

Title IX: You've Received a Report - Now What?

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**Katie G. Cornetto
Poyner Spruill, LLP
kcornetto@poynerspruill.com**

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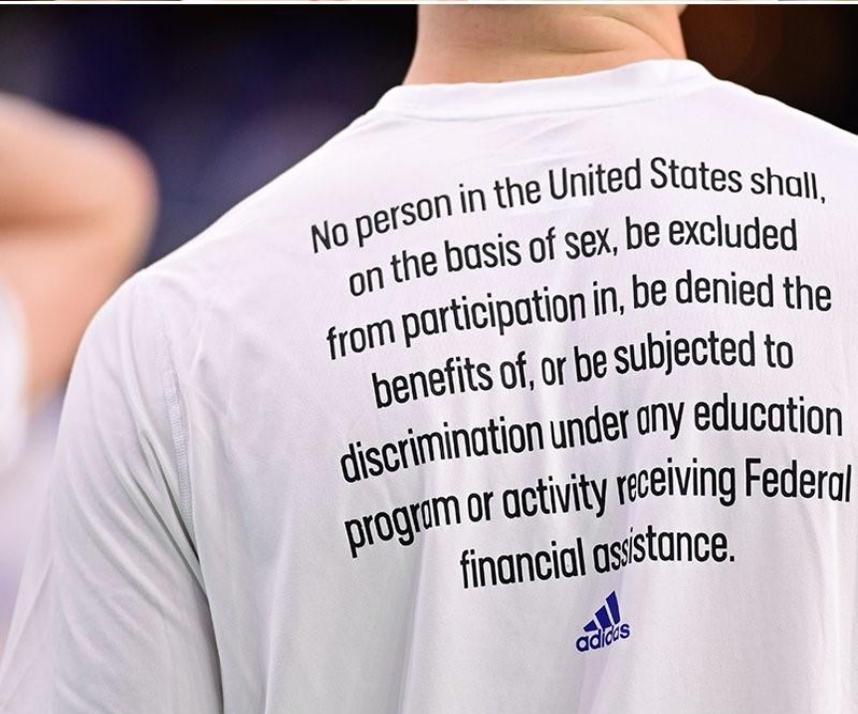
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Title IX Purpose & Definitions



What is 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...”
20 U.S. Code §1681

ESPN [@espn]. (2022, April 2). *Kansas wore these Title IX shirts before the Final Four game* ↓ [Tweet].
Twitter. <https://twitter.com/espn/status/1510392060142305284>

Recent Title IX Developments



**TITLE IX SEXUAL HARASSMENT –
PROHIBITED CONDUCT AND
REPORTING PROCESS**

Policy Code: 1725/4035/7236

The board acknowledges the dignity and worth of all students and employees and strives to create a safe, orderly, caring, and inviting school environment to facilitate student learning and achievement. As provided in policy 1720/4030/7235, Title IX Nondiscrimination on the Basis of Sex, the board will not tolerate sexual harassment in the education program and activities of the school system. The board takes seriously all reports and formal complaints of sexual harassment.

This Title IX sexual harassment policy specifically prohibits sexual harassment as that term is defined under Title IX. It provides a process for students, employees, and others to report such sexual harassment for response by school officials. All incidents of conduct that could constitute sexual harassment under this policy are to be reported and treated in accordance with this policy, whether or not the incidents may also constitute violations of other board policies or standards of conduct.

Individuals who believe they have been subjected to sexual harassment prohibited by this policy or who have witnessed or have reliable information that another person has been subjected to sexual harassment prohibited by this policy should use the process provided in Section C of this policy to report such violations.

The board also provides a grievance process for those who believe they have been victims of sexual harassment that is designed to achieve prompt and equitable resolution of formal complaints of sexual harassment through a formal investigation and adjudication of the allegations in the complaint or through informal resolution processes.¹ The grievance process is provided in policy 1726/4036/7237, Title IX Sexual Harassment Grievance Process. Affected individuals are encouraged to report sexual harassment in accordance with the process provided in Section C of this policy before filing a formal complaint to initiate the grievance process.

Title IX Prohibited Conduct & Reporting Process

NC School Boards Association, Policies to Lead the Schools, Sample Policy 1725/4035/7236, “Title IX Sexual Harassment – Prohibited Conduct and Reporting Process”



Title IX Sexual Harassment Defined

3 Types of Prohibited Sex-Based Conduct

1. Quid Pro Quo
2. Unwelcome Conduct
3. Clery Act and the Violence Against Women Act (“VAWA”) Components

Quid Pro Quo

Occurs when:

- 1) a school employee
- 2) conditions access to educational benefits
- 3) on unwelcome sexual conduct

Note: This provision only applies to employee conduct

Unwelcome Conduct

- 1) Unwelcome conduct
- 2) Determined by a reasonable person
- 3) To be so severe AND pervasive AND objectively offensive
- 4) That it effectively denies a person equal access to an education program or activity.

Note: Severe conduct that constitutes sexual assault, dating violence, domestic violence, or stalking is covered by the third prong (Clery Act & VAWA Conduct) of the definition of sexual harassment.



Unwelcome Conduct: Denies Equal Access to the Education Program or Activity

- Does not require the complainant to have lost **ALL** access to the educational program/activity, but only **EQUAL** access
- Includes a student withdrawing from a class, quitting an extracurricular activity, experiencing falling grades
- May involve development of mental or physical health complications
- “Educational Program of Activity” 34 CFR § 106.44(a)
 - Locations, events, or circumstances over which the recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs.
 - Behavior must take place in the United States.

