- Disproportionate Impact on Students with Disabilities
- All Obligations Apply
- Considerations for Complainants with Disabilities
- Considerations for Respondents with Disabilities

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 **Disproportionate Impact On Students With Disabilities**

- 2012 report: Children with disabilities almost 3x more likely to be sexually abused
- Report on school sexual maltreatment of 300 students with disabilities (*Journal of Child Sexual Abuse*)
  - 55% of victims had significant cognitive disabilities
  - 68% reported verbal harassment
  - 62% reported touching, pinching, rubbing
  - 30% reported forced intercourse
  - 51% reported abuser was adult; 30% teaching personnel
  - 24.5% said school "did nothing"

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 **Disproportionate Impact on Students with Disabilities**

- Data cited in the comments to the proposed regulations:
  - 22 percent of students with disabilities reported some form of abuse over the last year
  - Nearly 62 percent had experienced some form of physical or sexual abuse before the age of 17
  - Only 27 percent reported the incident
  - Individuals with intellectual disabilities are sexually assaulted and raped at more than seven times the rate of individuals without disabilities

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**Two Sides of the Coin**

- Students with disabilities may exhibit sexually aggressive or inappropriate behaviors
  - Number of Title IX and other cases related to sexual violence in which both aggressor and victim is student with a disability
- Consider school's obligation to address such behaviors
- Consider school's limitations in addressing such behaviors

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**All Obligations Apply**

"Recipients' obligation to comply both with these final regulations and with disability laws applies to all aspects of responding to a Title IX sexual harassment incident including investigation, discipline, and segregating elementary and secondary school students with disabilities from classroom settings. Nothing in these final regulations precludes or impedes a recipient from determining what services may be necessary to ensure a safe, welcoming environment for all students."

• 85 F.R. 30026

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**Running Hypothetical**

- The parents of Maria Reynolds, a student with ASD who is nonverbal, submit a formal complaint
  - Alleges that an AngelSense™ device kept in Maria's backpack captured audio of her being sexually harassed every day for over two months by John Laurens, a student with an IEP due to his diagnosis of Tourette's Syndrome, and Mark Lafayette, a student with an IEP due to his diagnosis of dyslexia
    - Alleges Mark Lafayette made daily, graphic threats of sexual assault before attempting to rape Maria last week
    - Alleges John Laurens called Maria a "whore" and "slut" several times an hours

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**Accommodate throughout Process**

"The Department also fully encourages recipients to provide whatever reasonable accommodations are necessary for students with disabilities; recipients must comply with applicable disability laws while also complying with these final regulations."  
 • 85 FR 30026

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**Running Hypothetical**

- John Lauren's father is serving as John's advisor, and dad is deaf
- Consider accommodations throughout process:
  - Providing transcriptions of audio evidence, such as the AngelSense™ recordings
  - Making available an ASL interpreter in interviews involving the advisor



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**Running Hypothetical**

- Given Maria's inability to communicate verbally or engage in any activity for an extended period of time, her advisor requested additional time to prepare responses to written questions, evaluate evidence, and prepare a response to the investigator's report.



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**Complainants with Disabilities**

- Data suggests that students with disabilities will be complainants in Title IX process at disproportionate rates
  - Must be unbiased and neutral in reviewing complaint or considering the filing of a complaint
- Must ensure student continues to be provided FAPE
- Consider obligation to respond to harassment on the basis of disability

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**No Magic Words**

- Investigate reports of misconduct even if it isn't initially clear the report is a formal complaint of sexual harassment
  - "Similarly, recognizing whether a student has disclosed a Title IX sexual harassment incident includes taking into account any disability the reporting student may have that may affect how that student describes or communicates about the incident."

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**Supportive Measures**

- Department commentary emphasizes role of supportive measures in meeting the needs of students with disabilities
- Supportive measures, to the extent they change a student's placement, must be determined/approved by IEP team or written agreement with parents
  - I.e., if counseling services would remove complainant from general education setting, must amend IEP

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 **Supportive Measures are Key**

"The process for offering supportive measures after considering the complainant's wishes is an interactive process that is not unlike the interactive process that the ADA requires. By ensuring that each complainant is offered supportive measures regardless of whether the reported incident results in a grievance process, more complainants, including individuals with disabilities, can feel safe reporting without fearing that a report automatically leads to participation in a grievance process."

