

# Title IX Coordinator, Investigator and Decision- Maker: Refresher Training on Roles and Responsibilities

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# Today's Objectives:

- ▶ Understand the history, scope and enforcement of Title IX.
- ▶ Understand the sweeping changes to Title IX: 2020 and 2024, including important definitions and procedural changes.
- ▶ Understand how to determine Title IX jurisdiction and procedural steps when a complaint is received.
- ▶ Understand the role of an institution's Title IX Coordinator, Investigator and Decision-Maker.
- ▶ Checking bias in the Title IX investigation process



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# Title IX

➤ Title IX is a Federal Civil Rights law stating:

“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 financial assistance.”

➤ 37 small words: huge impact.



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# History and purpose of TIX



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- ▶ **Congress recognized that**, in spite of the Civil Rights Act of 1964, women continued to received unequal treatment in schools.
- ▶ **How it started:** to remedy a “long and unfortunate history of sex discrimination”. *United States v. Virginia*. 518 U.S. 515, 531 (1996) quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).
- ▶ **How it is going:** improved access to educational opportunities and providing “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.” *United States v. Virginia*. 518 U.S. 515, 531 (1996)



# Scope of Title IX

- Applies to institutions receiving federal financial assistance from the Department of Education, including state and local educational agencies.
- Approximately 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums.
- Also included are vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories and possessions of the United States.



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# Scope of Title IX cont.

- ▶ Title IX obligations apply to:
  - ▶ recruitment, admissions, and counseling;
  - ▶ financial assistance;
  - ▶ athletics;
  - ▶ sex-based harassment;
  - ▶ treatment of pregnant and parenting students;
  - ▶ discipline;
  - ▶ single-sex education;
  - ▶ retaliation;
  - ▶ and employment.



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# Who enforces Title IX?

- Title IX is a civil rights law and falls under the jurisdiction of the U.S. Department of Justice.
- DOJ enforces laws to ensure equal access to education, as well as the Equal Protection Clause of the 14<sup>th</sup> Amendment.
- DOJ coordinates enforcement of Title IX across agencies to include the Department of Education and Office of Civil Rights (OCR).



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# The **2020** Title IX Regulation Related to Sexual Harassment

Regulations - **effective beginning August 14, 2020.**

Changes include:

- ▶ New terminology, policy and notice requirements
- ▶ Limitations on jurisdiction
- ▶ Optional burdens of proof; must choose.
- ▶ Revised Title IX Coordinator responsibilities
- ▶ Revised investigation procedures
- ▶ Expanded hearing rights options for K-12 hearings
- ▶ New Requirements for Decision makers
- ▶ New rules for appeals
- ▶ Expanded training requirements and record keeping



# The **2024** Title IX Regulation Changes Related to Sexual Harassment: Highlights

- Removal of Geographic limitations  
34 CFR §106.11
- Title IX recipient should not focus on whether the alleged misconduct happened on or off campus, “but rather on whether the recipient has disciplinary authority over the respondent’s conduct in the context in which it occurred.”
- There is no distinction between discrimination that occurs in person and that which occurs online, and the **final regulations permit schools to exercise their authority under the law to consider some conduct that occurs outside an institution’s educational boundaries.**



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# The 2024 Title IX Regulation Related to Sexual Harassment(K-12) Cont.: Highlights



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- Broader definition of sexual harassment: Includes conduct that is "sufficiently severe **or** pervasive".
- Clarification on special education interaction with Title IX.
- Training requirements.
- Clarification of prohibition on discrimination based on pregnancy: Includes current, potential, or past pregnancy or related conditions
- Support for LGBTQ+ students: Confirms protections for LGBTQ+ students

# The 2024 Title IX Regulation Related to Sexual Harassment(K-12) Cont.: Highlights Cont.

- Improved reporting process: Makes it easier for complainants to report sexual harassment
- Support for parents and guardians: Supports the rights of parents and guardians to file a Title IX complaint on behalf of a minor student.
- Clear communication of nondiscrimination policies: Requires schools to clearly inform key people of their nondiscrimination policies and procedures
- Prohibition of sharing personal information: Prohibits schools from sharing confidential personal information during the TIX process, except as allowed by law.



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# Clarification of Pregnancy-Related Protections & Inclusion of Lactation Issues

- Title IX recipients must protect students, employees, and applicants from discrimination based on **pregnancy, childbirth, termination of pregnancy, lactation, related medical conditions, or recovery** (§ 106.2)
- Providing reasonable modifications for students (including Section 106.40(b)'s requirement to provide a pregnant student with the Title IX coordinator's contact information)
- **Reasonable break time for employees for lactation** (§ 106.57(e)(1)).
- Clean, private lactation space for both students and employees (§§ 106.40(b)(3)(v) and 106.57(e)(2)).
- Sections 106.40(b)(3)(v) and 106.57(e) of the final regulations require Title IX recipients to **assure students and employees have access to a lactation space**, "which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others,"





# Old Definitions

“Sexual Harassment” means conduct on the basis of sex that satisfies at least one of the following:

- ▶ A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo); or
- ▶ Unwelcome conduct that a reasonable person would determine is so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the school's education program or activity; or
- ▶ Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).



# New Definitions=Policy changes required

- ▶ 34 C.F.R. Section 106.2 “**sex-based harassment** is a form of sex discrimination, and include both sexual harassment, which is conduct of a sexual nature, as well as other forms of harassment that are not necessarily “sexual” but are based on a person’s sex, such as pregnancy harassment, gender identity, or sex-based stereotypes.”
- ▶ **Revised definition**: Sex-based conduct that, based on the totality of the circumstances, is subjectively **and** objectively offensive and is so severe **or** pervasive that it limits or denies a person’s ability to participate in or benefit from your education program or activity.
- ▶ **Retaliation** definition changes now clarifies that nothing in that definition prohibits institutions from requiring employees to participate as a witness in, or otherwise assist with, a Title IX investigation, proceeding, or hearing. 34 C.F.R. Section 106.2
- ▶ *Remember - sexual harassment is evaluated on the manner it was received, not the manner in which it was intended.*



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# Elements of Sexual/gender-based Harassment

- A form of sex discrimination involving conduct of a sexual nature.
- Unwelcome sexual advance or conduct that creates an intimidating, hostile or offensive workplace.
- May occur when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or academic progress.
- Sexual harassment does not have to be of a sexual nature - it can include offensive remarks about a person's sex. i.e. dumb ho, stupid bitch, faggot, homo
- Includes any retaliatory conduct in response to reporting such conduct.



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# Examples of verbal sexual harassment

- Threats or suggestions of loss of job, academic credit or privileges or withholding of a benefit unless sexual favors are given
- Threats or suggestions that a person will “get ahead” if sexual favors are given
- Repeated requests to have lunch, dinner, a drink or to just “hang out” or “hook up”
- Calling someone “doll,” “babe,” or “honey”
- Making sexual innuendoes
- Telling sexually-oriented jokes or stories
- Making sexually-oriented comments about a person’s appearance, clothing, or body.
- Turning innocent discussions to sexual topics
- Cat-calling



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# Examples of non-verbal sexual harassment

- Elevator eyes
- Staring (at someone or particular body parts)
- Displaying sexual and/or derogatory materials about men or women, including sharing pictures and videos on social media or on your phone
- Invading an individual's personal space
- Making sexual gestures with hands and/or body movements



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# Examples of Physical sexual harassment

- Massaging a person's neck, shoulders, etc.
- Brushing up against another person
- Hugging, kissing, patting, or stroking someone
- Pinning someone into a corner
- Touching oneself in front of another
- Adjusting a person's clothing
- **Non-consensual sexual contact**

If the conduct interferes with a person's ability to access educational or work opportunities - it may be sexual harassment.



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# Hostile Environment Analysis under TIX

- Unwelcome conduct determined by
  - a reasonable person, placed in a substantially similar situation,
  - to be so severe or pervasive, and objectively offensive that
  - it effectively denies a person equal access to the recipient's education program or activity.



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# Prohibitions on Retaliation

- ▶ 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.





# What Does Not Constitute Retaliation?

- ▶ The exercise of rights protected by the First Amendment does not constitute retaliation. (No party can be prohibited from discussing the allegations or gathering evidence).
- ▶ Charging an individual with a code of conduct violation for making a **materially false statement** in bad faith in the course of a grievance proceeding under this part does not constitute retaliation; provided,
- ▶ A determination of responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.



