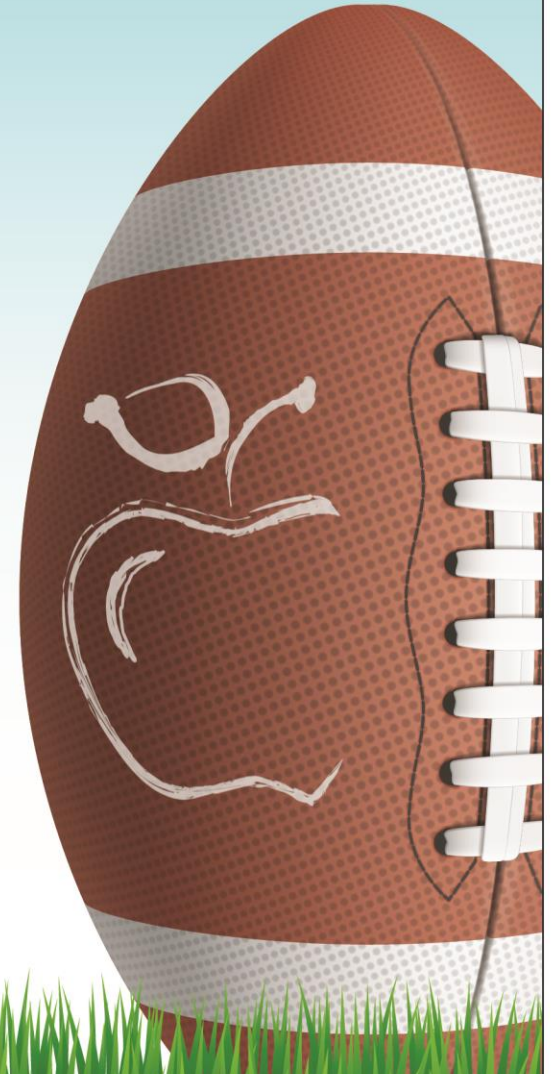


TACKLING TITLE IX:

**Understanding, Investigating
and Deciding Title IX Issues to
Avoid Getting Sacked!**



December 21, 2020

Flag on the Field!

- Today we are necessarily speaking in generalities rather than specifics
- The information provided is not legal advice
- Information in this presentation may quickly become outdated
- Always research original sources of authority and update this information to ensure accuracy when dealing with a specific matter
- Do not act or rely upon the information contained in this presentation without seeking the advice of an attorney

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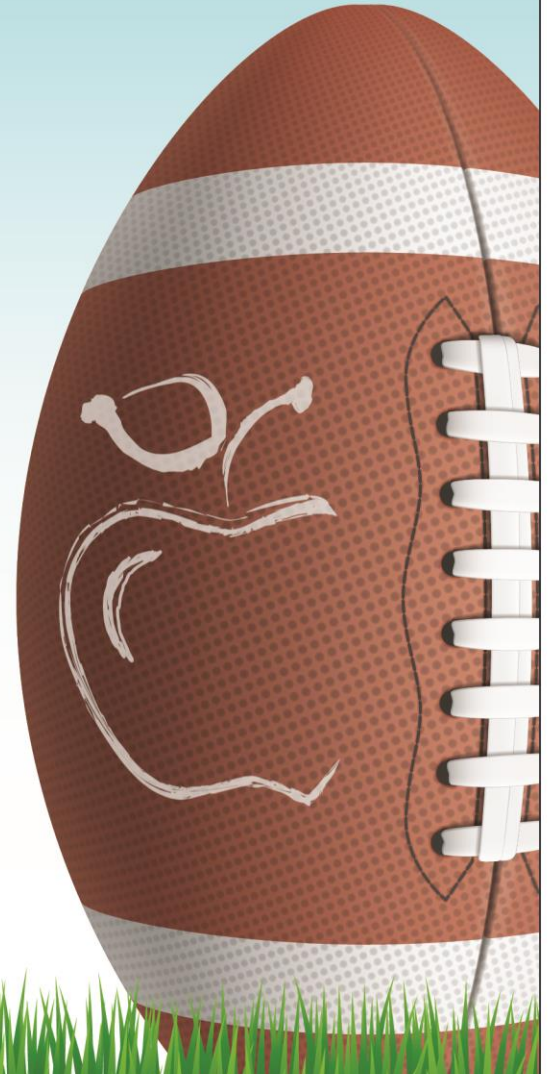
The Playbook

- History of Title IX
- The scope of Title IX related to educational program or activity
- Definitions of sexual harassment and other terms
- Roles of the Investigator and Decision-maker and how to serve impartially
- The Investigative Process
- The Decision-making Process
- Issues of relevance
- Appeals and informal resolution process

Our Understandings for the Day

- This is not as new as it may seem - do not panic!
- We want you to get your questions answered – feel free to speak up when you have questions.
- We know you are busy. If you have to drop off or come in and out, we understand. It's not like you are trying to have school in the midst of a pandemic.
- Have fun!

X's and O's



The Fundamentals of Title IX

Title IX, Education Amendments of (1972)

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

Evolution

- Title IX has significantly evolved from the language found in the Education Amendments of 1972.
- The expansion of Title IX is largely due to case law and significant guidance issued by the OCR in the last 20 plus years.

