

# A Refresher Course: Title IX Sexual Harassment

Hickman County Schools

March 18, 2022

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*Thank you for what you  
do each day for our  
children!* 🙌



# A teaser...

- Trinity and Brandon

Note: Names are fictitious and are not intended to reflect real persons affiliated with district or otherwise.

# Title IX

...[N]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a district which receives Federal financial assistance....

# Revised Regulations - 2020

- August 14, 2020.

Regulatory amendments specify requirements for policies governing complaints, grievance procedures and investigations to address sex-based discrimination, including sexual harassment.



# New Administration - 2021

- March 8, 2021
  - Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.
  - Requires review of all existing regulations, orders, guidance documents, policies, and any other similar agency actions that are or may be inconsistent with this policy.


# New Administration - 2021

- APRIL 6, 2021
  - USDOE - OCR announced a comprehensive review of the Title IX regulations.
- June 22, 2021
  - USDOE issued an interpretation clarifying enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX in light of the Supreme Court's decision in *Bostock v. Clayton County*.



# Tennessee Response

STATE OF TENNESSEE  
Office of the Attorney General

  
**HERBERT H. SLATTERY III**  
 ATTORNEY GENERAL AND REPORTER  
P.O. BOX 20207, NASHVILLE, TN 37202  
 TELEPHONE: (615)741-2494  
 FACSIMILE: (615)741-2009

July 7, 2021

The Honorable Joseph R. Biden, Jr.  
 President of the United States  
 The White House  
 1600 Pennsylvania Avenue, NW  
 Washington, D.C. 20500

Re: Administrative Action Related to *Bostock v. Clayton County*

Dear Mr. President,

As you are aware, State Attorneys General play a critical role in preserving federalism and the balance of power among the states and the federal government. Two recent actions by the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Education (ED) threaten to impose unlawful regulatory guidance upon nearly every employer and educational facility in our states and throughout the country. First, on June 15, 2021, EEOC Chairwoman Burrows published a guidance document regarding the EEOC's interpretation of *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 173 (2020) and its effect on EEOC's enforcement of Title VII. *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, NVT A 2021-1, June 15, 2021. Second, on June 16, 2021, ED issued a Notice of Interpretation indicating that it intends to enforce Title IX in the same manner. 86 Fed. Reg. 32,637 (June 16, 2021). In each instance, the agency misconstrued federal law and failed to adhere to the transparency and deliberative process required by the Administrative Procedure Act (APA).

At the beginning of your administration, you issued Executive Order 13,988 directing the heads of executive agencies to, among other things, promulgate new rules to implement statutes that prohibit sex discrimination. We had expected, following the issuance of Executive Order 13,988, that States and the public would have the opportunity to engage in the statutorily provided regulatory and public comment process in response to agency efforts to implement the Administration's policy of "prevent[ing] and combat[ing] discrimination on the basis of gender identity or sexual orientation." Exec. Order No. 13,988, 86 Fed. Reg. 7023-25 (Jan. 20, 2021). Instead, the States and other affected institutions and individuals have been excluded from any discussion. We write this letter to state our objections.

1



UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
KNOXVILLE DIVISION

THE STATE OF TENNESSEE; THE )  
 STATE OF ALABAMA; THE STATE OF )  
 ALASKA; THE STATE OF ARIZONA; )  
 THE STATE OF ARKANSAS; THE )  
 STATE OF GEORGIA; THE STATE OF )  
 IDAHO; THE STATE OF INDIANA; THE )  
 STATE OF KANSAS; THE )  
 COMMONWEALTH OF KENTUCKY; )  
 THE STATE OF LOUISIANA; THE )  
 STATE OF MISSISSIPPI; THE STATE OF )  
 MISSOURI; THE STATE OF MONTANA; )  
 THE STATE OF NEBRASKA; THE )  
 STATE OF OHIO; THE STATE OF )  
 OKLAHOMA; THE STATE OF SOUTH )  
 CAROLINA; THE STATE OF SOUTH )  
 DAKOTA; THE STATE OF WEST )  
 VIRGINIA, )

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF )  
 EDUCATION; MIGUEL CARDONA, in his )  
 official capacity as Secretary of Education; )  
 EQUAL EMPLOYMENT OPPORTUNITY )  
 COMMISSION; CHARLOTTE A. )  
 BURROWS, in her official capacity as Chair )  
 of the Equal Employment Opportunity )  
 Commission; UNITED STATES )  
 DEPARTMENT OF JUSTICE; MERRICK )  
 B. GARLAND, in his official capacity as )  
 Attorney General of the United States; )  
 KRISTEN CLARKE, in her official capacity )  
 as Assistant Attorney General for Civil )  
 Rights at the United States Department of )  
 Justice, )

Defendants.