# TIX Notice and Response



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- When a Responsible Employee is made aware of conduct which may constitute sexual harassment, school/district must take specific action.
  - Conduct must be immediately reported to TIXC.
  - Promptly contact Complainant to discuss available supportive measures.
  - Supportive Measures: **individualized services to restore or preserve equal access to education, protect student and employee safety, or deter sexual harassment.**
  - Supportive measures must be offered even if a complainant does not wish to initiate or participate in a grievance process.
  - Explain to Complainant the process of filing a complaint and the TIX investigation process.

# Mandatory Response to Reports of Sexual Harassment



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## A District **MUST**

- ▶ respond promptly in a manner that is **not deliberately indifferent**, i.e., in a way that is not clearly unreasonable in light of the known circumstances;
- ▶ Offer supportive measures to the complainant (and Respondent if aware of complaint).

# Protection for LGBTQ+ Now Codified

- ▶ Codification of protection against discrimination on the basis of sexual orientation and gender identity.
- ▶ **The final regulations**: Protection against all sex-based harassment and discrimination.
  - ▶ The final rule protects all students and employees from all sex discrimination prohibited under Title IX, including by restoring and strengthening full protection from sexual violence and other sex-based harassment.



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# Social Media and AI –Included in Harassment

- ▶ A recipient's obligation is to address all forms of sex discrimination, including sex-based harassment that occurs within the recipient's education program or activity, whether the conduct takes place online, in person, or both.
- ▶ Online harassment can include, but is not limited to,
  - ▶ unwelcome conduct on social media platforms, such as
    - ▶ sex-based derogatory name-calling,
    - ▶ the nonconsensual distribution of intimate images (including authentic images and images that have been altered or generated by artificial intelligence (AI) technologies),
    - ▶ cyberstalking,
    - ▶ sending sex-based pictures or cartoons
- A recipient must evaluate **online** conduct with the same factors that are used to determine whether in-person conduct creates a hostile environment.



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# Special Education & Title IX

- ▶ Section 106.8(e) clarifies that the Title IX Coordinator is *not* required to consult with a student's *full* IEP team or Section 504 team.
- ▶ However, Section 106.8(e) does provide the recipient must require that the Title IX Coordinator consult with one or more members of a student's IEP team or Section 504 team, as appropriate.
- ▶ The purpose of the consultation is to determine how the recipient can comply with relevant special education laws while carrying out the recipient's obligation under Title IX
  - ▶ Think Section 504 for parties who are employees.



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# Title IX and Confidentiality

Schools must keep confidential the identity of complainants, respondents, and witnesses, **except as may be permitted by FERPA, or as required by law, or as necessary to carry out a Title IX proceeding.**



# Training Requirements

- ▶ Section 106.8(d)(2) requires all investigators, decisionmakers, and other persons responsible for implementing the recipient's grievance procedures or who have the **authority to modify or terminate supportive measures** to also be trained on the recipient's obligations; and
- ▶ the recipient's grievance procedures, and if applicable, how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias...



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# Title IX Required Training



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Title IX Coordinators, investigators, decision-makers and people who facilitate any informal resolution process, must be free from conflicts of interest or bias for or against complainants or respondents.

Training of Title IX personnel must include:

- ▶ the new rule's definition of sexual harassment and the scope of the school'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;
- ▶ training on any technology to be used at a live hearing;
- ▶ decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants.

# More Training

## *Decision makers must be trained*

- ▶ on a presumption that the respondent is not responsible for the alleged conduct **until** a determination regarding responsibility is made at the conclusion of the grievance process.
- ▶ Materials used to train Title IX personnel must be posted on websites, if any, or make materials available for members of the public to inspect if no website.



# Title IX Coordinator Responsibility

- ▶ Title IX Coordinators are *required to ensure* that all of the individuals involved in this process are trained annually and training is posted on the website.



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## Deadline for Implementation - August 1, 2024 (that was last week).

- All policies **MUST** be updated
- All staff trained on new Title IX regulations - annually.
- Update student, staff and parent handbooks, websites, etc. before school starts.



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# District Policy Requirements

The policy must address how notice of the nondiscrimination policy and grievance procedures will be made, including how to file or report sexual harassment and how the recipient will respond, and notice must be given to:

- ▶ applicants for admission and employment;
- ▶ students;
- ▶ parents or legal guardians;
- ▶ **unions or professional organizations holding agreements with the District**, and
- ▶ notice to the same groups must contain the Title IX Coordinator's name or title, email address, office address, and telephone number.



# Policy Requirements, cont'd.



## Notice of a District's non-discrimination policy must include,

- ▶ statement that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and its regulations not to discriminate in such a manner;
- ▶ the requirement that prohibition on discrimination in the education program or activity applies to employment;
- ▶ Statement that inquiries about the application of Title IX and its regulations to the District may be referred to the designated Title IX Coordinator, to the Assistant Secretary of the Federal Department of Education, or both; and
- ▶ both the **notice of nondiscrimination and the Title IX Coordinator's contact information must be published on District/School websites** and in any handbook provided students, parents/guardians, applicants, unions and professional organizations have agreements with a District.

# Supportive Measures Requirements



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- ▶ **Applies to both complainant and respondent, before or after the filing of a formal complaint, or where no formal complaint has been filed.**
- ▶ Measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment.
- ▶ **May include** counseling, course-related adjustments, modifications of work or class schedules, campus escort services, increased security and monitoring of certain areas of campus, and mutual restrictions on contact between the parties.

# Title IX Definitions

Under the 2024 Revised Regulations





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

- ▶ **“Title IX Coordinator”- At least one person designated and authorized by a District to coordinate its efforts to comply with Title IX and must be designated by that title.**
- ▶ **Applicants for admission and employment, students, parents or legal guardians of Grades 1-12 students, employees, and all unions, must be annually notified of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator.**
- ▶ **Website must include the contact information.**



# Sexual Discrimination/Harassment under Title IX



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- ▶ Any District employee engaging in *Quid Pro Quo* harassment;
- ▶ Any instance of **sexual assault** (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA);
- ▶ Any unwelcome conduct that a reasonable person would find so **severe**, **or** **pervasive**, **and** **objectively offensive** that it denies a person equal educational access.

# Quid Pro Quo



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## ▶ “This for that”

▶ Submission or rejection, explicitly or implicitly, as a term, condition or basis for academic, employment or activity or program participation, i.e. you scratch my back, I scratch yours...

▶ Examples of this type of harassment can include:

▶ A supervisor requesting sexual favors as a condition for hiring, promotion, advancement, or opportunities.

▶ A manager threatening to terminate, transfer, demote, or otherwise adversely affect an employee’s work life if sexual favors are not given or continued.

▶ A teacher promising or giving a student a higher grade because of real or expected sexual favors.

▶ A Coach benching a student for refusing to engage in sexual conduct

▶ NM House Bill 128 requires mandatory reporting of sexual abuse and other requirements.

# Sexual Assault



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► **Sexual Assault** is any attempted or actual sexual act directed against another person, **without consent** of the complainant, including instances where the complainant is incapable of giving consent.

► Any attempted or actual sexual act directed against another person, **without consent**, including instances where the complainant is incapable of giving consent. i.e. intellectual disability

► **Rape** is the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, **without the consent** of the complainant.

► **Fondling** is the touching of the private body parts of another person for the purpose of sexual gratification, **forcibly and/or against that person's will** (without the consent of the complainant), including instances where the complainant is **incapable of giving consent** because of the complainant's age or youth or because of the complainant's permanent or temporary mental incapacity.

► **Incest** is sexual intercourse between person who are related to each other within the degrees wherein marriage is prohibited by law.

► **Statutory Rape** is sexual intercourse with a person who is under the statutory age of **consent**.

► All offenses are applicable to all genders.



## ► Dating & Domestic Violence

► Dating Violence is violence committed by a person who is or has been in a **social relationship of a romantic or intimate nature** with the complainant; and where the existence of such relationship shall be determined based on a consideration of the length of the relationship, the type of relationship, frequency of interaction between the persons involved in the relationship.

► Domestic Violence is violence committed:

- By a current or former spouse or intimate partner of the complainant;
- By a person with whom complainant shares a child in common;
- By a person who is or has cohabitating with complainant, as a spouse or intimate partner;
- By a person similarly situated to a spouse of complainant under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
- By any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.



# Stalking (including cyberstalking)

- ▶ Stalking is a course of conduct directed at a specific person that would cause a reasonable person to:
  - ▶ Fear for the person's safety or the safety of others; or
  - ▶ Suffer substantial emotional distress.
  