Evolution

- **U.S. Supreme Court Decisions:**
 - *Gebser v. Lago Vista Independent School District*, 1998: (a claim involving a teacher and student)
 - *Davis v. Monroe County Board of Education*, 1999: (student-on-student harassment)
- **2001: U.S. Dept of Education** publishes “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties”

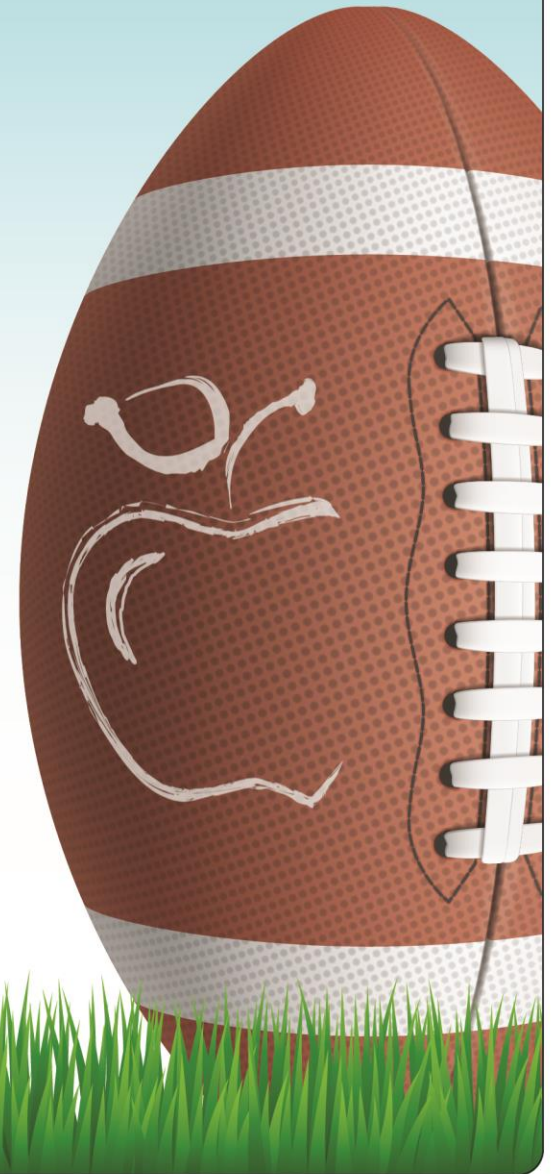
Evolution

- **2010: OCR** issues guidance on institutions' obligation to prevent sexual harassment and bullying and address complaints
 - Enforce state and federal rules
 - Harassment takes many forms
 - No requirement of intent
 - Includes hostile environment
 - If based on race, color, national origin, sex or disability, the harassment violates Title IX
- Numerous Dear Colleague Letters

2020 Title IX Regulations

- Released informally by the United States Department of Education on May 6, 2020 (34 CFR Part 106)
- Effective August 14, 2020
- Does NOT apply retroactively
- Requires training for Title IX Coordinators, Investigators, Decision-makers, Appellate Decision-makers, and Facilitators of informal resolution processes

Why Institute a New Defense Right Now?



Why Amend the Regulations?

- Effectuate Title IX's prohibition against sexual discrimination by requiring school districts to address sexual harassment as a form of sex discrimination in education programs and activities; and
- Obligate school districts to respond promptly and supportively to persons victimized by sexual harassment; and
- Resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process to victims and perpetrators; and
 - Effectively implements remedies for victims.

Why Amend the Regulations?

- Clarify and modify Title IX regulations regarding:
 - remedies the Department of Education may impose on school districts for Title IX violations; and
 - Title IX, Constitutional protections and other laws; and
 - the designation of a Title IX Coordinator to address sex discrimination including sexual harassment; and
 - The dissemination of non-discrimination policies and contact information for the Title IX Coordinator; and
 - Requiring the adoption of grievance process and procedures

Why Now?

- Original Title IX regulations became effective in 1975
- The original regulations focused on Title IX's non-discrimination mandate
- The original regulations predated federal courts' decisions regarding sexual harassment as a form of sex discrimination.
- Between 1975 and 2020, the Department of Education addressed sexual harassment through guidance documents and Dear Colleague letters.

Why Now?

- The Final Regulations:
 - Impose legally binding rules on school districts rather than best practices;
 - Adopt the United States Supreme Court's framework to address sexual harassment;
 - Provide clear guidance to school districts on how they must respond to allegations of sexual harassment while at the same time meeting requirements of constitution due process.
 - Provide specific meaning and definition to commonly used terms.

What are the Regulations Designed to do?