TITLE IX SEXUAL HARASSMENT – DEFINITIONS

Regulation Code: 1725/4035/7236-R

Terms used in board policy 1725/4035/7236, Title IX Sexual Harassment – Prohibited Conduct and Reporting Process, are defined as follows:

1. Sexual assault

A sexual assault is any one of the following offenses¹:

a. Rape

Rape is the penetration of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

b. Statutory rape

Statutory rape is sexual intercourse with a child 15 years of age or younger and the perpetrator is at least 12 years old and more than four years older than the victim.²

c. Fondling

Fondling is the touching, underneath the clothing, of a person's genitalia, anus, buttocks, or breasts without the consent of the victim for purposes of sexual gratification.³

d. Incest

Incest is sexual intercourse between: (i) grandparent and grandchild; (ii) parent and child/stepchild/legally adopted child; (iii) siblings of half or full blood; or (iv) uncle or aunt and nephew or niece.⁴

Clery Act & VAWA Conduct

NC School Boards Association,
Policies to Lead the Schools,
Sample Regulation
1725/4035/7236-R, "Title IX
Sexual Harassment Definitions"

School District Obligations Under Title IX



When must a school respond to sexual harassment allegations?

School must respond when it has “actual knowledge” of sexual harassment that occurred/is occurring “in the school's education program or activity.”

- “**Actual knowledge**” means a mandated reporter has notice of “sexual harassment or allegations of sexual harassment.” Note: In the K-12 context, **ALL** employees are mandated reporters.
- “**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 occurs.” Note: Does **NOT** include allegations of discrimination or harassment that occur outside of the United States.



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Reporting Sexual Harassment: Who, How and When?

- Reports of sexual harassment may be made by anyone, not just the alleged victim or a mandated reporter.
- Reports can be made by phone, mail, email, letter, or by any means that result in the Title IX Coordinator receiving the report.
- Reports can be made at any time, including non-business hours.

“Deliberate Indifference”

A school cannot be liable for failing to respond to known allegations of harassment unless it acts with “deliberate indifference”

Standard:

*An institution acts with **deliberate indifference** only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.*



Why Does it Matter?

School Boards can be liable for Monetary Damages

The U.S. Supreme Court has issued several important decisions in sexual harassment cases, including two decisions specifically addressing sexual harassment of students under Title IX.

Gebser v. Lago Vista Independent School District (*Gebser*), 524 U.S. 274 (1998), The Court held in *Gebser* that a school can be liable for monetary damages if a teacher sexually harasses a student, an official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent in responding to the harassment.

Davis v. Monroe County Board of Education (*Davis*), 526 U.S. 629 (1999). In *Davis*, the Court announced that a school also may be liable for monetary damages if one student sexually harasses another student in the schools' program and the conditions of *Gebser* are met.

North Carolina Supreme Court: School Boards Have an Affirmative Obligation to Maintain a Safe Learning Environment

Deminski v. State Board of Education, 858 S.E.2d 788 (2021): The North Carolina state constitution "require[s] the government to provide an opportunity to learn that is free from continual intimidation and harassment which prevents a student from learning. In other words, the government must provide a safe environment where learning can take place.)"

Why Does it Matter?

Districts Can Lose Federal Funding

If an educational institution fails to comply with Title IX, it can lose its federal funding.

Pending Sex Discrimination Cases Currently Under Investigation: 1,490

However, to date, no school has lost its federal funding despite pervasive non-compliance with Title IX.

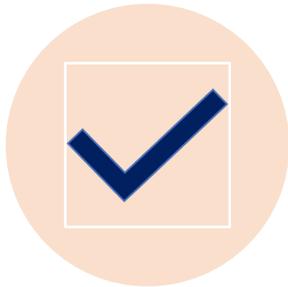
The Players

Title IX Personnel

Title	Responsibilities	Who?
Complainant	<p>A person who is alleged to be the victim of conduct that could constitute sexual harassment</p> <ul style="list-style-type: none"> • <u>NOT</u> a third party who reports alleged sexual harassment perpetrated against someone else • <u>NOT</u> the Title IX Coordinator, even if the TIXC “signs” a formal complaint 	<ul style="list-style-type: none"> • Student, Staff, Third Party
Respondent	<p>A person who has been reported to be a perpetrator of conduct that could constitute sexual harassment</p>	<ul style="list-style-type: none"> • Student, Staff, Third Party
Title IX Coordinator	<ul style="list-style-type: none"> • Oversees and coordinates <u>all</u> Title IX responsibilities for district • Oversees district’s response to Title IX reports and complaints • Implements supportive measures and remedies • Identifies and addresses any pattern or systemic problem revealed by reports and complaints • Evaluates an alleged victim’s confidentiality request, if one is made • Files a formal complaint on behalf of a student/employee, if necessary 	<ul style="list-style-type: none"> • Must be employee; • May not serve as decision-maker

Title	Responsibilities	Who?
Investigator	<ul style="list-style-type: none"> • Conducts a fair, objective, & impartial investigation • Differentiates b/w related & relevant evidence & privilege 	<ul style="list-style-type: none"> • Staff or External Person • May not serve as decision-maker
Decision-Makers	<ul style="list-style-type: none"> • Evaluates evidence, makes, and writes decision • “Rules” on relevancy during cross examination 	<ul style="list-style-type: none"> • Staff or External Person • Cannot serve in any other capacity
Advisor(s)	<ul style="list-style-type: none"> • Advises party they represent (not required) 	<ul style="list-style-type: none"> • Staff or External Person
Informal Resolution Facilitator	<ul style="list-style-type: none"> • Conducts informal resolution process 	<ul style="list-style-type: none"> • Staff or External Person

The Board's Role



Update policies to comply with new Title IX requirements



Follow notice and posting requirements for antidiscrimination, Title IX policies, and training materials



Ensure all employees involved in the Title IX process have adequate training, **including all school board members.**



Serve on the appeals panel (most policies have the Board or a panel of the Board serving as the appeals panel).

