

# Title IX: Best Practices in Training and Compliance

Part I and Part II Training – September 26, 2023

In conjunction with



**VSBA**

Virginia School Boards Association

Leadership • Advocacy • Support

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# DISCLAIMER

Please consult with your School Board attorney prior to addressing any specific fact pattern or situation.

# Purpose of Part I Training

- Required by federal implementing Regulations (34 CFR § 106.45(b)(1)) for a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal process.
- Must be trained on:
  - Definition of sexual harassment.
  - Scope of the school division's education program or activity.
  - How to conduct an investigation and grievance process - including hearings, appeals, and informal processes, as applicable.
  - How to serve impartially (avoiding prejudgment of facts, conflicts of interest, and bias).

# Purpose of Part II Training

- Required by the Regulations at 34 CFR § 106.45(b)(1) for investigators and decision makers:
  - Investigators must receive training on issues of relevance and crafting an investigative report that fairly summarizes relevant evidence.
  - Decision-makers must receive training on any technology to be used at live hearings and relevance of questions and evidence.

# Title IX Training Part I

34 C.F.R. PART 106

# Title IX Regulations

Effective August 14, 2020

# Title IX

- **Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (Title IX):**
  - **“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”**
  - A school division may violate Title IX if it does not respond promptly to actual knowledge of sexual harassment in an education program or activity of the school division against a person in the United States or if they respond in a manner that is deliberately indifferent.

# What Triggers a School's Obligation to Respond

1. Actual knowledge
2. Report of sexual harassment
3. Conduct within school division's own program or activity
4. Perpetrated against a person "in the United States" (new provision)



# #1 – Actual Knowledge

- A report to a Title IX Coordinator will always give schools actual knowledge.
- In K-12, reporting sexual harassment to any employee at that school gives the school actual knowledge.
- Any individual may report, not just the individual allegedly subjected to misconduct.

## *Doe v. Fairfax County School Board, No. 19-2201 (4th Cir. 2021)*

- Background
  - Male to female, student-on-student sexual harassment case brought under Title IX.
  - Doe claimed that FCPS was deliberately indifferent in its response to known sexual harassment which occurred on the bus during a band trip.
  - FCPS officials stated that they thoroughly investigated and determined that it amounted to mutual sexual touching.
  - Jury verdict in favor of FCPS because it found there wasn't "actual knowledge" of sexual harassment.
- Fourth Circuit reversed the district court's judgment in favor of the School Board and agreed with Doe that the district court misconstrued what it meant for a school to have actual notice or knowledge of alleged harassment in Title IX cases.
- Remanded for a new trial. Court found that no evidence in the record supported the jury's verdict when using the correct legal standard.

## *Doe v. Fairfax County School Board*, No. 19-2201 (4th Cir. 2021)

- Rationale for reversal:
  - Reviewed objectively
    - “A school’s receipt of a report that can objectively be taken to allege sexual harassment is sufficient to establish actual notice or knowledge under Title IX – regardless of whether school officials subjectively understood the report to allege sexual harassment or whether they believed the sexual harassment actually occurred.”
  - The School Board, through appropriate officials with authority to address complaints of sexual harassment and to institute corrective measures, including an Assistant Principal, received multiple reports alleging the sexual assault.
  - Jury could find that Doe was deprived of equal access to educational opportunities or benefits.
    - Sexual violence would have a severe and traumatic impact on any high school student.
  - Jury could find that School Board’s response was clearly unreasonable and it acted with deliberate indifference.
    - Principal made inappropriate jokes about the incident – “how many inches under the blanket or on the ground.”
    - Doe testified that security specialist’s behavior during meeting with student after band trip “menacing.”

## *Doe v. Fairfax County School Board, No. 19-2201 (4th Cir. 2021)*

- Persuasive findings:
  - A reasonable jury could conclude that the sexual violence Doe allegedly suffered was severe, offensive and harrowing.
  - No evidence in the record supports the jury’s finding that the School Board lacked actual notice or knowledge.
  - To the contrary, the School Board had actual knowledge of the following:
    - During a bus trip, Doe sat next to an older male student who repeatedly touched her breasts and genitals and penetrated her vagina with his fingers despite her efforts to physically block him and that he put her hand on his penis repeatedly.
    - Doe told two friends who in turn relayed the information to two school administrators.
    - Doe did not think the sexual activity was consensual.
    - Doe’s mother explicitly described the bus incident as “sexual assault” or “sexual harassment.”
    - Doe’s parents requested a number of accommodations to help Doe cope with the psychological and emotional trauma.

