

**Title IX Team Training**



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## Title IX

- Prohibits discrimination “on the basis of sex” in education programs or activities that receive federal financial assistance.
  - 20 U.S.C. § 1681(a)
- Title IX applies to the entire school district.
  - 20 U.S.C. § 1687(2).

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### Title IX Over the Years

- Enacted in 1972.
- *Franklin v. Gwinnett County Pub. Schs.* (U.S. 1992)
  - An implied private right of action for money damages could be sustained where a teacher allegedly sexually abused a student.

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### Title IX Over the Years

- *Gebser v. Lago Vista Indep. Sch. Dist.* (U.S. 1998)
  - Damages for sexual harassment of a student by a teacher can only be recovered where:
    - An official who has authority to institute corrective measures on the district's behalf
    - Has actual notice of the teacher's misconduct, and
    - Acts deliberately indifferent to such misconduct

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### Title IX Over the Years

- *Davis v. Monroe County Bd. of Educ.* (U.S. 1999)
  - A private damages actions may be sustained against a school board in the case of student-on-student harassment, BUT only where:
    - The District acts with deliberate indifference to known acts of harassment in its programs or activities; AND
    - The harassment is so severe, pervasive, AND objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

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 **The New Regulations**



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"Our Legal Department has seen substantial growth over the last quarter, producing 21% more mumbo and 17% more jumbo."

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 **The New Regulations**

- Effective August 14, 2020
- Focus on schools' response to allegations of sexual harassment
- Provide specific procedures and require specific personnel
  - BUT not all alleged Title IX violations are subject to new procedures

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 **What hasn't changed?**

- Athletic opportunities for boys and girls
  - Equal accommodation (opportunities)
  - Equal treatment (qualitative experiences)
  - 3-part test from courts and OCR

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### What hasn't changed?

- General antidiscrimination and accommodation request issues, such as
  - Gender identity and sexual orientation
    - Courts: transgender students win
  - Third-party misconduct
  - Unequal treatment allegations against the institution that are not sex harassment

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### Responses Under the New Regulations

- Three Categories of Complaints/Allegations
  - Sex discrimination NOT involving sexual harassment
  - Sex harassment WITHOUT formal complaint
  - Sex harassment WITH formal complaint

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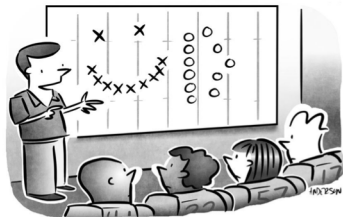
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### The TIX Training Game Plan



"OK, it's not that effective, but what a crowd pleaser!"

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## Game Plan

- What is sexual harassment under Title IX?
- What is the timeline for the process?
- What do the new regs require for administering Title IX generally?
- How should schools respond to complaints?
- How do we investigate complaints?
- How do we make decisions on responsibility?
- How do we avoid conflicts of interest and biases?
- How do students appeal?
- What confidentiality concerns do we have?
- How does special education factor into the Title IX process?

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## Title IX Team Training: Sexual Harassment




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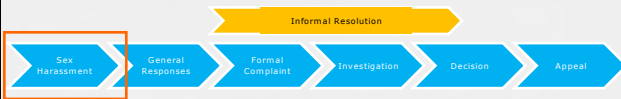
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## Overview of Grievance Process




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### Sexual Harassment

- Quid Pro Quo
- "Severe, Pervasive, AND Objectively Offensive"
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

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### Sexual Harassment

- "Quid Pro Quo" – district employee conditioning the provision of a district aid, benefit, or service on an individual's participation in unwelcome sexual conduct

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### Sexual Harassment

- 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 district's education program or activity (*Gebser/Davis*)

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**Sexual Harassment:  
Severe, Pervasive, and Objectively Offensive**

- *Doe v. Univ. of Kentucky* (6th Cir. 2020)
  - Severe = something more than just juvenile behavior;
  - Pervasive = multiple incidents of harassment; and
  - Objectively offensive = behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively.

