

Title IX Training for K-12 Staff

The Bruman Group, PLLC
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Disclaimers

- This training covers topics required under 34 CFR 106.45 and some related context. It is not a comprehensive Title IX training.
- Materials will be provided, and may be publicly posted to comply with federal regulations.
- This training does not constitute an agreement of legal representation. Consult with your own counsel for advice on a specific situation.

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Title IX



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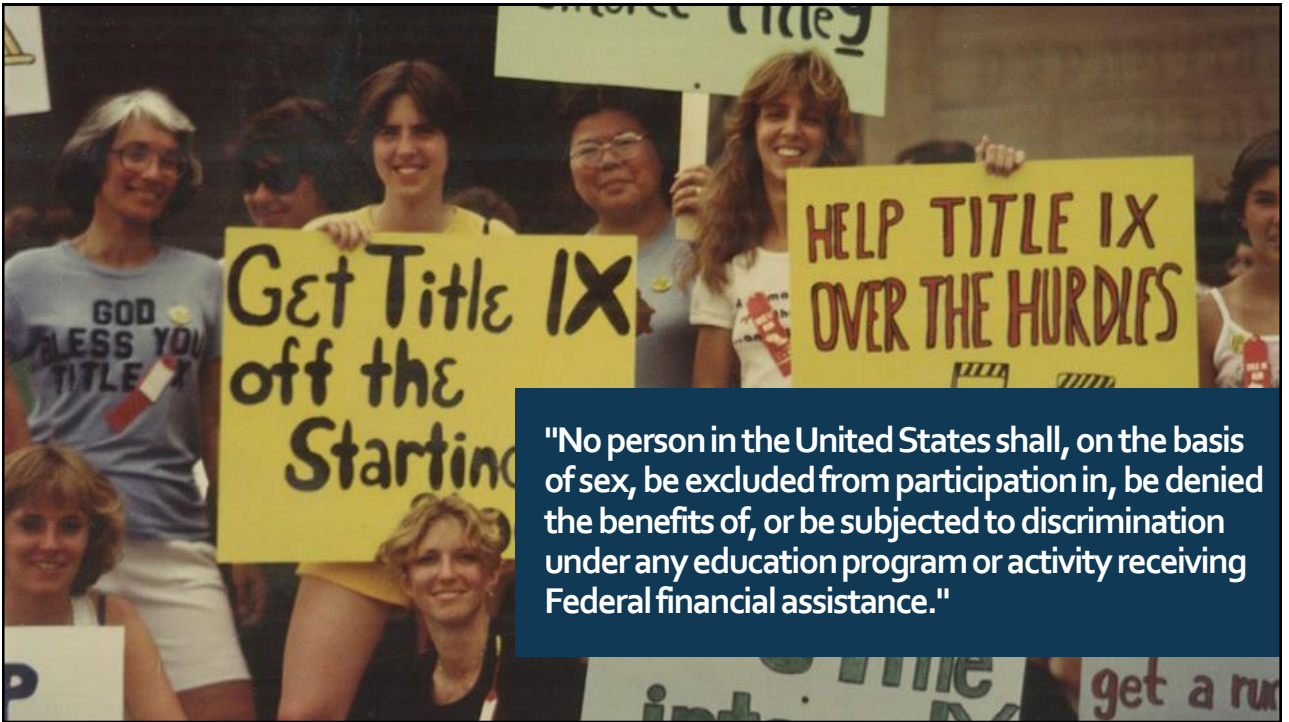
Where does it come from?

- Title IX of the Education Amendments of 1972
- Enacted as follow-up to Civil Rights Act of 1964
- Originally just applied to those receiving direct aid
- The Civil Rights Restoration Act (1988) extended Title IX coverage to all programs of any educational institution that receives *any federal assistance, both direct and indirect*.
 - Public and private
 - At all levels of education (elementary, secondary, postsecondary)
 - Includes any school district of which any part receives federal funds
 - Known as “recipients”

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What does it do?

