



DANNIS WOLIVER KELLEY

Attorneys at Law

TITLE IX FUNDAMENTALS: GETTING YOUR TEAM INTO COMPLIANCE TRAINING MANUAL



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This manual is not intended to provide or be a substitute for legal advice. Information provided in the manual is current as of August 2020. Please consult your DWK attorney with questions. This manual was provided as part of a Title IX compliance training facilitated by DWK. By posting this material publically on its website, the posting entity represents that it attended this training.

Title IX Fundamentals: Getting your Team Into Compliance Training Manual

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HOW TO USE THIS TRAINING MANUAL

This training manual is designed to assist local education agencies achieve compliance and implement best practices with respect to responding to complaints of sexual harassment. The content of this manual focuses on the legal mandates of federal Title IX regulations, which were updated—and in many ways significantly changed—in August 2020. In light of this major regulatory overhaul, this training manual serves to train and guide Title IX Coordinators and their teams through the process of a Title IX complaint from start to finish.

While this training manual should be relied upon in consultation with the LEA's legal counsel, we hope it provides clarity and meets the goal of assisting LEAs respond to complaints in compliance with both the letter and the spirit of the law.

WHAT IS TITLE IX?

"No person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."
(United States Congress, June 23, 1972.)

Title IX of Education Amendments of 1972 is a federal law that serves as a powerful tool for combating gender-based violence in public education institutions.¹ The law requires local education agencies (LEAs) receiving federal funding to respond to gender-based violence and harassment in order to ensure that all students have equal access to education.

In principle, the law is straightforward. In implementation, it is more complicated. To aid in implementing this complex law, Dannis Woliver Kelley has created and provided a Title IX Complaint Process Checklist for your reference in conjunction with this training manual. (Appendix A.)

2020 TITLE IX OVERHAUL

In 2018, the U.S. Department of Education issued proposed regulations, or Notice of Proposed Rulemaking (NPRM). The NPRM closed for public comments on February 29, 2019. All told, the Title IX NPRM received over 124,000 public comments. This is an enormous number of comments, which indicates how engaged and interested the public is in this issue.

The 2020 Final Rule has not changed the underlying goal and legal requirement of providing equal access to education regardless of gender. Essentially, if an LEA becomes aware that someone may have been a victim of sexual violence or harassment, then the LEA has the obligation to provide resources in the form of a process. If, after the formal process, the LEA determines there was a violation of policy, the LEA must take remedial measures.

The U.S. Department of Education's Office for Civil Rights published a useful summary of the major provisions of the Final Rule. (Appendix C.)

An LEA's failure to comply with the requirements of the Title IX regulations can result in costly litigation and/or the withdrawal of federal funds.

¹ Title IX broadly encompasses sex discrimination in educational institutions, including access to programs and activities, such as athletics. This manual, however, focuses solely on how LEAs should respond to reports or complaints of sexual harassment.

TITLE IX TEAM AND POLICY

The Final Rule places a large emphasis on accessibility of reporting. Specifically, the new regulation clarifies that at least one employee of the LEA must be designated as the “Title IX Coordinator.” All LEAs must notify all students and employees of the (1) name, (2) office address, (3) email address and (4) telephone number of the Title IX Coordinator. This designation must also be “prominently displayed” on the LEA’s website. (34 C.F.R. § 106.8(a).)

The Title IX Coordinator is responsible for coordinating the LEA’s response under Title IX. Throughout the Title IX regulations, titles of other individuals involved in the Title IX process are referenced. For example: “investigator,” “decision-maker,” and “facilitator of informal resolution processes.” These individuals are all essential members of the Title IX team and their roles will be described in greater detail throughout this manual, but they do not have to be pre-designated or listed in a published policy or website.

Further, Title IX requires that LEAs adopt and disseminate a policy and complaint procedure stating that the LEA “does not discriminate on the basis of sex in the education program or activity that it operates” and that the LEA is required by Title IX not to discriminate in such a manner. The policy should also indicate that retaliation is prohibited and that the LEA will not tolerate intimidation, threats, coercion, or discrimination against an individual who has made a report or complaint, testified, assisted, participated, or refused to participate in any manner in an investigation. (34 C.F.R. § 106.71(a).)

While most LEAs already have such policies in place, they should be updated to reflect the new definitions and procedural requirements of the formal complaint process (discussed below). After the LEA updates its policy and complaint procedures, the policy and procedures should be disseminated pursuant to the regulations. Notably, the Final Rule expanded the pool of individuals to whom the policy and complaint procedures must be disseminated to include:

1. Students;
2. Employees;
3. Parents or legal guardians of K12 students;
4. Applicants for admission and employment; and
5. All “unions or professional organizations holding collective bargaining or professional agreements” with the LEA.

The policy should be prominently displayed on the LEA’s website and in each handbook that is made available to the categories of people listed above. (34 C.F.R. § 106.8(b).)

OBLIGATION TO RESPOND

"A recipient with actual knowledge of 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 C.F.R. § 106.44.) (*emphasis added*.)

Actual Knowledge

Generally, an LEA must respond to any reports of allegations of potential sexual misconduct, regardless of whether a victim and/or complainant comes forward. The initial report can be anonymous, written or spoken, or based on one's own observations.

Actual knowledge consists of notice to any employee of an elementary and secondary school. (34 C.F.R. § 106.30(a).) This means that ALL employees have an obligation to report any allegations or instances of sexual harassment. This report should be escalated to the Title IX coordinator every time.

Anything that can be interpreted as unwanted or unwelcome behavior of a sexual nature should be reported. This can include the use of derogatory terms (written or spoken), gestures, or unwanted contact.

Supportive Measures

"Supportive measures," previously known as "interim measures," must be promptly offered to complainants regardless of whether they file a formal complaint or not.

Supportive measures mean non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the LEA's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the LEA's educational environment, or deter sexual harassment. Measures must be implemented in a confidential manner to the extent possible. (34 C.F.R. § 106.30(a).)

Examples of supportive measures:

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Increased security and monitoring of certain areas of the campus

The Title IX Coordinator is responsible for coordinating the implementation of the supportive measure(s).