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**Examples of S, P, and OO**

- Each time female kindergarten student wears a dress to school, high school student on bus bullies kindergartner into lifting her skirt, pulling down her pants, and spreading her legs.
  - *Fitzgerald v. Barnstable Sch. Comm.* (1st Cir. 2007)
- Head soccer coach persistently and openly pried into and discussed the sex lives of his players and made sexually charged comments, creating a hostile environment in the women's soccer program.
  - *Jennings v. Univ. of N.C.* (4th Cir. 2007)

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**S, P, and OO**

- Even if some conduct is not motivated by sex, when it is part of a course of conduct that involves sexualized acts, it can be S, P, and OO
- Anything involving touching the private body parts or underwear of the victim or aggressor can lead to S, P, and OO
- Even if initial incident occurs outside of P&A, environment at school can trigger school's duty to respond

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### Examples of NOT S, P, and OO

- One incident of non-consensual kissing
  - *Doe v. Miami Univ.* (6th Cir. 2018)
- One incident of a male student briefly flicking the chest of female complainant (and complainant kneeling him in the groin in response)
  - *Sanchez v. Brawley Elem. Sch. Dist.* (9th Cir. 2018)
- Two isolated instances—one student touching the plaintiff’s shoulder and another student touching the plaintiff’s breast—which ceased immediately after they occurred
  - *Adusumilli v. Ill. Inst. of Tech* (7th Cir. 1999)

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### Sexual Harassment: Sexual Assault

- **Sexual Assault**
  - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation

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### Sexual Harassment: Sexual Assault

- **Sex Offenses, Forcible**
  - Any sexual act directed against another person, without the **consent** of the victim including instances where the victim is incapable of giving consent

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### Definition of "Consent"

- The willingness in fact for conduct to occur.
- An individual may be incapable of providing consent to some or all sexual conduct or activity.
  - E.g., Age, incapacity, disability, lack of information, or other circumstances.

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### Definition of "Consent"

- Neither verbal nor physical resistance is required to establish that an individual did not consent.
- Consider the totality of the circumstances in determining whether there was consent for any specific conduct.
- Consent may be revoked or withdrawn at any time.

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### Sexual Harassment: Forcible Sexual Assault

- **Rape** (Except Statutory Rape)
  - The carnal knowledge of a person,
  - Without the consent of the victim,
    - Including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

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**Sexual Harassment:  
Forcible Sexual Assault**

- **Sodomy**
  - Oral or anal sexual intercourse with another person
  - Without the consent of the victim,
    - Including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity

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**Sexual Harassment:  
Forcible Sexual Assault**

- **Sexual Assault With An Object**
  - To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person
  - Without the consent of the victim
    - Including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity

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**Sexual Harassment:  
Forcible Sexual Assault**

- **Fondling**
  - The touching of the private body parts of another person
  - For the purpose of sexual gratification
  - Without the consent of the victim
    - Including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity

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 **Sexual Harassment:  
Forcible Sexual Assault**

- **Fondling?**
  - *Gabrielle M. v. Park Forest-Chicago Heights* (7th Cir. 2003)
    - Kindergartners touching classmates private parts
    - Unaware of sexual nature of conduct
    - Probably not for the purpose of sexual gratification
    - Probably not sexual assault

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 **Sexual Harassment:  
Forcible Sexual Assault**

- **Fondling?**
  - *Doe v. Dardanelle Sch. Dist.* (8th Cir. 2019)
    - High school setting
    - Reaching up girl's shorts and touched outside of her "private parts."
    - Grabbing girl's breast over her shirt.
    - Probably for purposes of sexual gratification
    - Probably sex assault
    - Notice different outcome from prior standard

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 **Sexual Harassment:  
Non-forcible Sexual Assault**

- **Sex Offenses, Non-Forcible** (Except Prostitution Offenses)
  - Unlawful, non-forcible sexual intercourse.

