



## K-12 Title IX Training Are You Ready? New Title IX Regulations Go Into Effect on August 14, 2020

### Title IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”



### Agenda

1. Brief overview of Title IX;
2. The scope of a K-12 education program or activity;
3. The definition of sexual harassment provided within the regulations;
4. Grievance process including hearings, appeals, and informal resolution processes, as applicable;
5. How to conduct an investigation;
6. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;
7. Investigator training on issues of relevance to create an investigative report that fairly summarizes relevant evidence; and
8. Decision-maker training 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.



### Scope of “Educational Program or Activity”

- “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination **under any education program or activity** receiving Federal financial assistance.”
- Jurisdictional trigger
- “locations, events, or circumstances over which the recipient [the school/district] exercised substantial control over both the respondent and the context in which the sexual harassment occurs . . .”



## POST THESE (and all) TRAINING MATERIALS ON YOUR WEBSITE

Posting is REQUIRED



- *Respondent* means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- *Complainant* means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- Whether misconduct occurs on campus or off campus is not dispositive
- Title IX obligations for sexual harassment in K-12 institutions include incidents that occur off campus if:
  - if the off-campus incident occurs as part of the school's “operations” or
  - if the school exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus.



## Definition of “Sexual Harassment”

- **Conduct on the basis of sex** that satisfies one or more of the following:
  - (1) An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual’s participation in unwelcome sexual conduct (quid pro quo sexual harassment);
  - (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 school’s education program or activity; or
  - (3) “Sexual assault”, “dating violence”, “domestic violence”, or “stalking” (as defined under Clery Act)



- Definition under Title IX is different than interpretation under Title VII—must comply with both.

- Schools may continue to address harassing conduct that does not meet the new definition of sexual harassment under other provisions of the school’s own code of conduct.



- “Sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- “Dating violence” means violence committed by a person—
  - (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - (i) The length of the relationship.
    - (ii) The type of relationship.
    - (iii) The frequency of interaction between the persons involved in the relationship.



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- “Domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.
- “Stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - (A) fear for his or her safety or the safety of others; or
  - (B) suffer substantial emotional distress.



An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual’s participation in unwelcome sexual conduct (quid pro quo sexual harassment)

### • Quid pro quo-#1

- Encompasses situations where the quid pro quo nature of the incident is implied from the circumstances.
- Ex: if you do or don’t do x, I will or won’t do x
- Applies to all of a school’s employees
- “unwelcome” as used in the first and second prongs of the definition of sexual harassment is a subjective element



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 school's education program or activity

- "Catch-all"-#2
- Focus factually on the nature of the misconduct itself – not on the victim's response to the misconduct.
- Determinations of severity, pervasiveness, and objective offensiveness depends on a constellation of factors including the ages and numbers of parties involved, disability status, positions of authority of involved parties etc.
- Whether harassing conduct is "objectively offensive" must be evaluated under a reasonable person standard, as a reasonable person in the complainant's position.
- No intent aspect.
- Does not require that a complainant has already suffered loss of education before being able to report sexual harassment



## Reports of Sexual Harassment

- **The school is deemed to have actual knowledge of sexual harassment allegations if ANY staff member has knowledge.**
- The School is REQUIRED to respond promptly when it has actual knowledge in a way that is not deliberately indifferent.
- 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.



- Where conduct is sexual in nature, or where conduct references one sex or another, that suffices to constitute conduct "on the basis of sex."
- Any individual – irrespective of sexual orientation or gender identity – may be victimized by the type of conduct defined as sexual harassment to which a school must respond under these final regulations.



## Grievance Procedure for Sexual Harassment Formal Complaints

- |  |   |
|--|---|
| 1. Report  | 8. Question and Answer period (and hearing if applicable) |
| 2. Supportive measures and information on formal complaint | 9. Written determination                                  |
| 3. Formal complaint  | 10. Appeal on certain bases                               |
| 4. Written notice to parties                               | 11. Notice of appeal and opportunity to respond           |
| 5. Investigation   | 12. Final written decision on appeal                      |
| 6. Inspection and review of evidence                       |   |
| 7. Investigative report with review and written response   |   |



- "If the conduct alleged in the formal complaint would not constitute sexual harassment as defined . . . then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX"
- BUT such a dismissal does not preclude action under another provision of the recipient's code of conduct.