Role of Board Members in Handling Complaints

ROLE OF BOARD MEMBERS IN HANDLING COMPLAINTS

Policy Code: **2122**

An individual board member who receives a complaint or inquiry from a parent or interested citizen concerning a school matter shall refer the complainant to the appropriate school administrator and, when appropriate, advise the complainant of the procedures in place for making such complaints.

The board member also may refer the complainant to the superintendent, who will determine an appropriate means of responding to the complaint. The board attorney also may be notified of the complaint in accordance with board policy 2610, Board Attorney.

Individual board members shall refrain from taking individual action with regard to such complaints other than referring them to the proper administrative employee.

Legal References: G.S. 115C-36

Cross References: Board Attorney (policy 2610), Responding to Complaints (policy 1742/5060)

Issued:

Revised:

NC School Boards Association,
Policies to Lead the Schools,
Sample Policy 2122, “Role of
Board Members in Handling
Complaints”

Title IX Process Initiation

TITLE IX SEXUAL HARASSMENT GRIEVANCE PROCESS

Policy Code: 1726/4036/7237

The process provided in this policy is designed for those who believe that they have been sexually harassed in violation of policy 1725/4035/7236, Title IX Sexual Harassment – Prohibited Conduct and Reporting Process, and wish to file a formal complaint. School officials shall follow the grievance process established in this policy when responding to all formal complaints of sexual harassment.

The superintendent is responsible for notifying students and their parents or legal guardians, employees, and applicants for employment of this policy and ensuring that each principal or site supervisor provides a copy of this policy to these persons.¹

A. DEFINITIONS

All definitions in policy 1725/4035/7236, Title IX Sexual Harassment – Prohibited Conduct and Reporting Process, are incorporated by reference and have the same meaning when used in this policy, including all references to “sexual harassment” in this policy.²

The following additional definitions apply in this policy.

1. Investigator

The investigator is the school official responsible for investigating and responding to a formal complaint.

2. Decision-Maker

The decision-maker is the school official responsible for making a determination regarding responsibility in response to an investigation of sexual harassment triggered by a formal complaint.

