

# Roles Under Title IX Regulations

August 12, 2021 | Liberty-Benton Administrative Team





## Title IX Coordinator

- Each school must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities.
  - Must be known as the “Title IX Coordinator”
- Title IX Coordinator job title and stated job duties should now be identified and documented in Policy as well as prominently displayed.



## Title IX Coordinator's Responsibilities and Authority



- Coordinate the school's compliance with Title IX
  - This includes grievance procedures for resolving Title IX complaints
  - Also includes coordinating training for staff and students
- Coordinate and oversee the school's responses to all complaints and reports involving possible sex discrimination
- Obtain knowledge of school policies and procedures on sex discrimination
  - Should be involved in the drafting and revision of such policies and procedures



## **Title IX Coordinator's Responsibilities**

- Provide or facilitate ongoing training, consultation, and technical assistance on Title IX for all students, faculty and staff
- Explain complaint procedures to complainants and respondents
- Oversee investigations of reports and complaints of sexual misconduct
  - Recommend whether report/complaint constitutes sexual misconduct
  - Review informal resolution process
  - Appoint an investigative team
  - Ensure complaints are handled properly
  - Inform all parties of grievance process
  - Maintain information and documentation related to investigation in a secure manner
  - Monitor compliance with timelines



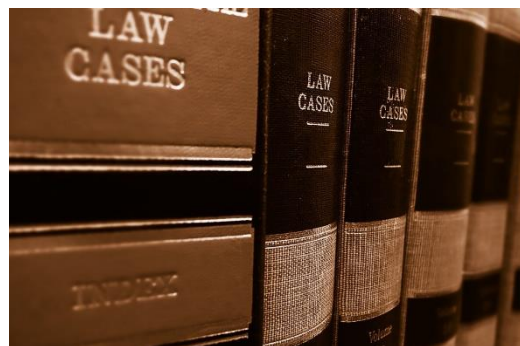
## **Title IX Coordinator's Responsibilities**

- Other Coordinator responsibilities:
  - Identify and address any patterns and/or systemic problems (including discipline)
  - Provide training on policies and procedures on sex discrimination & harassment
  - Monitor students' participation in athletics & extra-curricular activities for disproportionate impact
  - Monitor students' participation in academic programs and receipt of awards for disproportionate impact



## “Sexual Harassment”

- Title IX Regulations now define the term “sexual harassment”.
- Prior to the final rule, the term was loosely defined by interpretive case law and OCR Dear Colleague Letters.







## When Must A School Respond To Sexual Harassment?

- A recipient with actual knowledge of sexual harassment in an education program or activity must respond promptly and in a manner that is not deliberately indifferent.





## Reporting Sexual Harassment: Who, How And When?

- Any person may report sex discrimination, regardless of whether the person is the alleged victim of the reported conduct.
  - New Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints).
- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator.
- Or by any means that results in the Title IX Coordinator receiving the person's report.
- Such a report may be made at any time, including during non-business hours, by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator.





## Reporting Sexual Harassment: Formal Complaint

- “Formal complaint” is the 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.
  - Third party reporter is not authorized to file a formal complaint.
  - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during a grievance process, and must comply with requirements for all Title IX personnel to be free from conflicts and bias.
    - Title IX Coordinator is authorized to sign a formal complaint which triggers investigation. This includes signing of formal complaints over a complainant’s objections.



## Reporting Sexual Harassment: Formal Complaint

- “Document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.





## New Rule & Case Law Definition

### Gebser v. Lago Vista Indep. Sch. Dist. 524 U.S. 274 (1998)

**Knowledge:** Notice of sexual harassment or allegations of sexual harassment to:

1. A recipient's Title IX coordinator
2. Any official of the recipient who has authority to institute corrective measures on behalf of the recipient
3. **Any employee of an elementary and secondary school – must report to Title IX Coordinator within 2 business days**

"Notice" includes, **but is not limited to**, a report of sexual harassment to the Title IX Coordinator as described in the Final Rule.