- Protects against discrimination in:
 - Recruitment, admissions, and counseling
 - Financial assistance
 - Athletics
 - Sex-based harassment
 - Treatment of pregnant and parenting students
 - Discipline
 - Single-sex education
 - Employment

(from ED guidance)

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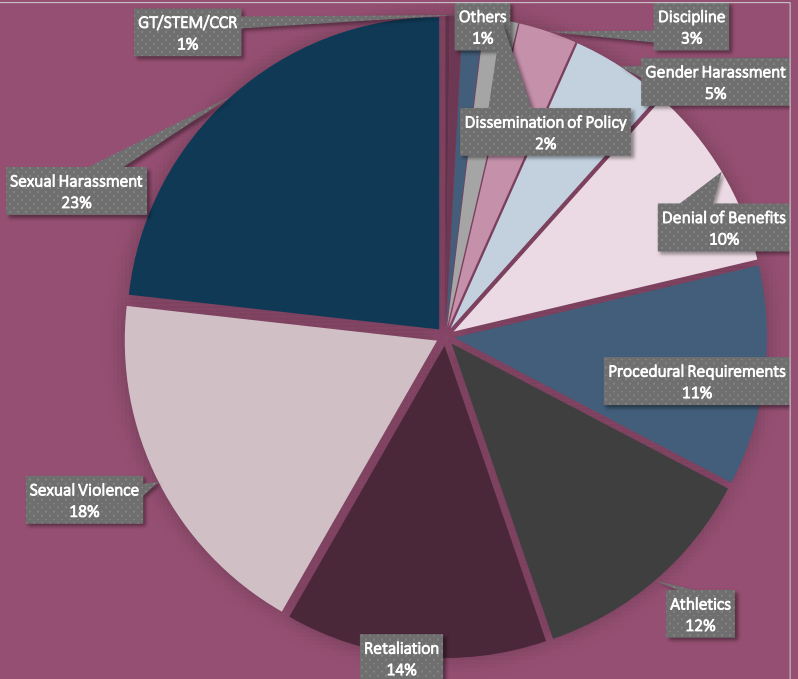
Enforcement

- Enforced primarily by U.S. Department of Education Office for Civil Rights
 - With investigations prompted by:
 - Individual complaints
 - Civil Rights Data Collection (CRDC)



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Snapshot of Federal Title IX Investigations by Types of Cases



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Title IX Coordinators

- Each recipient needs a Title IX coordinator
- Responsible for helping to ensure the recipient's compliance with Title IX's administrative requirements:
 - Must have knowledge of recipient's policies and procedures on sex discrimination
 - Should be involved in drafting and revision of policies and procedures
 - Should be involved in Title IX-involved disciplinary and other proceedings, monitor outcomes
 - Monitor athletic participation
 - Provide training and professional development
 - ...among other responsibilities

Who is a Recipient?

- **DOJ**: "The term recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended **directly or through another recipient** and that operates an education program or activity that receives such assistance, including any subunit, successor, assignee, or transferee thereof..."
- "[T]here may be more than one recipient in a program of federal financial assistance; that is, a primary recipient (e.g., State agency) that transfers or distributes assistance to a subrecipient (local entity) for distribution to an ultimate beneficiary."

Who is a Recipient?

- Rule references “elementary and secondary schools”, BUT:
- “As used in §§ 106.44 and 106.45: Elementary and secondary school means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.” (106.30(b))
 - public schools → responsibility sits at LEA level
 - preschool or private school → responsibility remains at the school level

Exemptions from Title IX

- Private undergraduate colleges
 - Admissions exempt
 - Other programs governed by Title IX if receive federal financial assistance
- Public elementary and secondary schools
 - Single-sex schools permitted if certain conditions met
- Private schools controlled by religious organizations
 - Does not apply if Title IX would be inconsistent with religious tenets of organization

Exemptions from Title IX

- Schools training individuals for military service
 - Complete exemption
 - Does not apply to “educational institution the primary purpose or which is the training of individuals for the military services of the United States or the merchant marine”
- YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls
 - Membership practices exempt
 - All other activities governed by Title IX if receive federal financial assistance

Exemptions from Title IX

- Social fraternities or sororities
 - Does not apply to membership practices if...
 - The active membership consists primarily of students in attendance at an institution of higher education and the fraternity or sorority is exempt from taxation under the Internal Revenue Code
 - Professional, service, and honor fraternities and sororities ARE subject to Title IX
 - Cannot exclude members on basis of sex

Exemptions from Title IX

- Voluntary Youth Service Organizations
 - Not applicable to membership practices
 - To receive exemption membership must be...
 - Voluntary;
 - Traditionally limited to one sex; and
 - Principally limited to persons under 19 years old.
 - Districts may provide “significant assistance” to these organizations as long as boys and girls have comparable opportunities overall

Key Differences for K-12 Schools

- Notice: Any time a K-12 school employee has notice that sexual harassment might have occurred, the school or district MUST respond.
 - Notice requirements are different for higher ed employees
- Hearing: K-12 schools may, but are not required to, conduct a live hearing with the opportunity for cross-examination
 - K-12 schools may conduct written question and answer exchange
- Parent or legal guardian may act on behalf of complainant or respondent throughout process

But why am I here?