# #2 – Report of Sexual Harassment

*Schools have responsibilities under Title IX for both alleged sexual harassment by staff and by other students:*

- **Staff-student harassment**
  - *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) established that a school district could be liable for sexual harassment of a student by a teacher where the school official with authority to institute corrective measure had notice of, but was deliberately indifferent to, misconduct.
- **Student-student harassment**
  - School divisions are not liable for one student harassing another but may be liable for failing to respond adequately. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

# Definition of “sexual harassment” (34 CFR § 106.30(a))

Defined broadly to include any of three types of misconduct on the basis of sex:

- 1) QUID PRO QUO – An employee conditions an educational benefit or decision on the student’s submission to unwelcome sexual conduct.
- 2) Unwelcome conduct on the basis of sex that is *so severe, pervasive and objectively offensive*, as determined by a reasonable person, that it denies a person equal access to an educational program or activity.

## Factors to consider:

- Degree to which the conduct affects students’ education
- Type, frequency and duration of the conduct
- Identity and relationship between complainant and respondent
- Number of individuals involved (group harassment)
- Age and sex of complainant and respondent
- Size of school, location of incidents, and context
- Welcomeness (depends on age, relationship between complainant and respondent)

- 3) Any instance of sexual assault, dating violence, domestic violence, or stalking as defined in VAWA.

# Relevant Definitions

- “Sexual assault” as defined in 20 U.S.C. 1092 (f)(6)(A)(v)
  - “Dating violence” as defined in 34 U.S.C. 12291(a)(10)
  - “Domestic violence” as defined in 34 U.S.C. 12291(a)(8)
  - “Stalking” as defined in 34 U.S.C. 12291(a)(30)
- 
- One incident of sexual assault can trigger Title IX responsibilities.
  - “We believe that sexual assault inherently creates the kind of serious, sex-based impediment to equal access to education that Title IX is designed to prohibit, and decline to require ‘denial of equal access’ as a separate element of sexual assault.”

# Report of Sexual Harassment – Who are the Parties?

**Complainant** – the person who experienced the alleged harassment.

- Attempting to access or participated in the educational program or activity.
- Generally, a current student or employee.

**Respondent** – the person alleged to have perpetrated the conduct that would constitute harassment.

- Presumed innocent

**Recipient** – the School Division who received federal funding.



## #3 – Conduct Within School Division’s Own Program or Activity

- Includes any location, event, or circumstance over which the school division exhibits substantial control over both the alleged harasser and the context in which the harassment occurred.

## #4 – Subject of Allegation in the U.S.

- The act must have been perpetrated against a person “in the United States” (new provision).

# General Response, 34 C.F.R. § 106.44

- Must appoint a Title IX Coordinator
  - Authorized to coordinate school division's compliance efforts.
  - Doesn't have to be coordinator's full-time job, but the individual must have sufficient authority and time to carry out the role.
- Must respond in a way that is not “deliberately indifferent”
  - Defined as “clearly unreasonable in light of the known circumstances.”
  - Division will be held liable if non-compliant.
- Must “respond meaningfully to every report”
- Must activate grievance process when a formal complaint is filed
  - If school follows grievance procedures – **safe harbor against finding of deliberate indifference.**
- Must investigate formal complaints
- Must treat complainants and respondents equitably

# Receipt of Report

- How a School Must Respond
  - Reports trigger the obligation for Title IX Coordinator to meet with and offer the complainant supportive measures (available to complainants and respondents).
    - Definition: non-disciplinary, 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 CFR § 106.30 (a).
      - Removing a respondent completely from an activity would likely be considered punitive.
  - Explain the formal complaint process.
    - K-12 schools need to protect younger students; this may require the Title IX Coordinator to file a formal complaint even when a young complainant does not want to file.
- Emergency removal/administrative leave of respondent is permitted under certain circumstances.
  - Must conduct an individualized safety and risk analysis and determine if emergency removal is necessary to protect a student or other individual from an immediate threat to physical health or safety.
  - Must provide respondent with notice and an opportunity to challenge the decision immediately after the removal.
  - Example: An accusation of sexual harassment leads to respondent's threats of physical self-harm.

# Title IX Grievance Process

- Basic Requirements, 34 CFR § 106.45(b)(1)
  - Treat complainants and respondents equitably.
  - Objective evaluation of all relevant evidence.
  - Presumption of innocence for respondent.
  - Burden of proof and burden of gathering evidence on recipient.
  - Standards: preponderance of evidence vs. clear and convincing.
  - Reasonably prompt timeframes.
  - Description of possible disciplinary outcomes and remedies following a determination of responsibility.
- Notice of allegations, 34 CFR § 106.45(b)(2)
  - Written notice to all parties of grievance process and allegations at issue.
  - STATEMENT that respondent is presumed “not responsible” until final decision.
  - Notice of right to advisor (who may be an attorney) and to inspect and review evidence.
  - Notice of any code of conduct provision prohibiting false statements.