Regulations also permit "emergency removal" (such as suspension) of a respondent prior to the completion of the formal complaint process. In order to implement the emergency removal, the LEA must first:

1. Complete an individualized safety and risk analysis;
2. Determine there is a credible, immediate threat to the physical health or safety of another member of the educational community;
3. Provide the respondent with notice of the emergency removal decision; and
4. Provide an opportunity for the respondent to challenge the LEA's decision immediately following the emergency removal.

(34 C.F.R. § 106.44(c).)

There must be more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone's physical health or safety.

Employees may be placed on administrative leave prior to the completion of a formal complaint process. (34 C.F.R. § 106.44(d).) However, LEAs should not impose discipline on a student respondent without first complying with the formal Title IX complaint process, which includes notice and opportunity to obtain an advisor (discussed in detail below). (34 C.F.R. § 106.45(b)(5).)

Formal Complaint

"Formal complaint" under the regulations means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the LEA investigate the allegation(s) of sexual harassment.

Complainants must be participating in or attempting to participate in the education program or activity of the LEA within which the formal complaint is filed.

The formal complaint may be filed in person, by mail, or by electronic mail.

The formal complaint must contain physical or digital signature, or otherwise indicate that the complainant is the person filing the formal complaint. (34 C.F.R. § 106.30(a).)

Complainant and Respondent

Under the Title IX regulations, the definitions of "complainant" and "respondent" are defined. "Complainant" means an individual who is alleged to be the victim of conduct that could constitute sexual harassment. Thus, if the Title IX Coordinator decides to sign the complaint, the Title IX Coordinator is not considered the complainant.

Employees, not just students, may be complainants under Title IX. (*North Haven Bd. of Educ. v. Bell*, 102 S.Ct. 1912 (1982).)

Parents/legal guardians can file a formal complaint on behalf of their child, but they are not considered a "complainant."

"Respondent" means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
(34 C.F.R. § 106.30(a).)

NEW DEFINITION OF SEXUAL HARASSMENT

The new regulations make a significant change in what constitutes sexual harassment.

Sexual Harassment

Now, sexual harassment for Title IX purposes is defined as conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the LEA conditioning the provisions of an aid, benefit, or service of the LEA 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 LEA's education program or activity; or
3. Sexual assault, as defined in the Cleary Act, and dating violence, domestic violence, or stalking, as defined in the Violence Against Women Act.

(34 C.F.R. § 106.30(a).)

If the conduct claimed in the formal complaint does not meet the requirements described above, the formal complaint must be dismissed for purposes of Title IX. This does not mean the LEA should stop all investigation. Rather, the LEA should consider whether to pursue the complaint through other required processes, such as the LEA's Uniform Complaint Procedures, Non-discrimination/Harassment policies or Complaints against Employees policies, where applicable.

Educational Programs and Activities

Under the regulatory definitions, "education program or activity" is understood to include **locations, events, or circumstances** over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred. This is a factual determination LEAs must make when assessing whether the conduct alleged in a Title IX formal complaint meets the definition of sexual harassment. (34 C.F.R. § 106.45.)

LEAs may choose to respond to sexual harassment affecting their students or employees outside of the regulatory boundaries of an educational program or activity (e.g., cyberbullying on social media platforms), including the provision of supportive measures or the pursuit of disciplinary action outside of Title IX. This can be determined on a case-by-case basis.

Mandatory & Discretionary Dismissals for Title IX Purposes

After receiving a formal complaint, the Title IX Coordinator should determine whether the complaint must be dismissed for Title IX purposes. The Final Rule requires that an LEA dismiss a formal complaint in three specific circumstances:

1. The alleged conduct would not constitute sexual harassment as defined under the Final Rule § 106.30, even if proved;
2. The alleged conduct did not occur in the LEA's education program of activity; or
3. The alleged conduct did not occur against a person in the United States.

(34 C.F.R. § 106.45(b)(3)(i).)

The LEA *may* dismiss a formal complaint or any allegations therein if at any time during the investigation:

1. The complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegation therein; or
2. The respondent is not enrolled or employed by the LEA; or
3. Specific circumstances exist to prevent the LEA from gathering of evidence to reach a determination as to the formal complaint or allegations therein.

(34 C.F.R. § 106.45(b)(3)(ii).)

Once a dismissal is provided, the Title IX Coordinator must provide written notice. (34 C.F.R. § 106.45(b)(3)(ii).)

OPTION FOR INFORMAL RESOLUTION

LEAs may wish to offer informal resolution of formal complaints where all parties involved are students. If the LEA wishes to provide this option, the LEA must:

- Provide the parties with written notice disclosing the sexual harassment allegations;
- Provide requirements of an informal resolution process;
- Provide any consequences that may result from participating in the informal resolution process; and
- Obtain the parties' voluntary, written consent to the informal resolution process.

Informal resolution prohibits recipients from offering or facilitating an informal resolution process to resolve allegations that an employee sexually harassed a student. (34 C.F.R. § 106.45(b)(9).)

THE TITLE IX INVESTIGATION

After a formal complaint has been filed and preliminary assessments of whether the complaint meets the Title IX criteria to proceed have been made, LEAs have an obligation to implement a formal investigation process and/or an informal resolution process. This is not a new obligation. However, there are new requirements for what is required in the process, which offer significantly more due process for the parties.

Confidentiality

LEAs may be accustomed to ensuring students, parents and other involved parties that they will keep the information shared during the course of a formal complaint and investigation process confidential. However, because of the due process rights in a Title IX investigation, LEAs may wish to inform the parties at the outset that they cannot ensure complete confidentiality.

Notice of Allegations and Opportunity to Obtain Advisor

Once an LEA receives a formal complaint and initiates a Title IX investigation, it must provide all known parties notice of the LEA's Title IX complaint process. In addition, respondents must be given detailed, written notice of the allegations and both parties must be given an opportunity to have an advisor present. (34 C.F.R. § 106.45(b)(2).) This requirement may mean LEAs have to slow down the investigatory processes to which they are accustomed in order to comply with the regulations.

The regulations mandate that LEAs, "provide the parties with the same opportunities to have others present during the complaint proceedings, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be an attorney." LEAs must not limit the choice of or presence of the advisors for either party. The LEA may, however, limit the extent to which the advisor may participate in the process, as long as the restrictions apply equally to both parties.

