



TITLE IX
DISCRIMINATION BASED ON
SEX

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DISCLAIMERS

- Although we have worked hard to ensure that the information in this training module is accurate, it does not constitute legal advice.
- We are not creating an attorney-client relationship through this training.
- The application of any rules to a particular fact pattern must be made by an attorney who is given all relevant facts.

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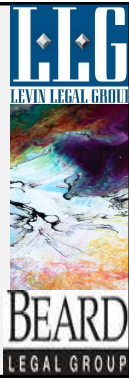
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DISCLAIMERS

- There are exceptions to almost every rule!
- Training and recommendations are subject to change over time with the issuance of court decisions and administrative guidance.
- When we refer to Title IX and the Title IX regulations in this training, we are limiting our comments largely to the new “discrimination based on sex” rules contained in the new Title IX regulations adopted April 19, 2024.

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PRACTICAL TIPS



Throughout this training, we will provide practical tips. When you see the stop sign, really pay attention—it will be on the test!

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NEW RULES:



- There are many tweaks and modifications to existing rules; and
- There are many new rules.
- We will signify the changes and new rules with these symbols.
- There may not be a difference between “new” and “different”

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TRAINING

- The Regulations require that you receive training on specific topics.
- When you see the professor in a slide, that means that we will take a deeper dive into the required subject subsequently in the training.

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RECOMMENDATIONS

When we make a recommendation, you will see our cartoon lawyer on the slide.

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AGENDA FOR TODAY’S PROGRAM

Part I: A listing of the 2024 Title IX changes (“new” and “different”) and the PHRC regulations

Part II: A Short History Behind Sexual Harassment as a Legal Doctrine

Part III: A Deep Dive into the New Title IX Regulations

Part IV: Integrating the New Requirements to Existing Public School Legal Framework and Requirements

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UNDERSTANDING LEGAL CITATIONS

➤Statutes:

- United States Code—20 U.S.C.A. §1401
- Purdon’s Statutes—24 P.S. §1-101
- Pennsylvania Consolidated Statutes—24 Pa.C.S.A. §8101

➤Regulations:

- Code of Federal Regulations—34 C.F.R., § 106.1
- Pennsylvania Code—22 Pa. Code § 12.1

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UNDERSTANDING WORD USAGE

As used in this training, “*School(s)*” means:

- School Districts;
- Intermediate Units;
- Public Vocational-Technical schools;
- Public charter and cyber charter schools.
- Although the Title IX regulations apply to post-secondary institutions, including community colleges, this training *does not!* There are some different rules for post-secondary schools.
- *We are using “School” as synonymous with “recipient of federal financial assistance.”*

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UNDERSTANDING WORD USAGE

As used in this training,

“*Parent(s)*” means [1] a natural parent, [2] an adoptive parent, [3] a legal guardian, or [4] other person who can act on behalf of the *Student*.

“*Title IX*” and “*Under Title IX*” means under Title IX and/or under the regulations at 34 C.F.R., part 106.

“*Includes*” and “*including*” means including, but not limited to, and by way of example and not limitations.

“*Coordinator*” means the Title IX Coordinator and not any other kind of “Coordinator,” such as the ADA Coordinator

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UNDERSTANDING WORD USAGE

As used in this training, “*Law*” or “*Applicable Law*” means applicable statutes, regulations, and relevant case law interpreting the statutes and regulations.

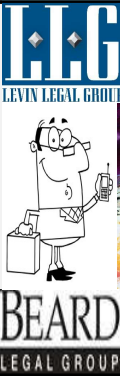
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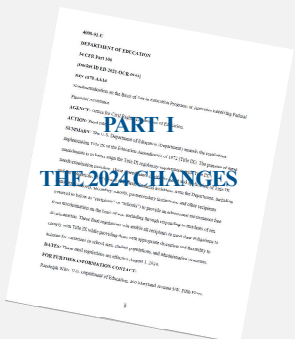
PENNSYLVANIA SCHOOL BOARDS ASSOCIATION (“PSBA”)

Because virtually all school districts, Intermediate Units, and Vocational-Technical Schools subscribe to the PSBA Policy Service, be on the lookout for the information from PSBA. We recommend that you review those publications and make sure that the new policies are adopted before the **effective date of August 1, 2024.**

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WHAT’S NEW OR DIFFERENT?

There are:

- New definitions;
- New rules;
- Specific rules regarding gender identity issues; and
- Modified procedures, including modified grievance procedures.

