

Title IX: Best Practices in Training and Compliance

Part I and Part II Training – September 14, 2021

In conjunction with



VSBA

Virginia School Boards Association

Leadership • Advocacy • Support

Bradford A. King
BKing@sandsanderson.com
(804) 783-7263

Nicole S. Cheuk
NCheuk@sandsanderson.com
(804) 783-7267



DISCLAIMER

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

Purpose of Part I Training

- Today's presentation includes Title IX Training Parts I and II
- Part I Training, as required by recently adopted federal implementing Regulations (34 CFR § 106.45(b)(1)), is designed for Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal process on the following:
 - 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

- The Regulations at 34 CFR § 106.45(b)(1) require Part II Training:
 - Investigators must receive training on issues of relevance, investigative report that fairly summarizes relevant evidence
 - Decision-makers must receive training on any technology to be used at live hearing, relevance of questions and evidence

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

- Fourth Circuit reversed the district court's judgment in favor of the School Board and agreed with Doe that "the district court by misconstruing what it means for a school to have actual notice or knowledge of alleged harassment in Title IX cases, that a new trial must be granted because no evidence in the record supports the jury's verdict under the correct legal standard." (Emphasis added).
- Background
 - male to female, student-on-student sexual harassment case brought under Title IX
 - Doe claimed that FCPS was deliberately indifferent 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 there wasn't "actual knowledge" of sexual harassment

Doe v. Fairfax County School Board, cont'd

- Doe asserts new trial is necessary because clear weight of evidence required a judicial override of the jury's finding
- Doe asserts that key school personnel received information from multiple sources
- Rationale for reversal:
 - “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.”
 - 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, cont'd

- 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*

Doe v. Fairfax County School Board, cont'd

- **Update:** On August 30, 2021, the Fourth Circuit denied a rehearing en banc, upholding the decision of the 4th Circuit three judge panel.
 - Concurring opinion
 - *“Surely a student is subjected to discrimination on the basis of sex when they report a sexual assault by a fellow student on school property and are met with nothing more than a collective shrug of the shoulders – or, worse still, with accusatory questions or flat-out blame”*
 - *“A single, severe instance of peer-on-peer harassment can lead to liability where the school’s response (or lack thereof) leaves the victim vulnerable to additional harassment”*
 - Dissenting opinions (2)
 - *“Title IX cannot be read to impose liability on local school systems for a single isolated incident of pre-notice sexual harassment in schools”*
 - *“Regretfully, we now leave the Supreme Court as the only possible venue for review of this important legal issue that will implicate educational institutions across the country”*

Title IX Training Part I

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”
 - 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 in a manner that is not deliberately indifferent

Title IX – Types of Harassment

Schools have responsibilities under Title IX both for 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 school district could be liable for sexual harassment of student by teacher where 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)

Title IX – 3 Types of Harassment

1) QUID PRO QUO – 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 when making a determination regarding whether conduct meets definition of 2)

- 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)

Title IX - Types of Harassment

“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), or “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”

34 C.F.R. PART 106

Title IX Regulations

Effective August 14, 2020



History of Sexual Harassment Enforcement

- 1975 - Department of Education promulgated rules to enact Title IX, sexual harassment not contemplated
- 1997 Guidance from DOE included sexual harassment under Title IX
- 1998 - SCOTUS rules an educational entity is liable for Title IX teacher-on-student harassment if it is “deliberately indifferent” to “actual notice” *Gebser v. Lago Vista*
- 1999 - SCOTUS rules peer-on-peer harassment is actionable under Title IX - *Davis v. Monroe County Board of Education*
- 2001 OCR revised 1997 guidance in light of *Gebser* and *Davis*, included “interim measures” to help victims
- 2011 and 2014 – sexual violence added to definition of sexual harassment, 2014 question and answer document based on multitude of questions regarding 2011 guidance
- 2017- OCR rescinded 2011 and 2014 guidance, provided 7pg. Q and A document