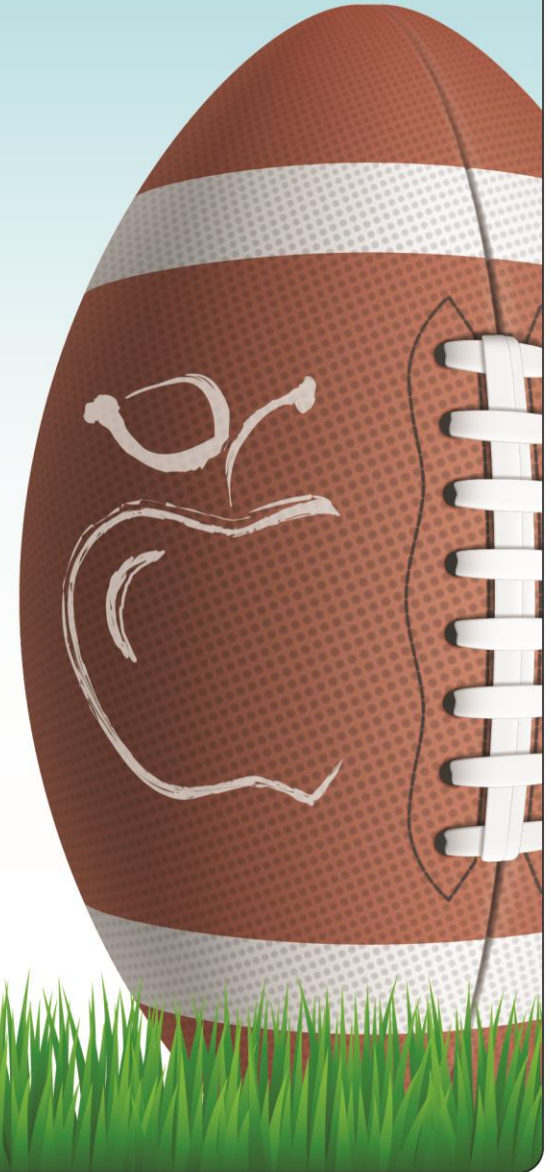
- Define conduct constituting sexual harassment for Title IX purposes;
- Specify conditions that activate a school district's obligation to respond to allegations of sexual harassment;
- Impose a general standard for the sufficiency of a response to those allegations by specifying requirements of a response;
- Specify when a grievance process to investigate and adjudicate allegations of sexual harassment; and
- Establish procedural due process requirements required in that grievance process to ensure a fair and reliable factual determination when a school district investigates and adjudicates a formal complaint of sexual harassment

What Title IX does and does not do

- Title IX ***is not*** “a ‘zero tolerance’ policy banning sexual harassment as such”
- Title IX ***does*** offer “effective protections to individuals against discriminatory practices, within the parameters set forth under the Title IX statute and Supreme Court case law.”
- Title IX ***does not*** preclude a school district from addressing the alleged misconduct under other provisions of the school district’s policies and procedures.

New Plays: Changes to the Definitions

34 C.F.R. 106.30(a)



Terms Defined by the Regulations

- Actual Knowledge
- Complainant
- Elementary and Secondary Schools
- Formal Complaint
- Postsecondary Institution
- Respondent
 - Sexual Harassment
 - Supportive Measures

Terms Defined by the Regulations

- A **Complainant** means an individual who is alleged to be a victim of sexual harassment
- A **Respondent** means any individual who is reported to be the perpetrator of sexual harassment
- Importantly, a person may be a **complainant**, or a **respondent**, even where no formal complaint has been filed and no grievance process is pending.

Terms Defined by the Regulations

- A **formal complaint** is a document that initiates a school district's grievance process. More about this later.
- A **formal complaint** is **not** required in order for a school district to
 - Have **actual knowledge** of sexual harassment or allegations of sexual harassment
 - Activate a school district's obligation to respond promptly, including by offering **supportive measures** to a **complainant**

Terms Defined by the Regulations

- **Sexual Harassment** is defined as:
- **Quid pro quo harassment**—that is, conditioning any educational opportunity or benefit on the granting of sexual favors—constitutes a *per se* violation of Title IX, regardless of its severity or pervasiveness. *Quid pro quo* harassment constitutes *conduct* without any constitutional protection.
- Any form of **sexual assault, dating violence, domestic violence, or stalking** as defined by the Clery Act/VAWA constitutes sexual harassment. These forms of misconduct are so serious in and of themselves that no finding of “pervasiveness” is required.
- **Unwelcome conduct of a sexual nature** that is “so serious, pervasive, and objectively offensive that it effectively denies a person equal access” to an educational program as determined under a **reasonable person** standard.

Terms Defined by the Regulations

- A school district has ***actual knowledge*** when ***any*** employee knows of sexual harassment.
 - An employee knows of sexual harassment when they have observed it or have heard about it.
 - Notice to a Title IX Coordinator or to an official with authority to institute corrective measures is actual knowledge.
 - When a school district with actual knowledge of sexual harassment in its education program or activity refuses to respond to sexual harassment or a report of sexual harassment, such a refusal is clearly unreasonable under § 106.44(a) and constitutes a violation of the final regulations.

Does the Employee have Actual Knowledge?

- Tom Brady is a bus operator for Tampa County Schools. After driving the team home from an away football game, Brady sees QB1, Cam Newton, get into cheer coach Erin Andrews' car. The next day, Brady tells his bus aide, Giselle how Newton scored the winning touchdown and that Andrews gave him a ride home. Giselle tells Brady that last year she heard Andrews took a group of kids, including Newton, to a bar in Morgantown following an away basketball game.
 - Does Brady have to report anything? Does Giselle?
 - Does the school district have actual knowledge?

Does the Employee have Actual Knowledge?

- Substitute cook, Nick Saban, is in charge of delivering lunch to the middle school classrooms. On his way back to the cafeteria, Saban sees one student with her back against a locker while the other student tries to kiss her. Neither student is wearing a mask. When Saban tells the students to break it up, they run in opposite directions down the hall.
 - Does Saban have to report anything?
 - Does the school district have actual knowledge?

Does the Employee have Actual Knowledge?

- Pete Carroll's 18 year old daughter, Lil' Carroll, is the captain of the lacrosse team. Carroll, has confided in the guidance counselor that she has found her soul mate and is considering quitting lacrosse so that she can be with him. The guidance counselor urges Carroll to stick with the team (no pun intended) because it is her senior year. In the meantime, Pete finds nude pictures on the cloud of Carroll and her math teacher. Pete confronts Carroll and calls the school. Pete tells the substitute secretary, Nick Saban, that she needs to speak to the principal because the math teacher is a pervert.
 - Does the guidance counselor have to report anything?
 - Does Saban have to report anything?
 - Does the school district have actual knowledge?