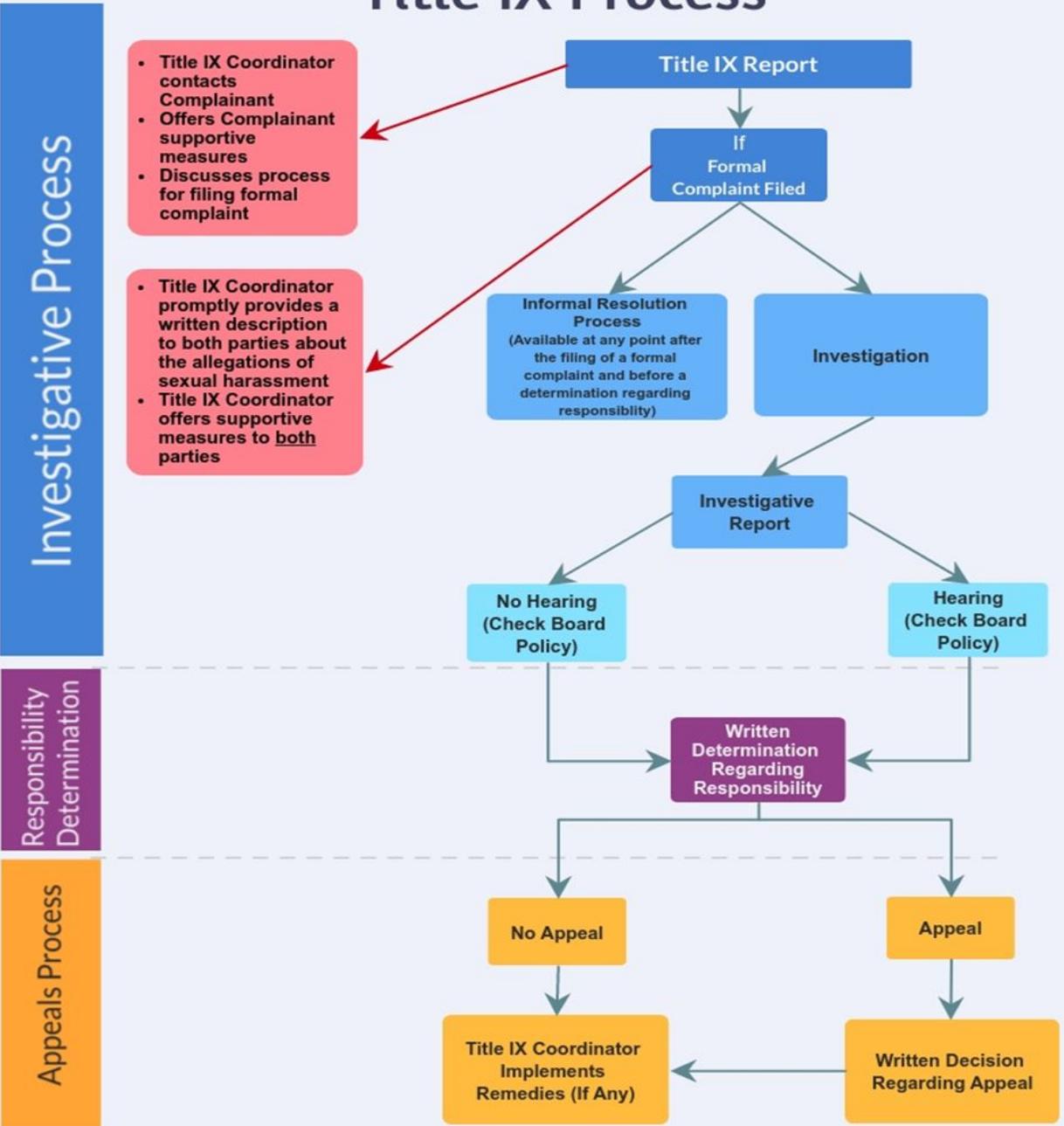
3. Investigative Report

The investigative report is a written account of the findings of the investigation conducted in response to a formal complaint.

Title IX Sexual Harassment Grievance Process

NC School Boards Association,
Policies to Lead the Schools,
Sample Policy 1726/4036/7237,
“Title IX Sexual Harassment
Grievance Process”

Title IX Process



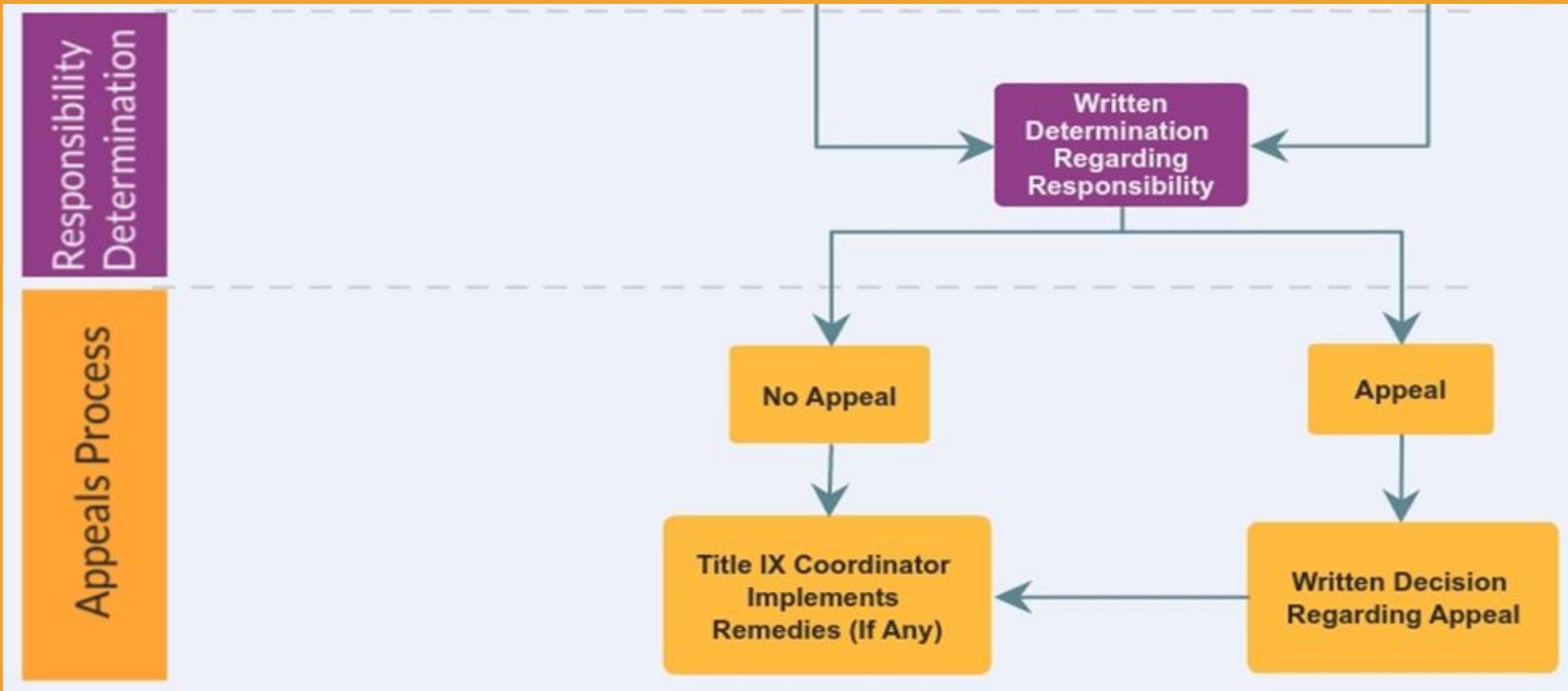
Title IX Process

Investigative Process

- Title IX Coordinator contacts Complainant
- Offers Complainant supportive measures
- Discusses process for filing formal complaint

- Title IX Coordinator promptly provides a written description to both parties about the allegations of sexual harassment
- Title IX Coordinator offers supportive measures to both parties



