

A presentation slide with a black background and white text. On the left side, there is a vertical grey bar with two white rectangular markers. The text is centered and reads: "TITLE IX TRAINING" in a large, bold, serif font, followed by "FREEDOM AREA SCHOOL DISTRICT" in a slightly smaller, bold, serif font. Below this, the date "November 3, 2020" is written in a smaller, italicized serif font. At the bottom right, the logo for "TUCKER ARENSBERG Attorneys" is displayed, with "TUCKER" and "ARENSBERG" in a large serif font and "Attorneys" in a smaller sans-serif font below them. At the very bottom, there are two lines of small text: "©2020 Tucker Arensberg, P.C." on the left and "www.tuckerlaw.com" on the right.

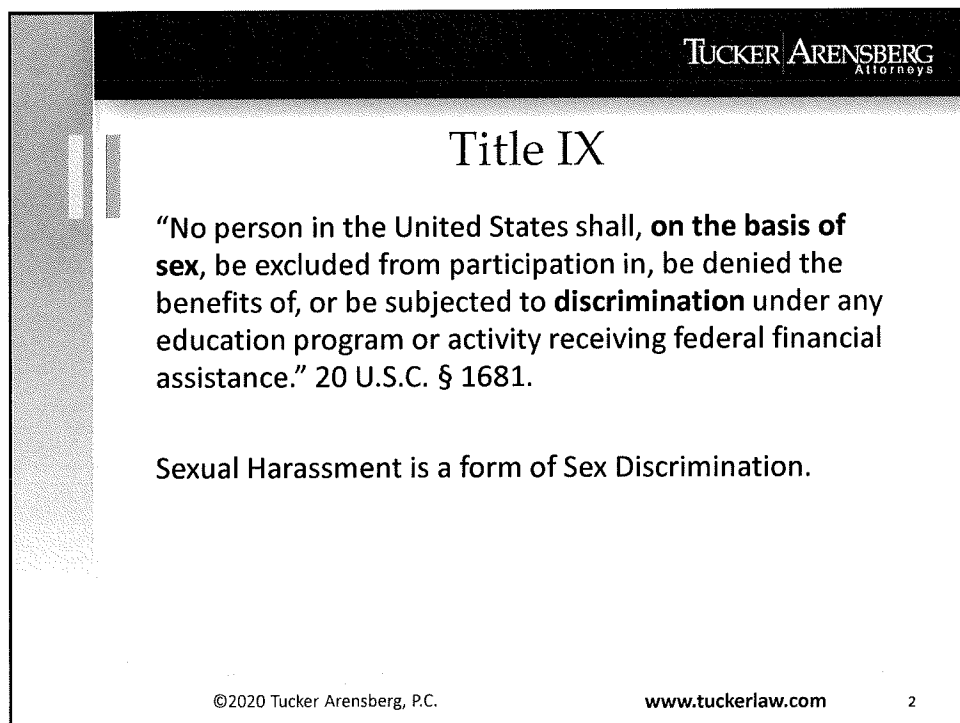
**TITLE IX TRAINING**

**FREEDOM AREA SCHOOL DISTRICT**

*November 3, 2020*

**TUCKER ARENSBERG**  
Attorneys

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A presentation slide with a white background and black text. On the left side, there is a vertical grey bar with two white rectangular markers. The text is centered and reads: "Title IX" in a large, serif font. Below this, a quote is displayed: "No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to **discrimination** under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681. Below the quote, the text "Sexual Harassment is a form of Sex Discrimination." is written in a serif font. At the top right, the logo for "TUCKER ARENSBERG Attorneys" is displayed. At the very bottom, there are two lines of small text: "©2020 Tucker Arensberg, P.C." on the left and "www.tuckerlaw.com" on the right, followed by a small number "2" on the far right.

**TUCKER ARENSBERG**  
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**Title IX**

"No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to **discrimination** under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681.

Sexual Harassment is a form of Sex Discrimination.

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## What does “on the Basis of Sex” mean?

- Title IX’s prohibition of discrimination “on the basis of sex” encompasses sex in the biological sense, gender, and gender stereotypes. Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989).
- It also applies to discrimination against homosexual and transgender students.
  - In Bostock v. Clayton County, 140 S. Ct. 1731 (2020), the Supreme Court held that discrimination against a person for being transgender is discrimination “on the basis of sex.” As the Supreme Court noted, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” In August 2020, the Fourth Circuit held that “we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him “on the basis of sex.”
  - Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 284 (W.D. Pa. 2017) (court issued a preliminary injunction against the school district and in favor of the students, holding they are likely to succeed on the claim that forcing them to use restrooms which either are single-user or those corresponding with their biological sex violates their right to Equal Protection under the law as guaranteed by the Fourteenth Amendment.
  - A.H. by Handling v. Minersville Area Sch. Dist., 2019 WL 4875331 (M.D. Pa. 2019) (partially granted an elementary school student’s (A.H.) motion for summary judgment on a claim that Minersville Elementary School prohibited A.H. from using girls’ restrooms at school, and at school sponsored events, in violation of Title IX’s prohibitions against sex discrimination and the Equal Protection Clause of the U.S. Constitution.)

## New Regulations

- On May 6, 2020, the United States Department of Education issued its long-awaited Final Regulations (the “Regulations”) that focus on Title IX protections for victims of sexual misconduct.
- **These apply to Students and Employees.**
- **General Rule:**

A School District with Actual Knowledge of Sexual Harassment in an Education Program or Activity of the School District against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

## Failure to Comply with Regulations

The Department of Education will hold a District liable when it:

1. Commits sex discrimination (i.e., by being deliberately indifferent to actual knowledge of actionable sexual harassment); and
2. Violates regulatory obligations that are required in order to further Title IX's non-discrimination mandate.

In other words, where a Complainant wants a District to investigate allegations, the District must conduct an investigation and adjudication, and provide remedies to that Complainant if the Respondent is found responsible.

## New Regulations – Training Requirements

- Title IX Personnel (Title IX Coordinators, Investigators, Decision-Makers, Mediators) must be trained on:
  - The definition of Sexual Harassment;
  - The scope of the District's Education Program or Activity;
  - 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.
- Decision-makers and investigators must receive training on issues of **relevance**, including how to apply the rape shield protections provided for complainants.