▪ 85 FR 30026

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 **M.J.G. v. Sch. Dist. of Philadelphia**  
74 IDELR 151 (3rd Cir. 2019)

- M.J.G. is a student with ASD and other disabilities
  - Reported to her mother that while in the school library, a peer with ID took her hand and placed it on his penis; Mom reported to school
  - Teacher met with mom and student to discuss incident; teacher refuted claim
    - Indicated M.J.G. was acting inappropriately and reprimanded, suggested she was reporting as attention-seeking behavior
- Nonetheless, teacher and school agreed to safety plan
  - Increased supervision
  - Changed student's seating
  - Implemented by other teachers

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 **M.J.G. v. Sch. Dist. of Philadelphia**  
74 IDELR 151 (3rd Cir. 2019)

- Nearly a year later, M.J.G. reported a second incident with different peer to mother
  - Claimed during a game of tag over lunch, aggressor pulled her pants down, blew on her stomach, and put his penis on her
- Mother reported to school and police
- School and police investigated
  - Reviewed security footage
  - Interviewed witnesses
    - Conflicting reports as to whether M.J.G. intentionally dropped her pants, but witnesses all agreed alleged aggressor did not commit assault as M.J.G. reported

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### M.J.G. v. Sch. Dist. of Philadelphia

74 IDELR 151 (3rd Cir. 2019)

- School implemented another safety plan in response
  - Additional supervision at lunch
  - Separated and monitored students
  - Provided escort during transitions
  - Called for daily communication log and weekly e-mails to mother
  - Called for IEP meeting to discuss 1:1 supervision
- Mom withdrew M.J.G. and files Title IX and ADA suit
  - Both require showing of deliberate indifference
- Summary judgment for school
- 3rd Cir.: Affirmed

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### Running Hypothetical



- Supportive measures for Maria
  - IEP team should be involved in determining appropriate supportive measures, as some may change her placement
    - Any additional counseling services that may remove her from current placement
  - If you determine separating her from respondents is appropriate, consider whether you're changing anyone's *placement* or whether you're changing *location*
    - Changes in placement for Maria, John, and Mark must be made through IEP process
    - Changes in location for Maria, John, and Mark may be made unilaterally
  - Consider whether supportive measures require accommodations or impact ability to access FAPE

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### Consent

- Review definition of "consent" adopted by your board in your policy
- Consider how a student's disability affects his/her ability/capacity to consent to sexual activity
  - For instance, Maria likely lacks the capacity to consent to sexual activity

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## Respondents with Disabilities

- Consider compliance with IDEA at all stages, including emergency removals, supportive measures, discipline
- Respondent must be provided FAPE irrespective of supportive measures
- Manifestation required prior to *disciplinary* removals of ten days or more
- Contemplate respondent's need for new placement/services
- Consider early whether discipline or a change in placement is more appropriate to address misconduct

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## Running Hypothetical

- Guidance Counselor Aaron Burr is investigating the formal complaint, and believes that Mark Lafayette presents an immediate threat to the safety of his peers
  - May Mark Lafayette be removed from school?
  - Must we conduct an MDR prior to removal?
  - Must his IEP Team meet?
  - Should his IEP Team meet?
- Burr believes that John Laurens is highly likely to continue to verbally harass peers during process
  - May John Laurens be removed from school?




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## Emergency Removals

*"Emergency removal. Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act."*

- 34 C.F.R. § 106.44(c)

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## Emergency Removals

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• 34 C.F.R. § 106.44(c)

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## Emergency Removals

*"As a further example, nothing in § 106.44(c) prevents a recipient from involving a student's IEP team before making an emergency removal decision, and § 106.44(c) does not require a recipient to remove a respondent where the recipient has determined that the threat posed by the respondent, arising from the sexual harassment allegations, is a manifestation of a disability such that the recipient's discretion to remove the respondent is constrained by IDEA requirements."*

• 85 FR 30026

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## Running Hypothetical

▪ Guidance Counselor Aaron Burr is investigating the formal complaint, and believes that Mark Lafayette presents an immediate threat to the safety of his peers

• May Mark Lafayette be removed from school?