Title IX Recent Developments

- November 16, 2018 Notice of Proposed Rulemaking
<https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf>
- 124,000 + comments received
- May 19, 2020 final rule published - USDOE guidance document is over 2000 pages; previous Title IX regulations did not refer to sexual harassment
- Seventeen states (including Virginia) filed suit challenging the final rule and requesting a stay of its effective date pending judicial review - stay DENIED on August 12, 2020
 - “Although Plaintiffs have raised serious arguments about certain aspects of the Rule, they have not established a likelihood of success on their claims, nor have they established that they are likely to suffer irreparable harm”

Title IX Regulations – Training Requirements

- 34 CFR § 106.45(b)(1)
 - Training for Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal process on the following (Part I):
 - 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)
 - In addition (Part II):
 - Investigators must receive training on issues of relevance, investigative report that fairly summarizes relevant evidence
 - Decision-makers must receive training on any technology to be used at live hearing, relevance of questions and evidence

Title IX Regulations

- Defining Sexual Harassment - 34 CFR § 106.30(a) – Conduct on the basis of sex that meets one or more of the following:
 - Quid pro quo harassment;
 - 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; or
 - Sexual assault (as defined in the Clery Act regulations)
- What Triggers School's Obligation to Respond
 - Actual knowledge
 - Reporting 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 individual allegedly subjected to misconduct
 - 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
 - Perpetrated against a person "in the United States" (new provision)

Title IX Regulations

- General Response 34 C.F.R. § 106.44
 - Regulations require school divisions to appoint a Title IX Coordinator - specifically named on website, contact information, training, records of that training
 - *authorized to coordinate school division's compliance efforts*
 - *doesn't have to be full-time only job, but individual needs to have sufficient authority and time to carry out role*
 - Liability when school knows of sexual harassment allegations and responds in a way that is "deliberately indifferent," defined as "clearly unreasonable in light of the known circumstances"
 - Must "respond meaningfully to every report" – but must activate grievance process only 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

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

- presumed innocent

Title IX Regulations – Receipt of Report

- How a School Must Respond
 - Reports trigger 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)
 - counseling, course modifications, schedule changes, monitoring, supervision, extensions of deadlines, security
 - removing a respondent completely from an activity would likely be considered punitive
 - Explain formal complaint process
 - K-12 schools need to protect younger students and 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 permitted under certain circumstances
 - Must conduct an individualized safety and risk analysis and determine that emergency removal is necessary in order to protect a student or other individual from an immediate threat to physical health or safety
 - School division must provide respondent with notice and an opportunity to challenge the decision immediately after the removal
 - Example: Accusation of sexual harassment leads to respondent's threats of physical self-harm

Title IX Regulations – Grievance Process

Formal Complaint

- 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 on the school, preponderance of evidence vs. clear and convincing
 - Reasonably prompt time frames
 - 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 regarding false statements

Title IX – Grievance Process

- Dismissal 34 CFR § 106.45(b)(3)
 - *Mandatory* if investigation reveals alleged conduct did not occur in school division's program or activity OR against a person in U.S.
 - *Mandatory* if alleged conduct would not constitute sexual harassment prohibited by Title IX even if proved
 - *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
- Investigation Phase 34 CFR § 106.45(b)(5)
 - Equal opportunity to present witnesses, evidence, **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*
 - *At least 10 days before determination of responsibility - send it to each party and the party's advisor for their review and response*
- Decision-maker - 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 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, decision-maker*

Title IX Regulations

- Informal resolution 34 CFR § 106.45(b)(9)
 - Cannot be required
 - 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 documenting every Title IX sexual harassment investigation and determination of responsibility including:
 - Disciplinary sanctions imposed, if any;
 - Any informal resolution or appeal;
 - All materials used to train their 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 – including documentation of supportive measures offered and implemented for complainant

Title IX – Regulations

- Other miscellaneous requirements and clarifications
 - Notice of policy, grievance procedures, and Title IX Coordinator's name or title, email address, office address, and telephone number 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 also publish notice of nondiscrimination policy and Title IX Coordinator's contact information in handbooks to students/employees
 - Timelines must be reasonably prompt
 - No damages assessed by DOE
 - Nothing requires restriction of 1st Amendment, Due Process rights
 - Severability provisions
 - Prohibition on retaliation (34 CFR § 106.71)

