



# Title IX

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# Disclaimer

This presentation is intended for educational purposes only. It is not intended to convey legal advice pertaining to any particular claim or situation and is not a substitute for legal advice in connection with any claim or particular matter.

Note: This presentation utilizes resources from a number of sources, including U.S. DOE, JDSupra, NSBA/COSA, National Law Review, Penn. Standards and Practices Commission, and EdWeek.

# Title IX Training Agenda

- ✓ Title IX Overview
- ✓ Grievance Process
- ✓ Recognizing Conduct
- ✓ Avoiding Bias

# Title IX Overview

- Essential Background
- Application of Title IX – The Law
- Key Terminology, Standards, and Rules
- Types of Claims under Title IX
- Liability Concerns / Questions
- Practice Tips for Examiners

# U.S. Law and Department of Education Title IX Regulations

- Title IX Regulations Addressing Sexual Harassment (2020)
  - 2033 Pages...rule amendments are 26 pages
- Title IX: Fact Sheet: Final Title IX Regulations
- Title IX: U.S. Department of Education Title IX Final Rule Overview
- Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule
- Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule
- Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)
- October 2023 – New Regulations

<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>

# Essential Background



# Title IX: The Law



No person in the United States **on the basis of sex** shall be

- excluded from participation in,
- be denied the benefits of, or
- be subjected to discrimination under any education program or activity

which is receiving federal financial assistance.

20 U.S.C. § 1681 (sex)

# Title IX: The Law



Title IX is but one of many laws addressing civil rights; others include:

- Title VI (1964) (public accommodations-federal funding)
- Title VII (1964) (employment discrimination)
- Title IX (1972) (discrimination on the basis of sex in educational programs and activities that receive or benefit from Federal financial assistance—K-12 and higher education)



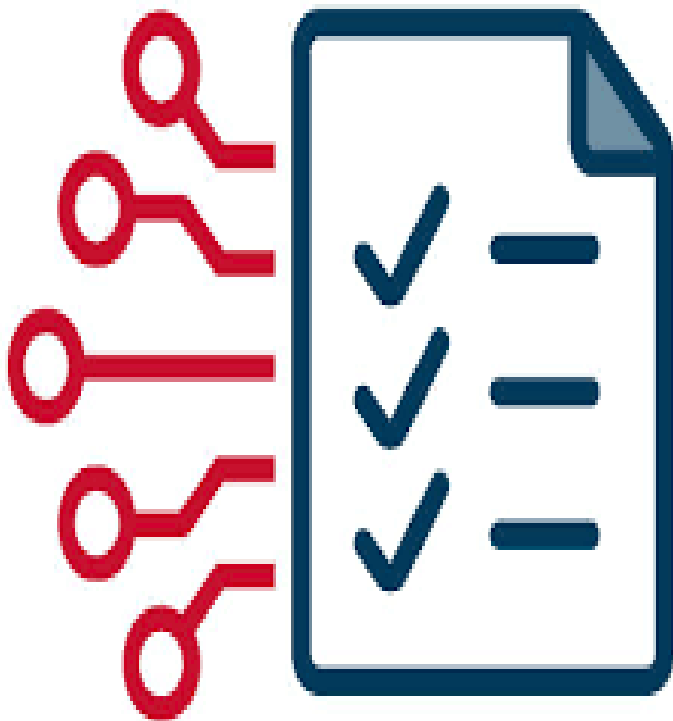
*Gebser v. Lago Vista Indep. School District,*  
524 U.S. 274 (1998)

A school board can be liable for money damages under Title IX for **employee-on-student sexual harassment** under certain circumstances.

***Davis v. Monroe County Bd of Education,***  
**526 U.S. 629 (1999)**

A school board can be liable for money damages under Title IX for **student-on-student sexual harassment** under certain circumstances.

# Let's Talk About 2020 Federal Title IX Regulations



## Key Terms, Standards, and Rules

# Sexual Harassment

- Employee *quid pro quo*
- **Hostile** environment (newly defined)
- Violence Against Women Act (VAWA)  
-- (stalking, date rape, etc.)