## Report Received

Title IX Coordinator must promptly reach out to the individual who is alleged to be the victim of conduct that could constitute sexual harassment (aka the complainant) to:

1. discuss the availability of supportive measures,
2. consider the complainant's wishes with respect to supportive measures,
3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
4. explain to the complainant the process for filing a formal complaint.



## Supportive Measures

- *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.
- Such measures are designed to restore or preserve equal access to the School's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the School'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 locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
- The School 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 School to provide the supportive measures.



## Investigation

- More to come later...



## Formal Complaint

- *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 School 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 School with which the formal complaint is filed.



## Investigative Report

- Prior to completion of their investigative report, 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.
- The parties must have at least ten (10) business days to submit a written response, which the investigator will consider prior to completion of the investigative report.
- Create an investigative report that fairly summarizes relevant evidence.
- Send investigative report to each party at least 10 days prior to the determination regarding responsibility.
- Allow for review and written response.



## Written Notice to Parties

- Upon receipt of a formal complaint (or later as additional allegations become known), the School has to provide the following written notice to the parties who are known
  1. Notice of the School's grievance process that complies with this section, including any informal resolution process.
  2. Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
  3. Notice 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.
  4. Notice to the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
  5. Notice of any provision in the School's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.



## Hearing and Question and Answer Period

- Institutions of higher education must hold a hearing prior to a determination of responsibility.
  - **K-12 schools do not have to hold a hearing**, though they may choose to add a hearing to their grievance procedure.
- With or without a hearing, the decision-maker must still 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.



### Hearing—K-12 has discretion on how to implement hearings, the following are higher ed hearing requirements that are optional for K-12

- At the live (or virtual) hearing, the decision-maker 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.
- At the request of either party, the school must provide for the live hearing to occur with the parties located in separate rooms.
- **TRAIN ON TECHNOLOGY**



### Written Determination

- Provided simultaneously to the parties;
- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the School's code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation
  - A determination regarding responsibility,
  - any disciplinary sanctions the School imposes on the respondent,
  - whether remedies designed to restore or preserve equal access to the School's education program or activity will be provided by the School to the complainant;
- Procedures and permissible bases for appeal.



### Hearing—K-12 has discretion on how to implement hearings, the following are higher ed hearing requirements that are optional for K-12

- 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 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.



### Appeal 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;
- (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; or
- (D) Any other bases allowed equally to either party.



- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;
- The decision-maker 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.
- Schools must also create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.



### Appeal

- Different decision-maker
- Notice to the other party
- Opportunity for both parties to submit a written statement in support of, or challenging, outcome
- Written decision describing the result of the appeal and the rationale for the result and provided simultaneously to the parties
- Make sure no conflict of interest or bias
- Train



## Overarching Requirements for Sexual Harassment Grievance Procedure

1. Have Presumption that Respondent is Not Responsible
2. Exclude Privileged Information
3. Follow Grievance Procedure Before Imposing Sanctions
4. No Bias or Conflict of Interest
5. Consider All Relevant Evidence Under Proper Standard (Preponderance or Clear and Convincing)
6. Include Range of Possible Sanctions/Remedies and Describe Supportive Measures
7. Follow Reasonably Prompt Timelines
8. Removal/Administrative Leave Permitted in Certain Instances
9. Remember Grounds for Dismissal
10. Informal Resolution Process After Formal Complaint is Optional
11. Train Staff
12. Keep Records
13. No Retaliation
14. Maintain Confidentiality



## Emergency Removal

- **BEFORE** removal
  - Undertake an individualized safety and risk analysis, and
  - Determine 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.
- Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- Follow the IDEA and Section 504 before any removals.



## Evidence

- Objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness.
- The standard of evidence to be used to determine responsibility must be either the clear and convincing evidence standard or the preponderance of the evidence standard.



## Grounds for Dismissal

- The School **MUST** investigate the formal complaint
- If the conduct alleged in the formal complaint
  1. would not constitute sexual harassment even if proved,
  2. did not occur in the School's education program or activity, or
  3. did not occur against a person in the United States,
 then the School must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX.
  - **However, such a dismissal does not preclude action under another provision of the School's code of conduct.**



## Good Cause Delay—With Written Notice

- 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.



## Permissive Grounds for Dismissal

The School may also dismiss the formal complaint or any allegations therein, if at any time during the investigation:

1. a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
2. the respondent is no longer enrolled or employed by the School; or
3. specific circumstances prevent the School from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.