• 2020 regulations were focused on “sexual harassment,” but the 2024 regulations are focused on **“discrimination based on sex.”**

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WHAT'S NEW OR DIFFERENT?

Expressly clarifies that sex discrimination includes discrimination based on:

- sex stereotypes,
- sex characteristics,
- pregnancy or related conditions,
- sexual orientation, and
- gender identity. 34 CFR §106.10.

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NEW OR MODIFIED DEFINITIONS OF:

• Sexual harassment;	• What's "Relevant";
• Hostile environment;	• Retaliation;
• Complainant;	• Stalking; and
• Complaint;	• Supportive measures.
• Confidential employee;	
• Parental status;	
• Peer retaliation;	
• Pregnancy	

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NEW OR MODIFIED DUTIES OF THE COORDINATOR:

• Treat complainant and respondent equitably;	• Make certain "determinations";
• Offer and coordinate supportive measures;	• Address concerns of Complainant and others about safety;
• Notify the complainant and respondent of the grievance procedure and informal resolution process under certain circumstances;	• Take prompt and effective steps to ensure sex discrimination does not continue or recur;
• Initiate grievance process under certain circumstances;	• Eliminate barriers to reporting; and
	• Ensure required training is provided.

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COVERAGE:

With certain exceptions, unlawful discrimination is prohibited regarding all “programs and activities” of the *School*. “Programs and activities” include:

- Academic programs and activities;
- Extracurricular programs and activities;
- Research programs and activities;
- Occupational training programs and activities; and
- Other education programs and activities operated by the School.



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SCOPE OF REGULATIONS

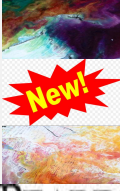
- The regulations apply to all sex discrimination occurring under the school’s education program or activity *in the United States*.
- For purposes of this section, conduct that occurs under a school’s education program or activity includes but is not limited to conduct that is subject to the School’s disciplinary authority.
- A school must address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred [1] *outside the School’s education program or activity* or [2] *outside the United States*.



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THE EXCEPTIONS—SPORTS:

- The right of transgender athletes to participate on teams consistent with their gender identity.
- The regulations regarding participates in sports will provide as follows:
 - (a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a [School], and no [School] shall provide any such athletics separately on such basis.






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THE EXCEPTIONS—SPORTS:

- (b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a [School] may operate or sponsor separate teams for members of each sex where [1] selection for such teams is based upon competitive skill or [2] the activity involved is a contact sport. However, where a School operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.”





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THE EXCEPTIONS—SPORTS:

- (c) *Equal opportunity*. A School which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, [10 enumerated] factors. 34 C.F.R. § 106.41.

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WHAT'S NEW OR DIFFERENT?

- Mandatory Reporting by most employees; and
- Mandatory Notices by confidential employees.

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WHAT'S NEW OR DIFFERENT?

- Since 1975, the Title IX regulations have required a School to adopt and publish grievance procedures that provide prompt and equitable resolution of sex discrimination complaints.
- The final regulations modify requirements for grievance procedures for complaints of sexual harassment set out in the 2020 amendments and apply them to **all complaints of sex discrimination**.
- **Sexual Harassment** is a kind of **sex discrimination**.

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WHAT'S NEW OR DIFFERENT?

The anti-discrimination rules regarding pregnancy-related conditions include the requirement that Schools provide reasonable modifications (i.e., accommodations) for:

- Students, (34 CFR § 106.40(b)(3)(ii));
- Reasonable break time for employees for lactation (34 CFR § 106.57(e)(1)), and
- A clean, private lactation space for both students and employees (34 CFR §§ 106.40(b)(3)(v) and 106.57(e)(2)).

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THE PREGNANCY DISCRIMINATION ACT, 42 U.S.C. § 2000e(k)

(k) The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and *women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes*, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 USCS § 2000e-2(h)] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

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WHAT'S NEW OR DIFFERENT?

- The final regulations prohibit a *School* from separating or treating any person differently based on sex in a manner that subjects that person to more than *de minimis* harm, except in the limited circumstances where the statute allows otherwise, such as in the context of [1] sex-separate living facilities and [2] sex-separate athletic teams.
- *The final regulations clarify that policies and practices that prevent a student from participating in a School's education program or activity consistent with their gender identity impose more than de minimis harm on that student based on sex, and therefore generally violate Title IX's nondiscrimination mandate.*

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WHAT'S NEW OR DIFFERENT?