# Sexual Harassment – What Changed?

## Old Definition (OCR Guidance)

- Unwelcome conduct
- Determined by a reasonable person
- To be severe, pervasive, or persistent, and to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities

## NEW DEFINITION (Final Rule)

- ✓ Unwelcome conduct
- ✓ Determined by a reasonable person
- ✓ To be severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity

# *Quid Pro Quo*

“An employee of the recipient (education institution) conditioning the provision of an aid, service, or benefit of the recipient on an individual’s participation in unwelcome sexual conduct.”

# VAWA

- ✓ **Sexual Assault** -- 20 U.S.C. 1092(f)(6)(A)(v)
- ✓ **Domestic Violence** -- 34 U.S.C. 12291(a)(8)
- ✓ **Dating Violence** -- 34 U.S.C. 12291(a)(10)
- ✓ **Stalking** -- 34 U.S.C. 12291(a)(30)

**“In an Education  
Program or Activity”**



Any location, events, or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred.

Education institutions need only address sex discrimination occurring against a person *in the United States* under Title IX

# So when must an education institution respond to sexual harassment?

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

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

- Any person may report sex discrimination, regardless of whether the person is the alleged victim of the reported conduct
- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator, or
  - By any means that results in the Title IX Coordinator receiving the person's report
- Such a report may be made at any time, including during non-business hours, by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator

# Actual Knowledge

## OLD RULE (OCR Guidance)

- A school has a responsibility to respond promptly and effectively if a school **knows or should have known** about sexual harassment

## NEW RULE (Final Rule)

- A school with **actual knowledge** of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent

# Deliberate Indifference by Institution

## OLD DEFINITION (OCR Guidance)

- ❖ The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects

## NEW DEFINITION (Final Rule)

- ❖ Failure to respond reasonably in light of known circumstances

A photograph of a desk setup. In the center is a white document with the text "SEXUAL HARASSMENT COMPLAINT FORM" printed in a bold, serif font. A black pen lies horizontally across the bottom of the document. To the left, a portion of a blue-lined notepad is visible. Above the document, a pair of glasses with dark frames rests on a wooden surface. The entire scene is set against a light-colored wooden background.

**SEXUAL HARASSMENT  
COMPLAINT FORM**

# Terminology:

- \* Complainant
- \* Respondent

➤ Applies to parties in both *reports* and *formal complaints* of sexual harassment

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

- **NOT a third party who reports alleged sexual harassment perpetrated against someone else**
- **NOT the Title IX Coordinator, even if the TIXC “signs” a formal complaint**

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

# Initial Response

**34 C.F.R. 106.30(a), 106.44(a)**

Must treat **complainants** and **respondents** equitably

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



# Initial Response

## 34 C.F.R. 106.30(a), 106.44(a)

- Title IX Coordinator must promptly, even if no formal complaint is filed:
  - Contact complainant and respondent to discuss the availability of “supportive measures”
  - Consider the wishes of complainant and respondent with respect to supportive measures
  - Inform complainant and respondent of the availability of supportive measures with or without the filing of a formal complaint
  - Explain the process for filing a formal Complaint

# Supportive Measures

## Final Regulatory Rule

- **Non-punitive**, individualized services, offered as appropriate and without charge to a complainant **or a respondent** before or after the filing of a formal complaint, or where no complaint has been filed (34 C.F.R. 106.30(a)).
- **Should be designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party**

# Examples of Supportive Measures

- Counseling
- Course modifications
- Schedule changes
- Increased monitoring or supervision

A supportive measure that completely removes a respondent from an activity would likely be considered punitive, except for “emergency removals” for students and “administrative leaves” for employees

# Emergency Removal / Admin Leave

## **Immediate emergency removal (34 C.F.R. 106.44(c))**

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat to physical health or safety**
- **Notice, opportunity to challenge** provided “immediately” provided the removal
- Consider other laws, e.g., “change in placement” under IDEA

## **Employee administrative leave (34 C.F.R. 106.44(d))**

- Not prohibited
- Consider state law, board policy, handbooks, and bargaining agreements