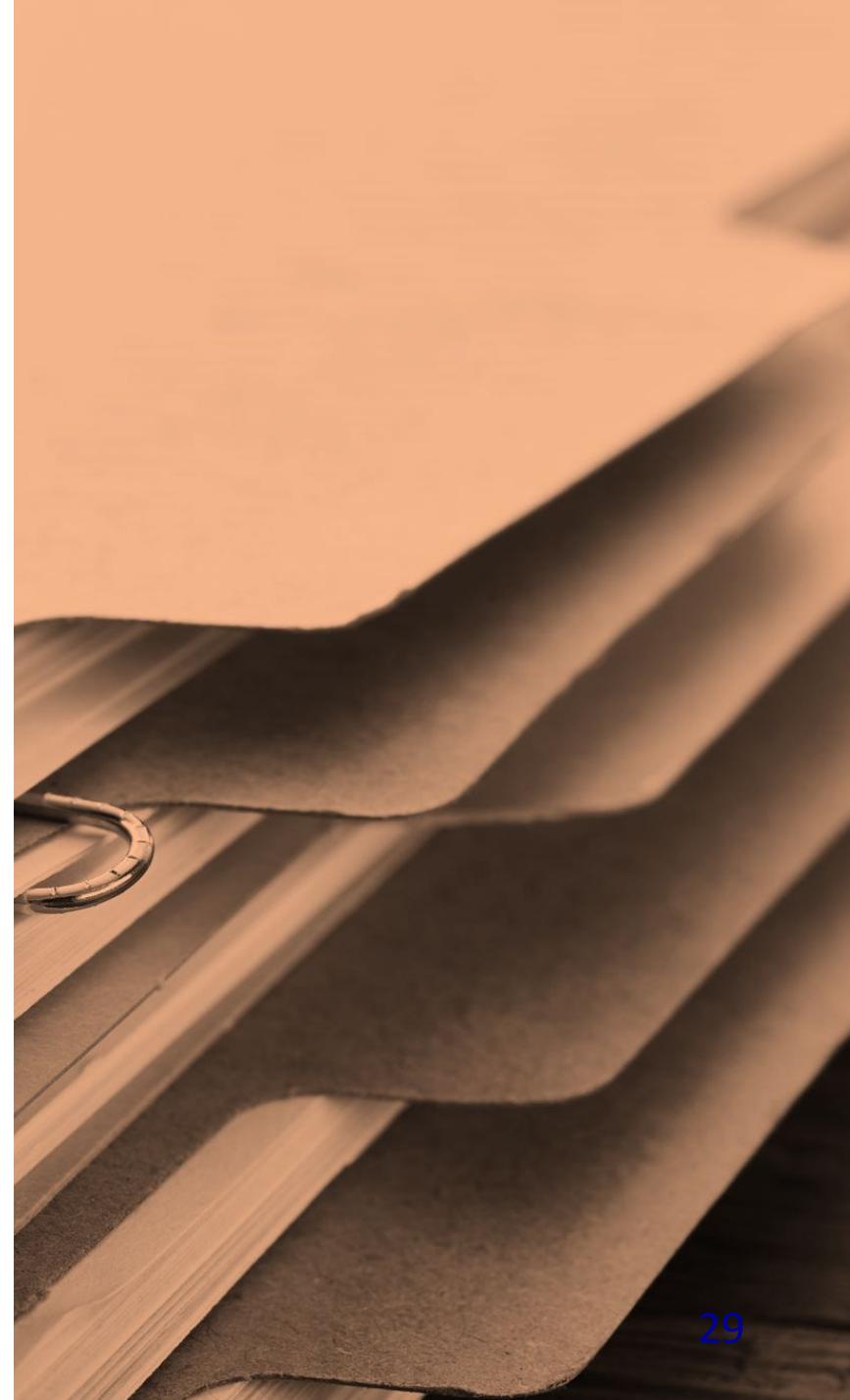


Report of Sexual Harassment

“Report” is an allegation of sex discrimination (including sexual harassment) made by any person, at any time, and by any means (in person, phone, mail or email) that results in the Title IX Coordinator receiving the person’s verbal or written report.

Not limited to a school’s campus community and may come from others, such as on-campus visitors.

School employees shall immediately notify the school’s Title IX Coordinator of any report of sex discrimination. **Note: This applies to any and all school employees and school board members**



The Title IX Coordinator

must:

Contact

Contact the alleged victim (i.e., Complainant);

Offer

Offer the complainant supportive measures;

Explain

Explain the process of filing a formal complaint;

Explain

Explain that supportive measures can be available with or without a formal complaint;

Consider

Consider the complainant's wishes regarding supportive measures;

Contact

Contact the respondent (i.e., alleged perpetrator), who must also be offered supportive measures; and

Document

If supportive measures are not provided to a complainant, the school must document why it did not provide a complainant with supportive measures and why not providing such measures is not deliberately indifferent.

**Upon
Receipt of
a Report
of Sexual
Harassment**

Formal Complaint of Sexual Harassment



- 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
- Only individuals participating in or attempting to participate in the education program or activity of the school may file 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 and by any additional method designated by the school
- Must contain the complainant’s physical or digital signature, or otherwise indicate that the complainant is the person filing the formal complaint
- Triggers the school’s duty to initiate the grievance process



Title IX Process: Initiation

- The Title IX Coordinator should generally respect the wishes of the complainant with respect to filing a formal complaint. However, in certain instances where a complainant is not willing or able to do so, the Title IX Coordinator may sign a complaint against a respondent to ensure the district is not deliberately indifferent.
- Some examples of when a Title IX Coordinator may sign a complaint include:
 - The district has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority;
 - The district wishes to investigate allegations in order to determine whether it has probable cause of employee sexual misconduct; or
 - A Title IX Coordinator receives multiple reports of sexual harassment against the same respondent.

Supportive Measures

Offered to both alleged victim and alleged perpetrator

Individualized services

Reasonably available

Nonpunitive, non-disciplinary, and not unreasonably burdensome to the other party

Designed to ensure equal educational access, protect safety, or deter sexual harassment

Supportive measures must be offered regardless of whether the district is informed via a “Formal Complaint” or a “Report”

Examples of Supportive Measures

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Security and monitoring of certain areas of campus
- Other similar measures

Note: A supportive measure that completely removes a Respondent from an activity (except for “emergency removals” for students and “administrative leave” for employees) would likely be considered punitive.