- ▶ For the purposes of this definition:
- ▶ Course of conduct means two or more acts.
  - ▶ Reasonable person means a reasonable person under similar circumstances and with similar identities to the complainant.
  - ▶ Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily require medical or other professional treatment or counseling.

# Actual Knowledge?

- ▶ **The** District/School has “actual knowledge” of discriminatory conduct when notice of sexual harassment or allegations of sexual harassment are made to the Title IX coordinator or any District official/employee who has the authority to institute corrective measures.
- ▶ **All** recipient employees are mandated reporters for the purposes of Title IX.



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- ▶ “Actual knowledge” means notice of sexual harassment or allegations of sexual harassment to the District’s Title IX Coordinator, or
- ▶ any official of the school who has authority to institute corrective measures on behalf of the school,
- ▶ or to any employee of an elementary and secondary school provided that imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.
- ▶ Teachers, administrators, employees - **must** report to Title IX coordinator



# Important Title IX Definitions cont'd.



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**“Complainant”** means an individual who is alleged to be the **recipient of conduct that could constitute sexual harassment**. The Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters.

- ▶ The person who simply reports is not the **“Complainant”** for purposes of investigation.

**“Respondent”** means an individual who has been reported to be the perpetrator of conduct that **could constitute sexual harassment**.

- The Title IX Coordinator has the right/obligation to file a complaint on behalf of a complainant(s) if the complainant is unwilling and the Title IX Coordinator determines there is a **“substantial risk of the conduct being repeated”**.

# Important Title IX Definitions cont'd.

"Notice" includes, but is not limited to,

- ▶ a report of sexual harassment to the Title IX Coordinator
- ▶ in person,
- ▶ by mail,
- ▶ by telephone,
- ▶ or by electronic mail,
- ▶ using the contact information listed for the Title IX Coordinator,
- ▶ or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- ▶ Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.
- ▶ 34 CFR 106.8

# Important Title IX Definitions cont'd.



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- ▶ “Education program or activity” - locations, events, or circumstances over which the school exercised substantial control over both the alleged harasser and the context in which the sexual harassment occurs and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.
- ▶ *Remember - new regulations include harassment on social media, text, etc., which impact a student’s access to educational opportunities.*
- ▶ **“Supportive measures”** means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge, **to the parties in a TIX matter.**

## ► Standard of Evidence

► The **PREPONDERANCE OF EVIDENCE** standard in reviewing evidence and determining if a violation of District Policy has occurred.

“More likely than not”



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# ► Relevant Evidence

- "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- Does the evidence provide information that will aid the Decision-Maker in reaching a determination?
- Who/what is the source of the evidence? It is important to determine the credentials of the person/group responsible for the evidence.
- Is the source of the evidence credible.
- Does the evidence corroborate a version of events that makes sense?



## ▶ Prior Sexual Behavior or Sexual Predisposition

▶ Rape shield protections & exceptions defined in 34 C.F.R. § 106.45(b)(6)(i).

▶ Evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless:

- ▶ are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
- ▶ if they concern specific incidents of the Complainant's prior sexual behavior and are offered to prove consent.



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## ► Privileged Information

- In NM, individuals with legal privilege may include **medical providers, attorneys, psychologists, clergy, counselors, and social workers.**
- Privileged information may not be used as evidence **unless** the Party (or parent of minor) has given voluntary, written consent for use of those records.
- Information about any Party's medical, psychological, and similar records are **irrelevant** unless the Party has given voluntary, written consent.





# ▶ **SANCTIONS**, if policy violation is ▶ found:

## ▶ Employees:

- ▶ Reprimand/Warning (oral/written) through
- ▶ Suspension, demotion, or involuntary termination/dismissal.

## ▶ Students:

- ▶ Warning (verbal or written),
- ▶ Disciplinary Probation,
- ▶ Restricted Privileges or Activities,
- ▶ Community Service,
- ▶ Counseling,
- ▶ Suspension, Expulsion



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► **REMEDIES**, if policy violation is found:

- District must implement any steps or actions designed to restore or preserve equal access to the District's educational programs.
- **May** including individualized services.
  - Imposed as deemed appropriate to the individual facts and circumstances of each case.



# Informal Resolution?

- ▶ An option for resolving a formal complaint that does not involve a full investigation.
- ▶ Methods (*mediation, restorative justice, facilitation, etc.*) used vary depending on circumstances and wishes of the Parties.
- ▶ In some cases, it may be used as an alternative to proceeding with investigation and determination.
- ▶ Cases involving a student *Complainant vs an Employee Respondent* are not eligible for informal resolution.

# Break Time

(Find your “Standard Operating Procedures” for when we return.)



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# Steps to Follow When a Complaint Comes to the Title IX Coordinator

From Title IX Coordinator to Investigator to Decision-Maker to Appeal Authority

# 1. Complaint

- ▶ Note: If your District uses the NMSBA policy service for their policies, there is a form found at A-0331.
- ▶ Take a look at the model complaint form found with your registration email.
- ▶ When the Title IX Coordinator reviews a complaint, they must determine:

## 1. Who is the Complainant?

- Remember, the *reporter* is not necessarily the *Complainant*.
- The Complainant is the person who received the allegedly discriminatory conduct - that is not always the person who made the report.

## 2. Who is the Respondent?

- Is the Complainant willing to proceed with an investigation?
- Regardless, must offer supportive measures to both parties.



# Procedures for Complaint Intake and Investigation

- ▶ **Who Can Complain?**- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment) but the term “complainant” means the **victim**.
- ▶ **How?** - In person, by mail, telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, **or by any other means** that results in the Title IX Coordinator receiving the person’s verbal or written report.



# More About Complaints

- ▶ A complaint 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.
- ▶ The District must treat a person as a “complainant” any time it has notice that the person is alleged to be the recipient of conduct that could constitute sexual harassment
- ▶ regardless of whether the person themselves reported, or a third party reported the sexual harassment,
- ▶ and irrespective of whether the complainant ever chooses to file a formal complaint or participate in an investigation.





# Mandatory Response MUST Do's

## Coordinator must

- ▶ promptly 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,**
- ▶ and explain to the complainant the process for filing a formal complaint.



# Coordinator Must Do's

- ▶ Determine initial jurisdiction questions.
- ▶ Determine whether complainant has made a formal complaint or if Coordinator will initiate complaint.
- ▶ Determine whether there is an obligation to investigate.
- ▶ Determine range of policy violations if allegations are true.
- ▶ Provide written notice to complainant and respondent of allegations and investigation prior to setting formal interviews.

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# Coordinator Responsibilities

- ▶ **Describe or list the possible disciplinary outcomes and remedies that may be implemented following a determination of responsibility.**
- ▶ Notify respondent of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process.



# Investigator Duties

- ▶ Promptly conduct an unbiased investigation
- ▶ Provide parties equal opportunity to present witnesses and evidence; allow them to be accompanied by an advisor; give parties written notice of meetings and sufficient time to prepare.
- ▶ A decision may not be made sooner than 10 days after the final report is served on the complainant and respondent for their review and written response.
- ▶ Provide the complainant and respondent the evidence gathered in the investigation 10 days prior to its finalization and parties must be allowed to respond within this period.



# Administrative Process

- ▶ Board Policy determines whether in person hearings with cross examination are permitted. Hearings not required by K-12 or post-secondary under the new regs.
- ▶ Parties may submit written questions that the party wants asked of any party or witness and be permitted follow-up questions.
- ▶ The complainant's prior sexual behavior is not relevant unless used to prove consent with respondent or that another person committed the acts complained of.
- ▶ Burden of Proof - Same for employees as others.
  - ▶ Preponderance of the evidence.



# Formal Administrative Decision

- ▶ The investigator **cannot be** the decision maker.
- ▶ Under the new regulations, the Coordinator can be the Decision-Maker.
- ▶ Separation of duties is the best model for checks and balances.
- ▶ The written decision must include:
  - ▶ The allegations that could constitute sexual harassment;
  - ▶ All procedural steps from receipt of the complaint to the determination;
  - ▶ The factual findings;
  - ▶ The conclusions applying the facts found to the code of conduct;
  - ▶ A statement of the rationale for the result found for each allegation, the determination of responsibility, any sanctions and any remedy needed to restore or preserve equal access to the educational program or activity for the complainant and
  - ▶ The bases and procedures for an appeal.