# Formal Complaint Response

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

- Requires a number of specific steps for investigating, dismissing, and determining responsibility in formal complaint
- Major shift from previous more deferential stance toward specific policies and practices for complaint resolution

# Basic Required Elements in Response to Complaint - 34 C.F.R. 106.45(b)(1)

- Treat parties equitably
- Objective evaluation of all evidence
- No conflict of interest for investigator or decision-makers
- Presumption respondent not responsible
- Reasonably prompt time frames
- Description or list of possible discipline / other remedies
- Statement of standard used (preponderance or clear / convincing)
- Appeal procedures and bases
- Range of supportive measures available
- No breach of privilege without waiver

# Written Notice Requirement

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

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

# More Steps: Written Notice

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

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



# Dismissal of Complaint

## **Mandatory if conduct alleged:**

- Not sexual harassment, if true
  - Did not occur in the school's program or activity
  - Did not occur in the United States
- \*\*can still address under non-Title IX policies

## **Permissive dismissal allowed if:**

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

# Investigation

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

- Burden of proof on school
- Certain treatment records cannot be obtained without voluntary, written consent
- No restriction of rights of parties to discuss allegations or gather or present evidence
- Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)
- Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
- All evidence provided to parties and their advisors with 10 days to respond before report
- Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility

# Determinations of Responsibility

## 34 C.F.R. 106.45(b)(6)

- Live hearing -- with live cross-examination by party/advisor(s) required for Higher Ed, **not K-12**
- Hearings permitted for K-12, with each party allowed to submit written, relevant questions to be asked of another party or witness to the decision-maker, who will provide each party with the answers and the opportunity for follow-up questions
- Questions about a complainant's prior sexual behavior or sexual predisposition only possible to establish that another person committed the alleged conduct or that the conduct was consensual

# Determinations of Responsibility

## 34 C.F.R. 106.45(b)(7)

- Decision-maker cannot be the investigator or the Title IX Coordinator
- Must issue written determination addressing:
  - Allegations
  - Procedural steps taken
  - Findings of fact
  - Application of code of conduct to facts
  - Statement of and rationale for result **as to each allegation** including
    - Determination of responsibility
    - Any disciplinary sanctions
    - Whether remedies to restore or preserve equal access to the educational program or activity will be provided

# Appeals

## 34 C.F.R. 106.45(b)(8)

### REQUIREMENTS (Final Rule)

- Must offer to both parties for dismissals and final determinations in the following circumstances
  - Procedural irregularity
  - New evidence not reasonably available
  - Conflict of interest against Title IX Coordinator, investigator, decision-maker
- Can offer for other reasons on equal terms
- Different decision-maker

# Informal Resolution

## 34 CFR 106.45(b)(9)

- Prohibited unless formal complaint is filed
- Allowed at any time during formal complaint process if:
  - Both parties provided written notice of rights
  - Both parties' written, voluntary consent obtained
  - Not for a complaint alleging that an employee harassed a student

# Retaliation

## 34 C.F.R. 106.71

Specifically prohibited in the final rule

“For the purpose of interfering with Title IX rights” or “because a person has participated or refused to participate in any manner in a proceeding under Title IX regulations”

Complaints “may” be addressed under Title IX grievance process

Can include

- Charging code violation for same facts or circumstances
- Charging code violation for false statement based on only losing Title IX process

# Title IX Coordinator

- Must be called Title IX Coordinator
- Must be designated and “authorized” to coordinate compliance efforts



# Policy and Notice Requirements

- ❖ Title IX Coordinator's name or title and contact information (including email address)
- ❖ Nondiscrimination policy
- ❖ Grievance procedures including how to file or report sexual harassment and how the school will respond

# Title IX Training

- Required for all staff (identify and report sexual harassment)
- Required for Title IX Coordinator, investigators, and decision-makers (both decision and appeal)
- Maintain records for 7 years and post materials on website (or otherwise make available to public if do not have a website)

# Recordkeeping

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

- Records related to alleged sexual harassment must be maintained for a minimum of 7 years:
  - Investigation records
  - Disciplinary sanctions
  - Remedies
  - Appeals
  - Records of any actions taken, including supportive measures
- Must document for every instance:
  - Why response was not deliberately indifferent
  - That measures were taken to restore or preserve equal access to the educational program or activity
  - If no supportive measures provided, why that was not deliberately indifferent

# Liability Issues

# Actual Knowledge – Appropriate Person

*Gebser* provides a clearer standard than *Davis*.