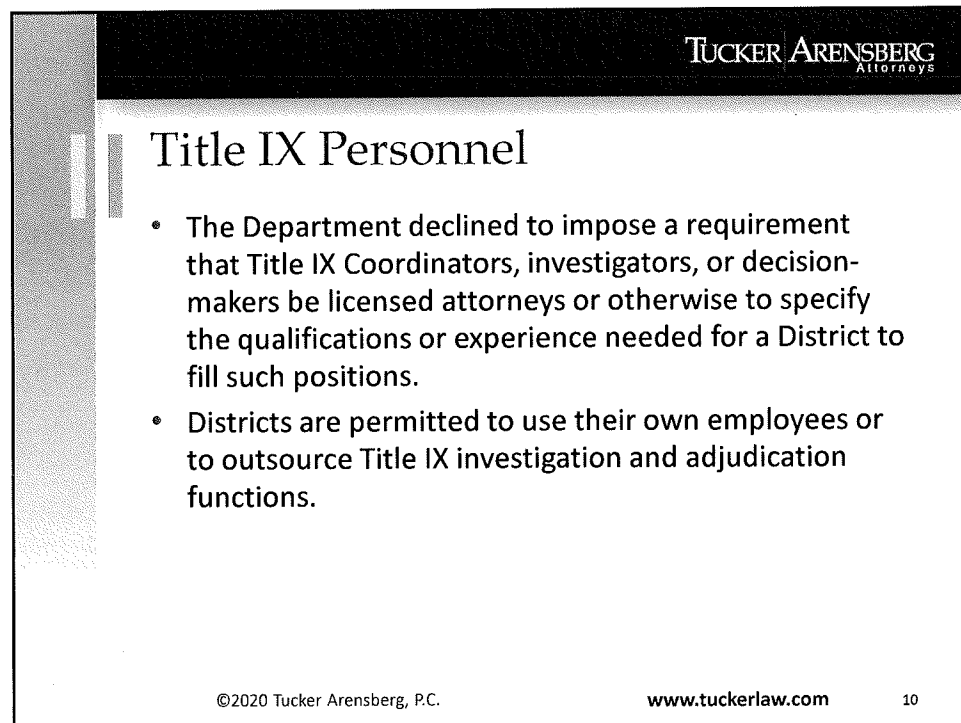
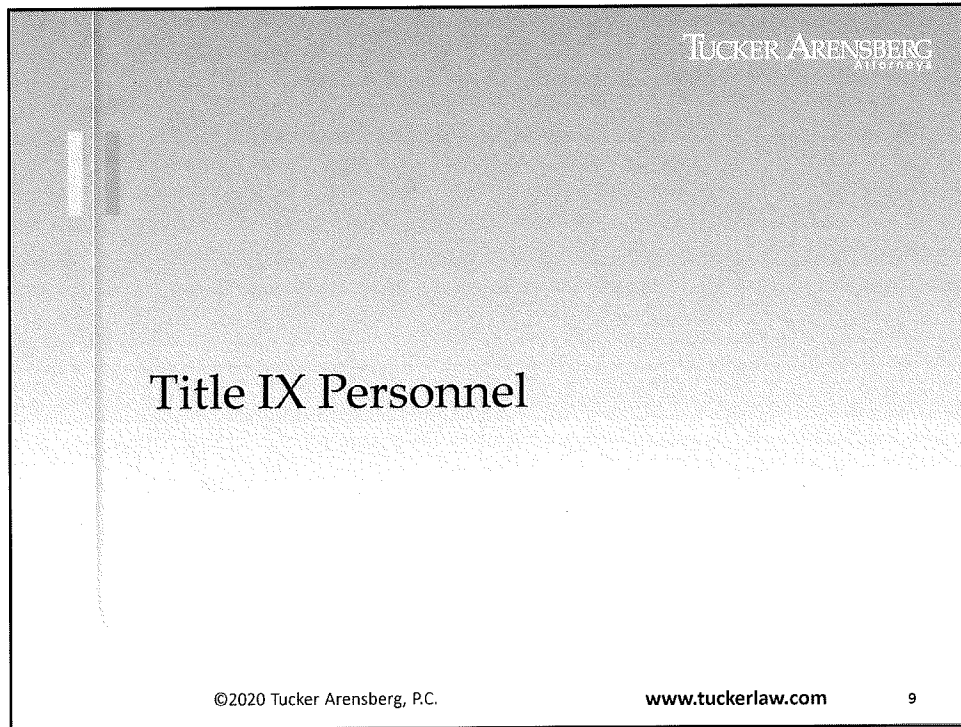
## Title VII and Title IX - Employees

- Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for a covered employer to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of their employment, because of such individual's race, color, religion, sex, or national origin.
- The Supreme Court has recognized that sexual harassment may constitute sex discrimination under Title VII when it is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)
- The Department of Education rejected the positions of commenters that District employers cannot comply with Title VII regulations, caselaw, and statutory schemes, and the new Title IX regulations.
- The Department also rejected the position that Title VII claims preempt Title IX claims in this setting.

## Title VII and Title XI - Guidance

- Instead, the Department maintained that where a claim may implicate employees as complainants or respondents, recipients can process claims through the specific grievance process in the new Title IX regulations, and also process a claim through a Title VII grievance process.
- Where a complainant may allege race and gender discrimination:
  - The District would need to investigate the gender discrimination claim through the Title IX process;
  - The race discrimination claim could not be investigated under the Title IX process as it does not meet jurisdictional requirement.





## Title IX Coordinator

- Each District must designate at least one employee to be the Title IX Coordinator to coordinate compliance efforts with the Regulations
- Title IX Coordinators shall accept reports of sex discrimination, including sexual harassment, at any time.
- the District must notify all Interested Persons of the name or title, office address, electronic mail address, and telephone number of the Title IX Coordinator(s).
  - Interested Persons: “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”

## Investigator(s)

- The Investigator carries out an investigation by conducting interviews of the involved individuals and witnesses, collecting documentary and other evidence, and drafting an investigative report.
- The Title IX Coordinator may serve as Investigator.

## Decision-Maker

- The Decision-Maker reaches the responsibility determination (“Determination”) by applying the standard of evidence selected by the District: “preponderance of the evidence”
- The Title IX Coordinator and the Investigator may not also be a Decision-Maker.
- In addition, each District will need to appoint an Appeal Decision-Maker to hear appeals.

## Mediator

- If the District adopts an informal resolution process, it must designate a properly trained facilitator (i.e., a mediator) for that process.
- The Regulations do not preclude the Title IX Coordinator from serving as the Mediator.

# I. Sexual Harassment

## Sexual Harassment

- Under the Regulations, **Sexual Harassment** is defined as any of the following conduct on the basis of sex:
  1. A **school employee** conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct ("*quid pro quo*");
  2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity ("Hostile Environment"); or
  3. Sexual assault, dating violence, domestic violence, or stalking ("Single Event").

## 1) *Quid Pro Quo* Sexual Harassment

### Elements:

- District employee;
- Conditioning a District benefit, aid or service;
- On participation in an unwelcome sexual act.

## *Quid Pro Quo* - Hypotheticals

1. Student is struggling in class. Student asks Teacher for tutoring help. Teacher agrees, but when Student arrives, Teacher makes advances on Student. Student rejects the advances and Teacher refuses to tutor Student unless Student agrees to engage in sexual activity.
2. Student A is struggling in class and asks Student B for tutoring help. Student B agrees to help on the condition that Student A agree to certain sexual favors.
3. Supervisor promises to give Employee a recommendation for a promotion in exchange for sexual favors.
4. Supervisor ask Employee on a date.

## 2) Hostile Environment Sexual Harassment

### Elements:

- Unwelcome conduct;
- Determined by a reasonable person;
- To be so severe, pervasive, and objectively offensive;
- That it effectively denies a person equal access to the school's education program or activity.

**NOTE:** Test includes both objective and subjective elements and was taken from the Supreme Court's decision in Davis v. Monroe County Board of Education ("Davis")

## Hostile Environment – Verbal Conduct

- Intimate nicknames
- Flirting/Sexual Advances
- Boasting of Sexual Prowess
- Intimate Questions about Sex Life
- Harassing voicemails and texts
- Excessive compliments
- Sexual innuendo
- Whistling, cat-calls

## Hypotheticals

1. Student A repeatedly asks Student B what she and her boyfriend did over the weekend, whether she wants to date other students at the school. Eventually, Student B tells Student A that the questions are inappropriate and should stop. Student A persists and Student B files a complaint.
2. Employee A likes to tell dirty jokes at work. Employee A sends emails that contain sexual innuendo and post similar material on bulletin boards in the teachers' lounge. Employee A will also include sexual language in her conversations. One day, Employee B makes a sexual joke to Employee A and Employee A files a complaint.

## Hostile Environment – Physical Conduct

- Hugging/Kissing
- Touching hair, body or clothing
- Giving Neck or Shoulder Massage
- Cornering

## Hypotheticals

1. Student A regularly puts his arms around other students' backs or gives them a "buddy type" shoulder massage when working in group assignments

What should a teacher do if he/she witnesses this?

Does it matter whether anyone complains?

## Hypotheticals

- 1b. What if Student A is a female? Does the analysis change?



## Hostile Environment – Other Conduct?

- Written messages (texts, notes)
- Visual images (drawings, photographs)
- Gestures

## 3) Single Event - Sexual Assault

**Sexual Assault** means a sexual offense under state or federal law that is classified as a **forcible** or **nonforcible sex offense** under the uniform crime reporting system of the Federal Bureau of Investigation.