- The Department intends to issue a separate final rule to address Title IX's application to sex-separate athletic teams.
- The final regulations prohibit a School from disclosing personally identifiable information obtained while complying with Title IX, with limited exceptions, such as when the School has prior written consent or when the information is disclosed to the parent of a minor.

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PARENTAL RIGHTS:

Nothing in Title IX may be read in derogation of any legal right of a:

1. parent,
2. guardian, or
3. other authorized legal representative

to act on behalf of a

1. complainant,
2. respondent, or
3. other person,

including to making a complaint through the *School's* grievance procedures.

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COMPLIANCE WITH THE FAMILY EDUCATION RIGHTS AND PRIVACY ACT (“FERPA”)

- Schools must comply with FERPA while implementing the Title IX requirements.
- This means that certain parental rights may terminate when a student turns 18.

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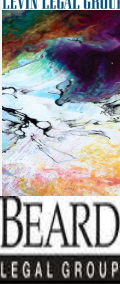
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STATE LAW IMPLICATIONS:

- Title IX trumps state and local laws to the extent that they are inconsistent with Title IX.
- The Pennsylvania Human Relations Commission regulations were amended in 2023; 16 Pa. Code § 41.201 (related to protected classes, relating largely to gender identity).
- We will have to wait to see if any parts of new PHRC regulations conflict with any parts of the Title IX regulations, particularly concerning gender identify issues

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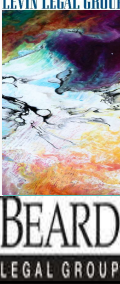
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PART II

THE HISTORY BEHIND SEXUAL HARASSMENT AS A LEGAL DOCTRINE.

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THE HISTORY OF SEXUAL HARASSMENT AND THE LAW

➤ Title VII of the Civil Rights Act of 1964:

➤ “It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, *or otherwise to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, *sex*, or national origin” 42 U.S.C.A. §2000e-2 (Emphasis added)

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A SHORT HISTORY

➤ Title IX: enacted in 1972 as part of the Education Amendments of 1972.

➤ “No person in the United States shall, [1]on the basis of sex, [2] be [a]excluded from participation in, be [b] denied the benefits of, or be [c] subjected to discrimination under any education program or activity receiving Federal financial assistance,” 20 U.S.C.A. § 1681 (Emphasis added)

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A SHORT HISTORY

➤ Title VII—Applies only to employment discrimination; did not reach schools, colleges or universities in the capacity as protecting students;

➤ Title IX—Applies to “recipients of federal financial assistance,” including

➤ Public schools;

➤ Colleges and Universities.

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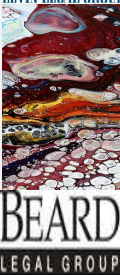
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A SHORT HISTORY—HOW DID “ON THE BASIS OF SEX” BECOME “SEXUAL HARASSMENT”?

The phrase “sexual harassment” was coined in 1975 by a group of feminist activists at Cornell University

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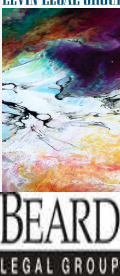



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A SHORT HISTORY: HOW DID “DISCRIMINATION” BECOME “SEXUAL HARASSMENT”?

1975: New York Times Article: “Sexual harassment of women in their place of employment is extremely widespread. It is literally epidemic,” said Lin Farley, director of the women's section of the Human Affairs Program at Cornell University. She listed the forms such harassment could take: Constant leering and ogling of a woman's body.; Continually brushing against a woman's body.; Forcing a woman to submit to squeezing or pinching.; Catching a woman alone for forced sexual intimacies.; Outright sexual propositions, backed by threat of losing a job.”

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A SHORT HISTORY

- Neither Title VII nor Title IX said anything about “sexual harassment.”
- 1976: The early cases: “In company with three of the four district courts that have considered the issue, *this Court holds that sexual harassment and sexually motivated assault do not constitute sex discrimination under Title VII.* *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F.Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).”

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A SHORT HISTORY

- 1975: First Set of Regulations Under Title IX:
- No mention of sexual harassment.
- No Title IX regulations until 2020 addressed sexual harassment.