*Gebser*: A Title IX damages remedy would not lie unless “an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of the discrimination....”

*Davis*: The “Board’s” knowledge and “known harassment.”

“With respect to harassment **by teachers or staff**, application of the Supreme Court's requirement of actual notice to an official with authority to address the discrimination and to institute corrective measures results in a limited and readily identifiable number of school administrators. However, a much broader number of administrators and employees could conceivably exercise at least some control over **student behavior.**” *Hawkins v. Sarasota County Sch. Bd.*, 322 F.3d 1279 (11th Cir. 2003)(emphasis added).

# Actual Knowledge – Appropriate Person

- Majority Rule: Appropriate-Person Analysis Is Inapplicable to Peer-Harassment Claims
  - In the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th Circuits, none of the peer-harassment cases citing *Davis* have ever required a plaintiff to **prove** actual notice by an appropriate person, though some lower courts have spontaneously grafted that requirement into their peer-harassment analyses.
- Minority Rule: Peer-Harassment Claim Requires Notice to Appropriate Person
  - Only the 10th and 11th Circuits have ever directly addressed the “appropriate person” in peer-to-peer sexual harassment cases.
    - *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1248 (10th Cir. 1999).
    - *Ross v. Univ. of Tulsa*, 180 F. Supp. 3d 951, 954 (N.D. Okla. 2016), *aff'd*, 859 F.3d 1280 (10th Cir. 2017), *cert. denied* 138 S.Ct. 1267 (Mar. 05, 2018).

# Deliberate Indifference – Historically a High Bar for Money Damages

- *Davis*: a funding recipient is deliberately indifferent only “where its response to the harassment or lack thereof is **clearly unreasonable in light of the known circumstances.**”
- Courts have asked:
  - Did the school investigate properly?
  - If it did investigate, did it implement remediation?
  - If it did remediate, was it effective?

# *Deliberate Indifference – Historically a High Bar for Money Damages (cont'd)*

- School districts don't need flawless investigations or perfect solutions. *Fitzgerald v. Barnstable Sch. Committee*, 504 F.3d 165 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009).
- Some form of investigation & some form of remediation usually allows a school district to have a case dismissed on summary judgment.
  - Example: School reasonably believed it had been successful in stopping the behavior through separating students and teachers keeping an eye on them, but the behavior resurfaced 2 years later. *Porto v. Town of Teuksbury*, 488 F.3d 67 (1st Cir. 2007).



# Retaliation

- Coach had standing to assert a Title IX retaliation claim where he complained of sex discrimination, was retaliated against, but was not the subject of the original discrimination complained of. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).
- Courts have adopted a Title VII burden-shifting framework. *See, e.g., Ollier v. Sweetwater Union High School Dist.*, 768 F.3d 843 (9th Cir. 2014); *Fuhr v. Hazel Park School Dist.*, 710 F.3d 668 (6th Cir. 2013).

# *Legal Theories Used to Advance Sexual Harassment Claims in Education Institutions*

- State law claims:
  - Negligent supervision and retention
  - Negligent training
  - Emotional distress
- Federal law claims:
  - Title IX (covering sexual harassment in education)
  - Section 1983 of the Civil Rights Act
  - Violation of the Equal Protection Clause of the 14th Amendment, and
  - Violation of Due Process under the 14th Amendment

# Potential Areas of Liability

Failure of the “Institution” (H.E. and K-12) to:

- revise and maintain a Title IX policy
- identify Title IX Coordinator, who is responsible for implementing Title IX and responsible for responding to incidents
- notify all parents or guardians of students, students, and employees about the Title IX Coordinator and how to report an incident of sex discrimination in a program or activity it operates

# Potential Areas of Liability

Failure of the Institution to:

- understand what the US DOE defines as “actual knowledge” of a Title IX incident that triggers a duty to report to the Title IX Coordinator
- failure to distribute and conspicuously post information and conduct training regarding the approved Title IX policy and procedures