# Applicability of State Law Due Process Requirements

- ▶ The Title IX Regulations allow the decision-maker to impose sanctions against a respondent determined to be responsible for sexual harassment.
- ▶ The NM Public School Code provides specific due process protections, including hearings, for terminating/discharging certain employees. NMSA 22-10A-24 thru 28.
- ▶ The NM Administrative Code provides specific due process protections, including hearings, for students facing long-term suspension/expulsion. NMAC 6.11.2.
- ▶ Does the federal law “preempt” these state law due process requirements? May have to do both.



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## District/School Obligation under TIX

- ▶ **Stop** the Reported Conduct
- ▶ **Prevent** it Recurrence
- ▶ **Remedy** its Effects
  - ▶ **Hold Accountable** through  
Corrective or Disciplinary  
Action



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## **2. Offer Supportive Measures**

- ▶ **Offered to both Complainant and Respondent**
- ▶ **Referral to Counseling and/or medical**
- ▶ **No Contact Orders issued**
- ▶ **Academic Accommodations**
- ▶ **Transfer classes/schools**
- ▶ **Job Modification**
- ▶ **Increased Monitoring, Supervision, Security**



# 3. Must determine Jurisdiction

- Does TIX jurisdiction attach?
  - ▶ Was the complainant attempting to participate in a District-sanctioned program or activity when the conduct occurred?
  - ▶ Was the respondent engaging in a District-sanctioned program or activity when the conduct occurred?
  - ▶ Did the District have control over the respondent when the conduct occurred?
  - ▶ Did the alleged conduct occur within the jurisdiction of the School/District?

**Remember:** The new regulations, effective August 1, 2024, require the district to consider conduct that did not occur within the geographical boundaries of the district, but impacted a student's access to their educational opportunities. i.e. social media, texting, snapchat, pictures, etc.



# ▶ Determining Title IX Jurisdiction

## ▶ Two-pronged test:

- ▶ Does the District have control over the harasser; and
  - ▶ Does the District have control over the context of the harassment (on our property, in our programs, on land we lease or control, or at events we sponsor).
- ▶ The District reserves the option to take jurisdiction of off-campus misconduct when deemed necessary due to the involvement and/or impact on students and/or employees, i.e. social media



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# 4. Must Determine SP00

- ▶ Does the conduct alleged, if true, rise to the level of a Title IX investigation:
- ▶ Severe **or**
- ▶ Pervasive **and**
- ▶ Objectively Offensive
- ▶ So as to effectively limit or deny a person's ability to participate in or benefit from your education program or activity.
- ▶ If yes, must meet with Complainant to review the investigation process.



# Complainant Considerations

## ► Questions

1. Has the Complainant been offered supportive measures?
2. Has the Complainant been informed of her right to contact law enforcement?
3. Has the Complainant had the Title IX investigation process explained to her?
4. Does the Complainant want an investigation into this matter?
5. If yes, what are the next steps?
6. If no, what are the next steps?
7. Should the TIX coordinator consider filing a complaint on behalf of complainant if she is unwilling to move forward? Why or why not?



# Respondent Considerations

1. Has Respondent been offered supportive measures?
2. Has Respondent been provided with written notice of allegations and advisement of rights?
3. Has Respondent been notified of the presumption that they are not responsible for the alleged conduct?
4. Has Respondent been notified of their right to provide witnesses and evidence to support their position?
5. Has Respondent been notified of their right to respond in writing to the allegations?



# Mandatory Dismissal of Formal Complaint

- ▶ If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 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,
  - ▶ Don't forget about social media considerations...
- ▶ then the district **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part;
- ▶ such a dismissal does not preclude action under another provision of the district's code of conduct.



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# Permissive Dismissal of Formal Complaint

- ▶ The district **may** dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing:
- ▶ 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 recipient;
- ▶ or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.



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## 5. Assign an Investigator

- ▶ Investigator must reveal any real or perceived conflict of interest.
- ▶ Make sure the investigator has time for a prompt investigation.
- ▶ Investigation formally begins when written allegations are served on the Respondent.

# ► What is a conflict of interest?

► **Any** time that an Investigator has a personal interest (whether actual, potential or perceived) that conflicts with the interests of the Parties.

► **A** conflict of interest challenge to the investigation is avoided by not having a conflict or the appearance of a conflict.

► **Be** honest about any conflicts or perceived conflicts from the beginning of the process.



# ► Investigation Process - Checklist

## ► Procedures include:

- Complaint;
- Intake;
- Dismissals of complaints/allegations, *if/when warranted*;
- Written Notice of Allegations;
- Interviews;
- Informal resolution process, *if/when warranted*;
- Inspection of evidence/records & draft report;
- Process draft report to parties for inspection, questions and response;
- Final report and evidence;
- Appeals.
- Implementation of Sanctions.
- Implementation of Remedies.



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# ▶ Notice of Allegations

- ▶ Initiates the investigation process.
- ▶ Must be in writing and state all rights afforded to the Parties. (use template)
- ▶ Provided simultaneously to both parties.
- ▶ Parties may respond to the allegations in writing (not mandatory).
- ▶ Notifies parties of right to present relevant witnesses and evidence.
- ▶ Notify parties that the Respondent is presumed not responsible.





## ► Privacy & Confidentiality

- These cases may not be discussed outside your role as an investigator.
- Private - You do not share
- Confidential - You only share with individuals who have a right to know.
- Title IX trumps FERPA, so information/evidence/sanctions is required to be shared among the Parties.
- Investigators must recuse if they have a real or perceived conflict of interest.
- Perceived conflicts may be worse - you can work around real conflicts.

# What about Special Education Students?

- ▶ Special Education students can be found responsible under Title IX.
- ▶ IDEA and Title IX are two voluminous and parallel running federal laws.
- ▶ Always check to see if the student is a special education student.
- ▶ If a student has an IEP, notify the case manager that the student is a party to a Title IX investigation.
- ▶ Determine if accommodations are required for the student to meaningfully participate in the investigation.
- ▶ Proceed with investigation.
- ▶ If special education student found responsible, must conduct an MDR prior to the administration of sanctions.



# Credibility Determinations

- ▶ **The most reliable credibility factors** (Gold Standard) when you're struggling
  - ▶ to decide who is telling the truth:
    - ▶ **Corroboration** - witness testimony, text message or email exchanges, video or photo evidence, also assessing reliability of testimony with a witness's recollection of events
    - ▶ **Consistency** - Is there witness testimony or physical evidence that is consistent with the complainant's testimony? Or are there inconsistencies that make you doubt credibility?
  - ▶ **Inherent plausibility** - Does the testimony make sense? Which version of the events seems more plausible? Is there a plausible reason for inconsistencies (ex., a student has left out part of the story to protect a friend from getting in trouble)?
  - ▶ **Motive to falsify** - Is there motivation to lie (fear of retaliation, a witness who wants to protect someone, etc.)?
  - ▶ **Material omission** - Did someone omit something that was important, despite having an opportunity to provide the information?



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# Credibility Pitfalls

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- ▶ **Confirmation bias** - you know the parties, or you stop investigating because of investigator bias - you've decided that you think something happened in a certain way. There may also be internal bias to get the investigation completed.
- ▶ **Making a determination** - then conducting your investigation in a manner that supports your determination.
- ▶ **Incomplete Investigation** - you have not talked to all the witnesses or obtained enough information. You will need to ask more questions or talk to more witnesses.





# Review of Report & Inspection of Evidence

- ▶ An Investigation Report will be drafted and sent electronically to the Parties, accompanied by relevant evidence.
- ▶ Parties have **ten (10)** school days to respond to the Report in writing, and provide additional evidence, should they choose to do so. Any responses will be included in the final report.
- ▶ Parties may pose questions in writing to the other Party to be submitted with any response to the draft report.
  - ▶ Questions and answers, if provided, will be included as appendices
- ▶ The final report/evidence submitted to the parties.



## 6. Consider Interim Suspension (depends on severity of allegations)

- ▶ The Regulation does not preclude a district from removing a respondent from the recipient's education program or activity on an emergency basis, **provided that**
- ▶ the recipient undertakes an individualized safety and risk analysis,
- ▶ determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal,
- ▶ and provides the respondent with notice and an opportunity to appeal the decision immediately following the removal.
  - ▶ Who will serve as the appeal authority in your organization?
- ▶ IDEA, Section 504, ADA may preclude total removal.



# Employee Administrative Leave

- ▶ The Regulation does not preclude a district from placing an employee respondent on administrative leave during the pendency of a Title IX grievance process.
- ▶ Work with HR on this.