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A SHORT HISTORY—QUID PRO QUO

This is not to say either that sexual harassment is never of concern under Title IX, or that a university may properly ignore the matter entirely. In plaintiff Price's case, for example, it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment . . . (cont'd on next slide)

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A SHORT HISTORY—QUID PRO QUO

When a complaint of such an incident is made, university inaction then does assume significance, for on refusing to investigate, the institution may sensibly be held responsible for condoning or ratifying the employee's invidiously discriminatory conduct. *Alexander v. Yale Univ.*, 459 F.Supp. 1, 4 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

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A SHORT HISTORY—FIRST REGULATIONS

April 11,1980: EEOC published the Interim Guidelines on sexual harassment as an amendment to the Guidelines on Discrimination Because of Sex. 29 CFR Part 1604.11, 45 FR 25024. “This amendment will re-affirm that sexual harassment is an unlawful employment practice.”

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A SHORT HISTORY—FIRST APPELLATE CASE

“Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in *Henson v. Dundee*, 682 F.2d 897, 902 (1982):

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A SHORT HISTORY: FIRST SUPREME COURT CASE

‘Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.’ ” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57(1986).

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A SHORT HISTORY: MAJOR HOLDINGS

- Title IX applies to employment discrimination and student discrimination. *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979);
- Students can sue for money damages under Title IX. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992);

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A SHORT HISTORY: MAJOR HOLDINGS

- Same-sex sexual harassment is actionable. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998);
- Title IX case will not lie by reason of teacher's sexual harassment of student in absence of actual notice on part of school district;

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A SHORT HISTORY: MAJOR HOLDINGS

A private right of action will not lie in absence of *School's* [1] *deliberate indifference* to teacher's conduct upon [2] *receipt of actual notice* thereof. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

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A SHORT HISTORY: MAJOR HOLDINGS

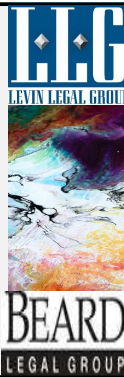
A private damages action may lie against a *School* under Title IX in cases of **student-on-student harassment**, but only where the *School* acts with **[1] deliberate indifference** and **[2] the harassment is [a] so severe that [b] it effectively bars the victim's access to an educational opportunity or benefit**. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

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A SHORT HISTORY: MAJOR HOLDINGS

- Title IX prohibits **retaliation** against those who complain of sex discrimination. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005);
- Title IX was **not the exclusive mechanism** for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights, and thus § 1983 suits based on the Equal Protection Clause were available in lawsuits alleging unconstitutional gender discrimination in schools. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009).

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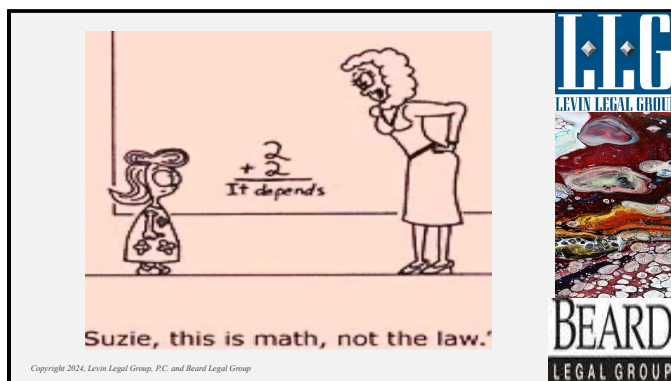
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A SHORT HISTORY: MAJOR HOLDINGS

An employer violates Title VII, which makes it unlawful to discriminate against an individual “because of” the individual’s sex, by firing an individual for being homosexual or being a transgender person. *Bostock v. Clayton Cty., Georgia*, 140 S.Ct. 1731 (2020).

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AUGUST 1, 2024, IMPLEMENTATION DATE

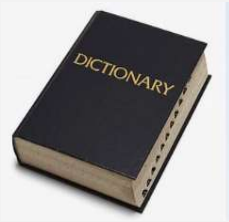
- What does it mean that the new rules are effective August 1, 2024?
- Page 1219 of the comments: “[t]he Department will not—and does not have the authority to—enforce these final regulations retroactively; they apply only to sex discrimination that allegedly occurred on or after August 1, 2024.”
- Page 5 of DOE’s “Fact Sheet”: “The final regulations are effective on August 1, 2024, and apply to complaints of sex discrimination regarding alleged conduct that occurs on or after that date.”