“A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and 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, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.”
(34 CFR 106.45)

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Agenda

- Definition of Sexual Harassment
- Scope of Program or Activity
- How to Conduct an Investigation
- The Grievance Process
- How to Serve Impartially
- Relevance
- Creating an Investigative Report
- Coming Changes

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Sexual Harassment: 34 CFR 106.30

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;
- (3) "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).

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“Unwelcome”

- What does it mean for conduct to be “unwelcome?”
 - Without consent
- ED does not require a particular definition of consent (i.e. verbal, implied, etc.)
- Preamble: recipient should choose a definition that “best serves the unique needs, values, and environment of the [school’s] own educational community.”

“Effectively Denies”

- Recipient should consider “whether a reasonable person in the complainant’s position would be effectively denied equal access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.”
- Examples from guidance:
 - Does complainant feel compelled to skip class to avoid harasser? Is their GPA declining? Do they have difficulty concentrating?
 - Do they quit school activities such as sports?
 - Do they exhibit changes in behavior consistent with trauma that could impact their ability to participate or concentrate?
- No threshold for “enough” impact – does not require total denial of access or concrete injury

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Sexual Harassment: Incorporated References

- 20 U.S.C. 1092(f)(6)(A)(v): definition of “sexual assault” under the Clery Act as “an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation”
- 34 U.S.C. 12291(a)(10): “dating violence” means violence committed by a person— (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship. (iii) The frequency of interaction between the persons involved in the relationship.

Sexual Harassment: Incorporated References

- 34 U.S.C. 12291(a): “domestic violence” includes felony or misdemeanor crimes committed by a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction receiving grant funding and, in the case of victim services, includes the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior, by a person who— (A) is a current or former spouse or intimate partner of the victim, or person similarly situated to a spouse of the victim; (B) is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; (C) shares a child in common with the victim; or (D) commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.
- 34 U.S.C. 12291(a): “Stalking The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to— (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.”

Sexual Harassment in Sum

- Conduct on the basis of sex that is:
 - Quid pro quo involving unwelcome sexual contact by an employee
 - Sexual conduct that is so significant it effectively denies access to an educational program or activity (“hostile environment”)
 - Sexual assault as defined in the Clery Act
 - Dating violence
 - Domestic violence
 - Stalking

Sexual Harassment in Sum

- Applies to conduct by/among employees as well as students
 - Employees may report directly to Title IX coordinator
 - Note that a power differential among employees, or voluntary conduct among others, may create a false impression of what is permitted within the scope of the recipient's education program or activity

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Why define this?

- Action must happen “within recipient’s education program or activity” to trigger obligation under the rule
 - 34 CFR 106.31(a) “Except as provided elsewhere in this part, no 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 recipient which receives Federal financial assistance.”
- Complainant must be participating or attempting to participate in educational programs or activities

When is Title IX obligation not triggered?

“If the conduct alleged in the formal complaint would not constitute sexual harassment... even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient **must dismiss** the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.”

(34 C.F.R. §106.44)

What is an Education Program or Activity?

- Locations, events, or circumstances over which the recipient exercises “substantial control”
 - On-campus or off-campus
- Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).
- Should not be conflated with Clery Act requirement that incidents take place “on campus” to trigger reporting
 - Two tests may reach same conclusion

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What is an Education Program or Activity?