- Forcible Sex Offenses: Forcible Rape, Forcible Sodomy, Sexual Assault with an Object, Forcible Fondling.
- Nonforcible Sex Offenses: Incest, Statutory Rape.

“Forcible” generally means without consent.

### 3) Single Event - Dating Violence

Dating violence means 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 is determined by the following factors:

1. Length of relationship.
  2. Type of relationship.
  3. Frequency of interaction between the persons involved in the relationship.
- **Note:** Relevant to District if it occurs during a District Educational Program or Activity (e.g., Prom).

### 3) Single Event - Domestic Violence

Domestic violence includes felony or misdemeanor crimes of violence committed:

1. by a current or former **spouse** or intimate partner of the victim;
  2. by a person with whom the victim shares a child in common;
  3. by a person who is **cohabitating** with or has cohabitated with the victim as a spouse or intimate partner;
  4. by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving federal funding; or
  5. by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.
- **NOTE:** Unlikely to arise in any District Program or Activity

### 3) Single Event - Stalking

Stalking means to engage in a course of conduct directed at a specific person that would cause a reasonable person to either:

1. Fear for their safety or the safety of others; or
  2. Suffer substantial emotional distress.
- Typical stalking behaviors include: following someone; sending unwanted gifts, letters, emails, or social media messages; monitoring phone calls or computer use; and using technology such as hidden cameras, social media or GPS systems to track someone's location.
  - Pennsylvania courts have determined that "substantial emotional distress" equals "great concern and alarm" Com. v. D'Collanfield, 805 A.2d 1244, 1249 (Pa. Super. 2002)

### Hypothetical

- ☐ District concludes that Student A is "stalking" Student B, but also determines that the conduct is not sufficiently "severe, pervasive and objectionably offensive" as to create a Hostile Environment. Student A files a formal complaint.
- ☐ Is the conduct Title IX Sexual Harassment?

## Answer

Yes. The Preamble to the Regulations clarify that:

*the Department's inclusion of sexual assault, dating violence, domestic violence, and stalking in the § 106.30 definition of sexual harassment, without requiring those sex offenses to meet the Davis elements of severity, pervasiveness, and objective offensiveness, appropriately guards against, for instance, some sexual assaults or incidents of dating violence or domestic violence being covered under Title IX while other sexual assaults or incidents of dating violence or domestic violence are deemed not to be "pervasive" enough to meet the Davis standard.*

## Single-Events - Hypothetical

Student A, during school hours and while in class, shares nude pictures of Student B via the social media app Instagram. The pictures are seen by many people and Student B is humiliated and is unable to return to school. However, Student A has never engaged other objectionable conduct against Student B.

- Is this Sexual Harassment?

## Discussion

- The Supreme Court in Davis v. Monroe County Board of Education observed that a single instance of sufficiently severe harassment on the basis of sex may have the systemic effect of denying the victim equal access to an education program or activity.
- The Regulations also cite to the withdrawn 2011 Dear Colleague Letter which stated that:

The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.

## II. Scope of Education Program or Activity

## District's Education Program or Activity

- The Regulations define this term as:  
*locations, events, or circumstances over which the District exercised substantial control over both the Respondent and the context in which the Sexual Harassment occurs.*
- 2001 Guidance states that Title IX protects students in connection with:  
*all of the academic, educational, extracurricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.*

## Hypothetical

Student A shares nude pictures of Student B via social media with over the weekend. The pictures are seen by many students and are recirculated among more students. Student B is humiliated and is emotionally unable to return to school, causing her to withdraw and enroll in a charter school.

- Is this Sexual Harassment?

## Discussion

- Did this occur in the District's Education Program or Activity?
- Would punishment violate Student A's First Amendment rights?
- B.L. by and through Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020)
  - High school student's vulgar and crude speech, in the form of social media post made over the weekend, away from school, and without use of school resources, took place "off campus"
  - while student's post mentioned school and reached classmates and school staff, student's post did not take place in a school sponsored forum, nor did it occur in a context that bore imprimatur of school, and district did not own or operate social media platform
  - Holding: Some vulgar, crude, or offensive speech is beyond the power of schools to regulate.
  - Open Question: "speech that is reasonably understood as a threat of violence or harassment targeted at specific students or teachers, would no doubt raise different concerns and require consideration of other lines of First Amendment law."

## District's Education Program or Activity

### Policy 218 (Student Discipline): Off-Campus Activities

- This policy shall also apply to student conduct that occurs off school property and would otherwise violate the Code of Student Conduct if any of the following circumstances exist:
- The conduct occurs during the time the student is traveling to and from school or traveling to and from school-sponsored activities via school district furnished transportation.
- The student is a member of an extracurricular activity and has been notified that particular off-campus conduct could result in exclusion from such activities.[10][11]
- Student expression or conduct materially and substantially disrupts the operations of the school, or the administration reasonably anticipates that the expression or conduct is likely to materially and substantially disrupt the operations of the school.
- The conduct has a direct nexus to attendance at school or a school-sponsored activity.
- The conduct involves the theft or vandalism of school property.
- There is otherwise a nexus between the proximity or timing of the conduct in relation to the student's attendance at school or school-sponsored activities.

**NOTE:** B.L. by and through Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020) appears to invalidate highlighted text.

## Why does this Matter?

- Under the Regulations, to file a formal complaint, the Complainant must be participating in or attempting to participate in the District's education program or activity.
- In addition, under the Regulations, District's are prohibited from punishing protected speech.

## District's Education Program or Activity

### Hypothetical – Remote Learning

District, due to COVID-19, is educating its students remotely. During class, Student texts naked pictures of another Student to other students in the class.

Is this within the District's Education Program or Activity?



## District's Education Program or Activity

### Hypothetical – Foreign Travel

Student A sexually assaults Student B while on a class trip to Toronto. The assault occurs in Canada. Student B files a formal complaint with the District alleging Title IX Sexual Harassment.

Is this governed by the new Title IX Regulations?

## Answer

No. Whether it's part of the Education Program or Activity probably depends on the facts of the case and the District's involvement in the trip.

However, the Regulations confirm that conduct that occurs against a person who is not located in the United States is not covered by Title IX.

## Does this Mean the Offender is Immune?

While the conduct is not covered by Title IX, it can still be punished. In the Preamble to the Regulations, the Department clarified that:

*nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment occurring outside the recipient's education program or activity, or occurring against a person who is not located in the United States.*

## III. Investigation and Grievance Process

### A. Responding to Reports of Discrimination

## Responding to Reports

Districts must respond “promptly” and not in a “deliberately indifferent” manner when it has “actual knowledge” of “sexual harassment” in its “education program or activity” against a person in the United States.

- “Actual Knowledge” – notice, including a formal complaint, of Sexual Harassment (including allegations) to the Title IX Coordinator **or any employee of the District.**
- “Deliberately Indifferent” – *i.e.*, “clearly unreasonable in light of the known circumstances.”

## Responding to Reports

- **Policy:** An individual who believes they have been subjected to discrimination (including Sexual Harassment) is encouraged to immediately report the incident to the building principal, building administrator or Title IX Coordinator using the Report Form or by making a general report verbally or in writing to the building principal, building administrator or the Title IX Coordinator.
- Such a report may be made at any time (including during non-business hours) by using the telephone number or email address, or by mail to the office address, listed for the **Title IX Coordinator.**
- Complainants are not required to use the Report Form.

## Common Steps

- A school employee who suspects or is notified that a student has been subject to conduct that constitutes a violation of this policy shall immediately report the incident to the building principal, building administrator or Title IX Coordinator as well as properly making any mandatory police or child protective services reports required by law.
- The building principal or the building administrator shall promptly notify the Title IX Coordinator of all reports of discrimination, Title IX sexual harassment or retaliation.
- The Title IX Coordinator/Compliance Officer shall review reports and complaints, and may gather additional information from the individual submitting the report and other parties identified in the report using the Report Form

## Common Steps

Title IX Coordinator shall assess whether the report:

- Involves other Board policies or the Code of Student Conduct.
- Indicates, based on an individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of an individual.
- Involves a student identified as a student with a disability under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act.