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# 7. Consider Informal Resolution

- ▶ Cannot be a requirement.
- ▶ At any time before a determination is reached, District may facilitate an informal resolution process, like mediation, that does not involve a full investigation and grievance process, so long as parties give voluntary written consent to the informal resolution process.
- ▶ Not allowed when respondent is an employee and complainant a student.
- ▶ Parties must agree to the resolution.
- ▶ **Get all of this in writing.**



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# ▶ Informal Resolution

## ▶ Informal Resolution

- ▶ ☐ **May** be offered in certain matters
  - ▶ ☐ **Both** parties must agree in writing to participate.
- ▶ ☐ **May** include training, restrictions, etc.
  - ▶ ☐ **Be** sure Parties understand that Informal Resolution concludes their case, but supportive measures may be ongoing.
- ▶ ☐ **Talk** it over with Title IX Coordinator - must be approved by TIXC.

## 8. Decision-Maker Receives the Investigation Report and Exhibits - Will Draft a Written Decision

- ▶ The Decision-Maker may be provided with documentation of the Respondent's conduct history, prior to the Decision-Maker issuing a decision.
- ▶ The Decision-Maker will issue a written decision to include:
  - ▶ A determination that a violation of policy has or has not occurred; and
  - ▶ A list of the allegations; and



# Decision-Maker Checklist

- ▶ Evidence should be relevant.
- ▶ Evidence should directly support your findings.
- ▶ Conclusions must flow from the findings.
- ▶ Conclusions must be supported by law and policy.
- ▶ Sanctions must be appropriate to the severity of the violation.
- ▶ Remedies must repair any damage done by the conduct.



# The Regulations Require a Decision-Maker to

- ▶ Have a process for assessing credibility when credibility is in dispute and relevant. (§ 106.45(g)).
- ▶ Use a preponderance of the evidence standard of proof to determine whether sex discrimination occurred (§ 106.45(h)).
- ▶ Determine remedies for the complainant or others, if it is determined that sex discrimination occurred, disciplinary sanctions for those found responsible; and other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur. (§ 106.45(h)(3)).





# Weighing Credibility

- ▶ A decisionmaker may weigh the credibility of a party or witness, including when a party or witness refuses to respond to relevant and permissible questions.
- ▶ A decisionmaker may not draw an inference about whether sex-based harassment occurred based *solely* on a party's or witness's refusal to respond to relevant and permissible questions. (§ 106.46(f)(4)).
- ▶ Written notice to the parties of the determination that includes a description of the allegations, information about the policies and procedures used to evaluate the allegations, the decisionmaker's evaluation of the relevant and not otherwise impermissible evidence, a determination whether sex-based harassment occurred, disciplinary sanctions and remedies if relevant, and information about appeal procedures. (§ 106.46(h)).
  - ▶ Send to the Title IX Coordinator to distribute to the parties.



# Party and Witness Credibility

- ▶ Credibility impacts preponderance
- ▶ Would a reasonable person do the same?
- ▶ Are there more likely alternative versions of these events?
- ▶ Credibility Assessment involves evaluating whether evidence is believable and reliable
- ▶ Refrain from focusing on irrelevant inaccuracies and inconsistencies
- ▶ Note: Recall does not necessarily diminish witness credibility, nor does refusal to answer - there may be legitimate reasons for not answering
  - ▶ Don't want to get a friend in trouble.
  - ▶ Don't want to admit other bad conduct; i.e. drugs, alcohol.



# Now Apply Facts to Policy

- ▶ DM must presume the Respondent is not in violation unless and until the standard of evidence is met
- ▶ The DM analyzes facts against each policy element to determine whether the Respondent violated policy
- ▶ Written rationale will have to cite to specific evidence supporting conclusion that a policy was or was not violated.
- ▶ Assess credibility of evidence and evidentiary weight.
- ▶ Assess statements as factual, opinion-based, or circumstantial
- ▶ Apply evidentiary standard to determine if policy has been violated
- ▶ Based only upon evidence in the investigation report.



# Decision Maker Roles and Responsibilities

- ▶ Decision-makers have no position on the outcome of the case;
- ▶ DM must have a thorough understanding of:
  - ▶ Institutional policy and procedures, including the investigation process
  - ▶ Whether you are addressing an alleged incident(s), a pattern, or a culture/climate complaint, and findings;
  - ▶ Best practices for asking good questions
  - ▶ Decision-making procedures and management
  - ▶ Evidence and how to weigh it and apply it to institutional policy by the standard of evidence
  - ▶ How to analyze credibility
  - ▶ How to make determinations, decide sanctions/remedies, and write a rationale



# Decision-Maker Skill Sets

- ▶ Decision-makers need to be organized:
  - ▶ Effective questioning skills
  - ▶ Strong writing skills
  - ▶ Subject matter expertise
  - ▶ Analytical skills



# Materials Review

- ▶ Review the complaint file, including:
  - ▶ Complaint
  - ▶ Written Notice of Investigation and Allegations (NOIA)
  - ▶ Applicable policies
  - ▶ Investigation report and appendix
  - ▶ Review carefully and thoroughly
  - ▶ May require multiple reads



# Policy Elements and Procedures

## ► Policy

- What policies are alleged to have been violated?
- What are the elements of those policies?
- Weigh and apply relevant evidence to determine whether a policy violation occurred

## ► Procedures

- Review decision-making procedures
- Note any procedural questions to ask legal counsel



# Understanding the Evidence

- ▶ Evaluate all relevant evidence
  - ▶ Evidence is any kind of information presented to help determine what occurred
  - ▶ Relevant evidence is evidence that tends to prove or disprove the underlying allegations
  - ▶ Directly related evidence is connected to the complaint, but is neither inculpatory nor exculpatory





# Types of Evidence

- ▶ Documentary Evidence
  - ▶ Supportive writings or documents
  - ▶ Electronic Evidence
    - ▶ Photos, text messages, and videos
    - ▶ Physical objects
- ▶ Direct or Testimonial Evidence
  - ▶ Personal observation or experience
  - ▶ Circumstantial Evidence Not eyewitness, but compelling
  - ▶ Hearsay Evidence Statement from outside the interview presented as truthful
- ▶ Character Evidence Evidence of a person's character or character traits



# Questions for Decision-Makers

- ▶ Is this evidence relevant?
- ▶ Is this evidence reliable?
- ▶ Will we be able to rely on this evidence to support a finding?



# Relevance

- ▶ Evidence is generally considered relevant when it helps determine:
  - ▶ Whether the Respondent violated policy,
  - ▶ Credibility of any evidence, including a party or witness statement
  - ▶ Investigator initially evaluates relevance, but the DM ultimately decides
  - ▶ All relevant evidence must be objectively evaluated and considered
  - ▶ Inculpatory: tending to suggest a finding of responsible
  - ▶ Exculpatory: tending to suggest a finding of not responsible



## ► Relevant Evidence

- "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- Does the evidence provide information that will aid the Decision-Maker in reaching a determination?
- Who/what is the source of the evidence? It is important to determine the credentials of the person/group responsible for the evidence.
  - Is the source of the evidence credible.
  - Does the evidence corroborate a version of events that makes sense?



► Should the Decision-Maker Know that a Party is a Special Education Student?

► **Yes**, if that knowledge is relevant and assists you in making a determination.



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## ▶ Responsibility Determinations & Sanctions

- ▶ The Decision-Maker may be provided with documentation of the Respondent's conduct history, prior to the Decision-Maker issuing a decision.
- ▶ The Decision-Maker will issue a written decision to include:
  - ▶ A determination that a violation of policy has or
  - ▶ has not occurred; and
  - ▶ A list of the allegations;  
and



# Responsibility Determinations and Sanctions

- ▶ A description of the procedural steps taken from the receipt of the formal complaint through determination; and
- ▶ Findings of fact supporting the determination; and
- ▶ Conclusions regarding application of policies to the facts; and
- ▶ A statement of and rationale for the results of each allegations, including sanctions to be imposed on Respondent; and any remedies afforded to the Complainant



# Sanctions and Remedies

- ▶ After making a determination of responsibility, DM must decide sanctions and remedies
- ▶ There must be a nexus between the sanctions and the misconduct.
- ▶ Sanctions must be proportionate to the severity of the violation, taking progressive sanctions/history into account.
- ▶ DM may consider:
  - ▶ Impact statements from the parties.
  - ▶ Precedent, prior misconduct, proven pattern (if charged), attitude, collateral violations, or multiple violations.
  - ▶ Aggravating or mitigating circumstances.
  - ▶ Primary purpose should not be developmental or educational, but equitable and remedial.
  - ▶ Each sanction must have a rationale





# Decision-Maker Training Requirements

- ▶ Definition of sexual harassment
- ▶ Scope of Title IX
- ▶ How to conduct an investigation and grievance process, appeals, and informal resolution processes
- ▶ How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- ▶ Issues of relevance for investigations and hearings



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# Decision makers must be trained

- ▶ on a presumption that the respondent is **not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- ▶ Materials used to train Title IX personnel must be posted on websites, if any, or make materials available for members of the public to inspect if no website.