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 **Sexual Harassment:  
Non-forcible Sexual Assault**

- **Incest**
  - Non-Forcible sexual intercourse
  - Between persons who are related to each other within the degrees wherein marriage is prohibited by law

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 **Sexual Harassment:  
Non-forcible Sexual Assault**

- **Statutory Rape**
  - Non-Forcible sexual intercourse with a person
  - Who is under the statutory age of consent

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 **Sexual Harassment:  
Dating Violence**

- Violence committed by a person—
  - who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - The length of the relationship.
    - The type of relationship.
    - The frequency of interaction between the persons involved in the relationship.

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### Sexual Harassment: Domestic Violence

- Includes felony or misdemeanor crimes of violence committed by a
  - Current or former spouse or intimate partner of the victim,
  - Person with whom the victim shares a child in common,
  - Person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,

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### Sexual Harassment: Domestic Violence

- Includes felony or misdemeanor crimes of violence committed 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
  - 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.

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### Sexual Harassment: Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - Fear for his or her safety or the safety of others; or
  - Suffer substantial emotional distress.

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**KSB**  
SCHOOL DISTRICT

## Overview of Grievance Process

Informal Resolution

Sex Harassment	General Responses	Formal Complaint	Investigation	Decision	Appeal
<ul style="list-style-type: none"> <li>Actual Knowledge</li> <li>Definitions of sex harassment</li> <li>Education Program or Activity</li> </ul>	<ul style="list-style-type: none"> <li>Supportive Measures</li> <li>No Discipline Until Grievance Process is Complete</li> <li>Emergency Removal?</li> <li>Administrative Leave?</li> </ul>	<ul style="list-style-type: none"> <li>Respondent Presumed Not Responsible</li> <li>Notices from TixC</li> <li>Evaluate Dismissal of Complaint</li> <li>All members of Tix Team are trained</li> </ul>	<ul style="list-style-type: none"> <li>Min 10 Days</li> <li>Burden on District</li> <li>Parties Can Inspect and Review All Evid.</li> <li>Written Response to Draft Report</li> </ul>	<ul style="list-style-type: none"> <li>Min 10 days</li> <li>Allow Exchange of Written Questions (w/ some limits)</li> <li>Legal Relevance</li> <li>Written Determination</li> <li>Determine/Recommend Consequences</li> </ul>	<ul style="list-style-type: none"> <li>Limited Grounds for Appeal</li> <li>No Bias/Conflicts</li> <li>Parties Can Submit Written Statement</li> <li>Written Decision on Appeal</li> </ul>

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**KSB**  
SCHOOL DISTRICT

## Welcome to School District 1776



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**KSB**  
SCHOOL DISTRICT

## District Buildings

		
Patriot Elementary School	Minuteman Middle School	Lincoln High School

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### Title IX Parties

- Complainant
  - An individual who is alleged to be the **victim** of conduct that could constitute sexual harassment
  - Must be an individual participating or attempting to participate in district's programs at the time of formal complaint
    - Formal complaint may be lodged by complainant (or parent/guardian) or Title IX Coordinator

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### Title IX Parties

- Respondent
  - An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
  - Recipient has discretion to dismiss a formal complaint where the respondent is not enrolled or employed by the recipient
    - 34 CFR § 106.45(b)(3)(ii)

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### Title IX Roles

- Title IX Coordinator
- Investigator
- Decision Maker
- Appellate Decision Maker
- Informal Mediator

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 **Title IX Coordinator**



**Activities Director Dolley Madison**

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 **Title IX Coordinator (TixC)**

- Each recipient must designate and authorize at least one **employee** to coordinate its efforts to comply with its responsibilities under Title IX
- Responsible for:
  - Overseeing Title IX compliance
  - Receiving formal complaints
  - Ensuring any remedies are carried out
- May serve as investigator in grievance process
- May **not** serve as decision-maker or appellate decision-maker

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**Who can serve as Title IX Coordinator?**

- Must be an "employee" 34 C.F.R. § 106.8(a)
- Should report directly to board or superintendent
- Should be able to have input into policies
- Should be able to conduct fair and efficient investigations
- Should be able to document investigations and other compliance efforts by the school
- Should be invested in gender equality

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### Core Responsibilities of Title IX Coordinators