## Common Steps

- The Title IX Coordinator shall contact the parents/guardians of the parties and provide them with information regarding the report and Title IX sexual harassment procedures and grievance process for formal complaints.
  - Section 106.6(g) of the Regulations were included to acknowledge the legal rights of parents and guardians to act on behalf of individuals with respect to exercise of rights under Title IX, including but not limited to filing a formal complaint of sexual harassment
  - If a Student is 18 years old, records related to discipline are educational records and, under FERPA, access to the education records of a student who is or has been in attendance at a school shall be granted to the parent of a student who is a minor or who remains a dependent for tax purposes. 34 C.F.R. §§ 99.10, .3, .31(a)(8).
- The Title IX Coordinator shall promptly contact the complainant regarding the report to gather additional information.
- Best Practices: Thoroughly document all steps taken in the process.

## Common Steps

- The Title IX Coordinator shall also determine what Supportive Measures may be offered to the respondent.
- The Title IX Coordinator shall consider the Complainant's wishes with respect to Supportive Measures.
- The Title IX Coordinator shall inform the Complainant of the availability of Supportive Measures with or without the filing of a Formal Complaint, and explain to the Complainant the process for filing a Formal Complaint.

## Common Steps – Special Needs

- When any party is an identified student with a disability, or thought to be a student with a disability, the Title IX Coordinator/Compliance Officer shall notify the Director of Special Education and coordinate to determine whether additional steps must be taken for the party, while the discrimination complaint procedures are implemented.

## Supportive Measures

- **What are they?**
  - Nondisciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and before or after the filing of a Formal Complaint or where no Formal Complaint has been filed.
  - Designed to restore or preserve equal access to the District's Education Program or Activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the District's educational environment, or deter Sexual Harassment.

## Supportive Measures

- **Supportive Measures**
  - Examples: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work, leaves of absence, increased security and monitoring of certain areas of the campus.
  - Confidentiality: District shall maintain as confidential any Supportive Measures provided to the Complainant or Respondent, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the Supportive Measures.

## Supportive Measures

- **Students with Disabilities:**
  - Supportive Measures may also include assessments or evaluations to determine eligibility for special education or related services, or the need to review an Individualized Education Program (IEP) or Section 504 Service Agreement based on a student's behavior. This could include, but is not limited to, a manifestation determination or functional behavioral assessment (FBA), in accordance with applicable law, regulations or Board policy.
  - The Title IX Coordinator is responsible for coordinating the effective implementation of Supportive Measures.

## Divergence

- If the Complainant elects to not file a Formal Complaint, then the procedures set forth on in your existing Policy 103 or 104 must be followed.
- If the Complainant elects to file a Formal Complaint, the new Grievance Process for Formal Complaints set forth in the new Regulations must be followed.

## Divergence

- **Discrimination** means to treat individuals differently, or to harass or victimize based on a protected classification including race, color, age, creed, religion, sex, gender, sexual orientation, genetic information, ancestry, national origin, marital status, pregnancy, or handicap/disability.
- All Title IX Sexual Harassment is Discrimination, but not all Discrimination is Title IX Sexual Harassment
- **Sex Discrimination/Harassment** that does not meet the definition of Title IX Sexual Harassment would follow the Attachment 2 procedures.
- Claims of Retaliation during the Attachment 3 procedures would follow the Attachment 2 procedures.



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## B. Discrimination Procedures

**Attachment 2: Discrimination Complaint/Procedures**

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## Discrimination Procedures

1. Initial Communications/Supports
  - Implement protective/supportive measures
  - Inform Complainant of his/her rights and the process for investigating the complaint
  - If Complainant is under the age of 18, attempt to obtain consent from parents for Complainant to participate
2. Informal Remedies
  - May be offered upon receipt of a report
  - Resolution must be signed by the parties and delivered to the Title IX Officer

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## Discrimination Procedures

### 3. Investigation

- Investigator selected by Title IX Coordinator (can be the Title IX Coordinator);
- Duty to “conduct an adequate, reliable and impartial investigation.”
- Complainant and Respondent may provide witnesses and evidence.
- Participants shall be directed to keep the matter confidential.
- Obligation to investigate remains even if there are parallel criminal investigations.
- Investigator shall submit a report to the Title IX Coordinator within 15 days of the initial report.

## Discrimination Procedures

### 4. District Action

- If the Investigation find that there has been a violation, District “shall take prompt, corrective action designed to ensure that such conduct ceases and that no retaliation occurs.”
- Disciplinary actions shall be consistent with the Code of Student Conduct, Board policies and administrative regulations, district procedures, applicable collective bargaining agreements, and state and federal laws and regulations.

## Discrimination Procedures

### 5. Appeals

- Either party has the right to appeal within 15 days of receiving notice of the outcome of the investigation.
- Appeals shall be submitted to Title IX Coordinator or Superintendent if Title IX Coordinator conducted the investigation.
- Response to the appeal shall be issued within 20 days.

## Retaliation

**Retaliation** is typically prohibited and constitutes conduct against any person for making a report of discrimination or participating in a related investigation or hearing, or for opposing practices the person reasonably believes to be discriminatory. A complaint of retaliation shall be handled in the same manner as a complaint of discrimination.

The **Regulations** provide a more detailed definition of retaliation:

No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX or its implementing regulations.

## Retaliation

The Regulations provides the following examples of Retaliation:

- Bringing code of conduct charges against an individual that do not involve sex discrimination/harassment, but arise out of the same circumstances, for the purpose of interfering with Title IX rights
- The District disclosing the identity of the Complainant, Respondent or Witness outside of the Title IX Grievance Process or otherwise required by law. (i.e., the District has a confidentiality requirement)
  - NOTE: The regulations prohibit the District from issuing a gag order to the participants

The Regulations provide that the following is not Retaliation:

- Exercising First Amendment rights;
- Charging an individual for making a false statement in bath faith (i.e., lying) during the grievance process

## Retaliation - Hypothetical

Student A submits a Formal Complaint of Sexual Harassment against Student B. Student A informs the Title IX Coordinator that Student B's friend, Student C, witnessed the event and can corroborate the allegations. Student C testifies against Student B. Thereafter, Student C is ostracized by the group, a rubber rat is put in his locker, they glare at him, and encourage others not to socialize with him.

Is this retaliation?

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## C. Title IX Sexual Harassment Grievance Process

### Attachment 3: Title IX Sexual Harassment Grievance Process

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## Formal Complaint

- Definition: 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.
- Complainant must be participating in or attempting to participate in the Education Program or Activity of the District
- May be any document or electronic submission (e.g., email) that either contains Complainant's actual or digital signature or otherwise indicates that the Complainant is filing the Formal Complaint.
- Title IX Coordinator can file a Formal Complaint if Complainant refuses "if doing so is not clearly unreasonable in light of the known circumstances." This will generally exist when the facts indicated that failure to investigate equates to being deliberately indifferent. In this case, Title IX Coordinator is not the Complainant.

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### III. The Sexual Harassment Formal Complaint Grievance Process

#### B. Background and Notice Requirements

### Background

General Requirements. The Grievance Process must:

1. Treat Complainants and Respondents equitably;
2. Prohibit the imposition of any disciplinary sanctions (other than Supportive Measures) prior to completion of the process;
3. Provide remedies designed to restore or preserve equal access to the District's Education Program or Activity;
4. Require an objective evaluation of all relevant evidence and credibility determinations;
5. Require that Title IX Personnel not have a **conflict of interest or bias** for or against Complainants or Respondents generally or an individual Complainant or Respondent;

## Background

6. Include a presumption that the Respondent is not responsible for the alleged conduct until a determination regarding responsibility is made;
7. Provide reasonably prompt time frames for conclusion of the grievance process;
8. Set forth the range of possible disciplinary sanctions and remedies;
9. State the standard of evidence to be used to determine responsibility;
10. Set forth the procedures and permissible bases for to appeal; and
11. Describe the range of Supportive Measures.