## ► Responsibility Determinations & Sanctions cont.

- A description of the procedural steps taken from the receipt of the formal complaint through determination; and
- Findings of fact supporting the determination; and
- Conclusions regarding application of policies to the facts; and
- A statement of and rationale for the results of each allegations, including sanctions to be imposed on Respondent; and any remedies afforded to the Complainant, and
- Notice of the right to appeal the determination.

## 9. Either Party May Appeal on the Following Grounds:

- ▶ A procedural irregularity that affected the outcome
- ▶ New evidence that was not reasonably available at the time the determination or dismissal of charges were made that could affect the outcome.
- ▶ Title IX Coordinator, investigator(s), decision-maker(s) had a conflict of interest against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome.



# Parties May Appeal at the following steps in the TIX Process

- When a Title IX complaint or allegation in a complaint is dismissed; and/or
- When an Interim Suspension is imposed; and
  - ▶ From the Decision-Maker's determination;
  - ▶ Both Parties have the right to appeal.
  - ▶ Time periods & requirements specified in SOPs.



# Qualifications of the Appellate Decision-maker (Appeal Authority)

- ▶ The appellate “decider” **cannot be** the Coordinator, investigator, or initial decision maker;
- ▶ Cannot have a conflict of interest or bias against complainants and respondents generally or the particular complainant and respondent, and
- ▶ Must be trained to same level as Coordinator and Hearing level decision maker.



# 10. RETAIN RECORDS



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- ▶ **All records must be retained and available to parties to an investigation for seven (7) years.**
  - ▶ This is minimum required under TIX.
    - ▶ State retention records may require a longer time period.
  - ▶ All records includes records of training, investigations, hearings, informal resolutions, supportive measures and any other processes.
  - ▶ Parties are entitled to a copy of report and exhibits.



# Lunch Break





# Conducting Interviews and Bias in the Investigation Process

Avoiding Bias in the Title IX Investigation Process

# Impartiality Required in Investigations

- ▶ 34 C.F.R. 106.45(1)(iii) requires that educational institutions provide training for Title IX Coordinators, investigators, decision-makers, and any person who facilitates a resolution process.
- ▶ Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints. 34 C.F.R. 106.45(b)(1)(iii).

# What is implicit bias?

- ▶ *The stories we make up about people before we know who they are.*
- ▶ Attitudes and/or stereotypes that affect one's understanding, actions, or decisions in an unconscious way
- ▶ Not explicit bias (operates consciously)
- ▶ Implicit bias operates subconsciously or unconsciously
- ▶ Can affect Title IX coordinators' /investigators perception of Complainant and Respondent
- ▶ Must learn to recognize behavior that may indicate bias or differential treatment
- ▶ (Kang, Jerry and Lane, Kristin, Seeing Through Colorblindness: Implicit Bias and the Law, 58 UCLA L. Rev. 465-520 (2010)).

# HOW CAN IMPLICIT RACIAL BIAS AFFECT TITLE IX INVESTIGATIONS?

- ▶ Implicit bias can affect perception of Complainant and Respondent, witnesses, of social groups to which either are members, etc.
- ▶ Can create confirmation bias - concept that people seek information/evidence that confirms their beliefs and preconceived notions
- ▶ Can affect how the investigators and adjudicators perceive witness credibility due to witness's race.

# TYPES OF BIAS

- ▶ Attitude and stereotypes can determine our thoughts about certain social categories, including gender and race

## **Attitude**

- ▶ Association between some concept (often a social group) and an overall evaluative feeling/belief, either positive and negative.
  - ▶ Ex: A negative association with Hispanic Americans.

## **Stereotypes**

- ▶ Association between a concept and a trait, negative or positive
  - ▶ Ex: A stereotype that African Americans are good athletes.

# IMPACT OF IMPLICIT BIAS IN SCHOOLS?

- ▶ **Disproportionality in discipline:** Policies that appear racially neutral on their face, but result in the over-representation of students of color -- particularly black boys -- in suspensions, expulsions, and referrals for subjective infractions like "defiance".
- ▶ **Disproportionality in special education:** Misguided placements that result in the over-representation of culturally and linguistically diverse students in special education programs.
- ▶ **Teacher mindsets and beliefs:** Underestimating the intellectual capacity of culturally and linguistically diverse students, and often girls, inside the classroom.
- ▶ **Tracking:** School policies that automatically place students of color in remedial or low-track courses.
- ▶ **Dominant discourse:** Ways of thinking and talking about students and families that diminish, underestimate, or even pathologize them.

# How to Work through Implicit Bias in Title IX Investigations?

- ▶ Become aware of your biases so that you can interrupt them.
- ▶ Check yourself with a neutral party.
- ▶ Be careful about trying to match your facts to your bias.
- ▶ Study and teach colleagues about implicit bias.
- ▶ Isolate and track instructional practices that interrupt, or promote, bias.
- ▶ Look out for tone policing - emphasis becomes on *how* something was said, not *what* was said.
- ▶ Tune into implicit bias in your school.
- ▶ Recognize implicit bias in yourself and in others.
- ▶ Know that people can counteract their biases - just do not go too far in the other direction.
- ▶ Participate in and encourage dialogue about implicit bias and its effects.

# BASIS FOR ALLEGATIONS OF BIAS IN A TITLE IX INVESTIGATIONS

- ▶ Generally, to state a claim for racial discrimination, the plaintiff must allege:
  - ▶ He/she is a member of a protected class.
  - ▶ He/she was treated differently from similarly situated individuals.
  - ▶ The disparate treatment was intentional and based on his/her membership in the protected class.
  - ▶ There may be racial discrimination in Title IX cases if the institution brings a disproportionate number of cases against parties of a particular race (selective enforcement) or enacts harsher penalties against members of that race (erroneous outcome).
  - ▶ Could constitute basis for appeal.



# Checklist for Countering Bias in Title IX Investigations



# 1. Test Yourself

- ▶ When you see or hear about sexual harassment cases in the news, on social media, in popular culture or elsewhere, do you tend to react strongly one way or another?
- ▶ Do you think you have strong reactions when you hear references to the Me Too Movement, etc.?
- ▶ If yes, think about why you are having those reactions and how you can neutralize them.

## 2. Develop a consistent intake process

- ▶ To avoid prejudging and mischaracterizing the nature of a complaint, develop a consistent methodology for receiving and understanding complaints so that you can accurately and consistently assess whether a complaint falls within Title IX jurisdiction, whether informal resolution may be an option or whether an investigation is required.
- ▶ The individual conducting intake should likely not investigate.
- ▶ Same with supportive measures.

### 3. Create a truth-telling environment

- ▶ Investigations are especially susceptible to affinity bias (also called “like me” bias - giving more or less credence to information depending on whether it is received from someone “like” or “not like” the investigator).
- ▶ Recognize the potential for this bias. Take steps to counteract.
- ▶ Be honest - It may mean that you do not investigate.

## 4. Prepare, prepare, prepare

- ▶ In addition to preventing confirmation bias, preparation will also minimize the dangers of priming - using stimuli to generate an (unconscious) effect on behavior/reaction.
- ▶ In investigations, this means you should not ask leading questions, such as, “You don’t think Bob was bullying Vanessa when he yelled in the meeting, do you?”
- ▶ Prepare your questions in advance and identify the areas about which you must question the parties/witnesses.

## 5. Develop a system to summarize interviews

- ▶ There is no special sauce when determining how best to document your interviews (written statement drafted by witness, written statement drafted by you and reviewed by witness, typing or handwriting your own notes, for example).
- ▶ The “trick” is to develop and follow a system that is reliable, accurate and consistent for you.
- ▶ You may want to have some protocols followed by all investigators, i.e. notes included in report or no notes?

## 6. Rely on tools which lend themselves to impartial investigations

- ▶ **Create a timeline that only lists dates/times and events,** with no commentary. This allows you to look at evidence more objectively thereby removing bias from the analysis.
- ▶ **Use experts to help you interpret complicated information or data more objectively.** This might include IT professionals, teachers or subject matter experts.
- ▶ **Play devil's advocate:** Consult with trusted colleagues. Describe the facts in the most objective way possible and see if they reach a different conclusion. If so, discuss why.
- ▶ **Put yourself in the shoes of both parties?** Does this make you see things differently? Do their versions of events make sense? Why or why not?
- ▶ **Determine the order of interviews in advance:** How might the order impact your neutrality?