Emergency Removal

Students

- An accused student can be removed from the education program or activity on an **emergency basis**.
- School must conduct an individualized safety and risk assessment and determine that there is:
 - An immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment; and
 - This immediate threat justifies removal from the education program/activity.
- The accused student must be provided with notice and an opportunity to challenge the decision “immediately” following the removal.

Employees

- The final regulations do not limit an institution’s ability to place an employee on administrative leave during the pendency of a complaint.
- Whether such leave is paid or unpaid is at the institution’s discretion.

NOTE: Title IX does not modify rights under IDEA (e.g., “change in placement”), §504, or the Americans with Disabilities Act.

Informal Resolution

Informal Resolution

- If a formal complaint has been filed, an informal resolution process (e.g., mediation) may be used, but only if all parties agree to participate in an informal resolution process that does not involve a full investigation and adjudication.
- The Title IX Coordinator will appoint a facilitator who is free from conflicts of interest or bias and who has received special training for the role.
- Any party may decline or terminate an informal resolution process at any time prior to agreeing to a resolution, without penalty.

Note: The informal resolution process may not be used to resolve allegations that an employee sexually harassed a student.



Formal Complaint Process

Dismissal of Formal Complaints

- An institution **must** dismiss a complaint if the conduct alleged in the formal complaint:
 - 1) Would not constitute sexual harassment even if proven;
 - 2) Did not occur in the institution's education program or activity; or
 - 3) Did not occur against a person in the United States.
- Additionally, an institution **may** dismiss a complaint where:
 - 1) The complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or allegations;
 - 2) The respondent is no longer enrolled or employed by the institution; or
 - 3) Specific circumstances prevent an institution from gathering evidence sufficient to reach a determination regarding responsibility.
- Institutions **must** provide the parties with written notice of a dismissal, whether mandatory or discretionary, and the reasons for the dismissal.
- Dismissal of the Formal Complaint under Title IX does not preclude action under another policy or code of conduct.
- Dismissals may be appealed.

The district must ensure its grievance process is consistent, transparent and:

- 1) Treats complainants and respondents equitably;
- 2) Does not make credibility determinations based on/because of a person's status as a respondent or complainant;
- 3) Requires objective evaluation of all relevant evidence, both inculpatory and exculpatory;
- 4) Requires Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions to be free from conflicts of interest and bias and trained to serve impartially without prejudging the facts at issue;
- 5) Presumes the non-responsibility of respondents until conclusion of the grievance process;
- 6) Includes reasonably prompt time frames for the grievance process;
- 7) Informs all parties of critical information about the district's procedures including the range of remedies and disciplinary sanctions a district may impose, the standard of evidence applied, the district's appeal procedures, and the range of supportive measures available to both parties; and
- 8) Protects any legally recognized privilege from being pierced during a grievance process.

Grievance Process

Investigation Procedures



The investigator should gather information by interviewing both parties and other witnesses and by collecting additional evidence.



The investigator should gather all evidence, inculpatory and exculpatory, directly related to the allegations.



The investigator should provide written notice in advance to parties who will be interviewed or requested to attend a meeting with sufficient time for the parties to prepare to participate.