Terms Defined by the Regulations

- ***Supportive measures*** are defined as:
- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Such measures are designed to restore or preserve equal access to the school district's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the school district's educational environment, or deter sexual harassment.

Responses to Allegations of Sexual Harassment – 34 C.F.R. 106.44

- General response to sexual harassment:
 - A school district with actual knowledge of sexual harassment in an education program or activity of the school district against a person in the United States **must** respond promptly in a manner that is not deliberately indifferent.
 - A school district is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

Responses to Allegations of Sexual Harassment – 34 C.F.R. 106.44

- A school district's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Responses to Allegations of Sexual Harassment

– 34 C.F.R. 106.44

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

Responses to Allegations of Sexual Harassment – 34 C.F.R. 106.44

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

Responses to Allegations of Sexual Harassment – 34 C.F.R. 106.44

- The Department of Education will not deem a school district's determination regarding responsibility to be evidence of deliberate indifference by the school district, or otherwise evidence of discrimination under Title IX by the school district, solely because the Department would have reached a different determination based on an independent weighing of the evidence.
 - What about the courts?

Responsibilities of the Title IX Coordinator

- If there is actual knowledge of sexual harassment, the 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,
 - inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
 - Explain to the complainant the process for filing a formal complaint.

To File or not to File . . .

- Sally Saban tells her guidance counselor that Daisy Newton calls her a lesbo when she passes her in the hallway and it really upsets her. She begs the guidance counselor not to tell anyone. The guidance counselor tells you, the Title IX Coordinator.
 - Do you offer Sally supportive measures?
 - Do you file a formal complaint?

To File or not to File . . .

- Sally Saban tells her guidance counselor that she saw Cam Newton pat a teacher's butt when the teacher passed him in the hallway. She begs the guidance counselor not to tell anyone. The guidance counselor tells you, the Title IX Coordinator.
 - To whom do you offer supportive measures?
 - Do you file a formal complaint?

To File or not to File . . .

- Sally Saban tells her guidance counselor that Cam Newton pats her butt when she passes him in the hallway. She begs the guidance counselor not to tell anyone. The guidance counselor tells you, the Title IX Coordinator.
 - Do you offer Sally supportive measures?
 - Do you file a formal complaint?

To File or not to File . . .

- Sally Saban tells her guidance counselor that Coach Newton pats her butt when she passes him in the hallway. She begs the guidance counselor not to tell anyone. The guidance counselor tells you, the Title IX Coordinator.
 - Do you offer Sally supportive measures?
 - Do you file a formal complaint?

Instant Replay: Changes in the Grievance Process

In other words, what is your policy for handling allegations of sexual harassment?



Discrimination on the Basis of Sex

- A school district's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX. 34 C.F.R. 106.45(a)
- For the purpose of addressing formal complaints of sexual harassment, a school district's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a school district adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in §106.30, must apply equally to both parties. 34 C.F.R. 106.45(b)

The Grievance Process

- A school district's "grievance process" = its Title IX policy and procedures
- DO NOT confuse "grievance process" with filing something with the grievance board; a citizen's complaint or any other process where we file a "grievance."

Basic Requirements of the Policy

- REMEMBER, you must: treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a process that complies with the regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

Basic Requirements of the Policy

- Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the entire process;

Basic Requirements of the Policy

- Include reasonably prompt time frames for conclusion of the process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the school district offers informal resolution processes, and a process that allows for the temporary delay of the process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.
 - Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; **concurrent law enforcement activity**; or the need for language assistance or accommodation of disabilities;
 - Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the school district may implement following any determination of responsibility;

Basic Requirement of the Policy

- The standard of evidence to be used to determine responsibility is the preponderance of the evidence standard, and apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;
- Include the procedures and permissible bases for the complainant and respondent to appeal;
- Describe the range of supportive measures available to complainants and respondents; and
- Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Ruling on the Field: Personnel Needs and Training



Personnel Needs and Training

- The Title IX Coordinator, investigator, and decision-maker are 3 different people
- All 3, plus the person who facilitates informal resolutions, must be trained
- Training must be posted
- Do these people have to be employees of the school district?

Requirements for Certain Personnel

- Any individual designated by a school district as a Title IX Coordinator, investigator, decision-maker, or any person designated by a school district to facilitate an informal resolution process, must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must receive training on:
 - the definition of sexual harassment in § 106.30, the scope of the school district's education program or activity,
 - how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and
 - how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Additional Requirements for Investigators

- In addition, Investigators must receive training on
 - issues of relevance to create an investigative report that fairly summarizes relevant evidence

Additional Requirements for Decision-Makers

- In addition, decision-makers must receive training on
 - any technology to be used at a live hearing; and
 - 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

On Offense: How to serve your role impartially



The Importance of Impartiality

- An impartial process before unbiased officials promotes accurate, reliable outcomes, which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices.
 - 85 Fed. Reg. 30054.

What does it mean to be impartial? Who does it apply to?

ANY INDIVIDUAL DESIGNATED AS:

- Title IX Coordinator
- Investigator
- Decision-maker
- Appellate Officer
- Facilitator of an informal resolution process

MUST NOT HAVE A:

- Conflict of interest OR bias
- for OR against
- Complainants or Respondents generally OR an individual Complainant or Respondent

What is impermissible bias?

- Impermissible bias is making a decision based on the characteristics of the parties, rather than based on the facts.
- This includes treating a party differently on the basis of the party's sex or stereotypes about how men or women behave with respect to sexual violence
- It also includes blaming, ignoring, or punishing a party due to stereotypes about the party

Conflict of Interest: Who can serve which functions?