## Student Rights - Generally

- **Complainant (victim)** has right to attend school without being subjected to unwelcome sexual conduct, especially conduct so severe, pervasive, and objectively offensive that it denies equal access to education.
- **Respondent (alleged perpetrator)** has right to due process before discipline is imposed and right not to be disciplined at all for activities protected by First Amendment.



## Respondent's Due Process Rights

Students accused of misconduct are entitled to **substantive** and **procedural** due process.

- **Substantive:** District cannot arbitrarily or unreasonably deprive students of education. Discipline must be supported by substantial, reliable, and probative evidence in the record. Typically “preponderance of the evidence” standard used for most disciplinary issues.
  - Does the evidence prove that the alleged perpetrator (respondent) sexually harass / sexually assault the victim (complainant)?
- **Procedural:** In deciding whether discipline is warranted, students are entitled to fair procedures. More procedures required for more significant discipline.
  - In answering the above question, did the district provide a fair chance for the alleged perpetrator to prove his or her innocence and respond to the allegations?





## Changes To Procedural Due Process Rights

- Single investigator and decision-maker no longer allowed.
- Detailed grievance process with a focus on:
  - Notice of allegations
  - Opportunity to review and respond to evidence
- Explicit prohibition on conflicted or biased coordinators, investigators, decision-makers.
- Emphasis on equal opportunities for both complainants and respondents to participate in the process.





## **New: Initial Response** **34 C.F.R. 106.44(a), .30(a)**

Must treat complainants and respondents equitably:

- Offer supportive measures to both
- Follow a grievance process before disciplining or sanctioning respondent





## New: Initial Response 34 C.F.R. 106.30(a), .44(a)

Title IX Coordinator must promptly (within 2 business days of receiving complaint), even if no formal complaint is filed:

- Contact the complainant to discuss the availability of “supportive measures”
- Consider the complainant’s wishes with respect to supportive measures
- Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a formal complaint





## Supportive Measures

Old Term (from OCR guidance)	New Term (Final Rule)
<ul style="list-style-type: none"><li>• Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access.</li><li>• Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents.</li></ul>	<ul style="list-style-type: none"><li>• Non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed (34. C.F.R.106.30(a)).</li><li>• Should be designed to restore or preserve equal access to the education program or activity without unreasonably” burdening the other party.</li></ul>



## Supportive Measures

- Examples:
  - Counseling
  - Course modifications
  - Schedule changes
  - Increased monitoring or supervision
- A supportive measure that completely removes a respondent from an activity would likely be considered punitive, except for “emergency removals” for students and “administrative leaves” for employees who pose an imminent threat.







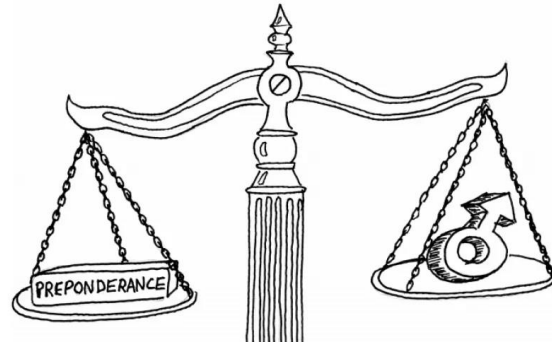
## Supportive Measures

- Supportive measures give districts “wide discretion to quickly, effectively take steps to protect student safety, deter sexual harassment, and preserve a complainant’s equal educational access.” Actions such as changing a respondent’s class or activity schedule may fall under permissible supportive measures, and supportive measures must be offered without waiting to see if a grievance process is eventually initiated or not.



## Complainant Participation Refusal

- District must provide complainant (alleged victim) with access to supportive measures and must provide complainant with written notice of grievance procedure, even if complainant is unwilling to participate.





## **Basic Required Elements of Process**

### **34 C.F.R.106.45(b)(1)**

- Treat parties equitably
- Objective evaluation of all evidence
- No conflict of interest for Title IX Coordinator, Investigator or decision makers
- Presumption respondent not responsible
- Reasonably prompt time frames



## **New: Formal Complaint Response 34 C.F.R. 106.45(b)**

- Requires a number of specific steps for investigating, dismissing, and determining responsibility in formal complaint.
- Major shift from previous more deferential stance toward specific policies and practices for complaint resolution.
- A complainant (alleged victim of sexual harassment) must be participating in or attempting to participate in the education program or activity of the district at time formal complaint is filed.