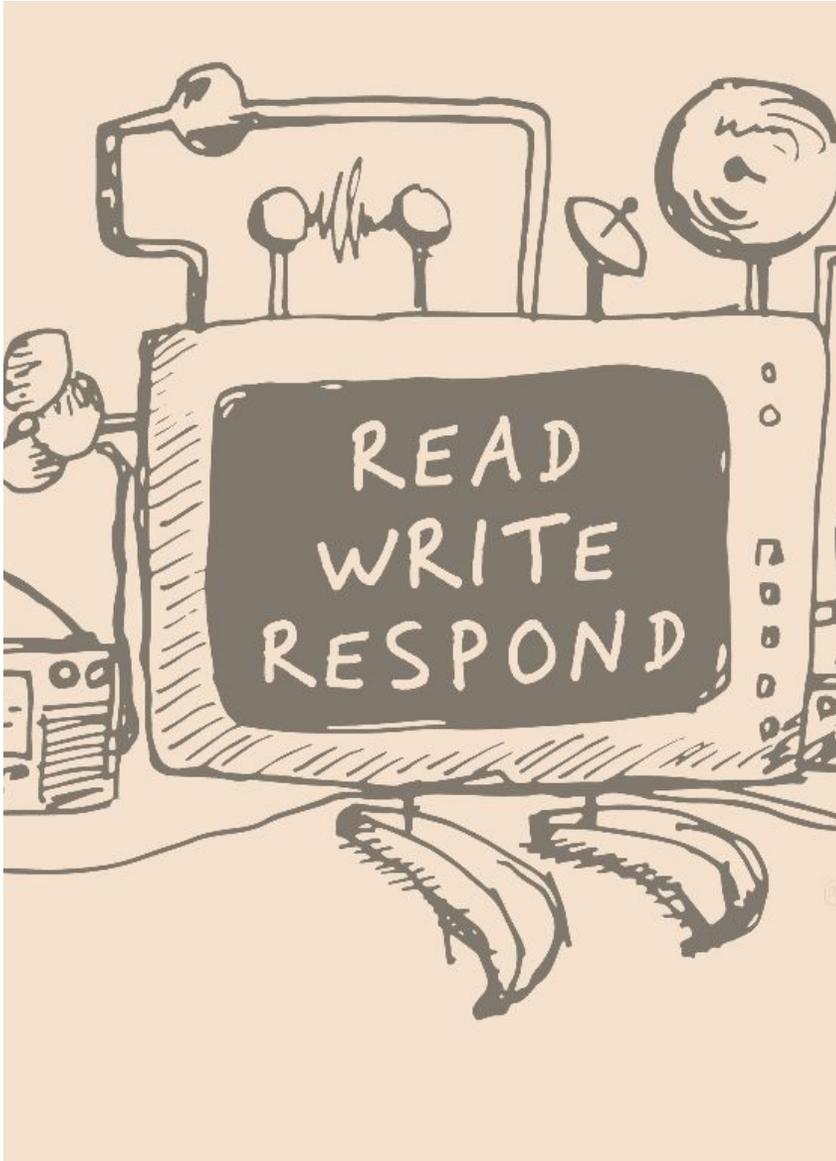
Determining Responsibility

With or without a hearing, after the district has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must:

- 1) Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness;
- 2) Provide each party with the answers;
- 3) Allow for additional, limited follow-up questions from each party.
- 4) Allow questions about a complainant's prior sexual behavior or sexual predispositions only to establish that another person committed the alleged conduct, or if they concern specific incidents of complainant's prior sexual behavior with respondent and are offered to prove consent.

*But keep in mind other statutes require hearings for students (e.g., long-term suspensions, expulsions) or employees (suspension without pay, dismissal, change in terms or conditions of employment or employment status).

Responding to Formal Complaints: Determining Responsibility



The decision-maker(s) cannot be the same person(s) as the Title IX Coordinator or the investigator(s).

The decision-maker(s) must issue a written determination regarding responsibility.

NOTE: The burden of proof is on the school.

The written determination must be provided to both parties simultaneously and must include:

1. Identification of the allegations;
2. 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;
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the district's code of conduct to the facts; and
5. A statement of, and rationale for, the result **as to each allegation**, including:
 - *A determination regarding responsibility;*
 - *Any disciplinary sanctions the district imposes on the respondent; and*
 - *Whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided; and*
 - *The district's procedures and permissible bases for the complainant and respondent to appeal.*

Appeals Process

Appeals Process

A school must offer both parties the opportunity for 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 (i.e., Title IX Coordinator, investigator or decision-maker) had a conflict of interest or bias that affected the outcome of the matter.

Note: A school may add additional bases for appeals, offered equally to both parties.

Appeals Process

For any appeal filed, the district must:

- 1) Notify the other party;
- 2) Ensure that the decision-maker(s) for the appeal is not the same person who made the initial determination;
- 3) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- 4) Issue a written decision describing the result of the appeal and the rationale for the result; and
- 5) Provide the written decision simultaneously to both parties.



Retaliation

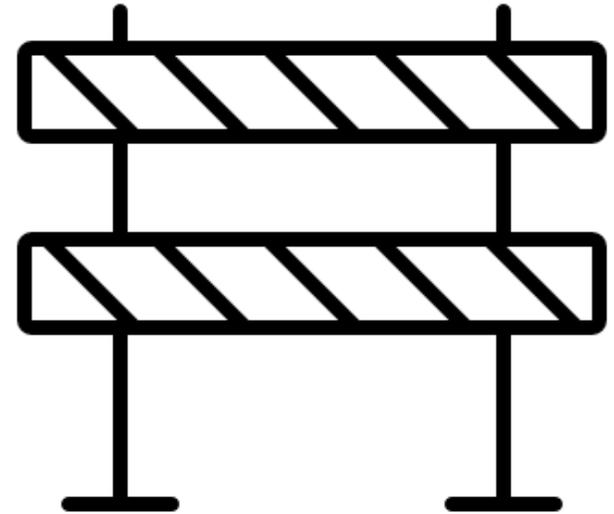
No district or other person may intimidate, threaten, coerce, or discriminate against any person because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.

Notice Requirements under Title IX

Each district must designate at least one employee to coordinate its efforts to comply with Title IX, and that employee must be referred to as the “Title IX Coordinator.”

The district must notify all applicants for admission and employment; students, parents or legal guardians of elementary and secondary school students; and employees of the “name or title, office address, electronic mail address, and telephone number of the employee or employees” designated as the Title IX Coordinator.

The district also must provide notice to the above-listed persons that the district does not discriminate on the basis of sex in education programs or activities that it operates, including admission or employment, and that inquiries may be referred to the Title IX Coordinator or the U.S. DOE’s Assistant Secretary for Civil Rights, or both. This non-discrimination statement and the contact information for the Title IX Coordinator must be prominently displayed on the district’s website and in each handbook and catalog.



Training

Training required for all staff on how to identify and report sexual harassment

Training required for all Title IX investigators, decision-makers, coordinators, and facilitators of an informal resolution to instruct on how to:

- be impartial and unbiased;
- objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence



Maintain for seven years every report and formal complaint of sexual harassment. Records to be maintained include:

- Investigative records;
- Disciplinary sanctions;
- Remedies;
- Appeals;
- Actions taken; and
- Supportive measures.

If complainant is not provided supportive measures, then the reasons why must be documented.

Document the basis for the school system's conclusion that its response was not deliberately indifferent.

Document that it has taken measures designed to restore or preserve equal access to the education program or activity.

A record of all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must also be maintained and published on the website.

Record Keeping

Title IX vs. Title VII



Title VII

It shall be an unlawful employment practice for an employer –

- 1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.”

Title IX vs. Title VII

Title IX is “substantially different from Title VII.”