Yes, subject to the requirements of notice and due process

• Must we conduct an MDR prior to removal?

– Check state law...

– Required for **disciplinary** removals; emergency removals may not be disciplinary

• Must his IEP Team meet?

– Guidance indicates the team **should** meet to consider a revision to his placement/services if he'll be removed for 10+ days

– Not explicitly required by regulation, but you still owe FAPE

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## Sticks and Stones

- Burr believes that John Laurens is highly likely to continue to verbally harass peers during process
  - May John Laurens be removed from school?
    - No! Verbal harassment does not present an immediate threat to the physical health and safety of others.

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## Running Hypothetical



- Both respondents verified under the IDEA, will be subject to procedural safeguards
- Title IX Coordinator Dolley Madison is familiar with both respondents
  - She believes that \*if\* the allegations are true, John's alleged misconduct would have been caused by, or directly related to, his disability
  - She believes that \*if\* the allegations are true, Mark's alleged misconduct would not be related to his disability
- Why is this important???

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## Discipline

- Students with disabilities may be disciplined subject to procedural safeguards of the IDEA
- Discipline may only be administered after a final determination of responsibility finds a respondent responsible after the formal grievance procedure

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### Discipline NOT Required

"Even when conduct committed by a respondent with a disability constitutes sexual harassment (e.g., because the conduct constitutes sexual assault, or because the conduct is severe, pervasive, and objectively offensive), the Department does not second guess whether the recipient imposes a disciplinary sanction on a respondent who is found responsible for sexual harassment, and thus recipients have flexibility to carefully consider the kind of consequences that the recipient believes should follow in a situation where a respondent with a disability unintentionally committed conduct that constituted sexual harassment, perhaps not realizing the effect of the conduct on the victim."

• 85 FR 30026

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### Discipline NOT Required

"For example, the recipient could determine that counseling or behavioral intervention is more appropriate than disciplinary sanctions for a particular respondent. (We note that in such a circumstance, the complainant is still entitled to remedies designed to restore or preserve the complainant's equal educational access.)"

• 85 FR 30026

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### 34 CFR § 300.530(b)(1)

"School personnel... may remove a child with a disability who violates a code of student conduct from his or her current placement... for not more than 10 consecutive school days... and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536)."

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 **Not more than 10 consecutive school days**

- 10 consecutive days per offense
- Additional removals in same school year for separate incidents of misconduct allowable so long as not a "pattern of removals" constituting a "change in placement"

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 **Major Discipline**

- Removals for more than 10 days
- "Expulsion"
- Removal for 45 days for special issues
- Requires MDR
  - The MDR must be conducted by "the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA)." 34 CFR 300.530(e)(1)
  - Team must "review all relevant information in the student's file, including the child's IEP, (and) teacher observations ... and any relevant information provided by the parents."

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 **Manifestation Determination**

- Was this misbehavior caused by the student's disability?
- Was conduct in question caused by or did it have a direct and substantial relationship to the child's disability?
- Was the misconduct a direct result of the district's failure to implement the IEP?

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## Manifestation Determination

- If no:
  - Child can be treated like a regular education student consistent with state law
  - Sort of ...
- If yes:
  - Cannot remove
  - Must conduct FBA, implement BIP, OR review existing BIP
  - Must return to prior placement (unless agreement otherwise)

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## Misconduct is a Manifestation

34 CFR 300.530(f)

- If student's conduct is a manifestation of the student's disability, the IEP team must:
  - Conduct a functional behavioral assessment (provided the district had not conducted such assessment prior to the conduct at issue) and implement a behavioral intervention plan for the child.
  - When a behavioral intervention plan already has been developed, review the plan and modify it as necessary to address the behavior.
  - Return the child to the placement from which he was removed, unless the parent and district agree to a change in placement as part of the modification of the behavioral intervention plan.