- Develop and maintain a working knowledge of Title IX and relevant state laws
- Monitor school district's compliance with legal requirements
  - Ensure school district has required policies and procedures in place
  - Conduct evaluations of school compliance
  - Arrange for training for staff and students
  - Provide and update resources
  - Ensure prompt and effective processing of complaints

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### Investigator



Guidance Counselor Aaron Burr

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### Investigator

- New role for sex harassment only
- Responsible for investigation of formal complaint
- Must follow regulatory requirements in conducting investigation
- Not required to be an employee
- May be Title IX Coordinator
- May not be decision-maker or appellate decision-maker

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**KSB**  
SCHOOL BOARD

## Decision-Makers



**High School  
Principal Thomas  
Jefferson**



**Elementary  
Principal Sally  
Hemmings**



**Middle School  
Principal John  
Adams**

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**KSB**  
SCHOOL BOARD

## Decision-Maker

- Again, new role for sex harassment only
- Issues written determination in grievance procedure after receiving investigative report from investigator and facilitate opportunity for parties to submit questions
- Not required to be an employee
- May not be Title IX Coordinator, Investigator, and Appellate Decision-Maker
- Recommended that you align decision-maker role with similar roles in general disciplinary processes

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**KSB**  
SCHOOL BOARD

## Appellate Decision-Maker



**Superintendent George Washington**

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### Appellate Decision-Maker

- For sex harassment only: recipient must offer both parties an appeal on specific bases
- For other Title IX issues: appellate decision-maker is still a good idea
- Appellate decision-maker not required to be an employee
- May not be Title IX Coordinator, Investigator, or Decision-Maker

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### Hypothetical

- Alexander Hamilton is in his senior year at Lincoln High School. His favorite coach is the assistant hockey coach, Ms. Abigail Adams.
- Dolley Madison is the Activities Director and TixC and has arranged for all staff, including Coach Adams, to be trained in recognizing sex harassment.
- Alex is dating Maria Reynolds and the pair is elected homecoming King and Queen. After the dance, Coach Adams hears rumors that "something bad" happened between them in Alex's truck in the parking lot after the dance.
- Maria has Coach Adams for English, a class in which students are required to journal. In her journal Maria writes that Alex forced her to have sex with him in his truck but she doesn't mention where.

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### Hypothetical

- Does Coach Adams have to report?
  - Can she pull Alex and Maria into her room to ask them what is going on?
  - Can she call Alex's parents?
- If so, to whom?
- After getting the report, what does Dolley Madison do?
  - Can she talk things over with Aaron Burr, the guidance counselor?
  - Can she talk things over with Thomas Jefferson, the high school principal?
  - Can she talk things over with George Washington, the superintendent?
- If Dolley files a TIX complaint, who does what?
  - Burr - investigation
  - Jefferson - wait for report
  - Washington - wait for possible appeal

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### Title IX Team Training: Administration of the Title IX Program



"The buck does stop here. Then the buck and I have some coffee, chat for a bit, and I send it down to Simmons. Let him deal with it."

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### Administration Overview

- Policy Requirements
- Notice Requirements
- Publication Requirements
- Training Requirements
- Documentation and Record-Keeping
- Complaints of Harassment/Discrimination not Sexual Harassment

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### Heavy is the Head...

- Each recipient designates at least one Title IX Coordinator to "coordinate its efforts to comply with its responsibilities" under the regulations
- Explicitly mentioned
  - Ensure grievance procedure is followed
  - Respond to harassment, complaints and inquiries
  - Coordinate provision of supportive measures
  - Implement remedies
- Implicit
  - Coordinate to fulfill all the other obligations (training, policies, notices, etc.)