Case No. 3:21-cv-00308

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

# Tennessee Response

- 2021 Public Chapters
  - 40 - Gender for Athletic Participation
  - 281 - Notice to Parents of Sexual Orientation Instruction
  - 452 - Restroom Accommodation
  - 453 - Restroom Signs
  
- More to Come???

# Revised Regulations - 2020

- Grievance procedures must -
  - Treat complainants and respondents equitably
  - Protect constitutional and civil rights
  - Provide an impartial, unbiased process



# A Pre-test...

- Who is your Title IX Coordinator?
- What do you call the individual who is the alleged victim?
- What do you call the individual who is accused?
- Who is the Investigator?
- How long does the Investigator have to initiate the investigation?
- How long does the Investigator have to conclude the investigation?
- Who is the Decision-maker?
- Can final determinations be appealed?

# HCBOE Policy 6.3041

## Hickman County Board of Education

<b>Hickman County Board of Education</b>			
	Descriptor Term:  <b>Title IX &amp; Sexual Harassment</b>	Descriptor Code: <b>6.3041</b>	Issued Date: <b>02/01/21</b>
		Rescinds: <b>6.3041</b>	Issued: <b>08/03/20</b>

# HCBOE Policy 6.3041

1 *General*

2 In order to maintain a safe, civil, and supportive learning environment, all forms of sexual harassment  
3 and discrimination on the basis of sex are prohibited.<sup>1</sup> This policy shall cover employees, employees'  
4 behaviors, students, and students' behaviors while on school property, at any school-sponsored activity,  
5 on school-provided equipment or transportation, or at any official school bus stop in accordance with  
6 federal law. This policy shall be disseminated annually to all school staff, students, and  
7 parent(s)/guardian(s).<sup>2</sup> The Title IX Coordinator as well as any personnel chosen to facilitate the  
8 grievance process shall not have a conflict of interest against any party of the complaint.<sup>3</sup> These  
9 individuals shall receive training as to how to promptly and equitably resolve student and employee  
10 complaints.<sup>3</sup>



# Training Required

- Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must receive training on
  - The definition of sexual harassment.
  - The scope of the district's education program or activity.
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable.

# Training Required

- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Any technology to be used at a live hearing.
- On issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.
- Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

# HCBOE Policy 6.3041

11 All employees shall receive training on complying with this policy and federal law.<sup>4</sup>



# HCBOE Policy 6.3041

## 12 **TITLE IX COORDINATOR<sup>5</sup>**

13 The Title IX Coordinator shall respond promptly to all general reports as well as formal complaints of  
14 sexual harassment. He/she shall be kept informed by school-level personnel of all investigations and  
15 shall provide input on an ongoing basis as appropriate.

16 Any individual may contact the Title IX Coordinator at any time using the information below:

17 Director of Accountability

18 115 Murphree Ave.

19 931-729-3391 Ext. 2226

20 [misty.shelton@hickmank12.org](mailto:misty.shelton@hickmank12.org)

# HCBOE Policy 6.3041

## 21 **DEFINITIONS<sup>4</sup>**

22 “Complainant” is an individual who is alleged to be the victim of conduct that could constitute sexual  
23 harassment.

24 “Respondent” is an individual who is reported to be the perpetrator of conduct that could constitute  
25 sexual harassment.

26 “Sexual harassment” is conduct on the basis of sex that satisfies one or more of the following:<sup>3</sup>

# HCBOE Policy 6.3041

- 1        1. A school district employee conditioning an aid, benefit, or service of an education program or  
2        activity on an individual's participation in unwelcome sexual conduct;  
3
- 4        2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and  
5        objectively offensive that it effectively denies a person equal access to the education program  
6        or activity; or
- 7        3. Sexual assault,<sup>6</sup> dating violence,<sup>7</sup> domestic violence,<sup>8</sup> or stalking<sup>9</sup> as defined in state and federal  
8        law.