# Title IX Grievance Process

- Dismissal 34 CFR § 106.45(b)(3)
  - *Mandatory* if elements #2, 3, or 4 are not met.
    - *Mandatory if alleged conduct would not constitute sexual harassment prohibited by Title IX even if proved.*
    - *Alleged conduct did not occur in school division's program or activity.*
    - *Allegation against a person not in U.S.*
  - *Permissive* if complainant provides Title IX Coordinator in writing a request to withdraw complaint, if respondent is no longer employed by the recipient or enrolled in its education program, or if specific circumstances prevent the school division from gathering enough evidence to reach a decision.
  - Give parties written notice of dismissal.
- Investigation Phase 34 CFR § 106.45(b)(5)
  - Equal opportunity to present witnesses and evidence.
  - Equal opportunity to inspect and review evidence (10-day review period).
  - \*Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a doctor, psychiatrist, psychologist, and made in connection with treatment to the party unless there is written consent from the parent to do so.
  - No gag order.
  - Advisors (can be a lawyer) permitted for complainant or respondent in any meeting, any restrictions imposed by school division as to advisors must be applied equally to both parties.
  - Written notice of interviews.

# Title IX Grievance Process

- Investigative Report
  - Must fairly summarize relevant evidence (Investigator-specific training).
  - At least 10 days before determination of responsibility - send it to each party and the party's advisor for their review and response.
- Decision-making Phase
  - Decision-maker must be someone other than Title IX Coordinator or investigator.
  - Reviews investigative report and parties' responses to it.
  - If no hearing, must allow parties to submit written questions to challenge each other's credibility and allow for limited follow-up.
  - Questions and evidence about the complainant's prior sexual behavior are not relevant, unless offered to prove that someone other than the respondent committed alleged conduct; or if it concerns specific incidents related to respondent to prove consent.
  - Decision-maker must explain to the party proposing the questions any decision to exclude a question as not relevant.

# Title IX Grievance Process

- Decision-maker's Written Determination 34 CFR § 106.45(b)(7)
  - Determination must:
    - Identify allegations potentially constituting sexual harassment;
    - Describe all procedural steps taken;
    - Include findings of facts and conclusions about the application of code of conduct to the facts;
    - Include a statement of, and a rationale for, the decision reached on each allegation;
    - Identify whether remedies will be provided to the complainant;
    - Identify any disciplinary sanctions imposed on the respondent; and
    - Include procedures and permissible bases for appeals.

# Title IX Grievance Process

- Appeals - 34 CFR § 106.45(b)(8)
  - Available to both parties after determination of responsibility or dismissal of formal complaint and based on the following:
    - Procedural irregularity;
    - New evidence that could affect the outcome and that wasn't available at the time of dismissal or determination of responsibility; or
    - Conflict of interest or bias by Title IX Coordinator, investigator, or decision-maker.



# Title IX Regulations – Other requirements

- Informal resolution, 34 CFR § 106.45(b)(9)
  - Cannot be required and can only be offered if formal complaint has been filed.
  - May facilitate mediation or other informal process.
  - MAY NOT be offered in employee-student harassment context.
- Documentation, 34 CFR § 106.45(b)(10)
  - For 7 years schools must create and maintain records:
    - Document every Title IX sexual harassment investigation and determination of responsibility, including disciplinary sanctions imposed or remedies provided;
    - Any informal resolution or appeal;
    - All materials used to train Title IX Coordinators, investigators and decision-makers, and any person who facilitates an informal resolution process (parties may request copies); and
    - Basis for conclusion that its response was not deliberately indifferent.
    - School must keep records regarding response to every report or formal complaint – including documentation of supportive measures offered and implemented.

# Title IX Regulations – Other Requirements

- Notice of policy, grievance procedures, and Title IX Coordinator’s name or title, email address, office address, and telephone number must be published on website and sent to:
  - Applicants for admission and employment.
  - Students’ parents or legal guardians.
  - Unions or professional organizations holding agreements with the school division (34 CFR § 106.8).
- Must publish notice of nondiscrimination policy and Title IX Coordinator’s contact information in handbooks to students/employees.
- Must publish training materials on website.
- Timelines must be reasonably prompt.
- Prohibition on retaliation (34 CFR § 106.71).

# Questions and Answers on the Title IX Regulations on Sexual Harassment (July 20, 2021)

Question: Which settings are covered by the 2020 amendments?

Answer:

- Buildings or other locations part of school's operations, ***including remote learning platforms.***
- Off-campus settings if the school exercised substantial control over the respondent and the context in which alleged conduct occurred (field trip).
- Off-campus buildings owned or controlled by a student organization (fraternity/sorority).