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THE DEFINITIONS:



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“COMPLAINANT” MEANS:

- (1) *A student or employee* who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part; or
- (2) *A person other than a student or employee* who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the School’s education program or activity at the time of the alleged sex discrimination.

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COMPLAINT:

- *Complaint* means an *oral or written request* to the School that objectively can be understood as a request for the School to investigate and make a determination about alleged discrimination under Title IX or this part.

This means that:

- no “magic words” are required to be used;
- Complaint form is not required, it can come in an email, a text, or a tweet.
- No more “formal complaint”

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“CONFIDENTIAL EMPLOYEE” MEANS:

(1) A school’s employee *whose communications are privileged or confidential under Federal or State law*. The employee’s confidential status, for purposes of this part, is only concerning information received while the employee is functioning within the scope of their duties to which privilege or confidentiality applies;

(2) A school’s employee *whom the School has designated as confidential* under this part for the purpose of providing services to persons related to sex discrimination. If the employee also has a duty not associated with providing those services, the employee’s confidential status is only with respect to information received about sex discrimination in connection with providing those services.

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PENNSYLVANIA CONFIDENTIALITY LAWS:

Confidential communications to psychologists:

“No psychiatrist or person who has been licensed under the act of March 23, 1972 (P.L.136, No.52), to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client.” 42 Pa.C.S. § 5944

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PENNSYLVANIA CONFIDENTIALITY LAWS:

Confidential communications to school personnel:

No [1] guidance counselor, [2] school nurse, [3] school psychologist, or [4] home and school visitor in the public schools . . . , including any [5] clerical worker of such schools and institutions, who, while in the course of his professional or clerical duties for a guidance counselor, home and school visitor, school nurse or school psychologist, [6] has acquired information from a student in confidence shall be compelled or allowed:

- (1) without the consent of the student, if the student is 18 years of age or over; or
- (2) without the consent of his parent or guardian, if the student is under the age of 18 years;

to disclose such information in any legal proceeding, trial, or *investigation before any government unit*. 42 Pa. C.S. § 5945.

Exception—Child abuse report to Childline.

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PARENTAL STATUS

Parental status, . . . , means the status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:

- (1) A biological parent;
- (2) An adoptive parent;
- (3) A foster parent;
- (4) A stepparent;
- (5) A legal custodian or guardian;
- (6) In *loco parentis* with respect to such a person; or
- (7) Actively seeking legal custody, guardianship, visitation, or adoption of such a person.

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PEER RETALIATION:

Peer retaliation means retaliation by a student against another student.

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"PREGNANCY OR RELATED CONDITIONS" MEANS:

(1) Pregnancy, childbirth, termination of pregnancy, or lactation;

(2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or

(3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

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RELEVANT:

Relevant means related to the allegations of sex discrimination under investigation as part of the grievance procedures . . .

Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

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RETALIATION IS DEFINED AS:

- intimidation,
- threats,
- coercion, or
- discrimination

against any person by:

- the School,
- a student,
- an employee, or
- other person authorized by the School to provide aid, benefit, or service under the School's education program or activity,

for the purpose of interfering with any right or privilege secured by Title IX or the regulations, or because the person has:

- reported possible sex discrimination,
- made a sex-discrimination complaint, or
- participated or refused to participate in any way in a School's Title IX process. (34 CFR § 106.2).

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SEX-BASED HARASSMENT:

Sex-based harassment is a form of sex discrimination and means [1] sexual harassment and [2] other harassment on the basis of sex, including on the bases described in § 106.10, that is:

- (1) *Quid pro quo harassment*. * * *
- (2) *Hostile environment harassment*. * * *
- (3) *Specific offenses*. * * *

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QUID PRO QUO HARASSMENT:

An employee, agent, or other person authorized by the School to provide an aid, benefit, or service under the School's education program or activity explicitly or impliedly conditioning the provision of such aid, benefit, or service on a person's participation in unwelcome sexual conduct.

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HOSTILE ENVIRONMENT HARASSMENT.

1. Unwelcome sex-based conduct that,
2. based on the totality of the circumstances, is
 - a. subjectively and
 - b. objectively offensive; and
3. is so severe or pervasive that
4. it limits or denies a person's ability
 - a. to participate in, or
 - b. benefit from the School's education program or activity (i.e., creates a hostile environment).

