

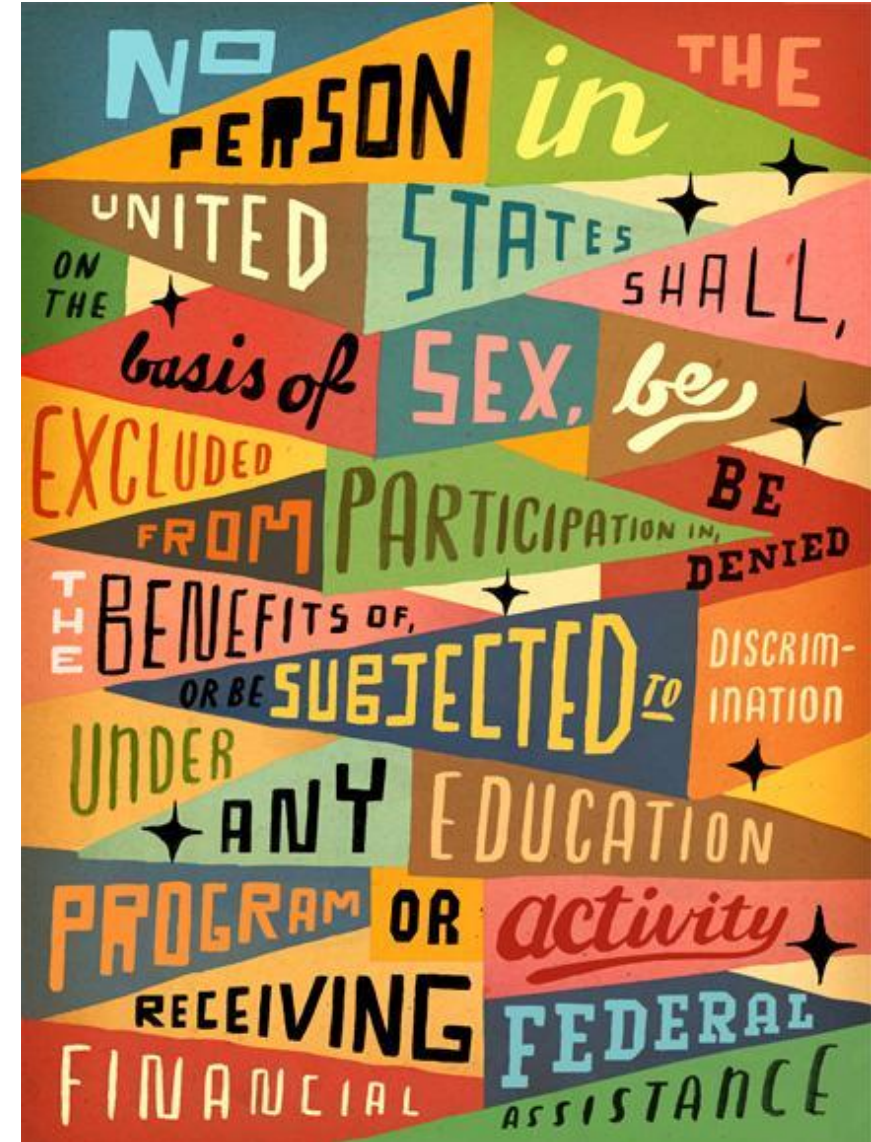
ASHEBORO CITY SCHOOLS
BOARD OF EDUCATION
AND
ADMINISTRATORS' WORKSHOP
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New Title IX Requirements and How to
Address Them

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What is 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. Code §1681



What's New with Title IX?