## Background

### Timeframes

- Established timeframes set forth in the procedures may be adjusted to allow for a temporary delay or a limited extension of time for good cause
- Good cause includes:
  - The absence of a party, a party's advisor or a witness;
  - Concurrent law enforcement activity; and/or
  - Need for language assistance or accommodation of disabilities
- Notice setting forth basis for an extension should be sent to parties and kept in the file

## Notice

**Step 1: Written Notice:** When a Formal Complaint is filed, the Title IX Coordinator shall provide written notice to all parties that provides:

1. Notice of the district's grievance process for formal complaints;
2. Notice of the Districts' informal resolution process (if any);
3. Notice of the **allegations** potentially constituting Title IX sexual harassment, including sufficient details (identity of the parties, conduct at issue, date and location of the alleged incident) known at the time and with sufficient time to prepare a response before any initial interview;

## Notice

4. A statement that a written determination regarding responsibility shall be made at the conclusion of the grievance process for formal complaints and, until that time, the **respondent is presumed not responsible** for the alleged conduct.
5. Notice that parties may have an **advisor** of their choice (e.g., attorney) who may inspect and review evidence.
6. Notice that Board policy and the district's Code of Student Conduct prohibits knowingly making **false statements** or knowingly submitting **false information**.

If additional allegations come to light during the investigation, the Title IX Coordinator shall provide notice of these allegations to the parties.



## Hypothetical - Notice

**Does the Title IX Coordinator need to issue the Written Notice prior to having the Investigator meet with the accused, Respondent?**

Yes. The Preamble to the Regulations provide:

*The Department understands commenters' concerns that investigators (whether law enforcement or not) may believe that catching a respondent by surprise gets at the truth better than giving a respondent notice of the allegations with sufficient time for the respondent to prepare a response, including by making it less likely that a respondent has time or opportunity to destroy evidence or manipulate testimony. However, the Department agrees . . . that notice of the allegations is an essential feature of a fair process; without knowing the scope and purpose of an interview a respondent will not have a fair opportunity to seek assistance from an advisor of choice and think through the respondent's view of the alleged facts.*

## Hypothetical

**Can the destruction of evidence be used against a party?**

Yes. The Department explains in the Regulations that:

*§ 106.45(b)(2) requires the initial written notice to the parties to include a statement about whether the recipient's code of conduct prohibits false statements, and § 106.45(b)(5)(vi) gives both parties equal opportunity to inspect and review all evidence gathered by the recipient that is directly related to the allegations, such that if relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker can take that into account in assessing the credibility of parties, and the weight of evidence in the case.*

### III. The Sexual Harassment Formal Complaint Grievance Process

#### C. Informal Resolution

### Informal Resolution

- **Step 2 – Informal Resolution**
  - **Not Available** where Formal Complaint alleges that an **Employee Harassed a Student**;
  - Only available where a **Formal Complaint has been filed**;
  - Can take many forms, including mediation, facilitated discussion, restorative practices, acknowledgement and apologies;
  - Must be Voluntary;
  - Can be initiated at any time before there is a written determination

## Informal Resolution

### Written Notice – The Offer of Informal Resolution must disclose:

- The allegations;
- The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a Formal Complaint arising from the same allegation;
- That, at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process;
- The consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

## Informal Resolution

### Additional Requirements

- If the matter is resolved to the satisfaction of the parties, the district employee facilitating the informal resolution process shall document the nature of the complaint and the proposed resolution of the matter, have both parties sign the documentation and receive a copy, and forward it to the Title IX Coordinator.
- The Title IX Coordinator shall contact the complainant to determine if the resolution was effective and to monitor the agreed upon remedies
- The Title IX Coordinator shall document the informal resolution process, responses from all parties, and include an explanation of why the district's response was not deliberately indifferent to the reported complaint of sexual harassment.

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## III. The Title IX Sexual Harassment Formal Complaint Grievance Process

### D. Investigation

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## Investigation

### Step 3 – the Investigation

- Title IX Coordinator shall appoint the Investigator
- Investigator can be the Title IX Coordinator, a District Employee or a Third Party.
- Investigator carries out an investigation by conducting interviews of the involved individuals and witnesses, collecting documentary and other evidence, and drafting an investigative report.
- Investigator and Title IX Coordinator shall assess the scope of the Investigation

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## Investigation - Scope

- The Regulations obligate the District to undertake a thorough search for relevant facts and evidence pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena.
- District Policy provides that the investigation shall be concluded within 30 days.

## Investigation - Requirements

### The District shall:

1. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the District and not on the parties.
2. Provide an equal opportunity for the parties to present witnesses and evidence;
3. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
4. Provide the parties with the same opportunities to have others present during any grievance proceeding (including an attorney);

## Investigation - Requirements

5. Provide timely written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings to a party who is expected to participate;
6. Provide an equal opportunity for the parties to inspect and review any evidence obtained as part of the investigation;
7. Send this evidence to the parties at least 10 days prior to completion of the Investigative Report;
8. Allow and consider written responses from the parties;
9. Create an Investigative Report;
10. Send the Investigative Report to the parties and the Decision-Maker at least 10 days prior to the determination of responsibility.

## Investigation – Best Practices

### Selecting the Proper Investigator(s):

1. Goal: Independent, impartial and professional
2. Proper Training (e.g., Human Resources or Student Services Departments)
3. No stake in the outcome (e.g., not the Respondent)
4. Avoid witnesses

Investigator should not discuss any aspect of the investigation who does not have “a need to know.”

## Investigation – Best Practices

### **Investigate, Do Not Speculate:**

Until the investigation is complete, don't speculate, discuss or worry about what the District will ultimately do or not do.

- Conflating the investigation with the determination of responsibility can give the impression that the District has prejudged the issue or is going to steer the investigation toward a certain conclusion.
- The Decision-Maker will make the determination of responsibility.

### **Follow the Facts and Information where they Lead:**

- Interview everyone and anyone who appears to have firsthand knowledge of the issues (including those with exonerating information)
- Give the Respondent a chance to tell his/her side of the story
- Gather other evidence (emails, texts, photos, social media posts, security camera video) that may be relevant.

## Investigation – Best Practices

### **Investigator's Preparation:**

- Review information collected by the Title IX Coordinator
- Review Notices to Complainants and Respondents
- Review Discrimination/Sexual Harassment Policy and Grievance Process
- Fully understand the allegations that prompted the complaint.
- Review and become familiar with existing evidence.
- Don't Delay – Contact the Complainant as soon as possible
- Inform the Complainant that an investigation has commenced in a way that projects independence, impartiality and professionalism.

## Investigation – Best Practices

### Interviewing the Witness (Outline)

- Purpose (e.g., claims of sexual harassment made against John Doe)
- Scope (what you have witnessed and what others have reported to you about claims)
- Notice (provide witness with copy of notice to attend interview)
- Rules:
  - Clarify that interview is not a memory test, but need to know what witness remembers
  - Clarify that the District is seeking facts, not opinions
  - Distinguish between what witness witnessed or "heard through the grapevine"
  - Confirm expectation that witness will cooperate by providing truthful answers and will not interfere with investigation by trying to coordinate or influence someone's answer or memory
  - Warn against retaliation and that District will not tolerate retaliation; encourage witness to report and resulting incidents of retaliation;
  - Don't promise confidentiality
  - Warn against retaliation and that District will not tolerate retaliation, encourage witness to report and resulting incidents of retaliation;