\*Practice tips:

- May still offer supportive measures to a complainant who reports sexual harassment that occurred outside school's program or activity.
- Any sexual harassment that occurs in a school's program or activity must be responded to even if it related to or happens subsequent to sexual harassment that occurred outside school's program or activity.

# Question and Answers on the Title IX Regulations on Sexual Harassment (July 20, 2021)

## Question:

Which school employees must be notified about allegations of sexual harassment for a school to be put on notice that it must respond?

## Answer:

In K-12 settings a school must respond whenever **ANY** school employee has notice of sexual harassment. This includes notice to a: teacher, teacher's aide, bus driver, cafeteria worker, counselor, school resource officer, maintenance staff, coach, athletic trainer, or any other school employee.

# Question and Answers on the Title IX Regulations on Sexual Harassment (July 20, 2021)

## Question:

How should a school respond to complaints alleging sex discrimination that do not include sexual harassment allegations?

## Answer:

Schools must respond to complaints alleging discrimination based on pregnancy, different treatment based on sex, or other forms of sex discrimination using the “prompt and equitable” grievance procedures that schools have been required to adopt and publish since 1975 when the original Title IX regulations were issued.

# VSBA Model Policy– Prohibition of Harassment and Retaliation

- Comports with Title IX Regulations
  - Applicable definitions
  - Reporting guidelines (confidentiality, prompt reporting, false statements and retaliation prohibited)
  - Reporting processes (including informal complaints)
  - Grievance procedures (reporting, initial response, supportive measures, formal complaints, notice requirements, informal resolution, investigation, determination regarding responsibility, written determination, appeal/review, discipline, records retention)
  - Annual notification and training requirements

# Response to Report and Investigation



# Administrative Response to Sexual Harassment or Assault

- All employees must be able to recognize sexual violence and harassment of students by other students or school employees.
- All employees must be able to recognize “grooming behaviors” by other employees or other third parties (volunteers, coaches, etc.).
- All employees must know to report suspected harassment or grooming behaviors to Title IX Coordinator.
- Failure to do so can contribute to liability of the Division under Title IX and individual liability of the employee under other laws.



## Step 1 – Title IX Coordinator Initiates Process

- Title IX Coordinator must meet promptly with the complainant and the parents and document the same.
  - Discuss availability of supportive measures with or without the filing of a formal complaint; explain process.
  - If formal complaint is filed, consider whether informal resolution might be appropriate.
- Determine the rules and law that apply; consult counsel if necessary.
- Map out the investigation:
  - Who will investigate?
  - What will be investigated?
  - Who will be interviewed and in what order?
  - Outline a calendar of events to begin without delay.
- Provide notice of allegations to both parties.
- Consider whether and what supportive measures are required for Respondent.

# Supportive Measures to Consider

- Placement of students in different classes
- Provide complainant with escort or different transportation services
- Counseling
- Academic, emotional, and social support
- Written agreement with respondent to avoid complainant
- Extension of deadlines
- Safety plan
- Offending employee placed on administrative leave
- Emergency removal

# Step 2 – Designate an Investigator(s)

- Free of actual or reasonably perceived conflicts of interest and biases for or against any party
- Trained
- Maintains confidentiality
- Analyzes and documents available evidence to support reliable decisions
- Objectively evaluates
- Synthesizes available evidence



# Step 3 – Gather Information

## Complainant

- Interview them like a journalist and LISTEN and DOCUMENT!
- Chronological order
- Obtain the names, addresses, contact info of anyone with knowledge.
- Ask about any proposed resolution.

# Step 3 – Gather Information

## Respondent

- Give a detailed description of what has been alleged to allow full response.
- Inform the responding party that no conclusions have been made.
- Inform the responding party that any attempt to influence, coerce or intimidate the reporting party will be grounds for immediate discipline.
- Consider the need for a recorded or written statement.

# Step 3 – Gather Information

## Witnesses

- Interview third-party witnesses with open, **non-leading** questions.
- Provide some background to give witnesses the opportunity to address the issues, but try to preserve confidentiality.
- Remind all witnesses of confidentiality and prohibition of retaliation.
- Compare all statements for consistency and inconsistency.

# Step 3 – Gather Information

## Sample questions:

- What can you tell me about the allegation?
- Where would you like to start?
- Where and when did it occur?
- Who was involved?
- Can you tell me more?
- Did anyone else see it happen?
- Have you talked to anyone since?
- Do you know anyone else with information about it?