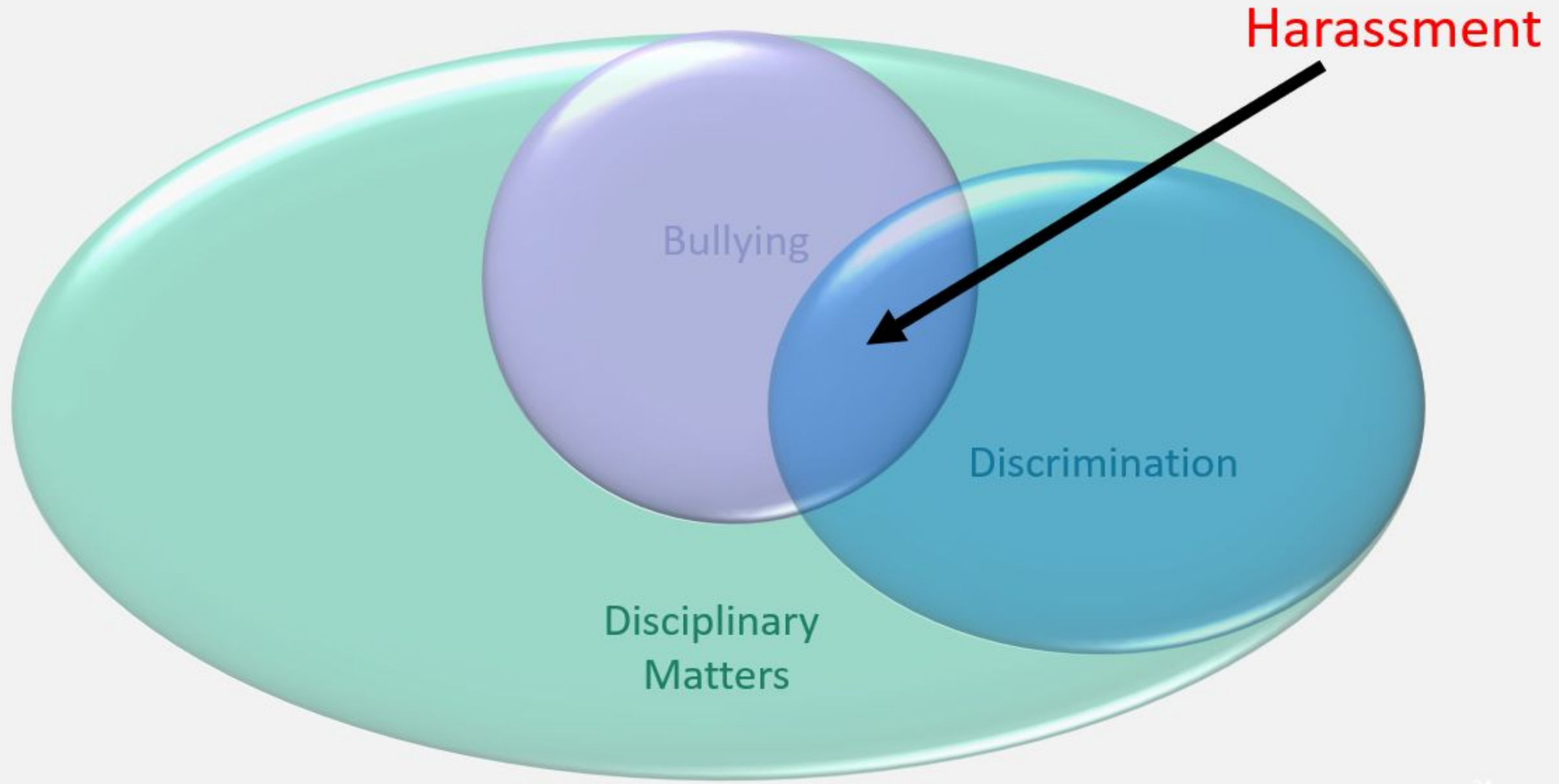


On May 6, 2020, U.S. the Department of Education (DOE) issued final Title IX regulations, which go into effect on August 14, 2020.

- These regulations make major changes from the Obama-era guidance.
- New process for handling formal complaints of sexual harassment.
- New notice, training and record-keeping requirements.
- New Board policies needed.
- More closely align with the U.S. Supreme Court Decisions in *Gebser v. Lago Vista Independent School District* (1998) and *Davis v. Monroe County Board of Education*(1999).
- *There are a number of pending lawsuits seeking to prevent the new rules from being implemented.*



Harassment v. Discrimination v. Bullying v. Discipline



Supreme Court Cases

When is a district liable for sexual harassment?