- The Title IX Coordinator may serve as the investigator or informal resolution facilitator, BUT NEVER THE DECISION MAKER
- The Investigator may serve as the investigator or informal resolution facilitator, BUT NEVER THE DECISION MAKER
- The Decision-maker can NEVER be the Title IX Coordinator or the Investigator!

Be Transparent!

- If you are asked to serve as an investigator or Decision-maker for a matter, BE TRANSPARENT!
 - **Notify the Title IX Coordinator immediately to disclose:**
 - Any prior professional experiences and affiliations
 - Explain why you believe you may or may not have a conflict
 - If substantive, consider disclosing to the parties and providing the the opportunity to object.
- If at any time you feel that you have a conflict of interest, and are incapable of acting in an impartial manner, notify the Title IX Coordinator immediately and step down from your role in that particular grievance process.**

Avoiding Prejudgment of the Facts

DO's	DON'Ts
Base all decisions on individualized facts, and not on stereotypical notions of what "men" and "women" do or do not do.	Pass judgment on the allegations presented by either party or witnesses.
Avoid any and all stereotypes.	"Believe" one party over the other.
Approach the allegations of both parties with neutrality	Jump to any conclusions without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties involved.
Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of the story.	

Notice Requirements when you Receive a Formal Complaint



Notice of Allegations

- Upon receipt of a formal complaint, a school district must provide the following written notice to the parties who are known:
 - (A) Notice of the school district's grievance process that complies with this section, including any informal resolution process.
 - (B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
 - » Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.

Notice of Allegations, continued

- The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
- The written notice must inform the parties of any provision in the school district's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
- If, in the course of an investigation, the school district decides to investigate allegations about the complainant or respondent that are not included in the original notice, the school district must provide notice of the additional allegations to the parties whose identities are known.

Dismissal of a Formal Complaint

- The school district **must investigate** the allegations in a formal complaint.
- If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the school district's education program or activity, or did not occur against a person in the United States, then the school district **must dismiss** the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX
- Such a dismissal **does not** preclude action under another provision of the school district's code of conduct.

Dismissal of a Formal Complaint

- The school district **may dismiss** the formal complaint or any allegations therein, if at any time during the investigation or hearing:
 - a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - the respondent is no longer enrolled or employed by the school district; or
 - Specific circumstances prevent the school district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- Upon a dismissal, the school district must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

Consolidating Complaints

A school district may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.

Informal Resolution

- A school district may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment.
- A school district may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed.
- However, at any time prior to reaching a determination regarding responsibility the school district may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.

Informal Resolution

- In order to have an informal resolution, the school district must:
 - (i) Provide to the parties a written notice disclosing:
 - the allegations,
 - the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the process with respect to the formal complaint, and
 - any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
 - (ii) Obtains the parties' voluntary, written consent to the informal resolution process; and
 - (iii) School Districts are prohibited from offering or facilitating an informal resolution process to resolve allegations that an employee sexually harassed a student.

Informal Resolution

- Sally Saban decides to file a formal complaint against Coach Newton and his son, Cam, for patting her on the butt in the hallway. Sally tells you, the Title IX Coordinator, that she wants to pursue an informal resolution and get this over with.
 - Do you offer an informal resolution to Sally?

Informal Resolution

- Sally Saban's dad, Bobby Bowden, decides to file a formal complaint against Coach Newton and his son, Cam, for patting Sally on the butt in the hallway. Bowden tells you, the Title IX Coordinator, that he wants to pursue the formal complaint, but Sally wants an informal resolution and get this over with.
 - Do you offer an informal resolution to Sally?

Investigating Formal Complaints

- When investigating a formal complaint and throughout the process, a school district must:
- Ensure that the burden of proof and the burden of gathering evidence rests on the school district and not on the parties.
- The school district cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school district obtains that party's voluntary, written consent to do so.
 - If a party is not an “eligible student,” as defined in 34 CFR 99.3, then the school district must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR 99.3)
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

Investigating Formal Complaints

- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- Provide the parties with the same opportunities to have others present during the process, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent; however, the school district may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;
- Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;
- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the school district does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

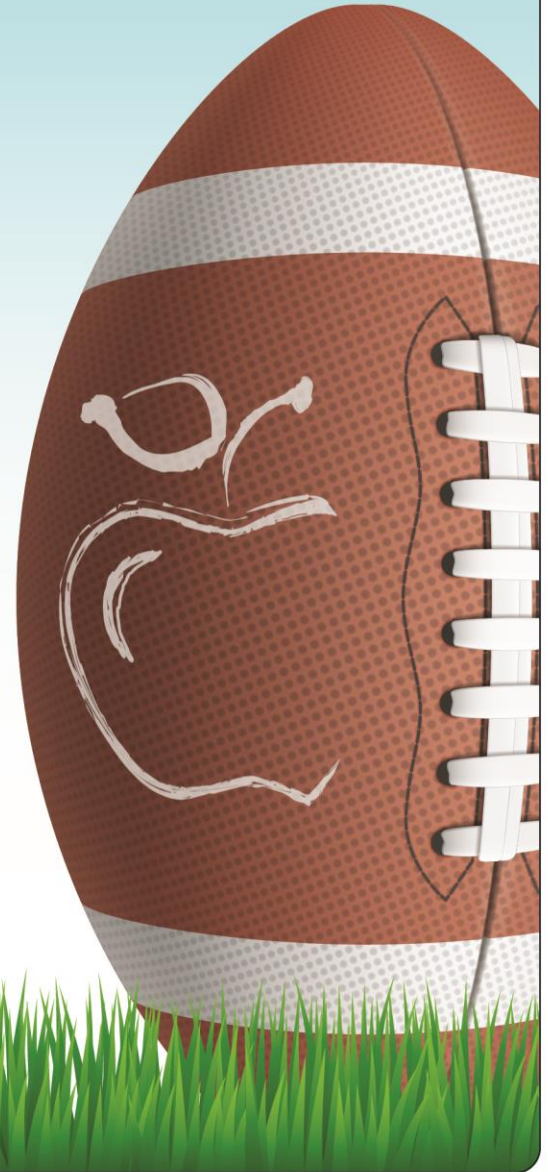
Investigation Reports of Formal Complaints