## 7. Collect and consider all evidence - the good, the bad and the ugly

- ▶ There are no good or bad facts, only facts. Even if you've been meticulous about asking unbiased questions and seeking to collect all information, don't get tripped up during your analysis - confirmation bias might still creep into your report. Do not leave something out because it does not match the picture in your head. Paint a complete picture.
- ▶ Objectively review the facts collected so that the decision-maker can reach findings that are in line with the information collected and therefore much more likely to be bias-free.



## 8. Appropriately Weigh the Relevance of the Evidence and Witnesses

- ▶ Not all Sexual Harassment is equal.
- ▶ Not all evidence is equal.
- ▶ Not all witnesses are equal.
- ▶ Title IX regulations do not define relevance.
  - ▶ The preamble to the regulations explains relevant evidence as “evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.”
  - ▶ That is a fairly broad standard.
- ▶ Remember the Title IX regulations, at 34 C.F.R. § 106.45(b)(6)(i)-(ii), state that a complainant’s sexual predisposition is “not relevant,” and that a complainant’s prior sexual behavior is “not relevant”.

## 9. Track your work at every stage of the investigation

- ▶ One of the best ways to see if bias affects your decision-making is to check your record.
  - ▶ Do you tend to find the Complainant credible, but not the Respondent? Or the opposite?
  - ▶ Do you tend to spend less time on investigations involving students who do not have involved parents?
  - ▶ Do you tend to spend more time on allegations against students or employees of a certain racial groups?
- ▶ In addition to checking your own record, the Title IX Coordinator should keep and review data on Title IX investigation outcomes to ensure consistency and fairness in investigations.

## 10. Identify and Report Conflicts of Interest

- ▶ A conflict of interest that disqualifies you from a Title IX investigation is one that prevents you from being able to impartially participate.
- ▶ You should first determine what type of conflict is present as you consider your ability to impartially serve.
- ▶ Immediately report conflicts of interest to the Title IX Coordinator.
- ▶ The *appearance* of a conflict cannot be countered.

# Trauma informed Interviews and Investigations

- ▶ A trauma-informed approach means recognizing trauma, understanding how, what, where and when to ask questions, and importantly, employing techniques and strategies that support a process that mitigates or reduces the possibility of re-traumatization.
- ▶ When gathering evidence during the investigation of sexual harassment or sexual assault, you will have to ask sensitive, difficult and intimate questions of parties and witnesses.
- ▶ Do not make Parties tell their stories multiple times.
- ▶ Parties and witnesses may find these questions difficult to answer due to trauma - either past trauma or the trauma of the incident they have reported.
- ▶ The phrasing of questions during interviews is important. Depending on how a question is asked, it might be perceived by a Complainant as blaming them for their actions, or for what they may be unable to recall.
- ▶ **Try cognitive interviewing techniques to aid memory and accuracy: recall everything, reverse the order, change perspective and reinstate the context.**

# Trauma informed Interviews and Investigations cont.

- ▶ Instead of
- ▶ “Did you say no?”
- ▶ Ask
- ▶ “What are you able to recall doing or saying during the incident?”
- ▶ Instead of
- ▶ “Why did you...”
- ▶ Ask
- ▶ “Explain to me...”
- ▶ Instead of
- ▶ “What happened first?”
- ▶ Ask
- ▶ “Where do you want to begin? What happened next?”
- ▶ More examples at: <http://www.theiacp.org/sites/default/files/2020-06/Final%20Design%20Successful%20Trauma%20Informed%20Victim%20Interviewing.pdf>

# Cultural Factors for Consideration

- Native American cultures tend to utilize more nonverbal communication.
- Native American parents often use “silent language,” such as gestures, body language, touch and facial expression, to communicate with their children.
- One study found that Navajo mothers had a more passive and silent interactional style with their infants than African American or white mothers did.
- Verbal interaction with adults, especially with young Native American children, may not be a familiar method of communication.

# Cultural Factors for Consideration cont.

- Individuals in a tribe or clan have some relationship to every other individual and could be considered family.
- Children may live in a nuclear family, or they may live with many family members.
- Native Americans, similar to African-Americans, tend to watch and care for all the children belonging to their group.
- Approximately 30% of Native American households are headed by women.
- Native American students may hesitate to put themselves forward at another student's expense.
- Discipline in the Native American family tends to be relaxed and consistent with the values children are taught, including: sharing, cooperation, harmony with nature, non-interference, respect for elders, loyalty, and a present, rather than future, time orientation.

How might trauma  
informed questioning  
and cultural  
considerations impact  
your investigation?



Think About It.

What questions might want  
answered before  
interviewing a special  
education student in a Title  
IX investigation?



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# Interviewing Special Education Students

- ▶ Check with the case manager - are they able to comprehend the questions and answer appropriately?
- ▶ Do they have the cognitive capacity to participate in an investigation?
- ▶ Do they need a social worker or other support to participate in an investigation?
- ▶ Did the student have the capacity to consent to the conduct?
- ▶ Does the student have the capacity to understand consent?
- ▶ What is the student's disability?





# Case Study - Complaint

- ▶ During PE class, a male student was providing marijuana to other students to smoke during lunch. A female student is offered marijuana, but tells the male student that she does not have any money. The male student offers to provide her marijuana in exchange for sex.
- ▶ Initially, she told him no. As class went on, the male student continued to pressure her to have sex with him.
- ▶ She then told him that she would do it if he also bought her chick-fil-a for lunch.
- ▶ The male student told her to meet him at his car at lunch and went to buy her lunch.
- ▶ The female student told her friend what she had agreed to and told her that she did not want to have sex with the male student.
- ▶ The female student's friend encouraged her to meet the male and have sex so they could get the marijuana.
- ▶ The female student's friend walked her out to the male student's car. The female student tried to back out, but her friend and the male student continued to "pressure" her to get into the car.
- ▶ Eventually, the female student got into the male student's car and they had sex.
- ▶ The female left with her chick-fil-a and her weed.

# Notice of Allegations

- ▶ Always use a template for the Notice of Allegations and Advisement of Rights.
- ▶ The regulations require certain information be provided in the written notice of allegations. Your template contains this information.
- ▶ Remember that your notice of allegations kicks off your investigation.
  - ▶ Statements made, by Respondent, prior to service of this Notice likely cannot be used in the investigation.

# Notice of Allegations Models

- 1 Whether Respondent's conduct constitutes coercion of the Complainant to engage in non-consensual sexual activity with another student, in exchange for drugs, in violation of Title IX and District Policy #1234 Student Sexual Harassment.
- 2 Whether Respondent's conduct of coercing Complainant into have sexual intercourse, in exchange for food and marijuana, constitutes sexual harassment in violation of Title IX and District Policy #1234 Student Sexual Harassment.
- 3 Whether Respondent's conduct of coercing Complainant into having sex, in exchange for food and marijuana, created a hostile environment, in which to learn, for Complainant, in violation of Title IX and District Policy #1234 Student Sexual Harassment.



# Summary of Relevant Evidence

- ▶ **Should be a summary of information and evidence provided by the parties and witness, without interpretation.**
- ▶ This:
- ▶ During her interview with Title IX investigator on March 20, 2024, Complainant reported that she was in P.E. class, playing basketball when she was approached by Respondent. They were talking and playing basketball when Respondent mentioned that he had marijuana and asked if she wanted some.
- ▶ Not this:
- ▶ During her interview with Title IX investigator on March 20, 2024, Complainant reported that she was in P.E. class, playing basketball, like she was directed to do by the teacher, when she was approached by Respondent, who should have been on his side of the gym. Respondent interrupted Complainant's game and offered to sell her illegal drugs - marijuana.

# Coercion Analysis

- ▶ When an allegation of coercion is made, the investigator must provide an analysis of the facts for the decision-maker to determine if coercion is likely to have occurred.
- ▶ Remember, if coercion is present, there can be no consent.

**Coercion:** In a sexual context, coercion is demonstrated by an unreasonable amount of pressure to engage in sexual activity. Determining what is unreasonable should be a function of duration, frequency, isolation, and intensity. Coercion can result in acquiescence, but not sincere, positive, or enthusiastic consent. It must then be determined whether the amount of pressure was reasonable or unreasonable.