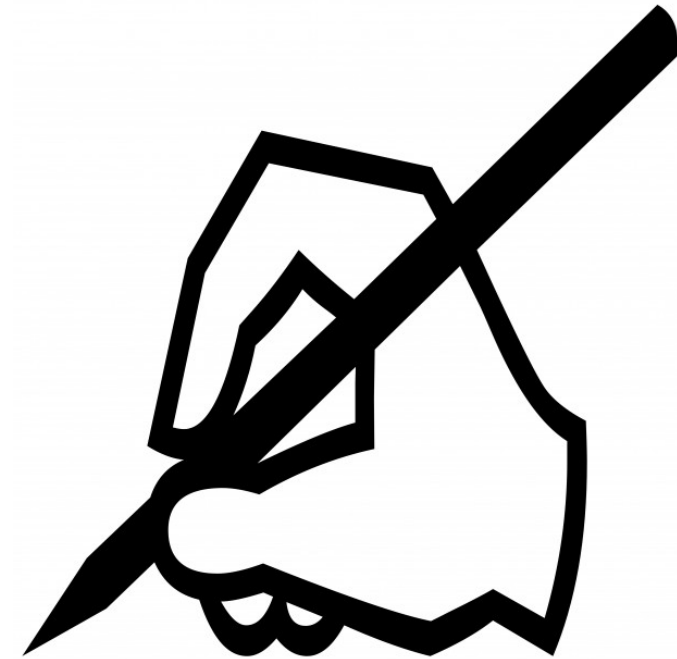
# Investigation Checklist

|  |  |
|--|--|
| Interviewed Complainant                                  | Interviewed Respondent                                   |
| Interviewed Witnesses                                    | Written witness statements                               |
| Interviewed complainant(s)<br>parent(s)/guardian(s)      | Interviewed respondent(s)<br>parent(s)/guardian(s)       |
| Examined physical evidence                               | Reviewed medical information (if<br>privilege is waived) |
| Reviewed student records                                 | Reviewed social history between<br>parties               |
| Interviewed teachers and/or<br>school staff (list names) | Reviewed student attendance and<br>grades                |
| Reviewed video surveillance                              | Reviewed electronic/web content                          |



# Step 4 – Submit Investigative Report to Decision-Maker

- Eliminate insignificant details.
- Highlight misconduct with specific description of the events, not generalized conclusions.
- Do not editorialize – but may make credibility determinations, which can't be based on party's status as complainant, respondent or witness.
- Make use of evidentiary attachments, such as photos, e-mails, texts, screen shots, videos, handwritten documents, etc.
- Summarize both inculpatory and exculpatory evidence.
- Account for unique and complex circumstances.
- Provide copy to both parties (and advisors); 10 days to provide a written response.



# Step 5 – Parties Submit Written, Relevant Questions to Decision-Maker

- After decision-maker receives investigative report AND before any determination is made, decision-maker must afford each party 10 days to submit written, relevant questions that a party wants asked of any party or witness and explain to the party proposing a question any decision to exclude a question as not relevant.
- Only relevant questions allowed.
- Limited follow-up questions allowed.



# Step 6 - Decision-Maker's Written Determination of Responsibility

- Cannot be the investigator OR the Title IX Coordinator.
- Makes written decision regarding determination of responsibility:
  - Commentary addresses consideration of consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, lack of credibility.
- Must include:
  - Identification of allegations.
  - Description of procedural steps taken from the receipt of formal complaint through determination.
  - Findings of fact supporting the determination.
  - Conclusions regarding application of code of conduct to facts.
  - Statement of and rationale for the result as to each allegation, including disciplinary sanctions.
  - Identification of any remedies to be provided to the complainant.
  - Details regarding appeal procedures.
- Standard: Is it more likely than not that the respondent engaged in the alleged misconduct?
- Provide written decision to both parties simultaneously.

# Step 7- Appeals

- Appeal decision-maker is NOT the same person as the initial decision-maker, investigator, or the Title IX Coordinator.
- Must give both sides a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
- Decides appeal on the following bases:
  - Procedural irregularity that affected outcome of matter;
  - New evidence not reasonably available at the time the determination regarding responsibility or dismissal was made; or
  - Title IX Coordinator, investigator, decision-maker bias.
- Provides notification in writing to both parties:
  - Of receipt of the appeal within three days of appeal filing; and
  - Of decision, describing result and rationale for result (must be simultaneous).