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### Policy Requirements

- Must have Title IX policy prohibiting discrimination on the basis of sex in any education program or activity it operates, and that it is required by Title IX not to discriminate in such a manner
  - Policy should specify that requirement not to discriminate extends to admission and employment
  - Should state that inquiries about Title IX may be referred to Coordinator or assistant secretary
    - 34 C.F.R. § 106.8(b)(1)

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### Grievance Procedures

- Required to adopt "grievance procedures"
  - Not necessarily in "policy" but we recommend it
- Grievance procedures must:
  - Provide for the prompt and equitable resolution of student and employee complaints alleging **any** action that would be prohibited by this part
    - Think general complaint process
  - Provide processes that comply with § 106.45 to address formal complaints

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### Notice Requirements

- Provide notice of:
  - Title IX Policy
  - Grievance Procedures
    - Including how to file a complaint
    - Including processes undertaken in response to complaint
  - Notice of nondiscrimination
    - Including extension to admission/employment
    - Including ability to make inquiries to coordinator and ED Assistant Secretary
  - Notice of designated coordinator and contact information

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## Notice Requirements

- Notices must be provided to:
  - Applicants for admission and employment
  - Students
  - Parents or legal guardians of elementary and secondary school students
  - Employees
  - All unions or professional organizations holding collective bargaining or professional agreements with the recipient

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## Handbooks and Catalogs

- Handbooks and catalogs must prominently display:
  - Grievance procedures
    - Including how to file a complaint
    - Including processes undertaken in response to complaint
  - Notice of nondiscrimination
    - Including extension to admission/employment
    - Including ability to make inquiries to coordinator and ED Assistant Secretary
  - Notice of designated coordinator and contact information

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## Website

- Website must **prominently display** (i.e., its own page)
  - Grievance Procedures
    - Including how to file a complaint
    - Including processes undertaken in response to complaint
  - Notice of nondiscrimination
    - Including extension to admission/employment
    - Including ability to make inquiries to coordinator and ED Assistant Secretary
  - Notice of designated coordinator and contact information
- Website must have available ALL materials used to train TIX Coordinators, investigators, decision-makers, and informal resolution facilitators
- We recommend including a link to submit complaint

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### Be Consistent

“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.”

- 34 C.F.R. § 106.8(b)(2)(ii)

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### Training Requirements

- Title IX Coordinator, investigator, decision-maker and any informal resolution facilitator must receive training on:
  - Definition of sexual harassment in § 106.30
  - Scope of the recipient’s program or activity
  - How to conduct an investigation and grievance process – including hearings, appeals, and informal resolution processes
  - How to serve impartially and avoid prejudgment, conflicts, and bias

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### Training Requirements

- Decision-makers must receive 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
- Investigators must 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

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### Training Requirements

"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."

- 34 C.F.R. 106.45(1)(iii)

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### Documentation and Record Keeping

- Must maintain for a period of seven years records of:
  - Each sexual harassment investigation including any determination regarding responsibility, 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;
  - Any appeal and the result therefrom;
  - Any informal resolution and the result therefrom; and
  - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process

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### Documentation and Record Keeping

- Must maintain for a period of seven years records of:
  - Any action in taken in response to a report or formal complaint of sexual harassment
    - Document the basis for its conclusion that its response was not deliberately indifferent
    - Document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
    - If no supportive measures provided, document the reasons why such a response was not clearly unreasonable in light of the known circumstances

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### Clarifications

"Any record that the recipient creates to investigate an allegation, regardless of later dismissal or other resolution of the allegation, must be maintained for seven years. Therefore, recipients must preserve all records, even those records from truncated investigations that led to no adjudication because the acts alleged did not constitute sex discrimination under Title IX and the formal complaint (or allegation therein) was dismissed. The Department also wishes to clarify that the date of the record's creation begins the seven year retention period."  
• 85 FR 30026

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### Title IX Team Training: Responding to ALL Allegations of Sex Harassment



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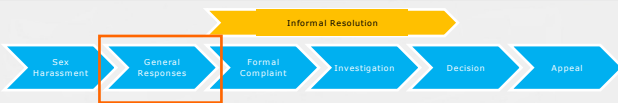
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### Overview of Grievance Process



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 **General Response to ALL Allegations of Sexual Harassment**  
(with or without formal complaint)

- If the district has:
  - actual knowledge
  - of sexual harassment
  - in an education program or activity
  - against a person in the United States
- The district must respond
  - promptly
  - in a manner that is not deliberately indifferent

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 **General Response to ALL Allegations of Sexual Harassment**  
(with or without formal complaint)