- Can include:
 - Classroom buildings and libraries
 - Campus tours
 - School busses
 - Official Field Trips
 - Vocational resources
 - Public lectures or events
 - Sporting events
 - Computer networks, digital platforms, and other software used in the operations of the school – including when used on a personal device

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What is “Attempting to participate”

- Complainant is “attempting to participate” when they:
 - Have withdrawn due to the alleged conduct and express a desire to re-enroll if the school responds appropriately
 - Has graduated but intends to apply to a new program or participate in alumni programs or activities
 - Is on a leave of absence and is still enrolled as a student or intends to re-apply
 - Has applied for admission
 - 2020 Rule does not apply to admissions *decisions*
- If complainant is not attempting to participate, TIX coordinator may still file a complaint based on actual knowledge of a pattern of alleged misconduct

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Obligation to Respond

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Obligation to Respond

- Regulations serve as “floor” for response
- Recipient has discretion to respond to reports that do not fit within the scope of conduct covered by Title IX
 - Code of conduct can (and should) be more expansive than just Title IX policies
 - Can offer similar supportive measures
 - Should follow own processes for allegations of sex discrimination not covered by rule
- Recipients must minimize the potential for such acts to occur, and to stop them when they are occurring

General Obligation to Respond

- “A recipient with actual knowledge of [conduct that could constitute] sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
- A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

(34 CFR 106.44)

What is “actual knowledge?”

- Actual knowledge= notice of sexual harassment or allegations of sexual harassment to a recipient’s:
 - Title IX Coordinator, or
 - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or
 - To **any employee of an elementary or secondary school** (34 C.F.R. §106.30(a))
 - Employees must then report to Title IX coordinator

NOTE: This is not the same standard as “mandated reporter” obligations at the State and local level

What is “actual knowledge?”

- Knowledge of behavior that COULD CONSTITUTE sexual harassment
- Actual knowledge can be:
 - “through an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, through a newspaper article, through an anonymous report, or through various other means” (see preamble to 2020 rule)
- Actual knowledge is not:
 - A rumor
 - An assumption based on behavior
 - Knowing something to be true

What is “actual knowledge?”

- “Any school employee” is very broadly defined for K-12 context
- Includes notice to:
 - Teacher
 - Teacher’s aide
 - Bus driver
 - Cafeteria worker
 - Counselor
 - School resource officer
 - Maintenance staff worker
 - Coach
 - Athletic trainer
 - Any other school employee

What Happens Next?

- “Actual knowledge” of allegations triggers obligation to respond
- K-12 employees must report to Title IX Coordinator
- Title IX Coordinator must:
 - Determine what supportive measures, if any, are needed
 - Coordinate filing of formal complaint, if any
 - Coordinate grievance process or informal resolution process

Principles of a Response

- Response must:
 - Treat parties equitably
 - Not burden an individual's constitutional rights (1st, 5th, or 14th amendment) in response
 - Follow an investigation and grievance process that aligns with 34 CFR 106.44 and 106.45 before disciplinary sanctions are imposed
 - Reach a reliable responsibility determination
- Should involve “a presumption that the respondent is not responsible for the alleged conduct” until a determination is made otherwise.

Retaliation Prohibited

- “No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...” (34 C.F.R. §106.71)
- More than just expressing an opinion
- May include verbal threats or harassment or physical violence

Supportive Measures

- Non-disciplinary measures taken by Title IX coordinator to “protect access” of both parties to educational programs, “protect safety,” and “deter sexual harassment”
 - During the disciplinary process OR
 - In the absence of a formal complaint
- ED strongly encourages use of “supportive measures”
 - If recipient doesn’t provide, have to show why that decision isn’t “clearly unreasonable”
- Must be free of charge, remain confidential to the extent possible

Supportive Measures

- May include (34 CFR 106.45):
 - Changes in class enrollment
 - Counseling
 - Extensions of deadlines or other course-related adjustments
 - Modification of work or class schedules or locations
 - Campus escort services
 - Housing changes
 - No-contact orders
 - Increased monitoring of certain areas
 - Leaves of absence
 - “other similar measures”

Formal versus Informal Complaint

• Informal Complaint

- No formal document filed
- Does not trigger grievance process
- Supportive measures should be offered
- Parties must be treated equitably
- No impingement on constitutional rights

• Formal Complaint

- Document signed and filed by complainant or Title IX coordinator
 - “Actual knowledge” requires Title IX coordinator to file formal complaint
- alleging sexual harassment against a respondent and
- requesting that the recipient investigate the allegation of sexual harassment.
- Supportive measures should be offered
- **Triggers grievance process under 106.45**

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**Investigation and
Grievance Process**

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Important Parties

- Complainant(s)
- Respondent(s)
- Advisors (may be, but do not have to be, attorneys)
- Investigator
- Decision-maker
 - May not be the same person as the investigator OR the Title IX coordinator
- “Recipient” – here, a general term for staff acting on behalf of the institution or entity