# Decision-makers must be IMPARTIAL

- Regulations' preamble states that being impartial = free from bias.
  - Whether bias exists requires examination of facts and school divisions should apply an objective, commonsense approach to evaluating whether a particular person is biased.
- Consider perceived conflict of interest vs. actual conflict of interest toward complainants or respondents generally or an individual complainant or respondent.
  - Past advocacy for victim or respondent's rights
  - Prior adjudication involving complainant or respondent
- Avoid:
  - Reliance on sex stereotypes (complainant always female, respondent always male)
  - Pre-judgement of facts

# Remedies for Student-on-Student Harassment

- Disciplinary sanctions against respondent
- Strict behavioral and “no contact” contract
- Separate classes, schedules, transportation, or programs
- Administrative transfer of complainant (voluntary) or respondent (voluntary or involuntary) to another school
- Targeted training for certain groups (i.e. band, athletic team)
- Safe person plan
- Follow-up/monitoring

# Sanctions

- Students
  - Loss of privileges
  - Removal from extra-curricular activity
  - Any other sanction authorized by Student Code of Conduct
  - Detention
  - In-school suspension/out-of-school suspension
  - Expulsion
- Staff
  - Leave of absence
  - Termination
  - Reassignment

# Title IX Part II Training

For Investigators and Decision-Makers



# Relevance

- Investigators must receive training on (1) **relevance** and (2) writing reports that fairly summarize **relevant evidence**.
- So, what is relevance?
  - Generally, “relevant” evidence is that evidence tending to prove or disprove an alleged fact.
  - Stated differently, it is 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.



# What is Relevant Evidence?

- The Preamble addresses this definition as follows:
  - “The requirement for recipients to summarize and evaluate relevant evidence, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to § 106.45, appropriately directs recipients ***to focus investigations and adjudications on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant).***” 85 F.R. 30294.

# Rules of Evidence

- Importantly, the regulations specifically do NOT apply formal rules of evidence:
  - “The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and declines to impose a comprehensive, detailed set of evidentiary rules for resolution of contested allegations of sexual harassment under Title IX.” Comments to the Regulations, 85 FR 30337.
  - “A recipient’s grievance process must . . .require an objective evaluation of all relevant evidence – including both *inculpatory and exculpatory evidence* – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.” 34 C.F.R. 106.45(b)(1)(ii).

# More on Rules of Evidence and Relevance

- OCR’s September 4, 2020 “Questions and Answers Regarding the Department’s Final Title IX Rule”:
  - “The Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX. . . . [T]he Rule uses ‘relevance’ as the sole admissibility criterion.” Q&A #7.
  - The Title IX Rule also deems certain evidence and information to be not relevant or otherwise precludes the recipient from using it:
    - A party’s treatment (medical, psychological and similar) records, without the party’s prior written consent [§ 106.45(b)(5)(i)];
    - Information protected by a legally recognized privilege [§ 106.45(b)(1)(x)]; and
    - Questions or evidence about a complainant’s prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)].

# Legally Privileged Information

- A recipient, when *investigating* a formal complaint:
  - “Cannot access, consider, disclose or otherwise use a party’s records that are maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance under this section.” § 106.45(b)(5)(i).
- Other recognized privileges:
  - Attorney-client communications
  - Spousal testimony in criminal matters
  - Fifth Amendment (right against self-incrimination)
  - Confessions to a clergy member

# Weight and Credibility

- The guidance documents recognize a difference between the ***admission*** of relevant evidence, and the ***weight, credibility, or persuasiveness*** of particular evidence:
  - “The § 106.45 process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.” Q&A #8, citing the Preamble.
  - “A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party’s prior bad acts, so long as such a rule is applied equally to the prior bad acts of complainants and the prior bad acts of respondents.” Q&A #8, citing the Preamble.

# Gathering the Evidence



- Parties must have an equal opportunity to inspect, review, and respond to evidence directly related to the allegations. (§ 106.45(b)(5)(vi)).
- Parties must have an equal opportunity to review and respond to the recipient's investigative report. (§ 106.45(b)(5)(vii)).
- The decision-maker must: (i) 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 for each party, and (ii) explain to the party proposing the questions any decision to exclude a question as not relevant. § 106.45(b)(6)(ii).



# Determining the Facts

- For each fact in dispute, weigh the evidence and argument submitted by the parties – including making credibility determinations – and make a determination: a “finding of fact.”
- The investigator’s findings will inform the decision-maker’s overall determination of responsibility.
- The Preamble states that the decision-maker should be looking at consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility. 85 FR 30315 and 30330.
  - Consider all witness statements; detail and consistency in stories; corroboration; changes in complainant’s behavior after alleged incident, and potential sources/causes of such changes
  - Timing of the complaint MAY inform decision in several aspects: consider whether filed promptly; however, a delay may reflect hesitation that claim may not be believed or a fear of retaliation.