## Informal Resolution

- Cannot require that the student or employee waive their right to the grievance process
- Cannot go forward with an informal process for sexual harassment allegations prior to there being a formal complaint
- Obtain voluntary written consent
- Not permitted for allegations that an employee sexually harassed a student
- Written notice to the parties is required, disclosing:
  1. the allegations,
  2. 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,
  3. 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
  4. any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared



## Maintain Confidentiality

- 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 [FERPA], or as required by law, or to carry out the purposes of [Title IX], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.



## Recordkeeping

- Keep for 7 years
- Investigation Records
- Appeal Records
- Informal Resolution Records
- Training Materials
- Response to all reports and formal complaints



## Grievance Procedures for Other Sex Discrimination

- 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 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.



## No Retaliation Provision Added For All Sex Discrimination Complaints

- 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.
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination complaints not alleging sexual harassment



The Investigation

## Conducting the Investigation

- Requirement 1: Trained Investigator
- Requirement 2: Equitable Treatment of Parties
- Requirement 3: Impartial Assessment (no prejudice, no bias, no conflict of interest)
- Requirement 4: Objective Evaluation of the Evidence
- Requirement 5: Detailed Written Investigative Report
- Requirement 6: Detailed Written Decision-Maker Report



## The Duty to Investigate

- The thoroughness of the investigation is critical to the school's ability to determine whether or not misconduct or harassment occurred and which type of disciplinary action, if any, is required as a matter of law or organizational policy.
- Failure to carry out an adequate investigation may contribute to potential liability for the district.



## Title IX Team Members

Position	Scope of Responsibility	Requirements
Title IX Coordinator	Person designated to coordinate and conduct intake reports and complaints, initiate formal complaints, and implement supportive measures, as necessary.	N/A
Investigator	Person designated to investigate, gather evidence, and compile an investigation report.	May be the Title IX Coordinator.
Decision-Maker	Person who evaluates evidence, rules on relevancy during hearing (if any), issues a written determination regarding responsibility.	Must not be the same person as the Title IX Coordinator or the Investigator.
Appeal Designee	Person designated to handle appeal, if any.	Must not be the same person as the Title IX Coordinator, Investigator, or Decision-Maker.



## Guidelines for Talking to Complainant

- Take the complaint seriously
- Listen objectively, without personal bias
- Focus on the facts and relevant details
- Document details

### Ask Questions, such as:

- "Please describe the situation."
- "Where/when did the behavior/incident occur?"
- "Who was involved?"
- "Were there any witnesses?"
- "Did you talk w/ anyone else about it?"
- "Has this happened to you before?"
- "To anyone else you know of?"
- "What would you like to see happen?"



## Timeline and Notices

- "Reasonably prompt" (30 working days to gather the evidence).
- Temporary delays can be granted for good cause.
- Investigation should start immediately.
- If union involved expect union reps to be present from the start and review any applicable CBA provisions.
- Written notice of the details regarding investigative meetings, including the purpose.



## Guidelines for Interviewing Witnesses

- Explain purpose of meeting
- Describe the circumstances generally (time & location only)
- Do not identify victim or harasser initially
- Focus on witness' observations, not opinions
- Talk w/ all witnesses in quick succession

### Ask Questions to determine if the witness:

- was in the location where harassment alleged?
- observed any potentially harassing conduct?
- knows who was involved in the incident?
- can identify others who were present?
- was also target of unwelcome behavior?
- discussed the alleged incident with the complainant before the complaint was filed?

Document all the information provided by the witnesses.





## Guidelines for Talking to Respondent

- Insure that the meeting place is private.
- Explain the purpose of the meeting.
- Be serious and to the point.
- Explain meeting is confidential.
- Focus on the behavior, not intentions.
- Do not identify witnesses, at least initially.
- Be unbiased. Listen and be nonjudgmental.
- Ask for separate response to each allegation.

Document the meeting.



## Impartiality Regarding Burden of Proof

- The school and investigator must remain neutral and impartial during the investigative process.
  - Schools should not act as police to try to uncover evidence to prove guilt.
  - Schools should not act as defense attorney to try to get alleged perpetrators cleared.
- Objective is truth-seeking mission.



## Maintaining Confidentiality

- Section 106.71 requires schools to keep party and witness identities confidential except as permitted by law or FERPA, and as needed to conduct an investigation or hearing (30316)
- No one other than advisor is permitted to attend the hearing with a party, unless otherwise required by law (30339)



## Emphasis on Impartiality

It is critically important that those individuals designated as Investigator, Decision-Maker, and Appeal Designee understand their duty to serve impartially during the process.