# Potential Areas of Liability

Failure of the Institution to:

- provide training that is comprehensive and continuous for all Title IX or Title IX-related personnel to ensure they are knowledgeable about Title IX policy and procedures and are able to perform their roles free from any conflict of interests or bias
- ensure a prompt and equitable grievance process that is compliant with all US DOE directives

# Potential Areas of Liability

Failure of the Institution to:

- ensure effective documentation procedures are in place for how the district receives and maintains information
- Title IX investigation conducted by personnel not trained in a certified program

# Title IX Intake/Preparation/ Report Writing

- Intake of a Complaint
- Preparation
- Notices
- Writing Report

# Intake and Preparing for Investigation

- Grievance Process Generally
  - Due Process – right to investigation and adjudication
  - Grievance Procedures
    - Formal complaint, supportive measures, disciplinary sanctions, remedial measures
  - Jurisdiction
    - Sexual Harassment, U.S.A., school property/activity/event (exercise control)
  - Notice Requirements
    - Actual knowledge - any employee of an elementary and secondary school



# Intake and Preparing for Investigation

- Definitions

- Actual knowledge
- Complainant
- Respondent
- Advisor – chosen or appointed; may be attorney, but not required
- Decision-maker (hearing, appeal, disciplinary)
- Sexual harassment
  - Sexual Assault, Dating Violence, Domestic Violence, Stalking

# Intake and Preparing for Investigation

- Receiving Reports

- Title IX Coordinator or any employee
- Any person may report (does not make them the complainant)
- Actual knowledge of sexual harassment or allegation of sexual harassment triggers response (even if no formal complaint filed)

# Intake and Preparing for Investigation

- Response to Report of Sexual Harassment
  - Prompt Response
  - Equitable Treatment
    - For complainant
    - For respondent
  - Supportive Measures
    - Supportive measures vs. disciplinary sanctions

# Intake and Preparing for Investigation

- Prompt Response

- As soon as reasonably possible – contact complainant to:
  - discuss the availability of and offer 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

# Intake and Preparing for Investigation

- **Formal Complaint**

- Contains an allegation of sexual harassment and a request that the District investigate the allegations is required before the District may conduct a formal investigation of sexual harassment or take any action (other than supportive measures) against a person accused of sexual harassment.
- At a minimum, a formal complaint must:
  - contain the name and address of the complainant and the student's parent or guardian if the complainant is a minor student
  - describe the alleged sexual harassment
  - request an investigation of the matter, and
  - be signed by the complainant or otherwise indicate that the complainant is the person filing the complaint
- May be filed with Title IX Coordinator in person, by mail, email

# Intake and Preparing for Investigation

## • Dismissal of Formal Complaint

- **Must** dismiss a formal complaint if alleged conduct:
  - Would not constitute sexual harassment, even if proved
  - Did not occur in District's education program or activity
  - Did not occur against a person in the United States
- **May** dismiss if:
  - Complainant notifies wish to withdraw in writing to Title IX Coordinator
  - Respondent no longer enrolled/employed
  - Special circumstances preventing gathering of evidence
- Must send notice to all parties, stating reason
- **Does not preclude District action under other policies**
  - Title IX Coordinator may redirect after dismissal

# Intake and Preparing for Investigation

- Notice of Formal Complaint

- Notice to contain:

- this Title IX Grievance Process, including any informal resolution process;
- the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview; “sufficient details” shall include to the extent known identities of persons involved, the conduct allegedly constituting sexual harassment, and the date and location of the incident;
- a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility will be made at the conclusion of the grievance process;

# Intake and Preparing for Investigation

- Notice of Formal Complaint
  - Notice to contain:
    - that each party may have an advisor of their choice, who may be, but is not required to be, an attorney;
    - that each party is entitled to inspect and review evidence; and
    - a reference to any provision in the District's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.