# HCBOE Policy 6.3041

9 Behaviors that constitute sexual harassment may include, but are not limited to:

- 10 1. Sexually suggestive remarks;
- 11
- 12 2. Verbal harassment or abuse;
- 13
- 14 3. Sexually suggestive pictures;
- 15
- 16 4. Sexually suggestive gesturing;
- 17
- 18 5. Harassing or sexually suggestive or offensive messages that are written or electronic;
- 19
- 20 6. Subtle or direct propositions for sexual favors; and
- 21
- 22 7. Touching of a sexual nature.

# HCBOE Policy 6.3041

23 Sexual harassment may be directed against a particular person or persons, or a group, whether of the  
24 opposite sex or the same sex.

25 “Supportive measures” are non-disciplinary, non-punitive, individualized services and shall be offered  
26 to the complainant and the respondent, as appropriate. These measures may include, but are not limited  
27 to, the following:

- 28 1. Counseling;
- 29
- 30 2. Course modifications;
- 31
- 32 3. Schedule changes; and
- 33
- 34 4. Increased monitoring or supervision.

35 The measures offered to the complainant and the respondent shall remain confidential to the extent that  
36 maintaining such confidentiality would not impair the ability of the school district to provide the  
37 supportive measures.

# HCBOE Policy 6.3041

## 38 **GRIEVANCE PROCESS**

1 Upon learning of an instance of alleged sexual harassment, even if no formal complaint is filed, the  
2 Title IX Coordinator shall:

- 3 1. Promptly contact the complainant to discuss the availability of supportive measures;
- 4
- 5 2. Consider the complainant's wishes with respect to supportive measures;
- 6
- 7 3. Inform the complainant of the availability of supportive measures; and
- 8
- 9 4. Explain the process for filing a formal complaint.<sup>10</sup>



# Notice to District

- *Notice* includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator.
- *Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to a Title IX Coordinator or any official who has authority to institute corrective measures on behalf of the district, or to any employee of an elementary and secondary school.

# HCBOE Policy 6.3041

## 38 **GRIEVANCE PROCESS**

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2 Title IX Coordinator shall:

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- 5 2. Consider the complainant's wishes with respect to supportive measures;
- 6
- 7 3. Inform the complainant of the availability of supportive measures; and
- 8
- 9 4. Explain the process for filing a formal complaint.<sup>10</sup>

# HCBOE Policy 6.3041

10 While the school district will respect the confidentiality of the complainant and the respondent as much  
11 as possible, some information may need to be disclosed to appropriate individuals. All disclosures shall  
12 be consistent with the school district's legal obligations and the necessity to investigate allegations of  
13 harassment and take disciplinary action.



# HCBOE Policy 6.3041

14 Disciplinary consequences or sanctions shall not be initiated against the respondent until the grievance  
15 process has been completed. Unless there is an immediate threat to the physical health or safety of any  
16 student arising from the allegation of sexual harassment that justifies removal, the respondent's  
17 placement shall not be changed.<sup>11</sup> If the respondent is an employee, he/she may be placed on  
18 administrative leave during the pendency of the grievance process.<sup>12</sup> The Title IX Coordinator shall  
19 keep the Director of Schools informed of any employee respondents so that he/she can make any  
20 necessary reports to the State Board of Education in compliance with state law.<sup>13</sup>

# HCBOE Policy 6.3041

## 21 **Complaints**

22 Any individual who has knowledge of behaviors that may constitute a violation of this policy shall  
23 immediately report such information to the Title IX Coordinator, however, nothing in this policy requires  
24 a complainant to either report or file a formal complaint within a certain timeframe. If the complaint  
25 involves the Title IX Coordinator, the complaint shall be filed with the Director of Schools.

26 If a complaint involves allegations of child abuse, including child abuse on school grounds, appropriate  
27 notification shall be made per the board policy on reporting child abuse.

# HCBOE Policy 6.3041

28 Upon receipt of a formal complaint, the Title IX Coordinator shall promptly:<sup>14</sup>

- 29 1. Provide written notice of the allegations, and the grievance process to all known parties to give  
30 the respondent time to prepare a response before an initial interview;  
31
- 32 2. Inform the parties of the prohibition against making false statement or knowingly submitting  
33 false information;  
34
- 35 3. Inform the parties that they may have an advisor present during any subsequent meetings; and  
36
- 37 4. Offer supportive measures in an equitable manner to both parties.