# Weighing the Evidence

- Do not make a decision until all evidence has been received and reviewed. Do not “pre-judge” the facts. § 106.45(b)(1)(iii).
- Consider only relevant evidence and make findings of fact and determinations based only on the evidence received in its totality.
- Determine what evidence is worthy of belief and its importance along with necessary and reasonable inferences.
  - Rely on direct evidence whenever possible.
- Make witness credibility determinations (motives, bias, probability, consistency, etc.) and ascribe the testimony the weight you believe it deserves.
  - But remember you are confirming FACTS.
- These do require judgments, but the judgments must be impartial.
- Do not consider potential consequences or outcomes at fact-finding stage.

# Investigative Report Elements

- Allegation(s) Investigated
- Description of Procedural Steps Taken
  - Written notice
  - Selection of investigator and investigative approach
  - Relevant school board policies/code of conduct provisions
  - Pre-investigation gathering of relevant evidence
  - Witness interviews
  - Delivery of directly related evidence
  - Parties' written responses to directly related evidence
- Findings of Fact and Credibility Determinations
- Notification of the right to respond to evidence/submit written relevant questions to other party through the decision maker

# Avoiding Bias in Decision-Making

- The Preamble includes significant discussion addressing concerns by commenters regarding potential bias and unfairness in the grievance process.
  - Examples include: decision-maker's financial and reputational interests encourage protecting the institution; inappropriately combining administrative and adjudicative roles; Title IX Coordinator may supervise decision-maker; past role as advocate for victim's or respondent's rights.
  - Also includes concerns about marginalized groups: racial minorities, LGBTQ community, disabled persons.
- The Rule now provides that a recipient's grievance process must:
  - "Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent."
  - Further, "A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on . . . **how to serve impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interests, and bias."
  - § 106.45(b)(iii)

# Preventing Biased Decisions

- Bias may be created by differences in cultural backgrounds; age; race; religion; life experiences; trauma.
  - Decision-makers must remain impartial, avoiding sympathy or a personal perspective on the claim.
  - Avoid sex-based stereotypes (e.g., women have regret and/or lie about sexual assault; men are sexual aggressors).
- Decision-makers may nonetheless draw reasonable inferences from the evidence.
- The Preamble encourages recipients to apply an objective (reasonable person), common sense approach to evaluate whether a particular person is biased.

# Determination of Responsibility/Non-Responsibility

- Findings of fact will then be assessed by applying the recipient's identified standard of proof (e.g., preponderance of the evidence or clear and convincing) to the elements of the alleged offense (e.g., sexual assault, harassment, etc.)
  - Preponderance of the evidence: a fact is more likely than not to be true.
  - Clear and convincing: a fact is highly probable to be true.
  - 85 FR 30373, FN 1409
- Recall that a recipient **MUST** begin with 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. § 106.45(b)(iv)

# Written Determination of Responsibility/Non-Responsibility

- Must Include:
  - Identification of the allegations potentially constituting sexual harassment;
  - Description of the procedural steps taken;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of the recipient's code of conduct to the facts;
  - A statement of, and rationale for, the result as to each allegation, including:
    - A determination regarding responsibility,
    - Any disciplinary sanctions the recipient imposes on the respondent, and
    - Whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant.
  - The recipient's procedures and permissible bases for the complainant and respondent to appeal.
  - § 106.45(b)(7)(ii)(A)-(F)

# Written Determination and Appeals

- The recipient must provide the written determination to the parties simultaneously.
  - The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely. § 106.45(b)(7)(iii)
- The recipient must offer both parties an appeal from the determination on the following bases:
  - Procedural irregularity that affected the outcome;
  - New evidence not reasonably available at the time the determination was made that could affect the outcome; or
  - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter. § 106.45(b)(8)(i)(A)-(C)

# Live Hearings

- Live hearings are NOT required for elementary and secondary school Title IX grievance proceedings.
  - If your division intends to conduct live hearings, additional training is required, specifically for the use of technology in such proceedings.
  - This presentation presumes the recipient is NOT conducting live hearings.



# Recent Law Update

## *Doe v. Virginia Polytechnic Institute and State University (4th Cir. 2023)*

- Background: Two romantically involved students at VT broke up. Roe accused Doe of physical assault. VT opened a Title IX investigation. Doe then accused Roe of physical assault. Both were found responsible. Doe was suspended for 1.5 yrs. and Roe got probation.
- Grievance Process:
  - Initial notice didn't include any information about specific incidents, allegations or possible violations of the Student Conduct Code being investigated.
  - Didn't interview respondent's witnesses during investigation of Roe's allegations, but did interview them once Doe filed his own complaint.
  - Investigation Report didn't include exact allegations or charges being brought against respondent.
  - Respondent made allegations against complainant so joint hearing held.