Gebser v. Lago Vista Independent School District
(1998)

- District is liable for harassment when it:
 - **Has actual knowledge** of allegations by an “**appropriate person**”; and
 - Responds to the allegations so deficiently that it amounts to “**deliberate indifference.**”

Davis v. Monroe County Board of Education
(1999)

- District is liable for harassment when it:
 - Has actual knowledge by an appropriate person;
 - Responds with deliberate indifference; **AND**
 - The harassing conduct was “**so severe, pervasive, and objectively offensive**” that it **denied the victim equal access to educational opportunities or benefits.**



2020 Regulations

What has changed?



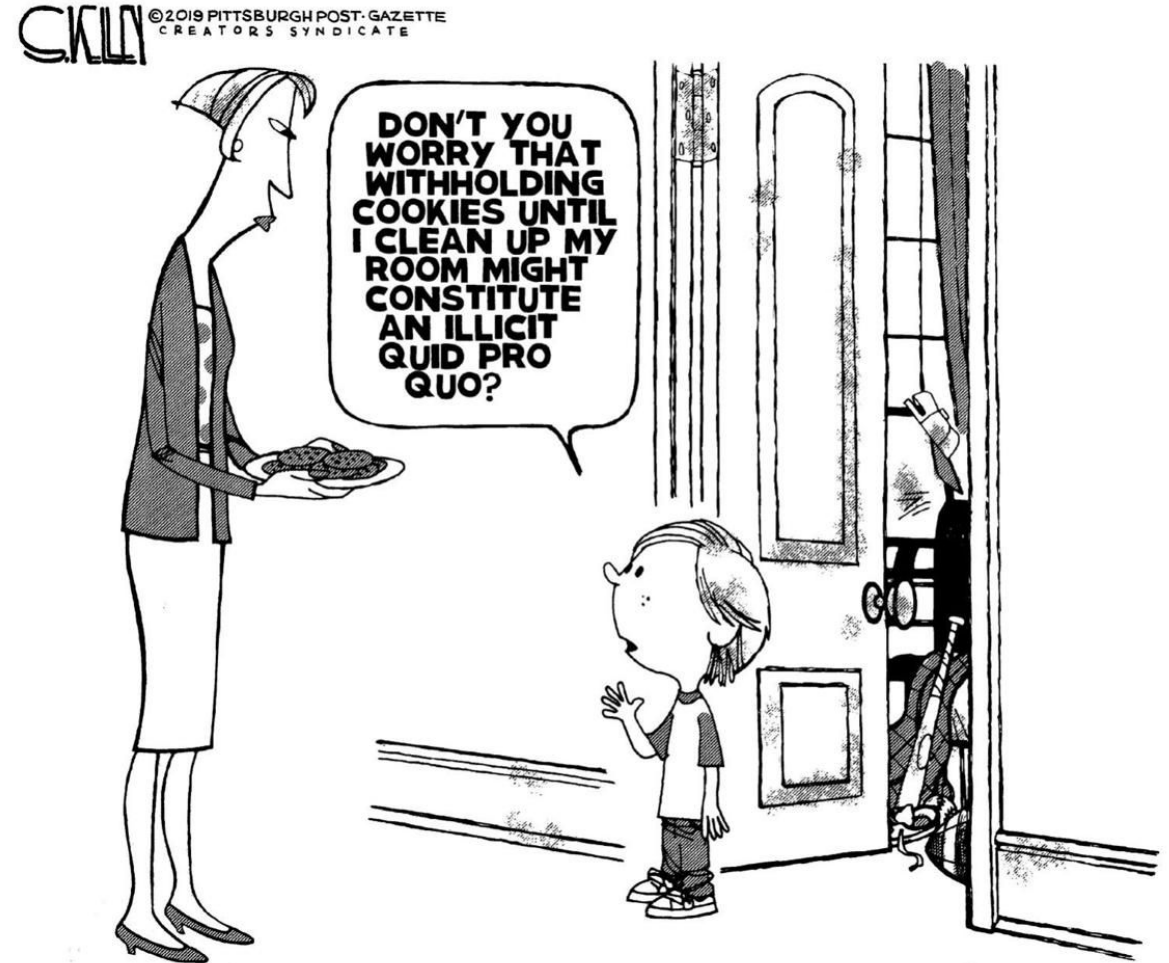
- Sexual Harassment
 - The final regulations make several changes intended to narrow the definition of “sexual harassment” and sync that definition with the holdings in *Gebser* and *Davis*.
 - 3 types of prohibited sex-based conduct
 - Quid Pro Quo
 - Unwelcome Conduct
 - Clery Act and the Violence Against Women Act (“VAWA”) Components