As a practical note, the written notice stage may be an opportune juncture for the Title IX Coordinator to designate who in the LEA will play what role in the process (i.e., investigator, facilitator of informal resolution process and decision-makers). LEAs may consider putting that information into the notice, but it is not required by the regulations.

Planning the Investigation

It is advisable, but not required by the Title IX regulations, for LEAs to develop a written investigation plan. The investigation plan should contain the basic information about the allegations in the formal complaint, the plan to proceed through the investigation, and applicable timelines. The investigation plan might also contain, but not be limited to the following: (1) the date the formal complaint was received; (2) involved parties and witnesses; (3) Title IX Team roles; (4) the scope of investigation; (5) any and all relevant LEA policies; and (6) a communication log.

Generally, the investigation plan should be used as a working document and be updated and revised as the investigation proceeds. The investigation plan can be maintained by the investigator or the Title IX Coordinator.

As a best practice, LEAs may wish to use the below two-step process for planning and implementing the Title IX investigation:

1. Determine the Scope
 - a. The scope is driven by the formal complaint and LEA policies.
 - b. This determination can be made in consultation with the Title IX Coordinator.
 - c. When writing the allegations/scope, be detailed.
 - i. Allegations should be specific with actions and time-frames, including the "who, where, and when."

2. Make a Plan to Gather the Evidence

- a. Plan the interviews.
 - i. When determining the sequence of interviews, it is generally best practice to start with complainant, then witnesses, then respondent. It is acceptable, and sometimes advisable, to circle back to witnesses when more information is needed.
 - ii. Consider how to communicate with and invite witnesses to participate.
 - iii. Consider location (privacy, confidentiality and comfort).
 - iv. Have a consistent note-taking method.
- b. Gather other evidence.
 - i. This can include documents, photos, or social media posts.

Interviewing Techniques

The Title IX regulations do not proscribe a specific interviewing method. However, LEAs should consider the purpose of Title IX interviewing and always act with impartiality.

Asking questions in a Title IX investigatory interview is a skill that takes preparation and practice. The interviewer's questions should be designed to elicit all the information needed for the decision-maker to make a determination of responsibility regarding each allegation.

The "funnel method" can be an effective tool for any Title IX investigator. Using this method, the investigator starts by asking broad, open-ended questions. Then the investigator keeps narrowing the questions and circling back for more specifics and details. To ensure accuracy, investigators should quantify vague terms used by parties and witnesses. For example if a witness says something happened "a lot," or "hardly ever," the investigator should seek specifics regarding frequency.

Another best practice for effective interviewing is allowing for silence. Although it may feel awkward, sometimes the investigator needs time to generate the right question. Silence also gives the interviewee time to think and respond thoughtfully.

At the end of the interview, investigators should consider taking a moment to review and ensure that all topics within the scope of the investigation have been covered. One technique to consider is to ask a final open-ended question such as, "Is there anything else I should be aware of?"

Consider Implementing Trauma-informed Interviewing for Title IX Investigations

While the Title IX regulations do not mandate that Title IX investigations be conducted by someone who has had specific training in being trauma-informed, it is widely accepted that investigators who implement trauma-informed techniques often are more successful in their fact-finding efforts because they have built trust and confidence with the parties and witnesses.

Trauma is an event, or events, that overwhelm a person's ability to be in balance. It can be understood in using eight general categories: (1) threat to life or limb; (2) severe physical harm or injury, including sexual assault; (3) receipt of intentional harm or injury; (4) exposure to the grotesque; (5) violent, sudden loss of a loved one; (6) witnessing or learning of violence to a loved one; (7) learning of exposure to a noxious agent; and (8) causing the death or severe harm to another. (Wilson & Sigman, 2000.)

For students, experiencing traumatic stress can severely impact their ability to learn, remember, or manage their emotions and behavior. For parties in a Title IX investigation interview, the signs of trauma can manifest as memory loss, lack of focus or inconsistent versions of the same story.

Becoming trauma-informed means becoming more acutely aware of how trauma alters the lens through which its victims see their world, and building practices that honor that reality. In Title IX investigations, an effective trauma-informed interviewer will shift their mindset from, “What is wrong with this party/witness,” to “What happened to this person?”

A trauma-informed interviewer will focus on building relationships and trust. This can be accomplished by being communicative, transparent and reliable. To the extent possible, the investigator should empower and give choice to parties who have experienced trauma. The interviewer should be aware of how the signs of trauma can manifest in an interview and take this into consideration when crafting interview questions.

With thoughtful, trauma-informed interviewing, a Title IX investigator can be empathetic without being biased. A trauma-informed investigator can still make a party feel safe by acknowledging feelings of pain, not facts. For example, the investigator might say, “I understand this is a painful process.” Or “I can see this is hard for you to talk about.” The investigator should avoid saying things like, “I am sorry this happened to you.” These kind of statements might lead parties to believe that the investigator has already come to a decision about what occurred.

Opportunity to Inspect Evidence

The Final Rule added an evidence review process that LEAs must use to share evidence with both parties in a Title IX investigation, marking a significant change in the Title IX investigation process LEAs have been used to. (§ 106.45(b)(5).)

Title IX investigators may wish to consider the following practical tips for trauma-informed interviewing:

1. Hold the interview in a comfortable, confidential and neutral place.
2. Empower parties by letting them choose the time and date of interview and where to sit in the room.
3. Offer water and have tissues on hand.
4. Ask open-ended questions. For example, “What else happened?” instead of “What happened next?” Other examples of effective, open ended phrases are: “Tell me more about that,” and “What do you remember about that?”
5. Keep interviews under one and a half hours. Be willing to circle back if the party needs to stop the interview or time runs out.

Before the investigator issues the investigative report, the parties must be given at least ten (10) days to review any evidence gathered by the investigator, directly related to the allegations raised in the formal complaint, including both inculpatory and exculpatory evidence. The evidence does not have to be relevant or used in determination of responsibility. It can be, for example, police reports gathered in a concurrent law enforcement investigation if it is related to the allegations.