- Prior to completion of the investigative report, the school district must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy
- The parties must have **at least 10 days** to submit a written response, which the investigator will consider prior to completion of the investigative report.
- The school district must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and
- Create an investigative report that fairly summarizes relevant evidence.at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response

Investigation Reports of Formal Complaints

- At least **10 days prior** to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response
- So **10 days** prior to issuing the investigation report the parties get to respond to the evidence and **10 days** prior to a hearing parties get to review and respond in writing to the investigation report.

Call on the Field: The Investigation Process



Before Any Interviews Begin . . .

- Both parties must be provided with a WRITTEN explanation of the allegations with “sufficient details known at the time and with sufficient time to prepare a response before any initial interview.”
- If additional allegations are found during the investigation, or if the nature of the allegations changes, both parties are entitled to see that in writing.

Interviews and Evidence

- Both parties have a right to see all of the evidence collected
- Interviews must be recorded
- Schools must provide to each party—and their parents—a description of the allegation and a copy of the investigative report on the incident. They also “must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.”

Perspective is important



Conducting Interviews

- Perspective: “You will find that many of the truths we cling to depend greatly on our own point of view.”
 - Challenge people’s biases (friendships, romantic entanglements, power dynamics, prejudices, etc.)
 - Assess credibility of witnesses (i.e., Would a reasonable person who knew this witness believe his story?)
 - Three sides to every story
- **RECORD ALL INTERVIEWS**

Conducting Interviews

- Common witness questions
 - Do I need a lawyer?
 - Did I do something wrong?
 - Do I have to talk to you?

Finding the truth

- Get the witness to relax, let them know by your actions and demeanor that you will let them answer your questions without interruption
- Ask simple straightforward questions
- Let the witness talk, and talk, and talk, . . .
- Put the witness at ease, be a sympathetic listener (“and then what happened?”)
- When they are done talking, repeat the story back to them briefly
- Then start asking about details, not before then

Finding the truth

- Get the witness to commit to their story (which may be true or not)
 - What were you doing before this?
 - How did you end up in the gym at that time of day?
 - When did that happen?
 - Why were you talking to him?
 - Do you know him well?
- Truth tellers forget as much as liars do
- But liars can rarely come up with answers to your questions that are consistent with ALL of the facts; truth tellers don't have this problem
- When finished, analyze the overall content of the statement

Issue A

When an investigation could lead to discipline for Employee X, does she have a right to refuse to attend an investigative interview unless she is permitted to bring along a representative of her choice?

W. Va. Code 6C-2-3(g)(1):

- *“An employee may designate a representative who may be present at any step of the procedure as well as at **any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.**”*

Deyerle v. Department of Health & Human Services (July 15, 2014)

- Regardless of the label or title given to a meeting by the employer, if the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present if requested

(Deyerle)

- If an employee declines an investigative interview because she is told she cannot bring a representative, and if, without interviewing the employee, the investigation later results in discipline, the discipline may be set aside as a violation of due process

Issue B

When an investigation could lead to discipline for Employee X, can Employee X ever be required to answer the investigator's questions and penalized if she does not?

W. Va. Code 6C-2-3(g)(2):

- *“An employee may not be compelled to testify against himself or herself in a disciplinary grievance hearing”*

Thomas v. Department of Health & Human Services (1997)

- An employee who willingly cooperates in an investigation cannot object to his employer's later use of his statement in a disciplinary proceeding. Even if the statement is damaging, it is not “compelled” testimony in such a case.

Issue C

When an investigation could lead to discipline for Employee X, may an employee who represents Employee X refuse to answer an investigator's questions about Employee X?

W. Va. Code 6C-2-8

- An employee organization or its agent acting as an employee's representative for an actual or potential grievance cannot be compelled in a grievance proceeding to disclose germane information received in confidence from the employee

W. Va. Code 6C-2-8

- It doesn't matter if the employee does not belong to the organization
- The rule applies only to proceedings covered by the grievance procedure
 - it does not apply in other proceedings, including court

W. Va. Code 6C-2-8

- But an association or its agent acting as representative “must disclose” the employee’s confidential communication when necessary to
 - prevent certain death or substantial bodily injury; or
 - prevent the employee from committing a crime, fraud, or an act reasonably certain to result in substantial injury to the financial interests or property of another, (or to rectify any such action after it occurs); or
 - comply with a court order or other law

W. Va. Code 6C-2-8

- Also, disclosure is mandated when the communication or information constitutes an admission that the employee committed a crime

IMPORTANT TIMELINES-

THE RULE OF 10

- **10 DAYS BEFORE THE INVESTIGATION REPORT IS PREPARED...**
- The investigator must send to each party and their advisors, if any, the evidence collected during the course of the investigation for their inspection and review in either an electronic format or hard copy.
- The parties have 10 days to review and submit a written response, which the investigator will consider prior to completion of the investigative report.
- This evidence will be available for both parties to review and reference during the decision-making phase of the grievance process.