# HCBOE Policy 6.3041

- 1 If the Title IX Coordinator dismisses a complaint, written notice, including the reasons for dismissal,
- 2 shall be provided to both parties simultaneously.<sup>15</sup>

# Dismissal

- The district must investigate the allegations in a formal complaint but must dismiss the complaint if the alleged conduct
  - Would not constitute sexual harassment, even if proved;
  - Did not occur in the district's education program or activity; or
  - Did not occur against a person in the United States.
- Such a dismissal does not preclude action under another provision of the district's code of conduct.

# Dismissal

- The district may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing:
  - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
  - The respondent is no longer enrolled or employed by the district;
  - Specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.



# Dismissal

- Upon any dismissal, the district must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.
- The decision to dismiss is subject to appeal.

3 **Investigations<sup>16</sup>**

4 The Complaint Manager shall serve as the investigator and be responsible for investigating complaints  
5 in an equitable manner that involves an objective evaluation of all relevant evidence. The burden for  
6 obtaining evidence sufficient to reach a determination regarding responsibility rests on the school district  
7 and not the complainant or respondent.

8 Once a complaint is received, the investigator shall initiate an investigation within forty-eight (48) hours  
9 of receipt of the complaint. If an investigation is not initiated within forty-eight (48) hours, the  
10 investigator shall provide the Title IX Coordinator with appropriate documentation detailing the reasons  
11 why the investigation was not initiated within the required timeframe.

12 All investigations shall be completed within twenty (20) calendar days from the receipt of the initial  
13 complaint. If the investigation is not complete within twenty (20) calendar days, the investigator shall  
14 provide the Title IX Coordinator with appropriate documentation detailing the reasons why the  
15 investigation has not been completed.

# HCBOE Policy 6.3041

16 All investigations shall:

- 17 1. Provide an equal opportunity for the parties to present witnesses and evidence;  
18
- 19 2. Not restrict the ability of either party to discuss the allegations under investigation or gather  
20 and present relevant evidence;  
21
- 22 3. Refrain from requiring, allowing, relying upon, or otherwise using questions or evidence that  
23 seek disclosure of information protected under a legally recognized privilege unless such  
24 privilege has been waived;<sup>17</sup>  
25
- 26 4. Provide the parties with the same opportunities to have others present during any grievance  
27 proceeding;



# HCBOE Policy 6.3041

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5. Provide to parties whose participation is requested written notice of the date, time, location, participants, and purpose of all investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;
  6. Provide both parties an equal opportunity to inspect and review any evidence directly related to the allegations in the formal complaint; and
  7. Result in the creation of an investigative report that fairly summarizes relevant evidence.
    - a. Prior to the completion of the investigative report, the investigator shall send to each party the evidence subject to inspection and review. All parties shall have at least ten (10) days to submit a written response which shall be taken into consideration in creating the final report.

# HCBOE Policy 6.3041

1 Within the parameters of the federal Family Educational Rights and Privacy Act,<sup>18</sup> the Title IX  
2 Coordinator shall keep the complainant and the respondent informed of the status of the investigation  
3 process. At the close of the investigation, a written final report on the investigation will be delivered to  
4 the parent(s)/guardian(s) of the complainant, parent(s)/guardian(s) of the respondent, and to the  
5 Director of Schools.

# HCBOE Policy 6.3041

## 6 **Determination of Responsibility**<sup>19</sup>

7 The respondent is presumed not responsible for the alleged conduct until a determination regarding  
8 responsibility is made at the conclusion of the grievance process.<sup>20</sup> The preponderance of evidence  
9 standard shall be used in making this determination.<sup>21</sup>

10 The Director of Schools shall act as the decision-maker. He/she shall receive the final report of the  
11 investigation and allow each party the opportunity to submit written questions that he/she wants asked  
12 of any party or witness prior to the determining responsibility.

13 The decision-maker shall make a determination regarding responsibility and provide the written  
14 determination to the parties simultaneously along with information about how to file an appeal.



# Procedures

- After the Decision-maker receives the investigation report, each party must have at least 10 days prior to a final determination (or hearing, if any) to:
  - Submit written, relevant questions that a party wants asked of any party or witness,
  - Provide each party with the answers, and
  - Allow additional, limited follow-up questions from each party.

NOTE: Unlike postsecondary institutions, the district is not required, but may, provide for a hearing. Additional rules apply if a live hearing is permitted.