Then, both parties have ten (10) days to make a written response that the investigator must consider before finalizing the investigative report. Only after this initial opportunity to inspect and respond to relevant evidence is complete, can the investigative report be finalized. (§ 106.45(b)(5)(vi).)

LEAs may be concerned about the implications of the federal Family Educational Rights and Privacy Act (FERPA), which protects education records of students. Broadly, student information under FERPA is any evidence with identifiable information in it. Title IX investigations must honor the FERPA rights of parties and witnesses, to the extent possible. However, the preamble of the Final Rule clarified that, in instances in which FERPA and Title IX conflict, Title IX governs. Therefore, if an investigation collects evidence that contains FERPA-protected student information (an attendance record, for example, to show a party or witness was or wasn’t present in class at a certain time), it can be disclosed.

The Title IX regulations also explicitly allow for the redaction of information that is privileged or not “directly related” to the allegations. When LEAs consider what evidence is “directly related” and must be shared (especially where information is privileged), the U.S. Department of Education has cautioned LEAs to maintain a record of their decision-making. Thus, LEAs are advised to consider creating a “Privilege Log” to document any decisions related to redaction or withholding of information in this process.

WRITING THE INVESTIGATIVE REPORT

The core purpose of the investigative report is to summarize the relevant evidence for Title IX decision-makers in order for them to make determinations of responsibility. Therefore, the investigator's investigative report should be clear, concise and organized for the ease and efficiency of the decision-maker. (34 C.F.R. § 106.45(b)(5)(vii).)

The Title IX regulations do not outline what specifically must be in the investigative report, apart from a fair summary of the relevant evidence. (34 C.F.R. § 106.45(b)(5)(vii).) The regulations state only that LEAs must create an investigative report that "fairly summarizes relevant evidence" and, at least ten (10) days prior to the determination of responsibility, send the report to each party and the party's advisors in electronic format or hard copy, for their review and written response. The written response component is discussed in the section below.

However, it may be helpful for Title IX investigators to include information such as a description of the investigation's procedural steps taken and the methodology in the investigative report so that when the decision-maker writes the determination of responsibility (described in greater detail below), this leg work is already completed before the decision-maker makes the determination of responsibility. This description of methodology may include the following:

- Who performed the investigation
- When the respondent received notice of the allegations
- Which witnesses and parties were interviewed and when
- What locations were visited during the investigation
- All types of evidence reviewed

Writing the investigatory report requires a Title IX investigator to make determinations of relevancy. The regulations state that the Title IX investigator should include relevant evidence in the investigative report whether it is "inculpatory or exculpatory." (*Id.*)

An LEA is also permitted to allow or require a Title IX investigator to redact from the investigatory report information that is not relevant or that is not relevant but is contained in documents that are relevant. This ability to redact at this stage may address concerns that arise regarding student privacy.

OPPORTUNITY TO ASK QUESTIONS

After the LEA sends the investigative report to the parties, and at least ten (10) days before reaching a determination of responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants to be asked of any party or witness and provide each party with the answers, and allow for additional, limited follow-up questions from each party. (34 C.F.R. §106.45(b)(6)(ii).)

The LEA has some latitude in how it shares and collects answers to these written questions.

Limits on Questions and Relevance Issues

- Questions and evidence about the complainant's "sexual predisposition" or prior sexual behaviors are not relevant, unless the questions or evidence are offered to show that someone other than the respondent committed the alleged conduct, or if the questions or evidence about a complainant's specific incidents of sexual behavior are offered to prove consent to the alleged behavior. (34 C.F.R. § 106.45(b)(6)(ii).)
- The intention of the questions should not be to embarrass, blame, humiliate, or emotionally berate a party, but rather to ask questions that probe party's narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue. The decision-maker should also ensure that the questions are not based on bias or sex-stereotypes.
- The decision-maker must explain any decision to exclude a question as not relevant to the party proposing the questions. (34 C.F.R. § 106.45(b)(6)(ii).)

MAKING A DETERMINATION OF RESPONSIBILITY

Once the investigative report is complete, and parties have had an opportunity to ask questions, respond, and follow-up, the decision-maker will review the investigative report and additional information provided by the parties, then make a determination of responsibility pursuant to the LEA's policy.

Required Components

The written determination must be sent out to both parties simultaneously and must include six specific components:

1. Identification of allegations potentially constituting sexual harassment;
 2. A description of procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with the parties and witnesses, site visits, methods used to gather other evidence and hearings held;
 3. Findings of fact supporting the determination;
 4. Conclusions regarding the application of the LEA's code of conduct to the facts;
 5. A statement of, and rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions the LEA imposes on the respondent, if applicable, and whether remedies designed to restore or preserve equal access to the LEA's education program or activity will be provided by the LEA to the complainant; and
 6. The LEA's procedures and permissible bases for the complainant and respondent to appeal.
- (34 C.F.R. 106.45(b)(7).)

Standard of Evidence

LEAs can use either the preponderance of the evidence standard or clear and convincing standard to determine responsibility. The Final Rule requires the LEA's complaint procedure state which standard will be applied consistently to all Title IX investigations. LEAs should review their written complaint processes to ensure compliance. (34 C.F.R. § 106.45(b)(7)(i).)

Making Factual Findings

The regulations do not require the decision-maker to include all evidence presented in the investigative report in the determination of responsibility. Instead, the decision-maker must present an analysis of what facts support the determination of responsibility, or non-responsibility, for each allegation and describe the rationale for each finding.

Notably, the Final Rule states that in the new regulations the U.S. Department of Education "declined expressly

to require the written determination to address evaluation of contradictory facts, exculpatory evidence...or how credibility assessments were reached." This may be a departure from the analysis that many LEAs are accustomed to performing in personnel or other student misconduct investigations. However, such an analysis is not precluded.

A thorough, analysis of contradictory evidence and credibility assessments may be necessary to show the decision-maker was objective and reached an impartial conclusion, considering all sides.