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## IAES May Be an Option

- 34 CFR 300.530 (g)
  - May remove a student to IAES for 45 days (regardless of manifestation) if student . . . has inflicted serious bodily injury upon another person while at school.
- Whether student inflicted serious bodily injury is a fact specific inquiry

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 **Serious Bodily Injury**

- The term "serious bodily injury" means bodily injury that involves:
  - a substantial risk of death,
  - unconsciousness,
  - extreme physical pain,
  - protracted and obvious disfigurement, or
  - protracted loss or impairment of the function of a bodily member, organ, or mental faculty

18 USC § 2246(4)

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 **Different Outcomes ≠ Bias**

- "Any different treatment between students without disabilities and students with disabilities with respect to emergency removals, may occur due to a recipient's need to comply with the IDEA, Section 504, the ADA, or other disability laws, but would not be permissible due to bias or stereotypes against individuals with disabilities."
  - 85 FR 30026
- Same would be true of discipline

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 **Changes in Placement**

- If a student's behavior is likely a manifestation, it may be more appropriate to address behavior via services and placement rather than discipline
- Once discipline is initiated, student's placement cannot be changed without bilateral agreement if misconduct is a manifestation
  - Can hinder your ability to effectively meet student's needs
  - Can hinder your ability to ensure safe atmosphere

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### 34 CFR § 300.530(a)

"School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct."

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### Ogallala (NE) Pub. Sch., 106 LRP 913 (SEA NE 12/15/05)

- Student with Down syndrome transitioning from elementary to middle school
- Parents disagreed with program and methods
- Some sexualized misbehavior
  - Team determined that the misbehavior was a manifestation
  - Placed student in intensive social skills program

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### Ogallala (NE) Pub. Sch., 106 LRP 913 (SEA NE 12/15/05)

- Parents sued claiming that the social skills program was a punitive removal
- H.O.: placement, not disciplinary
  - "A plan needed to be put in place to deal with that behavior before it seriously interfered with [the student's] educational progress. That plan was put into place, [the student's] behavior improved, [the student] met the required goals, and the Respondent returned [the student] to the regular education classroom."

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## Running Hypothetical

- Guidance Counselor Burr is in the process of investigating Maria's claims.
- Principal Tom Jefferson\* has emergency excluded John Laurens during the pendency of the investigation
  - Manifestation required?
- Mark LaFayette's IEP team decided to remove him to an intensive day program which specializes in helping students with disabilities understand healthy sexuality.
  - Manifestation required?

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**Title IX Team Training:  
Administration of the Title IX Program**




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 **Disclaimers**

- KSB School Law represents only public schools and related entities (like Educational Service Units).
- We DO NOT represent individual teachers, students, parents, or district employees.
- This presentation and these slides DO NOT constitute legal advice—they are for training purposes only. Any questions about your obligations or specific situations should be discussed with your legal counsel.
- Neither this presentation nor these slides shall be construed to create an attorney-client relationship between you and KSB School Law or between you and us.
- You should have no expectation of confidentiality or that anything that discussed is privileged.
- Material discussed in this training is explicit.

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 **Session Overview**

- Policy Requirements
- Notice Requirements
- Publication Requirements
- Training Requirements
- Documentation and Record-Keeping
- Complaints of Harassment/Discrimination not Sexual Harassment

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### Heavy is the Head...

- Each recipient designates at least one Title IX Coordinator to "coordinate its efforts to comply with its responsibilities" under the regulations
- Explicitly mentioned
  - Ensure grievance procedure is followed
  - Respond to harassment, complaints and inquiries
  - Coordinate provision of supportive measures
  - Implement remedies
- Implicit
  - Coordinate to fulfill all the other obligations (training, policies, notices, etc.)