# Intake and Preparing for Investigation

- Determination/Decision-Maker
  - Decision-maker (not Title IX Coordinator) must issue written decision
  - Provided simultaneously to the parties
  - Must include appeal procedures

# Intake and Preparing for Investigation

- Appeals Process:
  - Must include the procedures and permissible bases for the complainant and respondent to appeal
    - Upon determination regarding responsibility
    - Dismissal of a formal complaint

# Intake and Preparing for Investigation

- Appeals Process:

- Appeal Standing

- Procedural irregularity that affected the outcome of the matter;
    - New evidence that was not reasonably available at the time of determination/dismissal; OR
    - Conflict of interest or bias for or against complainants or respondents that affected the outcome; AND

# Intake and Preparing for Investigation

- Appeals Process:
  - Timely
  - Disciplinary sanctions stayed during appeal

# Intake and Preparing for Investigation

- Informal Resolution:
  - Not required to offer
  - May offer only after:
    - Written notice to the parties disclosing (i) allegations of complaint; (ii) requirements of informal resolution process, including any preclusion from resuming a formal complaint after agreeing to a resolution; and

# Intake and Preparing for Investigation

- Informal Resolution:
  - (iii) consequences from participating in informal process, including records that will be maintained or could be shared
    - Voluntary written consent from the parties
  - Not permitted if allegations involve an employee sexually harassing a student

# Intake and Preparing for Investigation

- Final Determination, Disciplinary Sanctions:
  - In no case shall the District impose disciplinary consequences or sanctions against a respondent who has been accused of conduct which may constitute sexual harassment, until the Title IX Grievance Process has been completed.

# Intake and Preparing for Investigation

- Final Determination, Disciplinary Sanctions:
  - Final Determination = Title IX Decision → then sanctions and remedies
    - Disciplinary Sanctions – imposed by persons charged under Board policies
    - Non-Disciplinary Remedies – Title IX Coordinator responsible
  - Emergency Removal/Administrative Leave



# HOW DO I RECOGNIZE SEXUAL MISCONDUCT?

- There are a number of warning signs or “red flags” that can indicate sexual misconduct. While the presence of any of these warning signs does not equal proof that an educator is engaged in sexual misconduct, if you suspect sexual misconduct by seeing these indicators, trust your instincts regardless of any justification or rationalization the educator claims.

# HOW DO I RECOGNIZE SEXUAL MISCONDUCT?

Warning signs or “red flags” that can indicate sexual misconduct.

- Behavior indicators in students might include:
  - Inappropriate sexual behavior or knowledge, particularly in younger children
  - Late arrivals to class or excessive absences
  - Changes in personality
  - Increased time with one adult
  - Referring to a teacher as a “friend”
  - Difficulty paying attention
  - Unexplained disciplinary or academic issues
  - Depression or anxiety
  - Self-injury (cutting, burning)
  - Drug and alcohol abuse

# HOW DO I RECOGNIZE SEXUAL MISCONDUCT?

Behaviors of adults who engage in sexual misconduct might include:

- Spending more time with children than other adults
- Close personal relationships with students
- Singling students out for special attention or privileges
- Time alone with students
- Time in private spaces with students
- Flirtatious behavior with students
- Off-color remarks in class
- Being too permissive with students and allowing misbehavior
- Engaging in peer-like behavior with students
- Giving gifts to students
- Oversharing personal information with students
- Touching, tickling, hugging, kissing, wrestling or holding students even if they resist
- Exchanging personal notes, texts, emails, or other communications with students

# WHO IS INVOLVED IN SEXUAL MISCONDUCT?

## The Targets:

The imbalance of power inherent in the student-teacher relationship leaves students vulnerable to exploitation. Although any student can be a victim of sexual misconduct, some students are more vulnerable than others. Most at-risk are students who:

- are estranged from their parents;
- are unsure of themselves;
- are engaged in risky behavior or have parents who are engaged in such behavior;
- are socially marginalized;
- have special needs;
- have experienced prior physical or sexual abuse; and/or
- are experiencing emotional, social or academic stressors

# WHO IS INVOLVED IN SEXUAL MISCONDUCT?

## The Offenders

While offenders share patterns of behavior, there is no single profile of an offender. Offenders are:

- male and female;
- all ages;
- employed in a variety of education job categories; and
- often well-liked and considered excellent educators.