Therefore Title IX decision-makers may wish to deal with “bad” or conflicting facts, rather than ignore them. The decision-maker may also find it useful to consider the following credibility factors in weighing the facts supporting the determination:

- Corroboration/Lack of corroboration
- Consistent/Lack of consistency
- Knowledge or opportunity to observe
- Inherent plausibility
- Motive to falsify
- Consistent past conduct

In writing the findings, the decision-maker may consider using language like, “sustained” or “not sustained” for clarity. For example, “The complainant’s allegation that [insert allegation] is sustained/not sustained. The decision-maker finds by [a preponderance of the evidence OR clear and convincing evidence] that...”

APPEALS

The right to appeal a Title IX determination of responsibility is now mandatory and must be provided on an equal basis to both parties. (34 C.F.R. § 106.45(b)(8).)

LEAs must offer both parties a basis to appeal either the determination of responsibility or a dismissal of a formal complaint, or allegations therein, on the following three grounds:

1. A procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time of the determination of responsibility or dismissal was made, that could affect the outcome of the matter; and
3. The Title IX Coordinator, investigator or decision-maker had a conflict of interest or bias for or against the complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

The decision-maker on the appeal should be an individual different from the Title IX Coordinator and initial decision-maker.

When a party files an appeal, the following steps should be taken:

1. The LEA notifies the other party in writing;
 2. The LEA gives both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the determination of responsibility or dismissal;
 3. The LEA reviews the written statements and issues a written decision describing the result of the appeal and rationale; and
 4. The outcome of the appeal must be provided in writing simultaneously to both parties
- (34 C.F.R. § 106.45(b)(8).)

General Tips for Report Writing LEAs Can Consider

- Build and use a template.
- Write the report throughout the process. Waiting until all interviews are complete can create issues with meeting the LEA’s Title IX policy timelines.
- Use the active voice.
- Use headings, bullet points and tables, as necessary.

THE TITLE IX TEAM MUST SERVE IMPARTIALLY: HOW TO DO IT

The Final Rule requires that LEAs ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an information resolution process, receive training, including on how to “serve impartially, including by avoiding prejudgment of the facts at issue, conduct of interest and bias.” (34 C.F.R. § 106.45(b)(1)(ii).)

Because impartiality is a legal requirement, it is imperative that the Title IX team practice fundamental fairness to both parties and not allow their biases to impact Title IX investigations or resolutions.

Understanding Bias

Bias is preconceived judgment or opinion without just grounds and based on insufficient knowledge. Bias can be conscious or unconscious. Biases, or stereotypes, are beliefs that most members of a group have some characteristic. For example, implicit stereotypes are the beliefs that women are nurturing or that teachers drink a lot of coffee.

Types of Bias

1. Explicit Bias: An explicit stereotype is one that a person deliberately thinks about and reports.
2. Implicit Bias: An implicit bias is one that is relatively inaccessible to conscious awareness and/or control.
3. Confirmation Bias: The tendency to seek out, favor or interpret information in a manner that confirms previously held beliefs.
4. Priming: The unconscious influence of external information on what one expects to be an independent decision.

Everyone on a Title IX team should identify bias in themselves because research has shown that it corresponds to actions reflecting a preference for one group or another. One way to do this is through the Implicit Association Test (IAT) – Project Implicit. This test, developed by research psychologists from Harvard University, the University of Virginia and the University of Washington, measures the strength of associations between groups (e.g., sexual orientation, race) and evaluations (e.g., good or bad). The IAT may be especially interesting for a Title IX team because it might show that one has an implicit attitude that they did not know about. For example, one may believe that women and men should be equally associated with science, but their automatic associations may show that they associate men more than women with science.

<https://implicit.harvard.edu/implicit/takeatest.html>



Techniques for Minimizing Bias and Ensuring an Impartial Title IX Process

All Title IX Coordinators, investigators, decision-makers, and any person who facilitates an information resolution process should consider implementing the following techniques to minimize bias and ensure their impartiality throughout the Title IX process:

- Avoid early hypotheses and recognize all possible outcomes.
 - Investigations can sometimes get bogged down in early theories.
 - Expressly consider alternative theories.
- Obtain and consider all relevant information.
- Ask open-ended questions.
 - Open-ended questions are shown to reduce confirmation bias and avoid priming witnesses.
- Give the parties a meaningful opportunity to be heard and respond.
 - Keep an open mind when gathering evidence.
- Avoid making findings until all the evidence is gathered, including the question and answer phase.

TITLE IX RECORD-KEEPING

LEAs must maintain the following records for seven (7) years:

- Each sexual harassment investigation including any determination of responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the LEA's education program or activity
- Any appeal and the result therefrom
- Any informal resolution and the result therefrom
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

All LEAs must make the training materials publicly available on their website (or if the LEA does not maintain a website, the training materials must be available upon request for inspection by members of the public). (34 C.F.R. § 106.45(b)(10).)

TITLE IX SEXUAL HARASSMENT COMPLAINT PROCESS CHECKLIST

While this checklist should be relied upon in consultation with the LEA's legal counsel, we hope it serves as a resource for Title IX teams in processing possible Title IX complaints from intake to resolution.

NOTICE, TRAINING REQUIREMENTS AND POLICIES

1. Designate and authorize a "Title IX Coordinator."
 - ☐ Is the Title IX Coordinator's information prominently displayed on the LEA's website?
2. Adopt or update Title IX complaint procedures to be "prompt and equitable" and comply with the updated regulations.
 - ☐ Has the LEA disseminated the Title IX complaint procedure to students, employees, parents, applicants for admission and employment and all bargaining units?
3. Train the Title IX team.
 - ☐ Has the LEA provided training on the new regulatory definitions and how to act impartially for the Title IX Coordinator, investigators, decision-makers and anyone who facilitates informal resolution processes?
 - ☐ Has the LEA posted the training materials on its website?