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### Policy Requirements

- Must have Title IX policy prohibiting discrimination on the basis of sex in any education program or activity it operates, and that it is required by Title IX not to discriminate in such a manner
  - Policy should specify that requirement not to discriminate extends to admission and employment
  - Should state that inquiries about Title IX may be referred to Coordinator or assistant secretary
    - 34 C.F.R. § 106.8(b)(1)

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### Grievance Procedures

- Required to adopt "grievance procedures"
  - Not necessarily in "policy" but we recommend it
- Grievance procedures must:
  - Provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part
    - Think general complaint process
  - Provide processes that comply with § 106.45 to address formal complaints

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## Notice Requirements

- Must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient:
  - Of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator
  - That the recipient does not discriminate on the basis of sex in the education program or activity that it operates; that it is required by Title IX and this part not to discriminate in such a manner including in admission and employment; and that inquiries about the application of Title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both
  - Notice of the grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond

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  - That the recipient does not discriminate on the basis of sex in the education program or activity that it operates; that it is required by Title IX and this part not to discriminate in such a manner including in admission and employment; and that inquiries about the application of Title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both
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**Boiled Down**

- **Provide notice of:**
  - Title IX Policy
  - Grievance Procedures
    - Including how to file a complaint
    - Including processes undertaken in response to complaint
  - Notice of nondiscrimination
    - Including extension to admission/employment
    - Including ability to make inquiries to coordinator and ED Assistant Secretary
  - Notice of designated coordinator and contact information

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**Handbooks and Catalogs**

- **Handbooks and catalogs must prominently display**
  - Grievance Procedures
    - Including how to file a complaint
    - Including processes undertaken in response to complaint
  - Notice of nondiscrimination
    - Including extension to admission/employment
    - Including ability to make inquiries to coordinator and ED Assistant Secretary
  - Notice of designated coordinator and contact information

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**Website**

- Website must prominently display (i.e., its own page)
  - Grievance Procedures
    - Including how to file a complaint
    - Including processes undertaken in response to complaint
  - Notice of nondiscrimination
    - Including extension to admission/employment
    - Including ability to make inquiries to coordinator and ED Assistant Secretary
  - Notice of designated coordinator and contact information
- Website must have available ALL materials used to train TIX Coordinators, investigators, decision-makers, and informal resolution facilitators
- We recommend including a link to submit complaint

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**Be Consistent**

“A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.”

- 34 C.F.R. § 106.8(b)(2)(ii)

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**Training Requirements**

- Title IX Coordinator, investigator, decision-maker and any informal resolution facilitator must receive training on:
  - Definition of sexual harassment in § 106.30
  - Scope of the recipient’s program or activity
  - How to conduct an investigation and grievance process – including hearings, appeals, and informal resolution processes
  - How to serve impartially and avoid prejudgment, conflicts, and bias

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### Training Requirements

- Decision-makers must receive training on:
  - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- Investigators must receive training on:
  - Issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section

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### Training Requirements

"Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment."

- 34 C.F.R. 106.45(1)(iii)

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### Documentation and Record Keeping

- Must maintain for a period of seven years records of:
  - Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
  - Any appeal and the result therefrom;
  - Any informal resolution and the result therefrom; and
  - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process

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**Documentation and Record Keeping**

- Must maintain for a period of seven years records of:
  - Any action taken in response to a report or formal complaint of sexual harassment
    - Document the basis for its conclusion that its response was not deliberately indifferent
    - Document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
    - If no supportive measures provided, document the reasons why such a response was not clearly unreasonable in light of the known circumstances

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**Clarifications**

"Any record that the recipient creates to investigate an allegation, regardless of later dismissal or other resolution of the allegation, must be maintained for seven years. Therefore, recipients must preserve all records, even those records from truncated investigations that led to no adjudication because the acts alleged did not constitute sex discrimination under Title IX and the formal complaint (or allegation therein) was dismissed. The Department also wishes to clarify that the date of the record's creation begins the seven year retention period."

• 85 FR 30026

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**Other Complaints**

- Not all complaints will rise to the level of "sexual harassment"
  - Complaints may also argue discrimination on the basis of sex, generally
  - Misconduct may be sex-based or harassment/bullying on the basis of sex, but fail to meet the definition of "sexual harassment"
- How to respond?
  - Grievance procedure unnecessary
  - Respond pursuant to general complaint procedure or disciplinary processes

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