# *Doe v. Virginia Polytechnic Institute and State University (4th Cir. 2023)*

- Procedural History: Doe sued VT and several university officials alleging gender-based discrimination in violation of Title IX, violations of his due process rights under the U.S. Constitution and VA Constitution, and state-law claims including breach of contract. Federal district court found in favor of VT and school officials. Doe appealed to 4<sup>th</sup> Circuit.
- Fourth Circuit Rulings:
  - Doe failed to allege a claim under either the 14<sup>th</sup> Amendment or the VA constitution that his due process rights were violated because he failed to show that he was deprived of a cognizable liberty or property interest in his continuing education by some form of “state action.” Court said fundamental requirements of due process are “notice and an opportunity to be heard.”
  - No due process violation where university failed to interview Doe’s witnesses during investigation of Roe’s allegations, but Doe had opportunity to present witnesses at hearing, and sanction occurred after hearing. Reiterated that this Court has never held that a university has an obligation to present exculpatory evidence on behalf of accused student.

# *Doe v. Virginia Polytechnic Institute and State University (4th Cir. 2023)*

- Rationale

- Doe was found responsible and suspended only after he was given a chance to review the university's report, eventually received notice of the charges against him two months prior to the hearing, and was given a hearing.
  - *Distinguishes this fact pattern from Doe v. Rector & Visitors of George Mason University, 149 F. Supp. 3d 602 (E.D. Va. 2016) where student was never given notice at any point of certain allegations against him, and therefore, was not allowed any opportunity to meaningfully defend himself prior to being found responsible.*
- Of note, Title IX Regulation § 106.45 which now requires pre-investigation notice of the allegations was adopted in 2020 so it didn't apply to Doe's disciplinary proceedings.
- The Court said that even if Doe had been given pre-investigation notice, it would have provided minimal incremental value because the procedures VT employed before imposing sanctions sufficiently mitigated the risk of him being erroneously suspended.
- Doe's witnesses were unavailable at hearing. University did not prevent them from testifying. No obligation on university to present Doe's exculpatory evidence on his behalf.

# Proposed Amendments to Title IX Regulations

- Issued on: June 23, 2022
- Final Rule expected in October; effective date of amendments - unknown
- Significant revisions:
  - Definition of “sex-based” harassment means: Sexual harassment on the basis of stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity, and other conduct on the basis of sex that is: quid pro quo harassment; hostile environment, and specific offense of assault, dating violence, domestic violence, or stalking.
    - *Hostile environment - unwelcome sex-based conduct sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.*
  - Same grievance process for sexual harassment would apply to any alleged violation of Title IX (all forms of sex discrimination).
  - **Supportive measures** can include measures that burden a respondent, such as requiring changes in a respondent’s class, work, housing or extracurricular or any other activity; but must allow the respondent opportunity to seek modification or termination of such measures before they are imposed.

# Proposed Amendments to Title IX Regulations

- Training requirement for ALL employees.
- Title IX roles – the decision-maker may be the same person as Title IX Coordinator or investigator.
- Definition of “relevant.”
- On campus vs. off campus activity: Proposed § 106.11 would clarify that Title IX’s prohibition on sex discrimination would apply to a hostile environment under a recipient’s education program or activity, even if sex-based harassment contributing to such a hostile environment occurred outside of the recipient’s education program or activity or occurred within an education program or activity but outside of the United States.

# Frequently Asked Questions – “Is this a Title IX matter?”

- Report of a current employee’s alleged sexual conduct toward a student’s sibling (who does not attend the school division where the employee works);
- Report of an administrator’s refusal to allow a transgender student to use the bathroom corresponding to their gender identity;
- Report of teacher’s inappropriate comments to a group of students, comments are of a sexual nature;
- If Title IX Coordinator receives report and determines it does not fall within the grievance process, what should he/she do?
- If the complainant decides not to file a formal complaint, what should the Title IX Coordinator do?



# Case Study #1

## Facts:

- Student #1 complains that Student #2 touched him inappropriately on their way off the bus at school one day.
- Student #1 mentions this allegation to his homeroom teacher.
- The homeroom teacher immediately notifies the building principal.
- The building principal calls Student #2 to his office.
- Building principal determines that Student #2's story that he accidentally hit Student #1's buttocks with his lacrosse stick sounds plausible and thus does not call the Title IX coordinator.

THOUGHTS?

# Case Study #2

- **Post-graduation**, student complains to volleyball coach that a female teacher invited him to dinner by text and forwards the text message, noting that he felt uncomfortable.
- In the same communication about the invitation, student complains about conversations he allegedly had during school year regarding such topics as:
  - Sexual activity
  - Whether student has a girlfriend
  - What age females he preferred
- Student alleges that at the end of the school year, the teacher hugged and kissed him and that it made him feel “uncomfortable.”
- The volleyball coach forwarded the student’s complaint to the principal.
- What should the principal do next?



# Questions?

Thank You for your time!



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