- ▶ Analyze the facts as presented in the case study to reach a conclusion regarding coercion.



# Pattern Analysis

- ▶ An **alleged pattern** to include allegations or other evidence that one person has engaged in two or more substantially similar incidents or behaviors toward one or more targets. A **confirmed pattern** exists when a preponderance of the evidence supports that the alleged acts actually occurred. The similarity can be:
  - ▶ ● in the type of act
  - ▶ ● commonality of chosen victims,
  - ▶ ● location,
  - ▶ ● consistency of premeditation
  - ▶ ● and/or signature or modus operandi (method of operation) of the perpetration
- ▶ Pattern analysis can be of particular concern when conducting a risk assessment to determine if a student should be removed during the investigation.

# Intimidation Analysis

- ▶ An implied threat, which is different from a threat which is clear and overt. Intimidation, as a type of force describes a situation when someone uses their power or authority to influence someone else. There are subjective and objective requirements to the proof of intimidation. Subjectively, the reporting party must have felt intimidated, but objectively Respondents' actions must would have been intimidating to a reasonable person, under the same or similar circumstances, as well.
- ▶ Intimidation is more likely to be present when you have
  - ▶ older student and a younger student,
  - ▶ a supervisor and subordinate,
  - ▶ Employee and student
  - ▶ Coach and athlete

# Force and Threat Analysis

Any threat that causes someone to do something they would not have done absent the threat could be enough to prove force. This is especially true when coupled with evidence that the threatened individual reasonably believed the individual making threatens had the will and capacity to carry out the threat. A threat must have a negative condition attached.

- ▶ “If you do not have sex with me, I will tell people you raped me.”
- ▶ “If you do not have sex with me, I will hurt you.”
- ▶ “If you do not sleep with me, I will fail you in my course.”
- ▶ “If you do not have sex with me, I will harm someone close to you.”
- ▶ **“If you do not have sex with me, I will share this compromising video, pictures on the internet, with your parents, your boss.”**

# Physical Violence Analysis

- With actual violence or the use of a weapon. No matter how slight, any intentional physical violence upon another, use of physical restraint, or the presence of a weapon to gain sexual access will constitute the use of force.
- The key question is whether the physical violence enabled the person's ability to gain sexual access.

# Credibility Assessments

- ▶ Consider
  - Consistency of evidence;
  - Corroborative evidence that supports or refutes evidence of the party;
  - Forthcoming, straightforward evidence, versus evasive and defensive;
  - Plausibility of evidence (does it make sense?);
  - Admissions against one's own interest;
  - Motive.
  - Credibility assessments provide insight to the decision-maker who did not interview these individuals.

# Example from Case Study

- ▶ Complainant submitted a timely report following the incident. The information she provided was corroborated by Witness 1, who reported witnessing Respondent's offer to give her drugs in exchange for sex. The facts may not support Complainant's allegation that she was coerced into the sexual acts; however, Complainant risked getting in trouble for marijuana to make this complaint. Complainant explains that she did not want to go through with it, but did not know how to say no. Complainant's account was also corroborated by Respondent who admitted that he offered Complainant drugs for sex, but denies the sexual activity was not consensual. Complainant appears credible.
- ▶ Respondent has a motive to lie or not give accurate information to protect his own interest. Respondent; however, admitted to offering drugs to Complainant. Respondent denies giving drugs to other students, but witnesses confirmed that he was selling marijuana on campus. Respondent said that it was Complainant's idea to exchange the drugs for sex. Respondent says that when Complainant asked him to get her food as well, he thought they had reached "a deal". Respondent made statements against his own interests when admitting to providing marijuana to Complainant, but denies coercion. He says that he waited in his car, with food and marijuana, and the Complainant came out to his car and got inside. Respondent appears mostly credible.

## Bottomline:

- ▶ Reports should be clearly written and understandable.
- ▶ Title IX coordinator should review the report before it is processed to the parties or the decision-maker.
- ▶ Reports should be written in a neutral and objective manner - must avoid any appearance of bias.
- ▶ Reports should provide decision-maker with all exhibits and information necessary to make a fair and neutral decision.
- ▶ Reports can be used in future litigation, so think of your report as Exhibit A.

# Title IX Due Process

- ▶ Procedural
- ▶ Substantive
- ▶ Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose.
- ▶ Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property.



# Title IX Due Process Continued

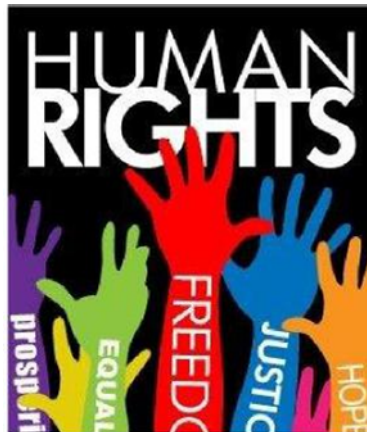
- ▶ Title IX regulations have built in procedural and substantive due process rights, which are reflected in your policy and standard operating procedures.
- ▶ Follow your policy and SOPs and you will provide due process.
- ▶ Be reasonable - just be equitable.
  - ▶ If a party requests an extension and it is reasonable - provide to both parties.
  - ▶ Due Process = Fair Procedures
- ▶ **Notice** of the proposed action and the **grounds asserted** for it. Opportunity to present reasons why the proposed action should not be taken. The **right to present evidence**, including the right to call witnesses.

# History of Title IX



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- **1964 Civil Rights Act**
- prohibits discrimination on the basis of race, color, religion, sex and national origin
  - *42 U.S.C. § 2000d, et seq.*



- **1972 Title IX of the Education Amendments.**

Amended the Civil Rights  
Act of 1964.

*20 USC § 1681 et. Seq.*



# Title IX and Student-to-Student Harassment

- ***Davis v. Monroe County Board of Education (1999)***
  - 526 US 629 (1999)
  - Grandmother sued school district on behalf of her 5<sup>th</sup> grade granddaughter.
  - Claimed school refused to stop harassment that had been reported multiple times.
  - **Lower Court:** School not responsible because it is a student harasser.
  - **Question:** Whether an educational entity can be held responsible under Title IX for student-on-student harassment?
  - **SCOTUS: Yes, the entity can be held responsible. Title IX grants an implied right to education. Established the “deliberate indifference” standard. Damages may be awarded under this standard.**



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# Title IX Prohibits Retaliation



- ***Jackson v. Birmingham Board of Ed.***
- 544 US 167 (2005)
- High school basketball coach claimed he was fired for reporting unequal treatment of girl's basketball team by school district.
- Brought suit under Title IX.
- Lower Court: No private right of action for reporting on behalf of others.
- Question: Whether Title IX provides a right of action for retaliation for reporting unlawful sex discrimination?
- **SCOTUS: Yes, can't protect against discrimination if it does not protect those who report discrimination. Retaliation against Jackson constituted internal discrimination on the basis of sex.**



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# Sex Discrimination = Gender Discrimination?

- *J.L v. Mohawk Consolidated SD* (2010)
- *Pratt v. Indian River CSD* (2010)
- *Putnam v. Somerset ISD* (2010)
- Dept. of Ed negotiated settlement agreements.
- Title IX prohibits discrimination against a student whose appearance/behavior does not conform to gender stereotypes.
- **Title IX protects students who are harassed due to actual or perceived sexual orientation.**
- Premise is that sexual orientation is about sex and notions of gender and protected by Title IX.



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# Impact of Title IX

## •1970

- 8% of women age 19 and older were college students.
- 14% of men were college students
- 59% of women were high school grads.



# Impact of Title IX cont.



## ► 2009

- 87% of women were high school grads
- 28% of women had a college degree

## ► 2011

- Title IX covered 49 million students in elementary/secondary schools
- 20 million in post-secondary schools (not including employees)

## ► 2018

- Women represented 51% of matriculants from U.S. medical and law schools.



# Effects of Title IX cont.

- **1971-72**

- Approximately 250,000 women participated in high school sports.
- Approximately 3,750,000 men participated.





# Effects of Title IX cont.

- **2010-2011**

- Approximately 3,250,000 women participated in high school sports.
- Approximately 4,500,000 men participated in high school sports.



## Effects of Title IX cont.

- NCAA has tracked women in college sports since 1981-82.
- Male NCAA student-athletes now number 278,614 nationwide, or 56 % of the student-athlete population.
- Women total 216,378, or 44 %.
- Women's NCAA teams now make up 54 % of NCAA teams, compared with 46 % for the men.





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thank you!