Types of Sex Discrimination: Quid Pro Quo

Occurs when:

1. A school employee
2. Conditions access to educational benefits
3. On unwelcome sexual conduct

Note: This provision only applies to *employee* conduct



Types of Sex Discrimination: Unwelcome Conduct

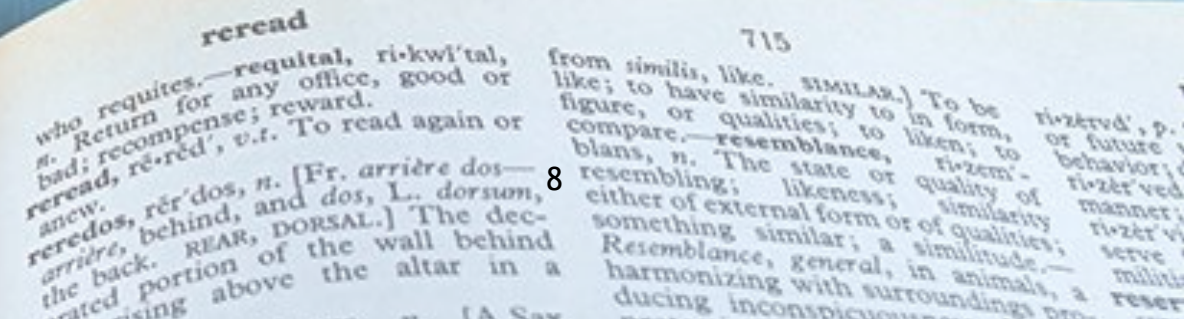
Old Definition

- Unwelcome conduct
- Determined by a reasonable person
- To be sufficiently severe, persistent, OR pervasive to limit a student's ability to participate in or benefit from the education program, activities, or other school services

New Definition

(effective August 14, 2020)

- Unwelcome conduct
- Determined by a reasonable person
- To be so severe AND pervasive AND objectively offensive that it effectively denies a person equal access to an education program or activity



Types of Sex Discrimination:

Clery Act and VAWA Components

- The Clery Act - Federal law requiring colleges and universities to disclose information about crime on and around campuses. Enforced by U.S. DOE. Does not apply to K-12.
- VAWA = Violence Against Women Act. Federal law, enacted in 1994, administered by U.S. DOJ.
- The following offenses, as defined in Clery and VAWA, are now specifically included as forms of sexual harassment:
 - Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)
 - Dating Violence 34 U.S.C. 12291(a)(10)
 - Domestic Violence 34 U.S.C. 12291(a)(8)
 - Stalking 34 U.S.C. 12291(a)(30)

When must schools respond to sexual harassment allegations?

School must respond when it has “actual knowledge” of sexual harassment that occurred/is occurring “in the school's education program or activity.”



“Actual Knowledge”



- NOTE: In the K-12 context, ALL employees are mandated reporters.**

“Actual knowledge” of sexual harassment “in the school’s education program or activity.”

Reporting Sexual Harassment: Who, How and When?



- Reports of sexual harassment may be made by anyone, not just the alleged victim or a mandated reporter.
- Reports can be made by phone, mail, email, letter, or by any means that result in the Title IX Coordinator receiving the report.
- Reports can be made at any time, including non-business hours.

“Actual knowledge” of sexual harassment “in the school’s education program or activity.”

“In the school's education program or activity”



- ▶ “Program or activity” includes “locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.”
- ▶ NOTE: Schools are only responsible for responding to allegations of discrimination/harassment that occur in the United States.