Questions and Answers for K-12 Public Schools in the Current COVID-19 Environment (OCR Sept. 28, 2020)

- 4 of 13 questions related to Title IX
- Yes, school divisions must continue to accept and investigate reports and complaints of sexual harassment even in a distance learning only environment
- A school division may need additional time to complete the grievance process and the situation related to COVID-19 may in some circumstances qualify as “good cause” for a delay, so long as all parties are notified promptly
- If a school division’s methods/process changes due to COVID-19 related interruption, it must promptly notify students/employees and display changes in process prominently on the school division website

U.S. DOE's OCR announced a comprehensive review of the Title IX regulations – April 6, 2021

- President Biden issued an Executive Order on March 8, 2021 - *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*
- As a result, OCR issued a letter on April 6, 2021 to students, educators, and other stakeholders, outlining plans to solicit the public's input on the regulations
- Could lead to possible revisions through a notice of proposed rulemaking – estimated timeframe – Spring 2022
- *Question and Answers on the Title IX Regulations on Sexual Harassment* (July 20, 2021)

Question 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 tip: may still offer supportive measures to a complainant who reports sexual harassment that occurred outside school's program or activity and 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

Administrative Response and Investigations

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 - Intake

- 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
- Give notice to both parties
- Consider whether and what supportive measures are required for the responding party during investigation

Step 2 – Designate an Investigator(s)

- Free of actual or reasonably perceived conflicts of interest and biases for or against any party
- 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

Supportive Measures

Different for each case –

- 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 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 or 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, not leading, questions
- Provide some background to give witnesses the opportunity to address the issues – but preserve confidentiality if possible
- Remind all witnesses of confidentiality and the prohibition of retaliation
- Compare all stories for consistency and inconsistency

Step 3 – Gather Information

Sample questions:

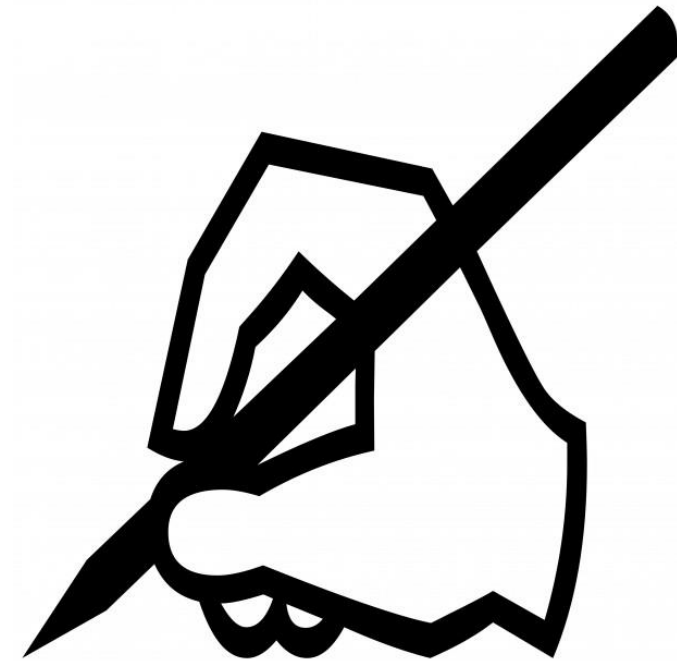
- What can you tell me about the allegation?
- Where would you like to start?
- Where and when did it occur?
- Who was involved?
- Can you tell me more?
- Did anyone else see it happen?
- Have you talked to anyone since?
- Do you know anyone else with information about it?