## Investigation – Best Practices

### Interviewing the Witness (Outline) (cont...)

- Preliminary Information of Witness (name, address, contact information, relationship to District)
- Identify other Persons in attendance
- Document Date, Time and Location of Interview
- Questions
  - Make Sure Witness Answers the five Ws: Who, What, Where, When and Why
  - Be open if witness offers additional information, but don't lose focus;
  - Ask witnesses open ended question (as opposed to leading) to see if testimony supports or refutes the allegations.
    - It is OK to interject with specific questions to confirm specific details
  - Bring existing evidence to Interviews
- Take notes (neutral play-by-play, not summaries or colorful commentary) and use direct quotes
- Have each witness review and confirm your documentation of their statements by signing or initialing (e.g., type up notes)



## Investigation – Investigative Report

### Outline of Investigative Report

- Background Information
  - Allegations
  - Parties
- Jurisdiction
  - Sexual Harassment, District Program/Activity, United States
- Information Gathered During Investigation
  - Witnesses (attach statements to Report)
  - Other Relevant Evidence (text messages, photos, etc.) (attach to report)
- Summary of Facts and Relevant Evidence

## Investigation – Investigative Report

- Be a Historian
- DO NOT make a Determination or a Recommendation as to Responsibility
  - One exception – Jurisdiction
    - Regulations require dismissal if conduct does not constitute Sexual Harassment or the event does not occur within the District's Program/Activity or within the United States
- Investigators are not required to identify data gaps in the investigative report, because the parties' right to inspect and review evidence, and review and respond to the investigative report, adequately provide opportunity to identify any perceived data gaps and challenge such deficiencies.

### III. The Title IX Sexual Harassment Formal Complaint Grievance Process

#### E. Dismissal of Complaints

### Hypothetical

Student A meets with Title IX Coordinator, who explains to Student A that the allegations, even if proven to be true, do not constitute Title IX Sexual Harassment and that Student A has no basis to file a Formal Complaint.

Student A disagrees, but the Title IX Coordinator tells Student A that the matter is considered closed. Student reports Title IX Coordinator and School District to the Department of Education.

Did the District follow the proper procedure for dismissing a Formal Complaint?

## Answer

No. In the Preamble to the Regulations, the Department states:

*Permitting a recipient to deem allegations meritless or frivolous without following the § 106.45 grievance process would defeat the Department's purpose in providing both parties with a consistent, transparent, fair process, would not increase the reliability of outcomes, and would increase the risk that victims of sexual harassment will not be provided remedies.*

## Dismissal of Formal Complaints

**Mandatory Dismissal:** The District **shall** dismiss the Formal Complaint with regard to that conduct for purposes of Sexual Harassment if the conduct alleged in the Formal Complaint:

- does not constitute Sexual Harassment even if proved;
- did not occur in the District's Education Program or Activity; or
- did not occur against a person in the United States,

**When:** After the filing of a Formal Complaint

**Who:** Title IX Coordinator

Such a dismissal does not preclude action under another provision of the District's code of conduct

## Dismissal of Formal Complaints

Discretionary Dismissal: The District **may** dismiss the Formal Complaint or any allegations therein, if at any time prior to the issuance of the written determination:

- A Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the Formal Complaint or any allegations therein;
- The Respondent is no longer enrolled or employed by the District; or
- Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein.

## Dismissal of Formal Complaints

- Written notification shall:
  - Be promptly issued to the parties simultaneously of any allegations found not to qualify or that are dismissed in compliance with Title IX.
  - State whether the allegations will continue to be addressed pursuant to the Code of Student Conduct and other Board policies.
  - State that the dismissal may be appealed pursuant to the appeal procedures.

## Hypothetical – Uncooperative Complainant

- **Question 1: What are a District's obligations if the Complainant withdraws the Complaint or refuses to participate in the investigation?**

## Uncooperative Complainant

1. The District still has a duty to investigate and could be liable if it fails to do so;
2. The District cannot punish the Complainant for not participating.

The Department has taken the position that the complainant is not required to participate in the process or to provide any information to the Title IX Coordinator and in fact, the final regulations expressly protect a complainant (or other person's) right not to participate in a Title IX proceeding by including such refusal to participate in the anti-retaliation provision in § 106.71.

*Where a complainant does not wish to participate in a grievance process, the recipient is not permitted to threaten, coerce, intimidate, or discriminate against the complainant in an attempt to secure the complainant's participation. Thus, even if a Title IX Coordinator has signed a formal complaint, the complainant is not obligated to participate in the ensuing grievance process and need not appear at a live hearing or be cross-examined.*

## Uncooperative Complainant

**Question 2: Since the Complainant is not participating, can the District withhold information from the Respondent?**

- No. The District must still obtain evidence about the allegations, and the Complainant and Respondent must have an opportunity to inspect, review, and respond to such evidence.
- The Respondent would have access to such education records under both FERPA and these final regulations implementing Title IX.
- A Respondent should have notice of and a meaningful opportunity to respond to the evidence about the allegations against the respondent.

## Uncooperative Complainant

**Question 3: Can the District withhold information from the Complainant if Complainant refuses to participate or cooperate with the investigation?**

- No. Even if a complainant chooses not to participate in a § 106.45 grievance process initiated by the Title IX Coordinator's signing of a formal complaint, the complainant is still treated as a party entitled to:
  - the written notice of allegations under § 106.45(b)(2);
  - notice of meetings or interviews to which the complainant is invited under § 106.45(b)(5)(v);
  - and a copy of the evidence subject to inspection and review under § 106.45(b)(5)(vi).
- Thus, the complainant would at least know what evidence was obtained and have the opportunity to respond to that evidence, if the complainant so desired.

### III. The Title IX Sexual Harassment Formal Complaint Grievance Process

#### E. Determination

#### Title IX Sexual Harassment – Determination

- Decision Maker - must issue a Written Determination regarding responsibility by applying the standard of evidence selected by the District: "preponderance of the evidence" or "clear and convincing."
- The District has selected "preponderance of the evidence" standard, which means:  
     "the greater weight of the evidence, *i.e.*, to tip a scale slightly is the criteria or requirement for preponderance of the evidence."
- Title IX Coordinators and the Investigators may not also be Decision-makers. Decision-makers can be third-parties.
- In considering evidence, credibility determinations are not based on an individual's status as a complainant, respondent or witness.

## Determination

- The Written Determination cannot be finalized until at least 10 days have passed from the release of the Investigative Report to Complainant and Respondent.
- After the Investigative Report is shared, the Decision-Maker(s) must afford each party the opportunity to submit written, relevant questions and limited follow up-questions.
  - Generally, questions and evidence about the complainant's sexual predisposition or prior sexual behavior is not relevant, unless offered to prove that someone other than the respondent is responsible or to prove consent.
- Decision-Maker must explain a decision to exclude a question for not being relevant.

## Determination

The written Determination shall be provided to the parties simultaneously and must include:

1. Identification of the allegations;
2. Descriptions of the procedural steps taken by the District (notification, interviews, site visits, methods used to gather other evidence);
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the District's code of conduct;
5. For each allegation:
  - a determination regarding responsibility;
  - any disciplinary sanctions the District imposes on the respondent; and
  - a statement as 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.
6. Appeal procedures.



### III. The Title IX Sexual Harassment Formal Complaint Grievance Process

#### E. Appeals

## Appeals

Both parties have the right to appeal:

1. a determination of responsibility; and
2. the dismissal of a Title IX formal complaint or any allegation in the Title IX formal complaint

Three Permitted Reasons for an Appeal:

1. A procedural irregularity;
2. New evidence that that could affect the outcome was not reasonably available at the time the decision to dismiss or determination of responsibility was made; and/or
3. Conflict of Interest or bias of the Title IX Coordinator, investigator(s), or decision-maker(s).

## Appeals

- The designated appeal authority (Appeal Decision-Maker) cannot be the same person as the Decision-Maker that reached the determination, the Investigator, or the Title IX Coordinator. The Appeal Decision-Maker can be a District employee.
- Appeal Decision-Maker shall:
  - Provide Written Notice of Appeal to the Parties;
  - Provide a Reasonable Opportunity for the Parties to submit a Position Statement;
  - Issue a Written Decision and provide it to both Parties simultaneously.
- The Appeal Decision-Maker can consider new evidence or remand to the Decision-Maker.