1. Individuals must treat parties equitably
2. Individuals must avoid prejudice of the facts at issue.
3. Individuals must avoid conflicts of interest and recuse themselves when conflicts occur.
4. Individuals must avoid bias in the process in favor of either Complainants or Respondents.



## Burden of Proof 106.45(b)(5)(i)

- Schools cannot restrict either party's ability to discuss the allegations or gather and present evidence, HOWEVER . . .
- Burden of proof sufficient to reach a determination regarding responsibility, rest on the school.
- Burden of proof is on school to conduct investigation, interview witnesses, gather evidence.



## Being Impartial

### DO . . .

- treat parties equitably
- acknowledge unfair societal biases
- acknowledge unfair personal biases
- have awareness of your own biases
- ensure that the evidence is considered in its entirety, without outside influence or preconceived notions.

### DON'T . . .

- act in favor of either party
- base credibility determinations on a person's status as complainant, respondent, witness, etc.
- base credibility determinations on a person's demographic or personal characteristics
- judge a party "due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory." (Preamble 30323)



### Treating Parties Equitably 106.45(b)(1)(i)

Treat complainants and respondents equitably:

- Complainants = Provide remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent.
- Respondents = Follow a grievance process that complies with Title IX before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.



### 106. 45(b)(1)(iii) Title IX Personnel Must be Conflict of Interest And Bias Free

(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 ...



### Presumption of Non-Responsibility 106.45(b)(1)(iv)

- Include in written notice to the parties a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility at the conclusion of the grievance process.



### Bias and Conflict of Interest: Concerns Raised in Comments in Preamble

- Does decision-maker with financial and reputational interests aligned with the school create a conflict?
- Are all paid staff of school biased in favor of the school that employs them?
- Would the Title IX Coordinator directly supervising the decision-maker create a conflict?
- Would past tweets or public comments that appear to support complainants or respondents be sufficient to show bias?
- Does past advocacy for a survivor's or wrongfully accused's rights group create conflict or bias?
- Are perceived conflicts of interest and biases sufficient or do the conflicts/biases have to be actual?



### Avoiding Prejudgment of the Facts at Issue

- To pass judgment prematurely or without sufficient reflection or investigation.
- Avoid rumors and speculation regarding alleged incident.
  - Keep an open mind and listen to all the facts presented.
  - Let the evidence and standard of proof guide your determination.
  - Avoid filling in evidentiary gaps with statistics, personal beliefs, or information about trauma.
  - Each case is unique and different.



### Response to Comments

- Final regulations "leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient's own employees are expected to perform functions free from conflicts of interest and bias." (30251)
- No *per se* prohibited conflicts of interest under 106.45(b)(1)(iii) in using employees or administrative staff. (30352)—including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor).
- No *per se* violations of 106.45(b)(1)(iii) for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process. (30353)



### Response to Preamble Discussion

- Provides as an example that it is not a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence. (30252)
- Cautions against using generalizations to identify bias and conflict of interest and, instead, recommends using a reasonable-person test to determine whether bias exists; e.g., not all self-professed feminists are biased against men, not all men are incapable of being sensitive to women, etc. (30252).
- Requires training on impartiality.
- Doesn't specify whether has to be perceived vs. actual bias or conflict.



### Avoiding Conflicts of Interests

- Conflicts of interests are not specifically defined in the regulations.
- A situation in which the concerns or aims of two different parties are incompatible, such as when a person could derive a financial, professional, personal, or other benefit from his official actions or decisions.
- If there are any potential or actual conflicts of interests, the impacted Title IX Coordinator, Decision-Maker, Appeals Designee should recuse themselves or be removed.



### Adequate And Unbiased Training

- Investigators and decision-makers must be free from bias or conflicts of interest.
- There is a heavy emphasis in the regulations on training the individuals involved in the investigation and the hearing process.
- A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.



### Avoiding Bias

- Prejudice in favor of or against one thing, person, or group compared with another.
- No bias against a particular complainant or respondent.
- No bias against complainants or respondents generally.
- Must not rely on gender, racial, economic, other stereotypes.
- Examples of stereotypes in the comments to the regulations (30253):
  - Women have regret sex and lie about sexual assaults;
  - Men are sexually aggressive or likely to perpetrate sexual assault;
  - Certain marginalized groups more likely to be victimized. (30259-30260)



### Practical Takeaways

- Schools must have training to ensure no conflict/bias.
- Schools may have a process for parties to assert claims of conflict/bias during the grievance process.
- Conflict and bias of Title IX personnel is a basis for appeal.