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HOSTILE ENVIRONMENT:
Whether a hostile environment has been created is a *fact-specific inquiry that includes consideration of the following:*
(i) The degree to which the conduct affected the *Complainant's* ability to access the *School's* education program or activity;
(ii) The type, frequency, and duration of the conduct;
(iii) The parties' ages, roles within the *School's* education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
(iv) The location of the conduct and the context in which the conduct occurred; and
(v) Other sex-based harassment in the *School's* education program or activity.

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SPECIFIC OFFENSES:
(i) *Sexual assault* meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;
(ii) *Dating violence* meaning violence committed by a person:
(A) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
(B) Where the existence of such a relationship shall be determined based on a consideration of the following factors:
(1) The length of the relationship;
(2) The type of relationship; and
(3) The frequency of interaction between the persons involved in the relationship;

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SPECIFIC OFFENSES:
(iii) *Domestic violence* meaning felony or misdemeanor crimes committed by a person who:
(A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the School, or a person similarly situated to a spouse of the victim;
(B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
(C) Shares a child in common with the victim; or
(D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction;

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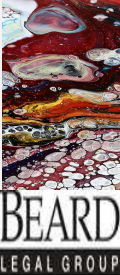


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SPECIFIC OFFENSES

(iv) ***Stalking*** meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- (A) Fear for the person’s safety or the safety of others; or
- (B) Suffer substantial emotional distress.

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STUDENT WITH A DISABILITY MEANS:

A student who is:

1. an individual with a disability as defined in Section 504, 29 U.S.C. 705(9)(B), (20)(B), or
2. a child with a disability as defined in the Individuals with Disabilities Education Act, (“IDEA”) 20 U.S.C. 1401(3).



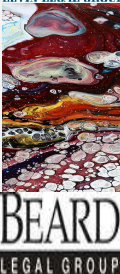

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“SUPPORTIVE MEASURES” MEANS :

Individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to:

- (1) ***Restore or preserve that party’s access*** to the School’s education program or activity, including measures that are ***designed to protect the safety*** of the parties or the School’s educational environment; or
- (2) ***Provide support during the School’s grievance procedures*** under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k).

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FUNDAMENTAL PREMISES OF THE NEW REGULATIONS

➤ **Fundamental Premise #1:** The new Title IX Regulations address both [1] discrimination based on sex; *and* [2] sexual harassment.

➤ **Fundamental Premise # 2:** Not all sexualized conduct constitutes “sexual harassment.”

➤ **Fundamental Premise #3:** Conduct **must not** be called “discrimination based on sex” until [1] the process has been completed and [2] the decision-maker concludes there has been discrimination.

➤ **Fundamental Premise #4:** Sexualized conduct **must not** be called “sexual harassment” by the *School* until [1] the process has been completed; and [2] the decision-maker concludes the conduct is sexual harassment.

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AIDES TO UNDERSTANDING THESE SLIDES

➤ Defined terms will be in ***bold and italicized font***;

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THE NEW REGULATIONS: THE FUNDAMENTAL PREMISE

- The regulations are premised on setting forth clear legal obligations that require *Schools* to eliminate discrimination on the basis of sex. 34 C.F.R. § 106.1.
- The elimination of discrimination on the basis of sex must be done in accordance with the regulations and the regulatory framework—*i.e.*, process is as important as substance!

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THE TWIN DUTIES

- Create the required Title IX “Infrastructure”
- Eliminate unlawful sex-based discrimination.

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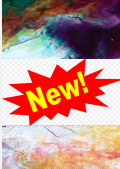
DUTY—ELIMINATE DISCRIMINATION!

Schools [1] with knowledge of conduct that [2] reasonably *may* constitute sex discrimination in its education program or activity must:

1. Respond promptly;
2. Respond effectively; and
3. Comply with the regulations when responding!

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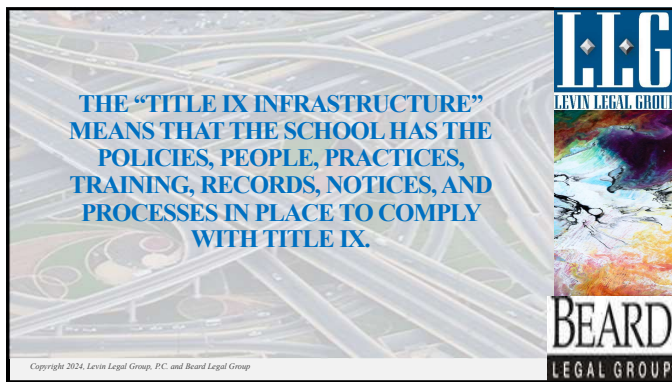
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THE REQUIRED BUREAUCRACY :

1. One or more Title IX Coordinators;
2. Investigators;
3. Facilitators;
4. Decisionmakers;

Not “required” by Title IX, but recommended:
Counsel

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THE TITLE IX COORDINATOR:

- *Schools* must designate and provide required authority on at least one *Coordinator*
- If more than one is designated, one must:
 1. have “ultimate oversight”; and
 2. Ensure consistent compliance.
- *Schools* or *Coordinators* may delegate specific duties.