## III. The Title IX Sexual Harassment Formal Complaint Grievance Process

### F. Other Issues

## Consent

- **Consent** means to give assent or approval. In the context of Discrimination and Sexual Harassment, Consent is knowing, voluntary conduct that demonstrates clear permission by word or action to engage in an activity, typically a sexual activity.
- The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.
- Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on the District to determine whether its policy has been violated.

## Consent

- Lack of resistance does not equal Consent
- Consent does not exist when the person engages in conduct constituting Sexual Harassment with a Complainant:
  - (1) By **Forcible Compulsion** (compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied);
  - (2) By **threat of Forcible Compulsion** that would prevent resistance by a person of reasonable resolution;
  - (3) Who is **unconscious** or where the person knows that the Complainant is unaware that the Sexual Harassment is occurring;
  - (4) Where the person has **substantially impaired** the Complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the Complainant, drugs, intoxicants or other means for the purpose of preventing resistance; or
  - (5) Who suffers from a **mental disability** which renders the Complainant incapable of Consent

## Emergency Removal - Students

- If the District has determined, based on an **individualized safety and risk analysis**, that there is an immediate threat to the physical health or safety of any individual due to the allegations of Sexual Harassment, the Respondent may be removed from the District's Education Program or Activity or moved to an alternative setting, consistent with all rights under federal and state laws and regulations, and Board policy, including but not limited to the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act

## Emergency Removal - Students

- If the Respondent is an identified student with a disability, or thought to be disabled, the Title IX Coordinator shall contact the Director of Special Education to coordinate the required actions in accordance with Board policy. The Respondent shall be provided with notice and provided an opportunity for due process, in accordance with law, regulations and Board policy, which shall provide the Respondent with notice and an opportunity to challenge the decision immediately following the removal.
- When an emergency removal is warranted to address an immediate threat to the physical health or safety of an individual, and it is not feasible to continue educational services remotely or in an alternative setting, the normal procedures for suspension and expulsion shall be conducted to accomplish the removal, including specific provisions to address a student with a disability where applicable. The Board's written adjudication of expulsion shall address the pending Title IX process and the impact of the outcome of the Title IX process on a student's emergency removal status.

## Administrative Leave - Employees

- When an employee, based on an individualized safety and risk analysis, poses an immediate threat to the health or safety of any student or other individual, the employee may be removed on an emergency basis.
- An accused district employee may be placed on administrative leave during the pendency of the grievance process for formal complaints, consistent with all rights under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, and in accordance with state law and regulations, Board policy and an applicable collective bargaining agreement or individual contract

## Consolidation of Formal Complaints

- Where the allegations of Sexual Harassment arise out of the same facts or circumstances, the District may consolidate Formal Complaints as to allegations of Sexual Harassment:
  - against more than one Respondent; or
  - by more than one Complainant against one or more Respondents; or
  - by one party against the other party.

## Record Keeping

- Best practice is to fully document the entire process;
- The District shall maintain the following records **for a minimum of seven (7) years** after conclusion of procedures and implementation of disciplinary sanctions and/or remedies, or in the case of a complainant or respondent who is a minor, until the expiration of the longest statute of limitations for filing a civil suit applicable to any allegation:
  1. Each Title IX sexual harassment investigation, including any:
    - **written determination** and any audio or audiovisual recording or transcript, and
    - **disciplinary sanctions** imposed on the respondent, and
    - any **remedies** provided to the complainant designed to restore or preserve equal access to the district's education program or activity

## Record Keeping

2. Any appeal and the result.
3. Any informal resolution and the result.
4. All materials used to train the Title IX Coordinator, investigators, decision-makers, and any person who facilitates an informal resolution process.
5. Records of any district actions, including any supportive measures, taken in response to a report or formal complaint of Title IX sexual harassment.
  - Document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the district's education program or activity.
  - If a district does not provide a complainant with supportive measures, then the district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances
  - OK to supplement with additional information at a later date

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## IV. Serving Impartially

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## Impartiality

“Conflicting” Responsibilities?

- The District is obligated to identify and address sexual harassment that occurs in its education program or activity.
- The Regulations Require that the District remain impartial and do not permit the District to take an adversarial posture with respect to either party.
- Ultimately, however, the District itself must take action in response to the determination regarding responsibility that directly affects both parties.

Rule

- It is the District’s burden to impartially gather evidence and present it so that the decision-maker can determine whether the District (not either party) has shown that the weight of the evidence reaches or falls short of the standard of evidence selected by the recipient for making determinations.
- The District should not advocate as to whether the burden has been met.

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## Serving Impartially

- Regulations: Section 106.45(b) requires Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions **to be free** from **conflicts of interest** and **bias** and trained to serve **impartially** without **prejudging** the facts at issue.

## Impartiality – Why is it Necessary?

- The Preamble to the Regulations contains examples of existing practices:
  - One school's disciplinary board training contained slides that were: "100% aimed to convince [adjudicators] to believe complainants, precisely when they seem unreliable and incoherent."
  - At Ohio State University, decision-makers were told that a "victim centered approach can lead to safer campus communities."
  - The OSU training guide told decision-makers that "[s]ex offenders are overwhelmingly white males."



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## IV. Impartiality

### A. Prejudgment

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## Hypothetical

**Is it proper for Investigators and Decision-Makers to institute a policy of believing accusers at the beginning to overcome historical societal bias against women?**

In the Preamble to the Regulations, the Department states:

The Department disagrees that the historical or general societal bias against women or against victims of sexual harassment requires or justifies a grievance process designed to favor women or complainants.

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## Impartiality: No Prejudgment

- **Prejudgment** means forming an opinion about a situation or a person that is formed before knowing or considering all of the facts.
- Title IX personnel must refrain from drawing conclusions or making assumptions about either party's credibility or truthfulness until conclusion of the grievance process.
- It is inappropriate for investigators and/or decision-makers to prejudge credibility based on a party's status as a complainant or respondent

## Prejudgment - Sex Stereotypes

- The Preamble to the Regulations provide:
  - There must be a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what "men" or "women" do or do not do.

### Examples:

- Men are sexually aggressive and/or likely to perpetrate sexual assault;
- Women have regret about a sexual experiences are likely to make a false claim about sexual assault;
- Men cannot be sexually assaulted

## Prejudgment - Presumption of Innocence

- Section 106.45(b)(1)(iv) affords respondents a presumption of non-responsibility until the conclusion of the grievance process.
- However, this does not mean that a Respondent should automatically be “believed.”
- The Department explains that the presumption of non-responsibility is not interpreted to mean that a respondent is considered truthful, or that the respondent’s statements are credible or not credible, based on the respondent’s status as a respondent.

## IV. Impartiality

### B. Conflicts of Interest

## Conflicts of Interest

Use by a public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a family member or an associated business.

Generally speaking, conflicts of interest can exist when an employee's personal or private interests may compromise his or her judgment, decisions, or actions.

Example: Decision-Maker is the employee of Complainant's father.

## District Employees

Can District employees serve impartially or are they necessarily conflicted?

- The Department declined to define certain employment relationships or administrative hierarchy arrangements as per se prohibited conflicts of interest under § 106.45(b)(1)(iii).

### Safeguards:

- Adopt practices to ensuring that investigators have institutional independence
- Decide that Title IX Coordinators should have no role in the hiring or firing of investigators.
- Nothing in the final regulations precludes a recipient from outsourcing such responsibilities to professionally trained investigators and adjudicators outside the recipient's own operations.

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## IV. Impartiality

### C. Bias

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## Bias

A bias is a disproportionate weight in favor of or against an idea or thing, usually in a way that is closed-minded, prejudicial, or unfair.

- Biases can be innate or learned
- An **implicit bias**, or **implicit stereotype**, is the unconscious attribution of particular qualities to a member of a certain social group

Whether bias exists requires examination of the particular facts of a situation.