“Deliberate Indifference”

- ▶ A school cannot be liable for failing to respond to known allegations of harassment unless it acts with “deliberate indifference”

Former Standard

- Liability could be found if the school did not take immediate action to eliminate the harassment, prevent its recurrence, and address its effects

New Standard

- An institution acts with deliberate indifference only if its response to sexual harassment is clearly unreasonable in light of the known circumstances



Terminology: Complainant, Respondent

Complainant: A person who is alleged to be the victim of conduct that could constitute sexual harassment

NOT a third party who reports alleged sexual harassment perpetrated against someone else

NOT the Title IX Coordinator, even if the TIXC “signs” a formal complaint

Respondent: A person who has been reported to be a perpetrator of conduct that could constitute sexual harassment

These terms apply to parties in reports and formal complaints of sexual harassment

Responding to Sex Discrimination Complaints: “Formal Complaint” versus “Report”

► “Report”

- Report of sex discrimination (including sexual harassment) made by any person, at any time, and by any means (in person, phone, mail or email) that results in the Title IX coordinator receiving the person’s verbal or written report.
- Not limited to a school’s campus community and may come from others, such as on-campus visitors.
- School employees shall immediately notify the school’s Title IX coordinator of any report of sex discrimination. Note: This applies to any and all school employees!



Responding to Sex Discrimination Complaints: “Formal Complaint” versus “Report”

► “Report”

- Upon receiving a report, the Title IX coordinator must promptly:
 - Contact the alleged victim (i.e., Complainant) if that person can be identified);
 - Offer the complainant **supportive measures**;
 - Explain the process of filing a formal complaint;
 - Explain that supportive measures can be available with or without a formal complaint;
 - Consider the complainant’s wishes regarding supportive measures;
 - Contact the respondent (i.e., alleged perpetrator), who must also be offered supportive measures; and
 - If supportive measures are not provided to a complainant, the school must document why it did not provide a complainant with supportive measures and why not providing such measures is not deliberately indifferent.



Responding to Sex Discrimination Complaints:

“Formal Complaint” versus “Report”

▶ 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 school investigate the allegation of sexual harassment
- ▶ Only individuals participating in or attempting to participate in the education program or activity of the school may file a “formal complaint”
- ▶ May be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator and by any additional method designated by the school
- ▶ Must contain the complainant’s physical or digital signature, or otherwise indicate that the complainant is the person filing the formal complaint
- ▶ Triggers the school’s duty to initiate the grievance process



SUPPORTIVE MEASURES

Responding to Sex Discrimination Complaints:
“Supportive Measures” (offered to both alleged victim
and alleged perpetrator)

Former Standard

- ▶ Required the use of “interim measures” to help a complainant maintain equal educational access

New Standard

- ▶ Individualized services
- ▶ Reasonably available
- ▶ Nonpunitive, non-disciplinary, and not unreasonably burdensome to the other party
- ▶ Designed to ensure equal educational access, protect safety, or deter sexual harassment



SUPPORTIVE MEASURES

Types of Supportive Measures

- ▶ Counseling
- ▶ Extensions of deadlines or other course-related adjustments
- ▶ Modifications of work or class schedules
- ▶ Security and monitoring of certain areas of campus
- ▶ Other similar measures

Supportive measures must be offered regardless of whether the district is informed via a “formal complaint” or a “report”

NOTE: A supportive measure that completely removes a Respondent from an activity (except for “emergency removals” for students and “administrative leave” for employees) would likely be considered punitive.



“Emergency Removal”

STUDENTS

- ▶ An accused student can be removed from the education program or activity on an emergency basis.
- ▶ School must conduct an individualized safety and risk analysis and determine that there is:
 - ▶ An immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment; and
 - ▶ This immediate threat justifies removal from the education program/activity.
- ▶ The accused student must be provided with notice and an opportunity to challenge the decision “immediately” following the removal.

EMPLOYEES

- ▶ The final regulations do not limit an institution’s ability to place an employee on administrative leave during the pendency of a complaint. Whether such leave is paid or unpaid is at the institution’s discretion.

NOTE: These provisions do not in any way modify rights under IDEA (e.g., “change in placement”), §504, or the Americans with Disabilities Act.