IMPORTANT TIMELINES-

THE RULE OF 10

- **10 DAYS BEFORE A DETERMINATION REGARDING RESPONSIBILITY...**
- The investigator must send to each party and their advisors, if any, the investigative report in an electronic format or hard copy.
- The parties have 10 days to review and submit a written response, which the investigator will consider prior to completion of the investigative report.

Drafting Report: Consider Including

- Allegations investigated
- Policy or law involved
- Records or other evidence reviewed
- Witnesses interviewed
- Factual findings
- Determination of whether the conduct constitutes violation of law or policy
- Other?

RELEVANCY

Why is relevancy important?

- Evidence pertinent to proving whether facts material to the allegation are more or less likely to be true and that do not relate to complainant's sexual predisposition or prior sexual acts (*with two exceptions*)
- A Decision-maker must make a determination as to relevancy for **EVERY** question asked
 - If not relevant: must explain rationale for that decision
 - Exclusion of questions based on relevancy could be appealable after the determination has been issued

Drafting Report: Relevant Evidence

- Evidence is relevant if:
 - (a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - (b)** the fact is of consequence in determining the action.

Rape Shield Protections

- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
 - Prior Sexual Behavior is NOT RELEVANT, unless:
 - **Mistaken Identity:** used to prove that someone other than the Respondent committed the conduct
 - **Consent:** Specific incidents of the Complainant's prior sexual behavior with respect to the Respondent to prove consent

Questions about a Complainant's predisposition are NEVER allowed.

Inadmissible Evidence

Inadmissible evidence is evidence that cannot be presented to the Decision-maker

Examples of Inadmissible Evidence/Questions

Treatment records from a medical professional**

Any statements made by a party or witness who does not submit themselves to cross examination

Any questions that seek the disclosure of information that is protected under a legally recognized privilege, such as patient-doctor, attorney-client, or spousal privilege.**

** Unless the person holding the privilege waives the privilege in writing.

Drafting Report

- Erin Andrews, Cheer Coach and math teacher, files a Title IX complaint against Tom Brady, alleging that he makes her uncomfortable. She claims he is constantly making sexual jokes and uses sexual innuendo. You are called to investigate. Brady tells you that he and Andrews had a sexual relationship and are still on again, off again and that he did not know she found their banter offensive.
 - Is the prior sexual relationship between Andrews and Brady relevant?

Drafting Report

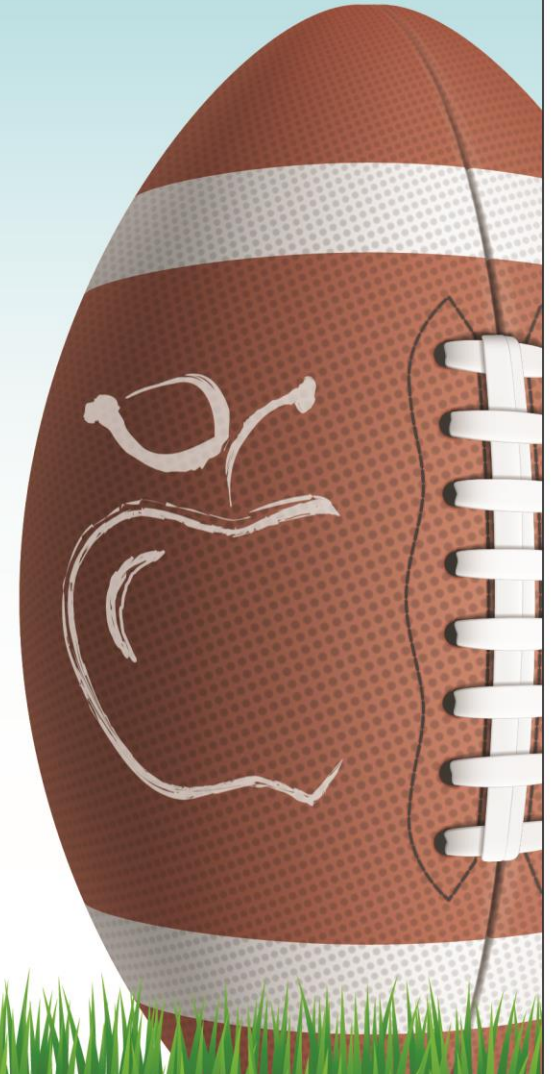
- Erin Andrews, Cheer Coach and math teacher, files a Title IX complaint against Tom Brady, alleging that he makes her uncomfortable. He is constantly making sexual jokes and uses sexual innuendo. You are called to investigate. Brady tells you that Andrews has had a sexual relationship with a number of other drivers and he did not know she found their banter offensive.
 - Are prior sexual relationships between Andrews and the bus drivers relevant?

Non-cooperating party or witness

- If a party or witness does not submit to cross-examination, the Decision-maker MUST NOT rely on any statement of that party or witness in reaching a determination regarding responsibility
 - THIS INCLUDES ANY STATEMENTS MADE EARLIER TO THE INVESTIGATOR
- Decision-maker cannot draw an inference (positive or negative) based solely on that party's or witness's absence or refusal to answer the questions
- School has no ability to compel parties or witnesses to cooperate, respond to questions, provide testimony, or otherwise participate in the process

Instant Replay: Changes in the Hearing Process

Sort of, Maybe



Prior to the hearing

- At least 10 days prior to the hearing, both sides must be given a written report that “fairly summarizes the relevant evidence.”

Standard of Evidence: PREPONDERANCE OF THE EVIDENCE

Whether it is more likely than not that the Respondent committed the alleged sexual harassment.