Elements of the Process (34 CFR 106.45)

- Written notice to both parties
 - Opportunity to select and advisor
 - Opportunity to review and submit evidence
- Use trained personnel to investigate and objectively evaluate all evidence
 - Use appropriate evidentiary standard and rules
 - Presumption that respondent is not responsible
- Conduct hearing or question-and-answer process
- Reasonably prompt timeframes
- Notice of potential sanctions and supportive measures
- Send both parties a written determination and opportunity to appeal
- Effectively implement remedies required
- Document and keep all records of reports and investigations

Notice of Allegations

- Required upon receipt of formal complaint to parties who are known
- Provide notice of grievance (formal) process and informal resolution process
- State allegations potentially constituting sexual harassment with sufficient details (date and location of alleged incident) and time to prepare a response before any initial interviews
- Include a note that respondent is presumed not responsible until process concludes otherwise
- Inform parties they may have an advisor of their choice and may inspect and review evidence
- Inform parties of any provision in any code of conduct that prohibits knowingly making false statements or submitting false information
- Update notice if additional allegations will be investigated during course of process

Dismissal

- Recipient **must** dismiss if:
 - Complaint would not constitute sexual harassment as defined in regulations
 - Conduct did not occur in recipient's education program or activity
 - Conduct did not occur against a person in the United States
- Recipient **may** dismiss if:
 - Complainant withdraws complaint/allegations in writing
 - Respondent is no longer enrolled or employed by recipient
 - Specific circumstances prevent recipient from gathering evidence sufficient to reach a determination
- Upon dismissal, must sent written notice, including reason for dismissal

Investigations

- Recipient is responsible for conducting an investigation
 - Can include review of evidence provided, interviews, site visits, and other information gathering
 - All burden for information gathering sufficient to reach a determination rests on the recipient
 - But may not restrict either party from discussing allegations or presenting evidence
 - Parties must have written notice of time, location, participants, and purpose of all hearings, interviews, or other meetings with sufficient notice to prepare and participate

Investigations

- Parties must have an equal opportunity to present:
 - Inculpatory evidence
 - Exculpatory evidence
 - Fact witnesses
 - Expert witnesses
- Parties must have the opportunity to inspect and review any evidence
 - Even if investigator does not intend to rely on evidence

Investigative Report

- Investigator must create an investigative report that summarizes results and any recommendations or conclusions
 - Send to each party and party's advisor along with evidence
 - Provide 10 days to review and offer response
 - Responses should be considered prior to completion of investigative report
- Report must be completed and provided at least 10 days before any hearing or other determination
- Parties have opportunity to respond

Hearings/Q&A

- Live hearing not required in K-12 context
 - Permissible
 - Institutions of higher education must conduct a live hearing with opportunity for cross-examination
- Hearings must be live, but may be in person or virtual
- Cross-examining
 - ~~If party or witness does not submit to cross-exam in the case of live hearing, decision-maker may not rely on their statement (a federal court vacated this provision in July 2021)~~
 - Refusal to be cross-examined alone may not lead to determination
- Respondents must create an audio, audiovisual, or written record

Hearings/Q&A

- K-12 entities may conduct written question and answer exchanges instead of a live hearing
- Decision-maker must afford each party the ability to submit written, relevant questions, provide each party with the answers, and allow for additional, limited follow-up questions
 - In a live hearing, decision-maker should pause after each question is asked to determine relevance
- Decision-maker must explain to party proposing questions reason for excluding them as not relevant

Questions on Sexual (and medical) History

- “Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.”

(34 CFR 106.45(b)(6))

Questions on Sexual (and medical) History

- “Prior sexual behavior” = “sexual behavior that is unrelated to the alleged conduct”
- Whether prior behavior is relevant to prove consent depends on definition in recipient’s code of conduct (i.e. does it require verbal expression?)
- Questions about medical, psychological, or other records are not permitted unless the party has given written consent
 - Recipient must abide by relevant health care and educational privacy laws

Questions on Sexual History

- Why are these questions prohibited?
 - To prohibit the use of evidence of a complainant's sexual reputation to prove consent;
 - To prevent the use of sexual history evidence to establish the complainant as a ‘type’ of person who is more likely to consent to sexual activity;
 - To exclude the use of a complainant's sexual history as an indicator of the complainant's truthfulness
 - To avoid prejudicing decision-maker