Responding to Formal Complaints: Written Notice

Upon receiving a Formal Complaint the Title IX Coordinator must:

1. Provide written notice of the allegations to the known parties that must:
 - ▶ Have sufficient details to permit parties to prepare for an initial interview;
 - ▶ Be provided in advance of any meeting, interview, or hearing conducted as part of the investigation or adjudication;
 - ▶ Include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process;
 - ▶ Inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney;
 - ▶ Notify the parties that they may inspect and review evidence; and
 - ▶ Inform the parties of any provision in the district's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
2. Investigate and adjudicate the complaint using a **grievance process** that complies with the final regulations

Note: An institution may not impose discipline on a respondent until the completion of the Title IX grievance process.



Dismissal of Formal Complaints

- ▶ An institution must dismiss a complaint if the conduct alleged in the formal complaint:
 - ▶ Would not constitute sexual harassment even if proven;
 - ▶ Did not occur in the institution's education program or activity; or
 - ▶ Did not occur against a person in the United States.
- ▶ Additionally, an institution may dismiss a complaint where:
 - ▶ The complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or allegations;
 - ▶ The respondent is no longer enrolled or employed by the institution; or
 - ▶ Specific circumstances prevent an institution from gathering evidence sufficient to reach a determination regarding responsibility.
- ▶ Institutions must provide the parties with written notice of a dismissal, whether mandatory or discretionary, and the reasons for the dismissal.
- ▶ Dismissal of the formal complaint under Title IX does not preclude action under another policy or code of conduct.
- ▶ Dismissals may be appealed.

Responding to Formal Complaints: Grievance Process

The district must ensure its grievance process is consistent, transparent and:

- ▶ Treats complainants and respondents equitably;
No credibility determinations based on/because of a person's status as a respondent or complainant;
Requires objective evaluation of all relevant evidence, both inculpatory and exculpatory;
- ▶ 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;
- ▶ Presumes the non-responsibility of respondents until conclusion of the grievance process;
- ▶ Includes reasonably prompt time frames for the grievance process;
- ▶ Informs all parties of critical information about the district's procedures including the range of remedies and disciplinary sanctions a district may impose, the standard of evidence applied by the district to all formal complaints of sexual harassment under Title IX (which must be either the "preponderance of the evidence" standard or the "clear and convincing evidence" standard), the district's appeal procedures, and the range of supportive measures available to both parties; and
- ▶ Protects any legally recognized privilege from being pierced during a grievance process



Responding to Formal Complaints: Investigation



When investigating a formal complaint and throughout the grievance process, the district must:

- Ensure that the burden of proof and the burden of gathering evidence is on the district, not the parties;
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other evidence;
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- Provide the parties with the same opportunities to have others present during any grievance proceeding;
- 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;
- Provide both parties an equal opportunity to inspect and review any evidence obtained;
- Prior to completion of the investigative report, the district must send to each party and the party's advisor, if any, the evidence subject to inspection and review, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report; and
- Create an investigative report that fairly summarizes relevant evidence and provide a copy to each party at least 10 days prior to the hearing for their written response.

Question: How will these timelines work when compared to long-term suspension requirements?

Responding to Formal Complaints: Determining Responsibility

Grievance Process may provide for a hearing but is not required to.*

With or without a hearing, after the district has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must:

- Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness;
- Provide each party with the answers; and
- Allow for additional, limited follow-up questions from each party.
- Questions about a complainant's prior sexual behavior or sexual predispositions are only allowed to establish that another person committed the alleged conduct, or if they concern specific incidents of complainant's prior sexual behavior with respondent and are offered to prove consent.

*But, keep in mind other statutes require hearings for students (e.g., long-term suspensions, expulsions) or employees (suspension without pay, dismissal, change in terms or conditions of employment or employment status).

Responding to Formal Complaints: Determining Responsibility

The decision-maker(s) cannot be the same person(s) as the Title IX Coordinator or the investigator(s).

The decision-maker(s) must issue a written determination regarding responsibility.

NOTE: The burden of proof is on the school.

The written determination must be provided to both parties simultaneously and must include:

1. Identification of the allegations;
2. 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, methods used to gather other evidence, and hearings held;
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the district's code of conduct to the facts; and
5. A statement of, and rationale for, the result **as to each allegation**, including:
 - A determination regarding responsibility;
 - Any disciplinary sanctions the district imposes on the respondent; and
 - Whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided; and
 - The district's procedures and permissible bases for the complainant and respondent to appeal.