- District is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances
- Rejects the "known or reasonably should have known" standard imposed by rescinded guidance

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 **Actual Knowledge**

- Notice of **sexual harassment** or allegations of **sexual harassment** to:
  - Title IX Coordinator
  - Any official of the respondent who has authority to institute corrective measures
  - Any employee

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 **Actual Knowledge**

- **Actual knowledge** will not be imputed to the district *based solely* on vicarious liability or constructive notice
- No **Actual Knowledge** when the only district employee with **actual knowledge** is the **respondent**

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 **Education Program or Activity**

- Includes locations, events, or circumstances over which the district exercised
  - (1) substantial control over both the respondent, AND
  - (2) the context in which the sexual harassment occurs
- Electronic or in person
- Does not say "on campus" or "off campus"

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 **Duty to Respond?**

- Alexander Hamilton (HS Student)
- Maria Reynolds (HS Student)
- After the dance, Coach Adams hears rumors that "something bad" happened between them in Alex's truck in the parking lot after the dance
- Maria's Journal: Alex forced her to have sex with him in his truck but she doesn't mention where

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**KSB**  
SCHOOL LAW

### Duty to Respond?



- Actual Knowledge ✓
- Allegations of Sexual Harassment ✓
- Education Program or Activity ?
- In the U.S. ✓

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**KSB**  
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### Duty to Respond?



- Truck in school parking lot ✓
- Truck parked in cornfield outside of county, unrelated to any school activity ✗
- Truck parked on side of road when students are returning from golf practice ✓

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**KSB**  
SCHOOL LAW

### General Response to ALL Allegations of Sexual Harassment (with or without formal complaint)

- Title IX Coordinator MUST
  - Promptly contact the complainant to discuss the availability of supportive measures
    - Consider the complainant's wishes with respect to supportive measures
    - Supportive measures are available whether a formal complaint is filed or not
  - Explain to the complainant the process for filing a formal complaint

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 **General Response to ALL Allegations of Sexual Harassment**  
(with or without formal complaint)

- Must treat parties equitably:
  - Offer supportive measures to complainant
  - Follow the formal grievance process **before imposing any disciplinary sanctions against respondent**
- Until the end of the grievance process,
  - **No Student Discipline**
  - **No Adverse Employment Action**

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 **General Response to ALL Allegations of Sexual Harassment**  
(with or without formal complaint)

- Respondents are presumed to be "not responsible for the alleged conduct until a determination regarding responsibility is made *at the conclusion of the grievance process.*"
  - 34 C.F.R. § 106.45(b)(1)(iv) (emphasis added)

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 **Supportive Measures**

- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available, and without fee or charge to the **complainant** or the **respondent**
- Offered before or after the filing of a **formal complaint** or where no **formal complaint** has been filed

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 **What CAN the school do immediately?**

- Emergency Removal
  - BUT, district MUST
    - undertake an individualized safety and risk analysis,
    - 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, and
    - provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.
  - Doesn't modify rights under IDEA, Section 504, or the ADA

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 **What CAN the school do?**

- Administrative Leave for Non-Student Employees
  - Doesn't modify rights under Section 504 or the ADA
  - Check state law processes for forced leaves of employees

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 **Back to Lincoln HS** 

- Coach/Teacher Adams reports allegations of sexual harassment to Title IX Coordinator Dolley Madison (GOOD!)

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**Back to Lincoln HS**

- Can Title IX Coordinator Dolley Madison
  - Offer counseling to Maria ✓
  - Extend Maria's deadlines for coursework ✓
  - Grant Maria a leave of absence ✓
  - Suspend Alexander during preliminary fact-gathering ⓧ
  - Emergency remove Alexander ?
  - Exclude Alexander from Maria's calculus class ?

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**Title IX Team Training: Formal Complaints**

"Stop calling it a 'head scratcher!' I know it's a 'head scratcher!' Stop saying 'head scratcher!!!"