# Let's Sum It Up

**If you see or hear something,  
report it!**

# Title IX Avoiding Bias

- USDOE Guidance
- Understanding and Avoiding Bias

# USDOE: Recommendation for Assessing Bias in Aug. 2020 Regs:

“Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists...bearing in mind that the very training required by 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.”



# USDOE

- Department cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations”
- The USDOE explained that this means, the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias”

# Ways to Avoid Bias and Be Impartial

- A good way to avoid bias and ensure impartiality: avoiding prejudgment of facts
- Keep an open mind as an investigator or decision-maker and actively listen to all the facts presented
- Each case is unique and different
- Avoid sex stereotypes, e.g., women have regret about sex and lie about sexual assaults, men are sexually aggressive or likely to perpetrate sexual assault

# Ways to Avoid Bias and Be Impartial

- Avoid sex stereotypes, e.g., women have regret about sex and lie about sexual assaults, men are sexually aggressive or likely to perpetrate sexual assault
- Understand various potential responses to trauma:
  - Delayed reporting
  - Difficulty remembering specifics (could also be due to trauma)

# Ways to Avoid Bias and Be Impartial

- Understand various potential responses to trauma:
  - Reluctant reporting
  - Remaining in a relationship or living arrangement with the respondent
  - Being calm and composed after an assault
  - Failing to identify the accused

# Ways to Avoid Bias and Be Impartial

- Do **not** assume that because there are signs of trauma, the trauma was caused by the respondent and therefore the respondent violated the policy
- Do **not** assume that because there are not signs of trauma, therefore nothing bad happened

# Ways to Avoid Bias and Be Impartial

- Trauma affects the way the brain **encodes and decodes memories** of what occurred
- Fight, flight, or freeze
- Why don't people tell right away?
  - Fear of retaliation
  - Fear of not being believed
- Be trauma informed....

# Ways to Avoid Bias and Be Impartial

- How a Title IX personnel handle a person in the first meeting can make the difference between:
  - Cooperation in the investigation **vs.** refusal to cooperate
  - Re-traumatization **vs.** supportive environment
  - Putting off other potential complainants or witnesses from coming forward **vs.** encouraging future reports

# Ways to Avoid Bias and Be Impartial

- How a Title IX personnel handle a person in the first meeting can make the difference between:
  - A lawsuit or OCR complaint (or both) **vs.** supportive and cooperative relationship
- Words have meaning:
  - Victim vs. survivor vs. complainant
  - Rely on policy language



# Ways to Avoid Bias and Be Impartial

- Culture can also impact responses from investigators and other Title IX personnel:
  - Age of consent
  - Attitudes towards homosexuality
  - Attitudes towards intimate partner violence
  - Cooperating with investigations

# Ways to Avoid Bias and Be Impartial

- Culture can also impact responses from investigators and other Title IX personnel:
  - Sharing personal information
  - Reactions toward authority figures
  - Reactions toward male vs. female

# Ways to Avoid Bias and Be Impartial

- Be human and think *tabula rasa*



# Scenario

Mrs. Smith is preparing for class. Melissa comes into the classroom early. She seems very depressed and appears to have been crying. Mrs. Smith walks over to Melissa and asks her if she is okay. Melissa seems like she wants to say something but remains silent. Mrs. Smith tells Melissa that she is available to talk if Melissa wishes.

Several minutes later, Mrs. Smith learns the following from Melissa.

Joe and Melissa have been classmates and friends for several years. Last Friday, Joe pressed his pelvis against Melissa's genitals without permission while the two were dancing in the gymnasium during a formal hosted by the school. Melissa thinks Bill, another classmate, may have seen something because Melissa made eye contact with Bill as she was shoving Joe away from her. Melissa also indicated that Joe started sending her suggestive texts the day after the dance.

Melissa also described another incident, which consisted of Joe attempting to kiss Melissa a week later by her locker as she was getting her books for her algebra class. When Melissa resisted, Joe told Melissa that she owed him because of the incident at the dance. Melissa told her friend, Kira Webb, about the two incidents. Kira encouraged Melissa to report Joe.

# **Discussion**

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