Responding to Formal Complaints: Appeals



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

1. procedural irregularity that affected the outcome of the matter;
2. newly discovered evidence that could affect the outcome of the matter; and/or
3. Title IX personnel (i.e., Title IX Coordinator, investigator or decision-maker) had a conflict of interest or bias, that affected the outcome of the matter.

NOTE: A school may add additional bases for appeals, offered equally to both parties.

Responding to Formal Complaints: Appeals

For any appeal filed, the district must:

- Notify the other party;
- Ensure that the decision-maker(s) for the appeal is not the same person who made the initial determination;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.

Informal Resolutions (34 C.F.R. 106.45(b)(9))

- ▶ Only available if a formal complaint is filed
 - ▶ Schools cannot require that the parties participate in the informal resolution process
 - ▶ Allowed (but not required) in all cases except where a complaint alleges that an employee sexually harassed a student
- May be offered at any time during the formal complaint process.
 - Offer of informal resolution must include written notice to both parties that discloses:
 - Allegations, requirements of the process, any rules that prevent complainant from bringing the formal complaint again, and any other consequences, including how records will be kept.
 - Both parties must voluntarily agree in writing to the informal resolution process.



Retaliation

(34. C.F.R. 106.71)

- ▶ No district or other person may intimidate, threaten, coerce, or discriminate against any person 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.



Notice Requirements under Title IX

- ▶ Each district must designate at least one employee to coordinate its efforts to comply with Title IX, and that employee must be referred to as the “Title IX Coordinator.”
- ▶ The district must notify all applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, and employees of the “name or title, office address, electronic mail address, and telephone number of the employee or employees” designated as the Title IX Coordinator.
- ▶ The district also must provide notice to the above-listed persons that the district does not discriminate on the basis of sex in education programs or activities that it operates, including admission or employment, and that inquiries may be referred to the Title IX Coordinator or the U.S. DOE’s Assistant Secretary for Civil Rights, or both. This non-discrimination statement and the contact information for the Title IX Coordinator must be prominently displayed on the district’s website and in each handbook and catalog.



Training

- ▶ Training required for all staff on how to identify and report sexual harassment
- ▶ Training required for all Title IX investigators, decision-makers, coordinators, and facilitators of an informal resolution to instruct on how to be:
 - ▶ impartial and unbiased;
 - ▶ objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence



Record Keeping

(34 C.F.R. 106.45(b)(10))

- ▶ Maintain for seven years every report and formal complaint of sexual harassment. Records to be maintained include:
 - ▶ Investigative records;
 - ▶ Disciplinary sanctions;
 - ▶ Remedies;
 - ▶ Appeals;
 - ▶ Actions taken; and
 - ▶ Supportive measures.
- ▶ If complainant is not provided supportive measures, then the reasons why must be documented.
- ▶ Document the basis for the school system's conclusion that its response was not deliberately indifferent.
- ▶ Document that it has taken measures designed to restore or preserve equal access to the education program or activity.
- ▶ A record of all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must also be maintained and published on the website.

Implementation

The Players



Title IX Coordinator



Investigator



Decision-maker(s)



Informal Resolution Facilitator



Appeal Officer



Advisors

Policy Decisions for Boards

- ▶ What supportive measures will be offered to the complainant and respondent?
 - ▶ “Supportive Measures” are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after a formal complaint has been filed or where no formal complaint has been filed.
 - ▶ “Supportive Measures” may include, but are not limited to, the following:
 - ▶ Counseling;
 - ▶ Extensions of deadlines or other course-related adjustments;
 - ▶ Modifications to class or work schedules;
 - ▶ Security and monitoring of certain areas of campus;
 - ▶ Mutual restrictions on contact between the parties; or
 - ▶ Campus escort services.