Presumption of No Responsibility

- The process should ensure “a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion” of the process
- Presumption does not imply that conduct did not occur or that complainant is untruthful
 - Intended to promote impartiality
 - Should have no impact on supportive measures offered

Standard of Proof

- A recipient may use either:
 - Preponderance of evidence (“more likely than not”); or
 - Clear and convincing evidence (highly probable” that allegations are true).
- Recipient must use same standard for students and employees
- Must use same standard for all formal complaints of sexual harassment

Determination of Responsibility

- Decision-maker must issue a written termination regarding responsibility simultaneously to both parties
- Written determination must include:
 - Identification of allegations
 - Description of procedural steps taken, notifications, interviews, hearings, etc..
 - Findings of fact supporting the determination
 - Conclusions regarding the application of recipient's code of conduct to the facts
 - Rationale for result as to each allegation, including
 - Statement of result
 - Determination of responsibility
 - Any disciplinary action
 - Remedies and responsible party (for recipient: Title IX coordinator will implement)
 - Procedures and permissible basis for appeal

Remedies

- Required to be provided to a complainant when a respondent is found responsible
- Must be designed to maintain the complainant's equal access to education and
- May include the same individualized services (supportive measures)
- Do not need to be non-disciplinary or non-punitive and
- Do not need to avoid burdening the respondent.



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Appeals

- Both parties must be offered the ability to appeal a determination of responsibility OR dismissal of complaint/allegations if there are:
 - Procedural irregularities
 - New evidence not reasonable available at the time
 - Conflict of interest or bias among Title IX coordinator, investigator, and/or decision-maker

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Appeals

- Recipient must:
 - Notify the other party in writing when the appeal is filed
 - Procedures must apply equally to both parties
 - Find another decisionmaker
 - May not be the same one as in the original hearing/determination, the investigator, or the Title IX coordinator
 - Ensure the decision-maker follows the same processes as outlined in the original grievance procedure
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging the outcome of the original determination
 - Issue a written decision describing the result of the appeal and rationale
 - Provide the written decision simultaneously to both parties

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Informal Resolution

- Cannot be required as a condition of:
 - Enrollment
 - Continuing enrollment
 - Employment
 - Continuing employment
 - Any other right
 - Waiver of the right to investigation and/or adjudication of formal complaints
- May not be required by recipient
- May not be offered unless a formal complaint is filed
- May not be offered or facilitated to resolve allegations that an employee sexually harassed a student

Informal Resolution

- Recipient may facilitate an informal resolution process at any time
 - Does not involve full investigation and adjudication
- Recipient must:
 - Provide a written notice of
 - Allegations
 - Requirements of the process
 - Circumstances under which it precludes resuming a formal complaint
 - Right to withdraw at any time prior to agreeing to a resolution and resume grievance process
 - Consequences resulting in informal process, including records that will be maintained or shared
 - Obtain voluntary written consent from both parties

Informal Resolution

- What should this process look like?
 - Regulations say it may look like mediation
 - Otherwise don't describe – look to recipient policies

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Recordkeeping

- Must maintain records for 7 years for
 - Each sexual harassment allegation, including
 - Determination of responsibility
 - Any recordings or transcripts
 - Any disciplinary sanctions
 - Any remedies provided to complainant to restore or preserve equal access
 - Any appeal and result
 - Any informal resolution and result
 - Any materials used to train Title IX coordinators, investigators, decisionmakers, and facilitators

Recordkeeping

- Must maintain records for 7 years for
 - Each incident of actual knowledge not taken to formal grievance process or informal resolution
 - Records of any actions
 - Any supportive measures
 - If none, document reasons why response was not clearly unreasonable in light of known circumstances
 - Basis for conclusion the recipient was not deliberately indifferent
 - Measures taken to restore or preserve equal access



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Impartiality in the Regulations

- Training must cover “how to serve impartially, including by avoiding prejudice of the facts at issue, conflicts of interest, and bias.”
 - Must not rely on sex stereotypes
 - Must promote impartial investigations and adjudications
- Preamble: “decision-makers must be trained to serve impartially without prejudging the facts.”
- Applies to investigators, decision-makers, Title IX coordinators, facilitation coordinators and other Title IX personnel
 - Does NOT apply to advisors
 - Professional experience, gender, or affiliation does not negate ability to serve

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Purposes of Impartiality/ Non-bias Rule

- Processes should be
 - Reliable
 - Legitimate
 - Impartial
 - Accurate
 - Truth-seeking
 - Rooted in due process

What is bias?