NOTICE OF ALLEGATIONS

Persons responsible: ALL LEA EMPLOYEES AND TITLE IX COORDINATOR

4. Upon receipt of a report or observation of sexual discrimination, including sexual harassment, all employees are responsible for reporting potential sexual harassment.
 - ☐ Have all employees been trained to report to their supervisor, an administrator or the Title IX Coordinator if they become aware of potential sexual harassment?
5. When a report of allegations of sexual harassment is escalated to the Title IX Coordinator:
 - ☐ Has the Title IX Coordinator promptly contacted the complainant to provide supportive measures and discussed how to file a formal complaint?
 - ☐ The Title IX Coordinator should respect the complainant's wishes with regard to supportive measures.
6. When a formal complaint is received, the Title IX Coordinator should:
 - ☐ Determine whether the LEA has, in fact, received a formal complaint:
 - ☐ Does the written complaint have sufficient details?
 - ☐ Is it signed by the complainant (or on behalf of the complainant by a parent/legal guardian)?
 - ☐ Does the complaint indicate that an investigation is sought?
 - ☐ Is the complainant currently participating in, or attempting to participate in the LEA's education program or activity?
 - ☐ Did the alleged conduct occur in an "education program or activity" of the LEA against a person in the U.S.?
 - ☐ Analyze the formal complaint to determine if it alleges sexual harassment, as defined under the regulations:
 - ☐ Quid pro quo harassment by an employee of the LEA;

- ☐ 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 LEA's education program or activity; or
- ☐ Sexual assault, dating violence, domestic violence, or stalking.

7. If the complaint does NOT meet the requirements for a Title IX formal complaint:

- ☐ The formal complaint (or allegations therein) must be dismissed and both parties must be provided with written notice of dismissal and right to appeal.
- ☐ LEA may still have obligations to continue a formal process. Consider whether the following policies, or other applicable LEA policies, may apply and take action accordingly:
 - ☐ Uniform Complaint Procedures
 - ☐ Violation of Student Code of Conduct or Handbook
 - ☐ Complaint Against Employee
 - ☐ Employee Complaint Pursuant to LEA's board policy on nondiscrimination

8. If some or all of the allegations meet the definition of sexual harassment for purposes of Title IX:

- ☐ Move forward with the complaint process.
- ☐ Give notice of allegations and opportunity to obtain an advisor to both parties.

9. Consider informal resolution options (*optional and can be done at any time after receipt of the formal complaint*)

- ☐ Ensure the person facilitating information resolution has been Title IX trained.
- ☐ Is the respondent an employee of the LEA? If so, do not offer informal resolution.
- ☐ Have both parties consented to the informal resolution in writing? If not, do not proceed with informal resolution.

INVESTIGATION

Person responsible: INVESTIGATOR

10. Plan and conduct an investigation.

- ☐ Draft investigation plan.
- ☐ Conduct interviews, collect documentation.

11. Conduct first evidence review process.

- ☐ Give both parties an "equal opportunity to inspect and review any evidence..."
- ☐ Give parties at least 10 days to submit a written response.
- ☐ Consider written responses prior to completion of the investigative report.

12. Draft and share the investigative report.

- ☐ Summarize all relevant evidence and consider including methodology.
- ☐ Simultaneously share investigative report to all parties.

DETERMINATION OF RESPONSIBILITY

Person responsible: DECISION-MAKER

13. Give parties an opportunity to ask questions and respond.

- ☐ Give both parties an opportunity to submit written, relevant questions.
- ☐ Make relevancy determinations.
- ☐ Allow parties to respond to questions.

- ☐ Provide each party with each other's answers.
- ☐ Allow for additional, limited follow-up questions.

14. Review evidence and make written determination of responsibility.

- ☐ Does the determination contain all necessary elements?
 - ☐ Identify allegations.
 - ☐ Describe procedural steps.
 - ☐ Make findings of fact and conclusions regarding the application of the LEA's policies to the facts.
 - ☐ Make determination of responsibility and rationale for determination for each allegation.
 - ☐ Describe any disciplinary sanctions and/or remedies the LEA imposes.
 - ☐ Describe the LEA's procedures and permissible bases for the parties to appeal.
- ☐ Simultaneously distribute written determination to all parties.

APPEAL

Person responsible: DECISION-MAKER ON APPEAL

15. When a party files an appeal of a dismissal or determination of responsibility:

- ☐ Determine if the appeal is timely and if there is a valid basis for appeal.
- ☐ Give all parties an opportunity to submit written statements.
- ☐ Consider the written statements and issue a written decision to all parties simultaneously.

Code of Federal Regulations – Title IX

Title 34. Education

Subtitle B. Regulations of the Offices of the Department of Education

Chapter I. Office for Civil Rights, Department of Education

Part 106. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

For easy reference, provided herein is the full text of the excerpted regulations pertaining to the Title IX sexual harassment grievance process, many of which were updated in the 2020 regulatory overhaul.

§ 106. Authority

Authority: 20 U.S.C. 1681 et seq., unless otherwise noted.

§ 106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub.L. 93–568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub.L. 93–380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

§ 106.3 Remedial and affirmative action and self-evaluation.

(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.

(b) Affirmative action. In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) Self-evaluation. Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) Availability of self-evaluation and related materials. Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c)(ii) of this section and of any remedial steps taken pursuant to paragraph (c)(iii) of this section.

§ 106.6 Effect of other requirements and preservation of rights.

(a) Effect of other Federal provisions. The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b–2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(b) Effect of State or local law or other requirements. The obligation to comply with this part is not obviated or alleviated by any

State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) Effect of rules or regulations of private organizations. The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives Federal financial assistance.

(d) Constitutional protections. Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA). The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

(f) Title VII of the Civil Rights Act of 1964. Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. or any regulations promulgated thereunder.

(g) Exercise of rights by parents or guardians. Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

(h) Preemptive effect. To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

(a) Designation of coordinator. Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator." The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

(b) Dissemination of policy—

(1) Notification of policy. Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

(2) Publications.

(i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under

paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.

(c) Adoption of grievance procedures. A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

(d) Application outside the United States. The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

§ 106.12 Educational institutions controlled by religious organizations.

(a) Application. This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) Assurance of exemption. An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

§ 106.30 Definitions.

(a) As used in this part:

Actual knowledge means 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 and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Consent. The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the

complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

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; or
- (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).

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

(b) 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.

Postsecondary institution means an institution of graduate higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), or an institution of vocational education as defined in § 106.2(o).

§ 106.44 Recipient's response to sexual harassment.

(a) General response to sexual harassment. A recipient with actual knowledge of 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. For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) Response to a formal complaint

(1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) Emergency removal. Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) Administrative leave. Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

§ 106.45 Grievance process for formal complaints of sexual harassment.