## Written Notice

### 34 C.F.R. 106.45(b)(2)

- Written notice to known parties “upon receipt of written complaint”
- In sufficient time to allow respondent to prepare a response before any initial interview.
- Must include:
  - Notice of grievance process, including any informal resolution process
  - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known)





## Written Notice

### 34 C.F.R. 106.45(b)(2)

- Notice must include:
  - Statement that respondent presumed not responsible and that responsibility determined at conclusion of grievance process.
  - Notice of parties’ rights to have an attorney or non-attorney advisor and to inspect and review evidence.
  - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during the grievance process.
- Must be supplemented if new allegations opened for investigation.



## Dismissals

### Mandatory if conduct alleged:

- Not sexual harassment under Policy definition if true.
- Did not occur in the school's program or activity (if there is dispute regarding this, the investigation may be required to determine whether there is jurisdiction).
- Did not occur in the United States.

\*\*can still address under non-Title IX policy





## Dismissals

### Permissive if:

- Complainant requests to withdraw.
- Respondent's enrollment or employment ends.
- Specific circumstances prevent recipient from gathering evidence sufficient to reach a determine (e.g., passage of time, lack of cooperation by complainant).





## Investigation 34 C.F.R.106.45(b)(5)

- There is no restriction of the rights of parties to discuss allegations or gather or present evidence.
- Same opportunities for others present (e.g., attorney or non-attorney advisor).
- Equal opportunity to present witnesses and evidence at interviews/meetings.



## **Investigation 34 C.F.R.106.45(b)(5)**

- At least 2 business days' written notice to parties of date, time, participants, purpose, and location of each that gives sufficient time to prepare before investigative interview.  
\*\*\* Policy 2266
- All evidence provided to parties and their advisors at least 10 calendar days before the investigator completes a written investigative report to allow time for each party to respond.
- Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 calendar days before decision-maker issuing determination of responsibility – so each party may review and respond (i.e. ask written and relevant questions).





## Written Questions Required



- With or without a hearing, **after the school 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.
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude questions as not relevant.



## Decision

- The District's grievance process states the standard of evidence to be used to determine responsibility is:
  - **The preponderance of the evidence standard [that is, it is “more likely than not” that the perpetrator committed the action. Also known as 51% rule]**
    - \*\*\*Current Policy 2266 identifies use of the preponderance of the evidence standard.**
- Must apply the same standard of evidence for formal complaints against students as for formal complaints against employees.



## Determinations of Responsibility 34 C.F.R. 106.45(b)(7)

- Decision-maker cannot be the investigator or the Title IX Coordinator
- Must issue written determination addressing:
  - Allegations
  - Procedural steps taken
  - Findings of fact
  - Application of code of conduct to facts
  - Conclusions/outcomes/remedies/discipline





## Determinations of Responsibility

- Statement of and rationale for result as to each allegation including:
  - Determination of responsibility
  - Any disciplinary sanctions
  - Whether remedies to restore or preserve equal access to the educational program or activity will be provided
- Procedures and bases for appeals
- ❖ Provide to all parties simultaneously
- ❖ Becomes final after appeal time has passed or when appeal result is provided
- ❖ Title IX Coordinator is responsible for ensuring implementation of the remedies.



## Appeals: What Changed?

Old Requirements (from OCR guidance)	New Requirements (Final Rule)
<ul style="list-style-type: none"><li>▪ Not required</li><li>▪ Must be provided equally to both parties, if provided</li><li>▪ No limitation on basis for appeals, if provided</li></ul>	<ul style="list-style-type: none"><li>▪ Must offer to both parties for dismissals and final determinations in the following circumstances:<ul style="list-style-type: none"><li>– Procedural irregularity</li><li>– New evidence not reasonably available</li><li>– Conflict of interest against Title IX Coordinator, Investigator, Decision maker</li></ul></li><li>▪ Can offer for other reasons on equal terms</li></ul>