- Defined in preamble as:
 - Treating a party differently because of the party's sex or stereotypes about how men and women behave with respect to sexual violence
 - Ignoring, blaming, or punishing a student due to stereotypes about the student
 - Bias against an individual's sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, socioeconomic status, or other characteristics.
- Apply a common-sense approach – would a reasonable person believe bias exists?

Principles of Impartiality

- Look for:
 - Equal access to evidence, documents, and appeals
 - Ability to cross-examine equitably
 - Pause during live hearings to consider relevance of each question before it is answered
 - Ensure that no party or witness is asked questions in an abusive or intimidating manner.
 - Avoiding prejudice and deciding cases based only on facts at issue
- Entities should have “rules of decorum” for hearings

Impartiality in Evidence

- Investigator making recommendations or credibility determinations may lead to allegations/ concerns of bias
- Decision-maker should not disallow relevant questions from being answered
- Decision-maker should not discount inconsistencies or errors made by complainant while relying on similar inconsistencies and errors made by respondent to reach a finding of responsibility

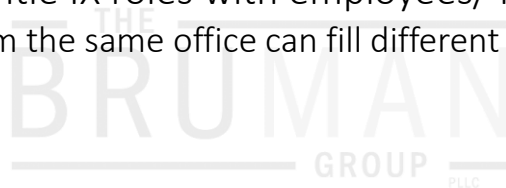
Avoiding Prejudgment

- Avoid relying on sex or other stereotypes
- Listen to all information provided without discounting a witness, respondent, or complainant



Conflicts of Interest

- Not defined in regulations, except in where individual cannot fill multiple roles
- Allowed to fill Title IX roles with employees/ internal personnel
 - Personnel from the same office can fill different roles in a case



Conflicts of Interest

Can X also be Y?	Title IX coordinator	Investigator	Decision-maker	Appeals decision-maker
Title IX Coordinator		YES	NO	NO
Investigator	YES		NO	NO
Decision-maker	NO	NO		NO
Appeals decision-maker	NO	NO	NO	

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Relevance and Investigative Reports

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Investigative Reports in the Regulations

- Source: 34 CFR 106.45(b)(5)(vii)
- Recipient must create an investigative report at least 10 days prior to hearing or other determination that
 - Fairly summarizes relevant evidence
 - Is sent to each party and the party's advisor, if any, in an electronic format or a hard copy, for their review and written response.
 - Investigator will consider response prior to completion of the investigative report.

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Notable Requirements

- Burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient
- Recipient cannot access, consider, disclose, or otherwise use a party's treatment records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional without written consent
- Both parties must have an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
 - Including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility
 - Including inculpatory or exculpatory evidence

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Notable Requirements, cont.

- Recipient must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
 - Not time-limited – at any point during the process
- Recipient must not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

Relevance

- Only relevant cross-examination and other questions may be asked of a party or witness. 34 C.F.R. § 106.45(b)(6)(i).
 - Before a party or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. 34 C.F.R. § 106.45(b)(6)(i).
 - Can be inculpatory or exculpatory
- Apply “plain and ordinary meaning” of relevance in determinations.
 - In general, this means:
 - It has a tendency to make a fact more or less probable than it would be without the evidence; and
 - The fact is of consequence in determining the action.

Relevance

- Relevance decisions should not be based on:
 - The sex or gender of the party for whom it is asked or to whom it is asked
 - Either party's status as complainant or respondent, either party's past status as complainant or respondent
 - Any organizations of which either party is or has been a member, or
 - Any other protected class covered by federal or state law, such as race, sexual orientation, or disability.