Investigation Checklist

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

Step 4 – Record Your Findings – Investigative Report

- Leave out 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 to parties and they have 10 days to provide a written response



Step 5 – Report Results to Decision-Maker

Decision-maker must afford each party the opportunity 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

Limited follow-up questions



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

- Makes decision regarding determination of responsibility, cannot be the investigator OR the Title IX Coordinator
 - 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
 - details regarding appeal procedures
- Is it more likely than not that the respondent engaged in the alleged misconduct?
- Decision is final when provided to both parties simultaneously and time for appeal expires

Step 7- Appeal Decision-Maker

- Not the same person as initial decision-maker, investigator, or the Title IX Coordinator
- Decides appeal on 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:
 - Within three days of appeal filing; and
 - of decision, describing result and rationale for result

Serving Impartially – Decision-makers

- 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:
 - *(i) a party's treatment (medical, psychological and similar) records, without the party's prior written consent [§ 106.45(b)(5)(i)];*
 - *(ii) information protected by a legally recognized privilege [§ 106.45(b)(1)(x)]; and*
 - *(iii) 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 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

- Recall that the grievance process must provide that the parties have an equal opportunity to inspect, review, and respond to evidence directly related to the allegations (§ 106.45(b)(5)(vi)) and an equal opportunity to review and respond to the recipient's investigative report. (§ 106.45(b)(5)(vii))
 - This process “allows each party the opportunity to provide input and make arguments about the relevance of evidence and how a decision-maker should weigh the evidence.” Q&A #13.
 - 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)
- The Preamble asserts that the Rule “. . . balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence.” (As cited in Q&A #13)

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.”
- These findings will inform the 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 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

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 stereo-types (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.

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.

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 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

- Remember: Decision-maker cannot be the same person as the Title IX Coordinator or the investigator.
- Must issue a written decision regarding responsibility.
- Applying standard of evidence identified by recipient's policy

Written Determination

- The Written Determination 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
 - *(i) a determination regarding responsibility,*
 - *(ii) any disciplinary sanctions the recipient imposes on the respondent, and*
 - *(iii) 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; and*
 - 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.

Fact Pattern #1 – Student-on-Student Harassment

- 11th grade female student sends a text to 10th grade male student during class that says “show me your private parts”
- 10th grade male says “no”; in the hallway, 11th grade female student continues to flirt with the male student
- Male student complains to teacher about female’s behavior and mentions this hasn’t been the first incident this school year, he wants behavior to stop but does not want to proceed with a complaint under the school division policy.
- What is the first step?
- Then what?

Fact Pattern #2 – Anonymous Reporter

- Title IX Coordinator receives anonymous email in regard to current employee's inappropriate relationship with several current students
- What is the first step?
 - What if the students refuse to participate?
- How to handle law enforcement or child protective services involvement?
- Should the employee be put on administrative leave?
- Does the school division's investigation proceed?
 - Under what circumstances should the Title IX Coordinator file the complaint on the student's behalf?

Fact Pattern #3 – Student with a Disability

- How should the school division proceed if a respondent student found to have violated sexual harassment prohibition after Title IX grievance process complete
 - Should it hold an MDR meeting to make a determination in regard to whether the misconduct is found to be a manifestation of his disability?
 - If student's Title IX violation is a manifestation, what will his/her placement be?
 - *Consider remediation*
 - *FBA, BIP*
 - *Adjust scheduling, learning environment*
 - *Keep in mind that changes to a student's schedule or the addition or provision of counseling services could constitute a change in educational placement requiring parental consent*
 - If student's Title IX violation is not a manifestation of disability, what happens?
 - *may proceed with a removal that exceeds 10 school days*
 - *student must continue to receive educational services so he/she can continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in IEP*

Fact Pattern #4 – What to do if a Report Does NOT Give School Division Actual Knowledge

- Report does not give the school division actual knowledge of allegations of sexual harassment prohibited by Title IX, instead, the allegations concern:
 - Complaint of illegal discrimination and/or harassment prohibited by other laws
 - An employee grievance
 - Bullying
 - Misbehavior prohibited by the Code of Student conduct

How should you proceed?

Close documentation, note that the reported allegations will be handled in accordance with the policies implicated above

Questions?

Thank You for your time!



Nicole S. Cheuk
NCheuk@sandsanderson.com
(804) 783-7267



Bradford A. King
BKing@sandsanderson.com
(804) 783-7263

Sands Anderson PC
1111 E. Main Street, Suite 2400
Richmond, VA 23219