The 2020 Title IX Regulations explicitly state that “[t]he obligations imposed by [Title IX] are independent of, and do not alter, obligations to not discriminate on the basis of sex imposed by Title VII of the Civil Rights Act of 1964.”

The Fourth Circuit has held that the rights provided to employees under Title IX are not preempted by Title VII, but Title IX discrimination claims should be interpreted in accordance with the principles governing Title VII.

Title IX vs. Title VII: Defining Sexual Harassment

Title IX

- “Unwelcome conduct that ... is so severe, pervasive, **and** objectively offensive that it denies a person equal access to the educational institution’s program or activity”

Title VII

- Sexual harassment is sufficiently severe, pervasive, **or** objectively offensive” that it creates, or is certain to create, “an intimidating, hostile, or offensive working environment.”

Not obligated to act unless there is “actual knowledge” of the allegations of sexual harassment

May investigate only after the filing of a written, formal complaint by the complainant or the Title IX Coordinator

Jurisdiction is limited to alleged sexual harassment that occurs within an education program or activity (over which the recipient exercises substantial control over both the respondent and the context in which the harassment occurs)

May be liable if the response to the allegations of sexual harassment is “deliberately indifferent”

Employer's Obligations Under Title IX

Employer's Obligations Under Title VII

May be liable if employer has actual or constructive knowledge of sexual harassment;

No requirement that the conduct occur within an educational program or activity;

Obligated to investigate and respond to allegations, which may be raised formally or informally, in writing or verbally

May be liable for acts of sexual harassment if the conduct occurred in a context that was “work-related”

May be liable if it is shown that recipient failed to take prompt and appropriate corrective action (exercise “reasonable care”);

May be strictly liable if an employee is sexually harassed by his or her supervisor

Title IX vs. Title VII: Other Differences

Title IX does **not** require that an employee exhaust their administrative remedies; The employee may use the District's grievance process, may file a complaint with OCR, or may file suit in federal district court

Compensatory damages available;
Loss of federal funding

Title VII does require an employee exhaust their administrative remedies by filing a Charge of Discrimination with EEOC

Certain compensatory damages available

Defining “Sex”

What does “sex” and “on the basis of sex” mean in the Title VII and Title IX context?

Important Sex Discrimination Cases

Meritor Savings Bank v. Vinson (1986)

- U.S. Supreme Court holds that sexual harassment resulting in hostile work environment prohibited as disparate treatment under Title VII

Price Waterhouse v. Hopkins (1989)

- U.S. Supreme Court holds that sexual stereotyping can be a form of prohibited sex discrimination
- “[G]ender must be irrelevant to employment decisions”

Both cases laid the groundwork for later cases involving discrimination on the basis of sex, sexual orientation, and gender identity

Important Sex Discrimination Cases

Gerdom v. Continental Airlines, Inc. (9th Cir. 1983)

- Airline had weight restrictions for female “flight hostesses” but not for males in similar positions
- Not legal under Title VII

Carroll v. Talman Fed. Sav. & Loan Assoc. (7th Cir. 1980)

- Females required to wear uniforms, but males could wear business suits
- Not legal under Title VII

Bostock v. Clayton County

Title VII protects employees against discrimination based on sexual orientation **and** gender identity

Companion Case: *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*

Involved transgender employee who was terminated as the employee was starting to transition

Violation of Title VII (discrimination on the basis of sex)

Bostock v. Clayton County

“An employer who fired an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.”

-Justice Gorsuch

Bottom Line: An employer may not, under Title VII, discriminate against an employee based upon sexual orientation **OR** transgender status.

Remember: This includes discrimination in the “terms and conditions” of employment and also includes sexual stereotyping.

NOW
ave Now.

Citizen Times

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NEWS

Trial set: Asheville female firefighter's discrimination case against city moves forward

 **Joel Burgess**
Asheville Citizen Times

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Ponder v. City of Asheville 20-CV-00330

Former firefighter filed suit in federal district court against her supervisor and the City of Asheville for sex discrimination

On motion to dismiss, federal judge dismissed claims against the employee's former supervisor, saying he could not be held responsible under Title VII because the Fourth Circuit has said "supervisors are not liable in their individual capacities for Title VII violations."

However, the judge said that the City of Asheville, the supervisor's employer, could be held liable for his actions, which may have amounted to disparate treatment of the former employee based on her gender.

Recent Developments

Announced DOJ's interpretation that Title IX's prohibition on discrimination "on the basis of sex" includes discrimination on the basis of gender identity and sexual orientation

March 2021: Memorandum from DOJ

OCR stated that it will investigate allegations of discrimination on the basis of sexual orientation or gender identity in education programs or activities.

This includes "allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities."

June 2021: DOE Notice of Interpretation

April 2021: DOE Letter to Students, Educators, & Stakeholders

Outlines the steps DOE will take to carry out Exec. Order No. 14021, including: 1) immediate and comprehensive review of OCR guidance on LGBTQ+ issues; 2) plans for a public hearing to hear from interested parties of sexual harassment, including sexual violence, and discrimination based on sexual orientation and gender identity; 3) plans to issue a Q&A document about DOE's new Title IX Regulations; and 4) notice of anticipated rulemaking to amend those new Title IX Regulations

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Education

New Title IX rules set to assert transgender students

By [Laura Meckler](#)

March 30, 2022 at 6:00 a.m. EDT

Stay Tuned...

The U.S. Department of Education expects to publish proposed regulations governing not only sexual harassment but also explicitly stating that discrimination on the basis of sex includes discrimination “on the basis of sex stereotypes, sex-related characteristics (including intersex traits), pregnancy or related conditions, sexual orientation, and gender identity.”

Questions?