Relevance

- Topics that are off-limits (i.e. irrelevant)
 - Questions about a complainant's prior sexual history (34 C.F.R. § 106.45(6)(i)), unless:
 - Offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
 - Legally privileged information (34 C.F.R. § 106.45(1)(x))
 - Including information resulting from legal or medical consultation
 - Medical records
 - Unless with voluntary consent
 - Duplicative questions



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Timeline for New Title IX Regulations

- Draft regulations on discrimination in a recipient’s “educational program or activity” published July 12th, 2022
 - Received more than 250,000 public comments
 - Final version expected in May 2023
- Draft regulations on athletics published separately (April 13th, 2023)
 - Received more than 142,000 public comments
- Final rules expected ~~October 2023~~ **March 2024** 
- **Implementation date TBD**

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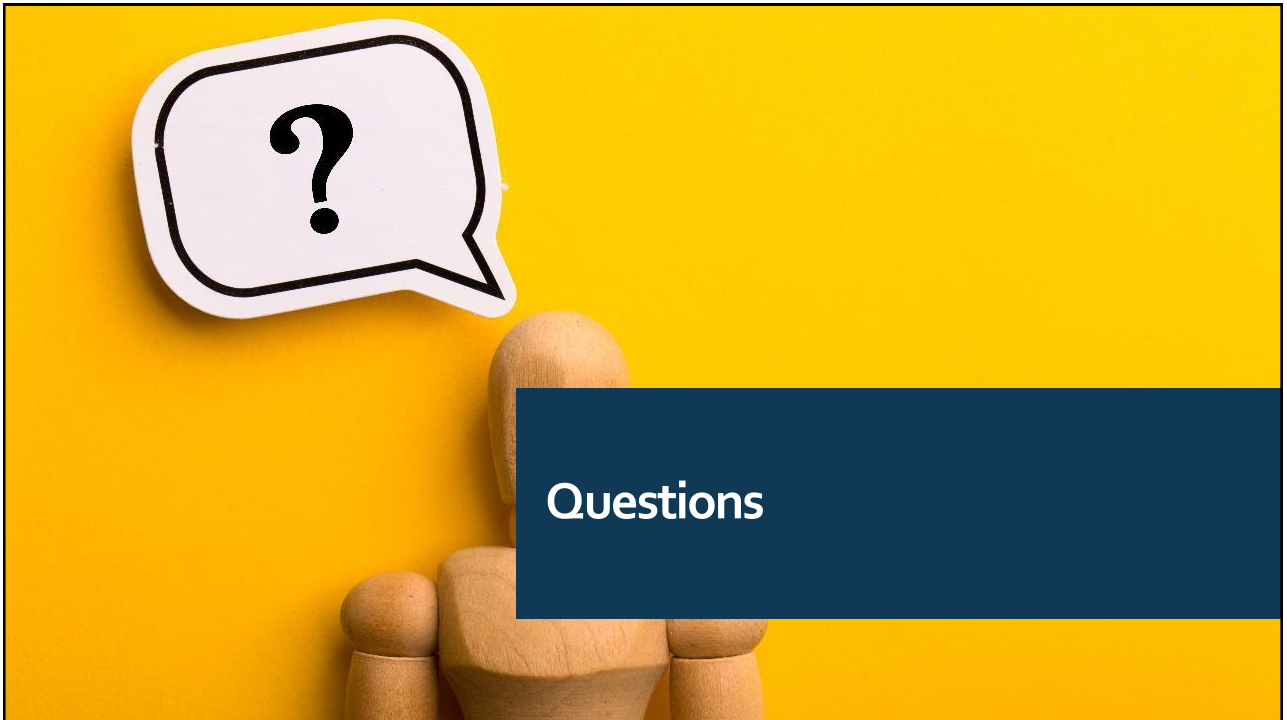
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Expected Changes : Education Programs and Activities

- Proposed rule contains new definition of “sex” as inclusive of:
 - Gender identity and sexual orientation
 - Sex characteristics or stereotypes
 - Pregnancy or related conditions
- Adds those “attempting to participate” in activities (includes admissions)
- Covers some off-campus conduct that contributes to a hostile environment
- Changes standard for action (not just avoiding deliberate indifference)
 - active obligation to respond to and prevent

Expected Changes: Proposed Athletics Rule

“If a recipient *adopts or applies* sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, *for each sport, level of competition, and grade or education level*: (i) be *substantially related to the achievement of an important educational objective*, and (ii) *minimize harms* to students whose opportunity to participate on a *male or female* team consistent with their gender identity would be limited or denied.”



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Resources

- [Title IX Final Rule](#)
- Title IX: U.S. Department of Education Title IX Final Rule Overview [PDF](#)
- Summary of Major Provisions of the Title IX Final Rule [PDF](#)
- [Fact Sheet: Final Title IX Regulation](#)
- [Questions and Answers Regarding the Department's Final Title IX Rule](#)

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