### Examples of Bias

- Situation where investigator or decision-maker has prior involvement or knows complainant, respondent, or witness and has made a credibility determination regarding that person.
- Situation where information "gleaned" by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.).
- Other biases exhibited during grievance process.

Race	Sexual Orientation
Ethnicity	Socio-economic Class
Gender	Age





## Related-to vs. Relevant Evidence

- **Related-to =**
- Investigator must collect all evidence that is related to the allegations whether or not relevant
  - Includes evidence otherwise excluded under rape shield protections
  - Excludes evidence subject to privilege, medical records
- **Relevant =**
- Relevant evidence is all evidence related to, except that which is protected under the rape shield provisions (and not otherwise privileged, medical records)
- Evidence pertinent to proving whether facts material to the allegation are more or less likely to be true



## Rape Shield Law - Respondents

- Rape shield protection do not apply to Respondents.
- Evidence of sexual behavior of respondents may be included.
- "The Department reiterates that the rape shield language . . . Does not pertain to the sexual predisposition or sexual behavior of respondents, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be."



## What is Relevant? (NOT based on Rules of Evidence)

- Any fact, testimony, other evidence related to a material issue involving the Complainant's allegation or the Respondent's defense that helps the decision makers come to a determination under the standard of evidence.
- Under preponderance of the evidence standard, ask does this fact, testimony, or evidence help me determine whether there was more likely than not a violation?
- Under clear and convincing standard, ask does this fact, testimony, or evidence help me determine if a fact is highly probable to be true?



## Privileged Evidence Excluded 106.45(b)(1)(x)

- Precludes a recipient from using information or evidence protected by a legally recognized privilege unless the holder of the privilege has waived the privilege.
  - Medical records
  - Mental health treatment records
  - Attorney-client communications
  - Spousal privilege



## Rape Shield Law – Complainants

- 34 CFR 45(b)(6)(i)
- Evidence and questions regarding complainants sexual predisposition or prior sexual behavior are not relevant.
- Unless
  - Offered to prove someone else committed alleged conduct
  - Offered to prove past sexual relationship with Respondent to establish consent



## Investigation Report

- Institution must create a written report that fairly summarizes relevant evidence.
- The parties must have an equal opportunity to inspect the investigative report and the evidence (inculpatory or exculpatory) at least 10 days prior to the hearing.
- The parties must be allowed to provide a written response to anything in the record.



## Contents of Investigative Report

1. Summarize all relevant evidence.
  2. Evaluate all relevant evidence objectively, including both inculpatory and exculpatory evidence.
  3. Provide credibility determinations (must not be based on an individual's status as a Complainant, Respondent, or witness).
- Submit final report to the Decision-maker for a determination of responsibility.



## Lawyerly Disclaimer . . . (we can't help it)

- These training materials are informational in nature and should not be construed as legal advice and are not provided to address specific grievance situations.
- Consult with your legal counsel as necessary to address specific Title IX report and grievance situations and investigations.
- Use the chat function to ask general questions, or email your school law attorney, or Aimee Gibbs or Chelsea Canaday at:
  - [agibbs@dickinsonwright.com](mailto:agibbs@dickinsonwright.com)
  - [ccanaday@dickinsonwright.com](mailto:ccanaday@dickinsonwright.com)



## Standard of Proof

- The regulations require that districts select the standard of evidence to determine responsibility within grievance process (preponderance of the evidence or clear and convincing).
  - Preponderance of the evidence = more likely than not to be true (30373, fn. 1409), i.e., 51% or more likely that conduct did or did not occur
  - Clear and convincing = highly probable to be true (30373, fn. 1409), i.e., higher bar, evidence is more than 51% but less than beyond a reasonable doubt
- Must apply same standard to all formal complaints of sexual harassment whether the respondent is a student or an employee (including tenured employee).



## Decision-Maker Written Determination Section 106.45(b)(7)

- The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding responsibility, including:
  1. findings of fact;
  2. conclusions regarding whether the alleged conduct occurred;
  3. rationale for the result as to each allegation;
  4. any disciplinary sanctions imposed on the respondent; and
  5. 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.