At the Hearing

- Your policy may, but need not, provide for a hearing.
- **With or without a hearing**, after the school district has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must:
 - afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness,
 - provide each party with the answers, and
 - allow for additional, limited follow-up questions from each party.
- **With or without a hearing**, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless
 - such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
 - The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

Following the Hearing

- The “decision-maker” must provide “a statement of, and rationale for, the result as to each allegation.”
- The decision-maker cannot be the same person(s) as the Title IX Coordinator or the investigator(s).
- The written statement makes a determination regarding responsibility.
- Either party can appeal that decision on the basis of (1) procedural irregularity, (2) new evidence, or (3) bias on the part of the investigators or decision-makers.

The Written Determination Must Include:

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

The Written Determination

- The written determination must be provided to the parties simultaneously.
- The determination regarding responsibility becomes final either on the date that the school district provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
 - The Title IX Coordinator is responsible for effective implementation of any remedies.

The Appeal

- Both parties must be offered an appeal from a determination regarding responsibility, and from a school district's dismissal of a formal complaint or any allegations therein.

The Bases for Appeal

- An appeal may be made on the following bases:
 - (A) Procedural irregularity that affected the outcome of the matter;
 - (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
- A school district may offer an appeal equally to both parties on additional bases.

Retaliation

- No school district 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 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.
- 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, constitutes retaliation.

Retaliation

- The school district must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under the new Title IX regulations
 - The exercise of rights protected under the First Amendment does not constitute retaliation.

Retaliation

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

Record Keeping

- A school district must maintain for a period of **7** years records of:
- (A) Each sexual harassment investigation including
 - any determination regarding responsibility
 - any audio or audiovisual recording or transcript
 - any disciplinary sanctions imposed on the respondent, and
 - any remedies provided to the complainant designed to restore or preserve equal access to the school district's education program or activity.
- (B) Any appeal and the result therefrom;
- (C) Any informal resolution and the result therefrom; and
- (D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.
 - A school district must make these training materials publicly available on its website, or if the school district does not maintain a website the school district must make these materials available upon request for inspection by members of the public.

Record Keeping

- For each response required under § 106.44, a school district must create, and maintain for a period of **7** years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
- In each instance, the school district must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the school district's education program or activity.
- If a school district does not provide a complainant with supportive measures, then the school district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
 - The documentation of certain bases or measures does not limit the school district in the future from providing additional explanations or detailing additional measures taken.

Notification of Policy

- Each school district must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school district that
 - the school district does not discriminate on the basis of sex in the education program or activity that it operates, and
 - that it is required by Title IX and its regulations not to discriminate in such a manner.
- Such notification must state that the requirement not to discriminate in the education program or activity extends to admission and employment, and that inquiries about the application of title IX and this part to such school district may be referred to the school district's Title IX Coordinator, to the Assistant Secretary of the Department of Education, or both.

Notification of Policy

- Each school district must prominently display the contact information required to be listed for the Title IX Coordinator and its policy on its website, if any, and in each handbook or catalog that it makes available to applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school district.
- A school district must not use or distribute a publication stating that the school district treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX or its regulations.

Notification of Grievance Procedure

- A school district must adopt and publish grievance procedures (i.e. its Title IX Policy) that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by the regulations.
- A school district must provide to applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school district notice of the school district'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 school district will respond.

What do you do?

- Pete Carroll's 18 year old daughter, Lil' Carroll, is the captain of the lacrosse team. Carroll, has confided in the guidance counselor that she has found her soul mate and is considering quitting lacrosse so that she can be with him. The guidance counselor urges Carroll to stick with the team (no pun intended) because it is her senior year. In the meantime, Pete finds nude pictures on the cloud of Carroll and her math teacher. Pete confronts Carroll and calls the school.

- What do you include on the Notice of Allegation?
- Who would you interview?

What do you do?

- During the summer, Sally Saban breaks up with Cam Newton. Cam and his friends post pictures of Sally skinny dipping on snapchat. Bowden comes to you, the Title IX coordinator, and demands that something be done about this. What do you do?
 - Do you investigate it under Policy 4373?
 - Do you offer supportive measures to Sally?

What do you do?

- During virtual school, Sally Saban breaks up with Cam Newton. Cam and his friends post pictures of Sally skinny dipping on snapchat. Bowden comes to you, the Title IX coordinator, and demands that something be done about this. What do you do?
 - Do you investigate it under Policy 4373?
 - Do you offer supportive measures to Sally?

What do you do?

- Neil Brown, the transportation director, is randomly reviewing the bus video of Tom Brady's extracurricular run. On it he sees the cheerleaders patting the butts of the football players when they get on the bus. Neil reports this to you, the Title IX coordinator.
 - Do you investigate it under Policy 4373?
 - Do you offer supportive measures to the football team?

What do you do?

- Neil Brown, the transportation director, is randomly reviewing the bus video of Tom Brady's extracurricular run. On it he sees the cheerleaders patting the butts of the football players when they get on the bus. Neil reports this to you, the Title IX coordinator.
 - Who you discipline?

What do you do?

- Tom Brady tells the high school principal that the cheerleaders have been patting the butts of the football players when they get on the bus. The high school principal says it is their school tradition. Coach Newton reports this to you, the Title IX coordinator.
 - Who you discipline?

What do you do?

- Tom Brady tells the high school principal that the Athletic Director, Erin Andrews has been patting the butt of Coach Newton after each game. The high school principal reports this to you, the Title IX coordinator.
 - What do you do?

Questions?