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**Overview of Grievance Process**

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### Formal Complaint

- A document filed by a **complainant** or signed by the Title IX Coordinator alleging **sexual harassment** against a **respondent** and requesting that the district investigate the allegation of **sexual harassment**

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### Formal Complaint

- May be filed with the Title IX Coordinator in person, by mail, by email, and "by any additional method designated" by the district

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### Formal Complaint

- Is a document or electronic submission that includes **complainant's** digital or physical signature or otherwise indicates that the **complainant** is the person filing the **formal complaint**
- A Title IX Coordinator who signs the **complaint** IS NOT a **complainant** or a party

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 **Formal Complaint**

- At the time of filing, a **complainant** must be participating in or attempting to participate in the district's education program or activity
- September 4, 2020 OCR Q & A

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 **OCR Q & A: Question 5  
September 4, 2020**

- "If a complainant either withdraws from school because of sexual harassment and then files a complaint, or files a complaint but then withdraws as a result of the sexual harassment or stress of the grievance process, how would the regulations affect the complainant's ability to pursue a formal complaint?"

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 **OCR Q & A: Answer 5  
September 4, 2020**

- Leave of Absence
  - May still be enrolled
  - May intend to re-apply after LOA
- "By way of further example, a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is 'attempting to participate' in the recipient's education program or activity."

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### OCR Q & A: Answer 5 September 4, 2020

- TixC may also sign formal complaint regardless of whether complainant is "participating or attempting to participate" in the school's education program or activity
- TixC's decision is evaluated under the deliberate indifference standard
  - Whether the decision was clearly unreasonable in light of the known circumstances

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### Formal Complaints Hypo

- Alexander Hamilton is in his senior year at Lincoln High School. His favorite coach is the assistant hockey coach, Ms. Abigail Adams
- Dolley Madison is the Activities Director and TixC and has arranged for all staff, including Coach Adams to be trained in recognizing sex harassment
- Coach Adams would regularly text with her players to communicate regarding practices and when the rink would be open
- In the middle of the season in January, Alexander abruptly decides to drop out of school the day after he turns 18
- In February, he sends the following text message to Coach Adams:
  - Hey Coach, I wanted to tell you I'm sorry I quit right after the season. I just didn't think I could do school anymore. My ex-girlfriend Maria Reynolds and I broke up and she got really upset when I ended it. She was a bit needy and I just couldn't do it anymore, but she got way worse after we broke up. She has stalked me on snap and insta ever since, saying she's watching me and that she can't wait for me to come back to school so we can get back together. It really freaked me out the way she said some stuff and I just couldn't come to school anymore. I'm sorry

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### Is this a "formal complaint?"

- Is a document or electronic submission that includes **complainant's** digital or physical signature or otherwise indicates that the **complainant** is the person filing the **formal complaint**
  - Here: no signature, no request for action
  - Probably not a "complaint"

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### Is this "Sexual Harassment?"

- Remember: 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 district's education program or activity (*Gebser/Davis*)

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### What should Abigail Adams do?

- Benefits and costs of initiating a complaint
  - Complaint triggers new TIX procedures
  - No complaint: has Maria violated code of conduct?
  - Our advice: probably file

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### Formal Complaints Hypo

- What if Alex's text asks Coach Adams to help him come back to school?
- What if Alex's mom is the one who reaches out to Coach Adams?
- What if Alex was still enrolled?
- What if Alex hadn't texted Coach Adams, but she saw that he posted this on Instagram?
- What if Maria posts nasty things about Alex on her Snapchat story and Coach Adams sees the story?
- What if Coach Adams doesn't say anything to AD Madison?

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### Title IX Coordinator's Role in Responding to Formal Complaint

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### Overview of Grievance Process

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### Title IX Coordinator's Role in Responding to Formal Complaint

- Title IX Coordinator
  - Posting required notices
  - Receive formal complaints
  - Consider factors for dismissal

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**KSB SCHOOL LAW**

## Required Notices During Grievance Process

- Before Investigation Begins-
  - Initial notice of investigation to *BOTH parties*
    - As soon as practicable after formal complaint received
- After Dismissal
  - Notice of Dismissal to both parties
- During Investigation
  - Notice of Interview to parties
  - Notice of Evidence to Parties (from investigator)

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**KSB SCHOOL LAW**

## When to Dismiss?



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"Counsel, please advise your client to knock off the smirking and conspicuous winking while entering his plea."