(a) Discrimination on the basis of sex. A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) Grievance process. For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

(1) Basic requirements for grievance process. A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(ii) 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;

(iii) 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. 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. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

(iv) Include 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;

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

(ix) Describe the range of supportive measures available to complainants and respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) Notice of allegations—

(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(3) Dismissal of a formal complaint—

(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 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.

(ii) The recipient 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 recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint

or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) Consolidation of formal complaints. A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular “party,” “complainant,” or “respondent” include the plural, as applicable.

(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party’s records that are made or 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 process under this section (if a party is not an “eligible student,” as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

(vi) Provide both parties 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 and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

(6) Hearings.

(i) For postsecondary institutions, the recipient’s grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted

directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. 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. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must 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 from each party. With or without a hearing, 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. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

(7) Determination regarding responsibility.

(i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

(B) 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;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) 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.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

(8) Appeals.

(i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) 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.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) Informal resolution. A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient—

(i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) Recordkeeping.

(i) A recipient must maintain for a period of seven years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

§ 106.71 Retaliation.

(a) 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. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(b) Specific circumstances.

(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

Summary of Major Provisions of the Department of Education's Title IX Final Rule

Issue	The Title IX Final Rule: Addressing Sexual Harassment in Schools
1. <i>Notice to the School, College, University ("Schools") : Actual Knowledge</i>	The Final Rule requires a K-12 school to respond whenever <i>any</i> employee has notice of sexual harassment, including allegations of sexual harassment. Many State laws also require all K-12 employees to be mandatorily reporters of child abuse. For postsecondary institutions, the Final Rule allows the institution to choose whether to have mandatorily reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office. For all schools, notice to a Title IX Coordinator, or to an official with authority to institute corrective measures on the recipient's behalf, charges a school with actual knowledge and triggers the school's response obligations.
2. <i>Definition of Sexual Harassment for Title IX Purposes</i>	The Final Rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect: Any instance of <i>quid pro quo</i> harassment by a school's employee; any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA). - The Final Rule prohibits sex-based misconduct in a manner consistent with the First Amendment. <i>Quid pro quo</i> harassment and Clery Act/VAWA offenses are <u>not</u> evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access, because such misconduct is sufficiently serious to deprive a person of equal access. - The Final Rule uses the Supreme Court's <i>Davis</i> definition (severe <i>and</i> pervasive <i>and</i> objectively offensive conduct, effectively denying a person equal educational access) as one of the three categories of sexual harassment, so that where unwelcome sex-based conduct consists of speech or expressive conduct, schools balance Title IX enforcement with respect for free speech and academic freedom. - The Final Rule uses the Supreme Court's Title IX-specific definition rather than the Supreme Court's Title VII workplace standard (severe <i>or</i> pervasive conduct creating a hostile work environment). First Amendment concerns differ in educational environments and workplace environments, and the Title IX definition provides First Amendment protections appropriate for educational institutions where students are learning, and employees are teaching. Students, teachers, faculty, and others should enjoy free speech and academic freedom protections, even when speech or expression is offensive.
3. <i>Sexual Harassment Occurring in a School's "Education Program or Activity" and "in the United States"</i>	The Title IX statute applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance. Under the Final Rule, schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States. - The Title IX statute and existing regulations contain broad definitions of a school's "program or activity" and the Department will continue to look to these definitions for the scope of a school's education program or activity. Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house). - Title IX applies to all of a school's education programs or activities, whether such programs or activities occur on-campus or off-campus. A school may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.

4. <i>Accessible Reporting to Title IX Coordinator</i>	The Final Rule expands a school’s obligations to ensure its educational community knows how to report to the Title IX Coordinator. - The employee designated by a recipient to coordinate its efforts to comply with Title IX responsibilities must be referred to as the “Title IX Coordinator.” - Instead of notifying only students and employees of the Title IX Coordinator’s contact information, the school must also notify applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and all unions, of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator. - Schools must prominently display on their websites the required contact information for the Title IX Coordinator. - Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. - Such a report may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.
5. <i>School’s Mandatory Response Obligations: The Deliberate Indifference Standard</i>	Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means a response that is not clearly unreasonable in light of the known circumstances. Schools have the following mandatory response obligations: - Schools must offer supportive measures to the person alleged to be the victim (referred to as the “complainant”). - The Title IX Coordinator must promptly contact the complainant confidentially to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. - Schools must follow a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. - Schools must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX. - The Final Rule requires a school to investigate sexual harassment allegations in any formal complaint, which can be filed by a complainant, or signed by a Title IX Coordinator. - The Final Rule affirms that a complainant’s wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances. - If the allegations in a formal complaint do not meet the definition of sexual harassment in the Final Rule, or did not occur in the school’s education program or activity against a person in the United States, the Final Rule clarifies that the school must dismiss such allegations <i>for purposes of Title IX</i> but may still address the allegations in any manner the school deems appropriate under the school’s own code of conduct.

6. <i>School's Mandatory Response Obligations: Defining "Complainant," "Respondent," "Formal Complaint," "Supportive Measures"</i>	When responding to sexual harassment (e.g., by offering supportive measures to a complainant and refraining from disciplining a respondent without following a Title IX grievance process, which includes investigating formal complaints of sexual harassment), the Final Rule provides clear definitions of complainant, respondent, formal complaint, and supportive measures so that recipients, students, and employees clearly understand how a school must respond to sexual harassment incidents in a way that supports the alleged victim and treats both parties fairly. The Final Rule defines "complainant" as an individual <i>who is alleged to be the victim</i> of conduct that could constitute sexual harassment. - This clarifies that any third party as well as the complainant may report sexual harassment. - While parents and guardians do not become complainants (or respondents), the Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters. The Final Rule defines "respondent" as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment. The Final Rule defines "formal complaint" as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment and states: - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed. - A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method designated by the school. - The phrase "document filed by a complainant" means a document or electronic submission (such as by e-mail or through an online portal provided for this purpose by the school) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or a party during a grievance process, and must comply with requirements for Title IX personnel to be free from conflicts and bias. - The Final Rule defines "supportive measures" as individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment. - The Final Rule evaluates a school's selection of supportive measures and remedies based on what is not clearly unreasonable in light of the known circumstances, and does not second guess a school's disciplinary decisions, but requires the school to offer supportive measures, and provide remedies to a complainant whenever a respondent is found responsible.
7. <i>Grievance Process, General Requirements</i>	The Final Rule prescribes a consistent, transparent grievance process for resolving formal complaints of sexual harassment. Aside from hearings (see Issue #9 below), the grievance process prescribed by the Final Rule applies to all schools equally including K-12 schools and postsecondary institutions. The Final Rule states that a school's grievance process must: - Treat complainants equitably by providing remedies any time a respondent is found responsible, and treat respondents equitably by not imposing disciplinary sanctions without following the grievance process prescribed in the Final Rule.