# Procedures

- Decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.
- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless offered to prove that someone else committed the alleged conduct or to prove consent.



# Determination

- The decision-maker(s) must issue a written determination regarding responsibility that includes—
  - Identification of the allegations potentially constituting sexual harassment;
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  - Findings of fact supporting the determination;





# Determination

- Conclusions regarding the application of the district'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 district imposes on the respondent, and whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the complainant; and
- The district's procedures and permissible bases for the complainant and respondent to appeal.



# HCBOE Policy 6.3041

15 A substantiated charge against a student may result in corrective or disciplinary action up to and  
16 including expulsion. A substantiated charge against an employee shall result in disciplinary action up to  
17 and including termination.

18 After a determination of responsibility is made, the Title IX Coordinator shall work with the complainant  
19 to determine if further supportive measures are necessary. The Title IX Coordinator shall also determine  
20 whether any other actions are necessary to prevent reoccurrence of the harassment.

# Determination

- The district must provide the written determination to the parties simultaneously.
- The determination regarding responsibility becomes final when the parties are notified of the date an appeal would no longer be timely or the written decision resulting from an appeal is provided to the parties.
- The Title IX Coordinator must effectively implement any remedies.



# HCBOE Policy 6.3041

## 21 **APPEALS**<sup>22</sup>

22 Either party may appeal from a determination of responsibility based on a procedural irregularity that  
23 affected the outcome, new evidence that was not reasonably available at the time of the determination  
24 that could affect the outcome, or an alleged conflict of interest on the part of the Title IX Coordinator or  
25 any personnel chosen to facilitate the grievance process. Appeals shall be submitted to the Title IX  
26 Coordinator within ten (10) days of a determination of responsibility.

27 Upon receipt of an appeal, the Title IX Coordinator shall:

- 28 1. Assign an impartial hearing officer within five (5) days of receipt of the appeal; and
- 29 2. Notify the parties in writing.

31 During the appeal process, the parties shall have a reasonable, equal opportunity to submit written  
32 statements. Within ten (10) calendar days, the hearing officer shall issue a written decision describing  
33 the result of the appeal and the rationale for the result. The written decision shall be provided  
34 simultaneously to both parties.

# HCBOE Policy 6.3041

## 1 **RETALIATION**<sup>23</sup>

- 2 Retaliation against any person who makes a report or complaint or assists, participates, or refuses to
- 3 participate in any investigation of an act alleged in this policy is prohibited.

# Record-Keeping

- A district must maintain for a period of seven years records of—
  - Each sexual harassment investigation including
    - Any determination regarding responsibility;
    - Any audio or audiovisual recording or transcript required;
    - Any disciplinary sanctions imposed on the respondent, and
    - Any remedies provided to the complainant designed to restore or preserve equal access to the district's education program or activity;
  - Any appeal and the result therefrom;
  - Any informal resolution and the result therefrom; and
  - All materials used to train Title IX Coordinators, investigators, decisionmakers, and any informal resolution facilitator.





# Record-Keeping

- Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
- Documentation that basis for its conclusion that its response was not deliberately indifferent,
- Documentation that it has taken measures designed to restore or preserve equal access to the district's education program or activity.
- Documentation that the reasons for a decision not to provide a complainant with supportive measures was not clearly unreasonable in light of the known circumstances.



# Let's Practice...

- Maya and Adrian
- Zoey and Mr. Harrison
- Dr. Scott and Mr. Martinez

Note: Names are fictitious and are not intended to reflect real persons affiliated with district or otherwise.

## 34 C.F.R. § 106.3(a)

*Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682.



# The Post-test...

- Who is your Title IX Coordinator?
- What do you call the individual making a complaint?
- What do you call the individual who is accused?
- Who is the Investigator?
- How long does the Investigator have to initiate the investigation?
- How long does the Investigator have to conclude the investigation?
- Who is the Decision-maker?
- Can final determinations be appealed?

# And...

- Which party receives supportive measures?
- Can you implement an automatic suspension or expulsion based on allegations of sexual harassment?
- Who can report allegations to the Title IX Coordinator?
- Who must report allegations to the Title IX Coordinator?
- Can you dismiss a formal complaint during the investigation?
- What is the standard of proof to make a determination that the respondent is responsible?

# Nearly finished...

- Summary and Final Comments
- Final Questions?



# *Debra D. Owen*

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*Thanks for listening!*

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