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**KSB SCHOOL LAW**

## Title IX Coordinator's Role— When to Dismiss?

- District ***must*** dismiss the complaint if the allegations:
  - Would not constitute sexual harassment even if proved
  - Did not occur in the district's education program or activity
  - Did not occur against a person in the United States

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### Title IX Coordinator's Role— When to Dismiss?

- District **may** dismiss if
  - Complainant requests (in writing to TixC) to withdraw the formal complaint\*\*;
  - Respondent is no longer enrolled or employed by the district
  - Specific circumstances prevent district from gathering evidence sufficient to reach a determination

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### Title IX Coordinator's Role— When to Dismiss?

- If the district dismisses, must provide notice of dismissal to both parties
- Notice must contain rationale for dismissal
- Whether it was mandatory or permissive

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### Title IX Coordinator Response Hypo— More Trouble at Lincoln High

- Title IX Coordinator Dolley Madison receives an email regarding sexual harassment
  1. Angelica Church, 17, alleges Mr. Franklin, a physics teacher, slapped her butt last year when she saw him at a restaurant.

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### Title IX Coordinator Response Hypo— Angelica and Mr. Franklin

- Give initial notices to both parties first
- Dismissal? Go through the steps
  - Would it constitute sex harassment if proved? Probably (see fondling definition).
- Educational Program or Activity?
  - Happened off-campus, outside school hours, not as part of any sanctioned activity
- Dismissal probably required (might want to consider when deciding to renew contract, though)



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### Investigations



"You're not getting warmer. You're not getting colder either. You gave up like a half hour ago, didn't you."

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### Overview of Grievance Process



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### Investigator



Guidance Counselor Aaron Burr

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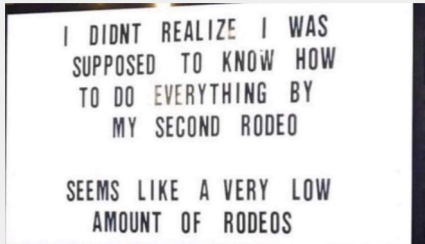
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### Investigation Best Practices



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### The Investigation

- Must be *prompt, thorough, impartial, and without bias*
- Treat all with respect and dignity
- Make no assumptions
- At a minimum should include interviews with the victim, the alleged harasser, and anyone else who can provide relevant information
- DOCUMENT, DOCUMENT, DOCUMENT

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### The Investigation

- Coordinate investigation with law enforcement or others as necessary or appropriate
  - School has the legal obligation to conduct a prompt investigation
  - 34 C.F.R. § 106.45 includes "law enforcement activity" as a "good cause" to delay "reasonably prompt" timelines
- Keep criminal, child abuse, and professional reporting obligations in mind

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### Understand the Claim

- Conduct a thorough interview of the complainant and identify specific allegations made
- Identify specific provisions of law or parts of school policy alleged to have been violated
- Conduct a thorough interview of the complainant and identify defenses

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### Create a Plan

- Written list of witnesses
- Written list of questions
- Written list of documents




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### Time for investigation?

- Review time line and plan accordingly
  - In addition to time taken to actually compile evidence, the parties must have **at least ten days** to review all evidence before a decision can be made by the decision maker
- Time limit?
  - Regulations say the grievance process must have "reasonably prompt time frames for conclusion of the grievance process"
  - Investigation should take less time if facts are straightforward

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### Keep Parties Informed

- No specific requirements to update parties at every step (other than notice of interviews and submission of evidence at end of investigation)
- However, keeping parties informed can make the process run more smoothly

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### Credibility determinations and decision-making

- Credibility determinations
  - Cannot be made based on status of complainant, respondent, or witness
  - Generally left to the D-M, especially when they impact responsibility determinations
  - Investigator should report facts regarding physical behavior and indicators of reliability and truthfulness during interviews
- Decision-making left to decision maker
  - Investigator should include facts that would bear towards responsibility or non-responsibility, but notes and report should not state any determination by the investigator

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