	- Remedies, which are 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 described in the Final Rule as supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. - Require objective evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person's status as a complainant, respondent, or witness. - Require Title IX personnel (Title IX Coordinators, investigators, decision-makers, people who facilitate any informal resolution process) to be free from conflicts of interest or bias for or against complainants or respondents. - Training of Title IX personnel must include training on the definition of sexual harassment in the Final Rule, the scope of the school'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 school must ensure that decision-makers receive training on any technology to be used at a live hearing. - A school's decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants. - Include 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. - Recipients must post materials used to train Title IX personnel on their websites, if any, or make materials available for members of the public to inspect. - Include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frames. - Describe the range, or list, the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility. - State whether the school has chosen to use the preponderance of the evidence standard, or the clear and convincing evidence standard, for all formal complaints of sexual harassment (including where employees and faculty are respondents). - Describe the school's appeal procedures, and the range of supportive measures available to complainants and respondents. - A school's grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege. - Any provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complaints of sexual harassment, must apply equally to both parties.
8. <i>Investigations</i>	The Final Rule states that the school must investigate the allegations in any formal complaint and send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint. During the grievance process and when investigating:

	- The burden of gathering evidence and burden of proof must remain on schools, not on the parties. - Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence. - Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no “gag orders”). - Parties must have the same opportunity to select an advisor of the party’s choice who may be, but need not be, an attorney. - Schools must send written notice of any investigative interviews, meetings, or hearings. - Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence. - Schools must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond. - Schools must dismiss allegations of conduct that do not meet the Final Rule’s definition of sexual harassment or did not occur in a school’s education program or activity against a person in the U.S. Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate. - Schools may, in their discretion, dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled or employed by the school, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination. - Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal. - Schools may, in their discretion, consolidate formal complaints where the allegations arise out of the same facts. - The Final Rule protects the privacy of a party’s medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party’s voluntary, written consent to do so.
9. <i>Hearings:</i> (a) <i>Live Hearings & Cross-Examination (for Postsecondary Institutions)</i>	The Final Rule adds provisions to the “live hearing with cross-examination” requirement for postsecondary institutions and clarifies that hearings are optional for K-12 schools (and any other recipient that is not a postsecondary institution). (a) For postsecondary institutions, the school’s grievance process must provide for a live hearing: - At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally.

(b) <i>Hearings are Optional, Written Questions Required (for K-12 Schools)</i> (c) <i>Rape Shield Protections for Complainants</i>	- At the request of either party, the recipient must provide for the entire live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other. - Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the party's advisor asking cross-examination questions any decision to exclude a question as not relevant. - If a party does not have an advisor present at the live hearing, the school must provide, without fee or charge to that party, an advisor of the school's choice who may be, but is not required to be, an attorney to conduct cross-examination on behalf of that party. - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. - Live hearings may be conducted with all parties physically present in the same geographic location or, at the school's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually. - Schools must create an audio or audiovisual recording, or transcript, of any live hearing. (b) For recipients that are K-12 schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, <i>but need not</i>, provide for a hearing: - With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must 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 from each party. (c) The Final Rule provides rape shield protections for complainants (as to all recipients whether postsecondary institutions, K-12 schools, or others), deeming irrelevant questions and evidence about a complainant's prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.
10. <i>Standard of Evidence & Written Determination</i>	The Final Rule requires the school's grievance process to state whether the standard of evidence to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard. The Final Rule makes each school's grievance process consistent by requiring each school to apply the same standard of evidence for all formal complaints of sexual harassment whether the respondent is a student or an employee (including faculty member). - The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant. - The written determination must be sent simultaneously to the parties along with information about how to file an appeal.

11. <i>Appeals</i>	The Final Rule states that a school must offer both parties an appeal from a determination regarding responsibility, and from a school’s dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity that affected the outcome of the matter, newly discovered evidence that could affect the outcome of the matter, and/or Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter. - A school may offer an appeal equally to both parties on additional bases.
12. <i>Informal Resolution</i>	The Final Rule allows a school, in its discretion, to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal resolution. Any person who facilitates an informal resolution must be well trained. The Final Rule adds: - A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment. Similarly, a school may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed. - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint. - Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.
13. <i>Retaliation Prohibited</i>	The Final Rule expressly prohibits retaliation. - Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation. - The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding. - Complaints alleging retaliation may be filed according to a school’s prompt and equitable grievance procedures. - The exercise of rights protected under the First Amendment does not constitute retaliation. - Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.

ABOUT THE FIRM

Dannis Woliver Kelley (DWK) is a full-service education law firm focused on serving the needs of California public school districts, county offices of education, community colleges and other educational organizations. Established in 1976, DWK was one of the first California law firms to devote its practice to governing boards, public schools and education. With more than 55 attorneys and eight offices across the state, DWK is one of the largest women-owned law firms in the country. From board ethics to students' rights, collective bargaining to charter oversight, litigation to construction, bond finance to business and technology, DWK provides outstanding legal representation and preventive and practical counsel on key issues surrounding your core mission—the education of students.

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This manual is not intended to provide or be a substitute for legal advice. Information provided in the manual is current as of August 2020. Please consult your DWK attorney with questions. This manual was provided as part of a Title IX compliance training facilitated by DWK. By posting this material publicly on its website, the posting entity represents that it attended this training.