- Districts should 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, exercising caution not to apply generalizations that might unreasonably conclude that bias exists.

Biased decision making increases the risk of erroneous outcomes because bias, rather than evidence, dictates the conclusion

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## Are Certain Individuals Biased?

- The Department explicitly states that it is **improper to assume** 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 renders the person biased for or against complainants or respondents).
- In addition, the Regulations posit that required training will 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.

## Appearance of Bias

- The Department refused to state whether conflicts of interest or bias must be “actual” or “perceived” and declined to adopt an “appearance of bias” standard.
- The Department reasoned that a standard of “appearance of” or “perceived” bias might lead to conclusions that most people are biased in one direction or another by virtue of being male, being female, supporting women’s rights or supporting men’s rights, or having had personal, negative experiences with men or with women.

## Outcome Based Bias

Hypothetical: School District is concerned that, despite have no basis to conclude that its Title IX Personnel are biased against women, the overwhelming number of determinations favor men (whether Complainants or Respondents).

Is the Department going to find that the Grievance Process is biased?

## Answer

Not necessarily.

The Department cautions parties and recipients from concluding bias, or possible bias, based solely on the outcomes of grievance processes decided under the final regulations; for example, the mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel. The entire purpose of the § 106.45 grievance process is to increase the reliability and accuracy of outcomes in Title IX proceedings, and the number of particular outcomes, alone, thus does not raise an inference of bias

## Avoiding Prejudgment and Bias

- Be honest with yourself - check and recognize your initial prejudices and watch what you say;
- Keep an open mind;
- Seek out witnesses and evidence;
- Gather facts and focus on the facts;
- Analyze your relationships - The Department notes that Decision-Makers are obligated to serve impartially and thus should not endeavor to "develop a personal relationship" with one party over another.
- Recuse yourself if necessary.

## IV. Impartiality

### D. Credibility



## Credibility - Conduct

### Hypotheticals:

- Complainant is crying when submitting a report to the Title IX Coordinator. Is that circumstance relevant to the credibility of the Complainant?
- Complainant is emotionless and very matter-of-fact when submitting a report of sexual harassment to the Title IX Coordinator. Is that circumstance relevant to the credibility of the Complainant?
- Complainant admits consuming alcohol on the night of the incident. Should that circumstance influence the determination as to the credibility of their testimony?
- Complainant and Respondent were dating at the time of the alleged incident. Is that circumstance relevant to determining whether Complainant consented to Respondent's conduct?

## Credibility

- Determinations of credibility must be based on objective evaluation of relevant evidence—not on inferences based on party status.
- Title IX personnel are not prevented from understanding and taking into account each party's interests and the "stakes" at issue for each party, yet what is at stake does not, by itself, reflect on the party's truthfulness.

## Credibility - Factors

In the preamble to the Regulations, the Department explains:

while credibility is typically based on a number of factors such as **sufficient specific detail, inherent plausibility, internal consistency, corroborative evidence, and demeanor**, the most unreliable factor is demeanor.

The Department continues:

judging credibility solely on **demeanor** presents risks of inaccuracy generally, the Department cautions that judging credibility based on a complainant's demeanor through the lens of whether observed demeanor is "evidence of trauma" presents similar risks of inaccuracy. The Department reiterates that while assessing demeanor is one part of judging credibility, other factors are consistency, plausibility, and reliability.

## Credibility - Details

- The final regulations do not require that any party, including a complainant, must recall details with certain levels of specificity;
- rather, a party's answers to cross-examination questions can and should be evaluated by a decision-maker in context, including taking into account that a party may experience stress while trying to answer questions.
- Because decisionmakers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory.

## Should the District Challenge Credibility?

No. The Preamble to the Regulations provide:

- § 106.45(b)(6)(i) respects and reinforces the impartiality of the District by requiring adversarial questioning to be conducted by party advisors (who by definition need not be impartial because their role is to assist one party and not the other).
- Precisely because the District must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties.
- Rather, the impartial decision-maker benefits from observing the questions and answers of each party and witness posed by a party's advisor advocating for that party's particular interests in the case.
- the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-maker's own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory.

## V. Relevance and Rape Shield Protections

## Relevance

The Regulations require the District to gather and evaluate relevant evidence, with the understanding that this includes both inculpatory and exculpatory evidence.

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Whether evidence has a tendency to make a given fact more or less probable is to be determined by the Investigator/Decision-Maker in the light of reason, experience, scientific principles and the other testimony gathered in the case.

## Relevance – Investigation and Determination

- The investigator is obligated to gather evidence directly related to the allegations whether or not the District intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it).
- The Complainant and Respondent may then inspect and review the evidence directly related to the allegations.
- The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the relevant evidence in the investigative report.
- The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker.
- The decision-maker will determine if evidence is relevant

## Hypothetical

- Student A had previously been convicted of sexual assault against another student at Student A's former school.
- Is this **relevant** in determining whether Student A sexually assaulted Student B?

## Answer

Evidence of separate or unrelated "crimes, wrongs, or acts," while typically inadmissible as character evidence against a criminal defendant, *is relevant*. Com. v. Dillon, 925 A.2d 131 (Pa. 2007).

## Hypothetical

- Employee A wishes to introduce evidence that Employee B uses sexually provocative language with Employee B's spouse outside of work to demonstrate that Employee A's explicit comments to Employee B during working hours were acceptable.
- Is this **relevant**?

## Answer

One court recently held that what a person views as acceptable or welcomed in other aspects of his or her private life is not probative of what that individual finds to be acceptable or welcomed in the workplace from a fellow employee or supervisor. Ogden v. All-State Career Sch., 299 F.R.D. 446, 450 (W.D. Pa. 2014)

## Hypothetical

- Employee A wishes to introduce evidence that Employee B dresses provocatively at work to demonstrate that Employee A's explicit comments to Employee B during working hours were acceptable.
- Is this **relevant**?

## Discussion

- Sublette v. The Glidden Co., No. 97-5047, 1998 U.S. Dist. LEXIS 15692, 1998 WL 964189 (E.D.Pa. Oct. 1, 1998) (holding that plaintiff's sexual speech and dress at work were relevant to her hostile work environment sexual harassment claim).
- Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) ( "While 'voluntariness' in the sense of consent is not a defense to [a sexual harassment] claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.").

## Discussion: Relevance/Weight

- References to “dressing provocatively” in the above-cases seems outdated.
- However, even if relevant, it does not need to be given much weight. The Department explained in the regulations:  

for example, where a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts, under the final regulations **the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility**, so long as the decision-maker’s evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.
- A District must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decision-maker finds particular evidence to be.

## Hypothetical – Delay in Reporting

- Student A wishes to introduce evidence that Student B waited two years after the alleged sexual assault to file the formal complaint for the purposes of demonstrating that Student B’s allegations are not credible.
- Is this delay relevant?



## Answer

Yes. Our Supreme Court in Com. v. Dillon, 925 A.2d 131, 138–39 (Pa. 2007) stated:

both the common law experience and the judgment of the General Assembly have led to a recognition of **the relevance of the promptness of a complaint** of sexual abuse, and this Court has separately recognized the reality that a sexual assault prosecution oftentimes depends predominately on the **victim's credibility, which is obviously affected by any delay in reporting the abuse**. Revealing the circumstances surrounding an incident of sexual abuse, and the reasons for the delay, enables the factfinder to more accurately assess the victim's credibility.

However, evidence that explains the delay in making a complaint is also relevant.

## Hypothetical – Rape Shield Protections

- The accused wishes to introduce evidence that Complainant, another student, engaged in sexual conduct with multiple students in the School to demonstrate that Complainant consented to accused's conduct.
- Is this relevant?

## Rape Shield Laws

### Regulations:

Complainant's prior sexual history is not relevant unless offered to prove that someone else committed the act or concern specific incidents with the Respondent and are offered to prove consent.

- NOTE: This is likely to arise during the investigation and during the question and answer portion of the decision-making process

## Thank you for attending!

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