## Appeals: What Changed?

Old Requirements (from OCR guidance)	New Requirements (Final Rule)
<ul style="list-style-type: none"><li>▪ No requirement that the decision maker on appeal be different from investigators/decision makers in other phases of the process.</li></ul>	<ul style="list-style-type: none"><li>▪ Different Decision-maker:</li><li>▪ May not be the Title IX Coordinator, investigator, or decision-maker</li><li>▪ Must not have a conflict of interest or bias against complainants and respondents generally or individually.</li><li>▪ Must receive training.</li></ul>



# Investigation Dos and Don'ts





## Investigator Dos

- Presume innocence throughout the process.
- Be open and receptive to the complaint.
- Take the complaint seriously even if it sounds far-fetched or frivolous.
- Reserve judgment on whether you believe the complainant.
- Follow Board procedures for gathering evidence and conducting interviews.
- Respond promptly. Do not wait to undertake an investigation.
- Take steps to prevent threats or acts of violence even if the investigation is pending.



## Investigator Don'ts

- Make light of a complaint.
- Show bias when conducting witness interviews.
- Promise that all information will be kept confidential. It is appropriate to state that information will be kept as confidential as possible given the obligation to respond to the complaint.
- Discuss the investigation with individuals who do not have a “need to know”.



## Informal Resolutions

- District may not:
  - Require an informal resolution.
  - Offer an informal resolution until a formal complaint is filed.
  - Facilitate an informal resolution where allegations are made by a student against employee.





## Informal Resolutions

District may facilitate informal resolution after formal complaint filed, but must:

- Provide written notice to both parties with:
  - Allegations
  - Informal resolution process including any provisions that **after** agreeing to a resolution, party cannot withdraw and resume formal grievance process
  - Consequences of participating including records maintained or shared
- Obtain both parties' written and voluntary consent to informal resolution



## Emergency Removal

Districts may emergency remove a student if individualized safety and risk analysis determines that sexual harassment allegations pose immediate threat to student physical health or safety such that removal is justified.

- Notice and opportunity to challenge the decision must be provided immediately after removal.
- Comply with all laws and regulations (federal and state) related to emergency removals (RC 3313.66) and students with IEPs and 504 Plans.
- Comply with Board Policy 5610.03 – Emergency Removal of Students



## Retaliation Prohibited

- No school or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in a Title IX investigation, proceeding, or hearing.





## Retaliation Prohibited

- Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.
- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.
- Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures.



## Other Requirements: Recordkeeping 34 C.F.R. 106.45(b)(10)

- Records related to alleged sexual harassment must be maintained for a minimum of 7 years:
  - Investigation records
  - Disciplinary sanctions
  - Remedies
  - Appeals
  - Records of any actions taken, including supportive measures





## Other Requirements: Recordkeeping 34 C.F.R. 106.45(b)(10)

- Must document for every instance:
  - Why response was not deliberately indifferent
  - That measures were taken to restore or preserve equal access to the educational program or activity.
  - If no supportive measures provided, why that was not deliberately indifferent.





## Other Requirements: Training

- Required for all staff (identify and report sexual harassment).
- Required for Title IX Coordinator, investigators, and decision makers (both decision and appeal).
  - Promoting impartial investigations and adjudication of formal complaints
  - Must not be based on sex stereotypes
- Maintain materials used for trainings for 7 years and post materials on website (or otherwise make available to public if the district does not have a website).



## Visibility of Title IX Coordinator

- Must be visible in the school community
  - Notice of nondiscrimination posted
    - Note that questions should be directed to the Title IX coordinator
    - Via bulletins, announcements, application forms, etc.
  - Students and employees must be notified of the name, office address, telephone number, and email address of the current Title IX coordinator
    - Contact information must be widely distributed and easily found on the website or in various publications





## Title IX Policy Notice



- District must provide notice of nondiscrimination policy and grievance procedures, including how to file or report sexual harassment and how the recipient will handle such reports.
- Notice must include the Title IX Coordinator's name, title, email address, office address and telephone number.
- Notice must be provided to: applicants for employment, students, parents/guardians, employee unions.
- Notice must be posted on: district website and in any handbook provided to employees, students, parents/guardians, and employee unions.