Policy Decisions for Boards (cont'd)

- ▶ What information will be provided to the Complainant by the Title IX Coordinator?
 - ▶ The Title IX Coordinator must promptly contact the complainant to discuss:
 - 1) the availability of supportive measures
 - 2) consider the complainant's wishes with respect to supportive measures,
 - 3) inform the complainant of the availability of supportive measures with or without filing of a formal complaint, and
 - 4) explain the complaint the process for filing a formal complaint.
 - ▶ In addition to what is required, what, if any, additional information will the Title IX Coordinator be required provide to the complainant? Where will the description of such information be provided – 1) in the policy, 2) in an administrative regulation, or 3) in a guidance document?

Policy Decisions for Boards (cont'd)

- ▶ What time frames will the Board set for the grievance process?
 - ▶ The regulations require that the timelines/frames be “reasonably prompt,” including:
 - ▶ reasonably prompt time frames for filing and resolving appeals and informal resolution processes (if offered); and
 - ▶ a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action
- ▶ What will be the disciplinary sanctions/remedies following a responsibility determination?
 - ▶ Students: Positive behavioral interventions and/or sanctions, up to and including expulsion?
 - ▶ Employees: Up to and including dismissal?
 - ▶ Volunteers/Visitors: Directed to leave school property and/or be reported to law enforcement?
 - ▶ Third Parties: Subject to termination of contracts/agreements, restricted from access to school property, and/or subject to other consequences as appropriate?

Policy Decisions for Boards (cont'd)

- ▶ What will be the standard of evidence?
 - ▶ Preponderance of the Evidence
 - ▶ More likely than not the alleged activity occurred; “Weight of a feather”
 - ▶ Clear and Convincing Evidence
 - ▶ Highly probable or probably certain that the alleged behavior/violation has occurred
- ▶ Will the Board provide a live hearing?
 - ▶ Regulations do not require a live hearing in K-12
 - ▶ When to provide a live hearing?
- ▶ Who will hear an appeal? Full Board? Panel of the Board?
- ▶ Will an Informal Resolution process be available?
 - ▶ If so, which personnel will implement?

FAQs



UNITED STATES DEPARTMENT OF EDUCATION *Office for Civil Rights*

September 4, 2020

Questions and Answers Regarding the Department's Final Title IX Rule

The Department of Education's Office for Civil Rights, through its new Outreach, Prevention, Education and Non-discrimination (OPEN) Center, issues the following technical assistance document to support institutions with meeting their obligations under the Title IX Rule, which was announced on May 6, 2020, and which became effective on August 14, 2020. Many of the questions were derived from questions posed to the OPEN center through e-mail.

OCR may periodically release additional Question and Answer documents addressing the Title IX Rule.

All references and citations are to the unofficial version of the Title IX Rule, which is available [here](#). A link to the official version of the Rule published in the Federal Register is [here](#).

Disclaimer: Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Question 1: Can the new Title IX regulations be applied retroactively?

- ▶ No, the new Title IX regulations cannot be applied retroactively.
- ▶ The new Title IX regulations will only be enforced as to sexual harassment that allegedly occurred after August 14, 2020.

Question 2: Is each individual school required to have a Title IX Coordinator?

- ▶ No, each recipient of federal funds is required to have at least one Title IX Coordinator.
- ▶ Individual schools do not need their own Title IX Coordinator, but the LEA or charter school must designate and authorize at least one employee to serve as the Title IX Coordinator.

Question 5: If a Complainant withdraws from school because of sexual harassment and then files a complaint or vice versa, what impact will that have on the Complainant's ability to pursue a formal complaint?

- ▶ Title IX requires that a District act in a manner that is not “deliberately indifferent” or clearly unreasonable in light of the circumstances
- ▶ Students and others who are participating or attempting to participate in the school's program or activity have a right to file a complaint
 - ▶ 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

Question 15: Some recipients divide hearings between a responsibility phase and a sanctions phase. Is bifurcation possible under Title IX?

- ▶ Yes, the Title IX Regulations do not preclude a recipient from using one decision-maker to reach the determination of responsibility and having another decision-maker determine appropriate remedies or disciplinary sanctions
- ▶ BUT, the end result must be that the written determination regarding responsibility includes remedies/disciplinary sanctions decided upon
 - ▶ A written determination cannot be “piecemeal”

Questions?