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THE BUREAUCRACY:

1. *Schools* must have enough:
 - a. Investigators;
 - b. Decisionmakers; and
 - c. Facilitatorsto perform the work on a timely basis;
2. *Schools* can use employees, outside contractors, or law firms, provided they have been properly trained!

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POLICY:

Schools must [1] adopt, [2] publish and [3] implement a policy that *School* [4]does not discriminate on the basis of sex and [5] prohibits sex discrimination.



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THE POLICY MUST ADDRESS:

- Prohibitions and requirements of *Title IX*;
- Grievance Process;
- Required personnel;
- Notices;
- Recordkeeping;** and
- Duties of employees to comply with *Title IX* requirements and prohibitions.



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GRIEVANCE PROCEDURES:

1. *Schools* must: [a] adopt, [b] publish, and [c] implement grievance procedures that:

2. provide for the [a] prompt and [b] equitable resolution of *Complaints* made by:

a. students,

b. employees, or

c. other individuals who are participating or attempting to participate in the School's education program or activity, or

d. by the *Coordinator*,

3. alleging any conduct that would be prohibited by Title IX.

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SCHOOLS MUST PROVIDE A NOTICE OF NONDISCRIMINATION TO:

1. Students;

2. Parents;

3. Guardians;

4. Other authorized legal representatives of elementary school and secondary school students;

5. Employees;

6. Applicants for admission

7. Applicants for employment;

8. All unions with collective bargaining agreements;

9. Professional organizations with agreements—i.e., administrative compensation plans.

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NOTICE MUST CONTAIN:

1. A statement that the *School* does not discriminate on the basis of sex and prohibits sex discrimination;

2. A statement that inquiries may be referred to the *Coordinator*, Office for Civil Rights or both;

3. The name or title, office address, email address, and telephone number of the *Coordinator*;

4. How to find the policy and grievance process;

5. How to report conduct that may constitute discrimination; and

6. How to make a *Complaint*.

7. Exceptions can be included.

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REQUIRED NOTICE MUST BE PUBLISHED:

- On *School's* website
- In **each** handbook, catalog; announcement, bulletin and application forms
- If the announcement or bulletin is too small to include full notice, a statement that the *School* prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the *Coordinator*, and provide the location of the notice on the *School's* website.

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PROHIBITED STATEMENTS:

Schools must not use or distribute a publication stating that the School treats applicants, students, or employees differently on the basis of sex, except as such treatment is permitted by Title IX.

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TRAINING—SPECIALIZED TRAINING:

1. Investigators,

2. Decisionmakers,

3. Others who are responsible for implementing the grievance procedures, and

4. Those with authority regarding supportive measures

must be trained regarding:

1. *The Basics*;

2. The *School's* obligations that are relevant to their responsibilities.

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TRAINING FOR INVESTIGATORS, DECISIONMAKERS, GRIEVANCE IMPLEMENTORS; SUPPORTIVE IMPLEMENTORS

In addition to training regarding their responsibilities, training must include:

1. The grievance procedures;

2. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;

3. The meaning and application of the term “relevant” in relation to questions and evidence; and

4. the types of evidence that are impermissible regardless of relevance.

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FACILITATORS:

Facilitators must be trained:

1. *The Basics*;

2. on the rules and practices associated with the school’s informal resolution process; and

3. how to serve impartially, including by avoiding conflicts of interest and bias.

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TRAINING FOR *COORDINATOR* AND *DESIGNEES*

Coordinator and designees must be trained:

1. “*The Basics*”;
2. on the rules and practices associated with the *School’s* informal resolution process; and
3. how to serve impartially, including by avoiding conflicts of interest and bias;
4. on their specific responsibilities under Title IX;
5. the *School’s* recordkeeping system;
6. Title IX’s record-keeping requirements; and
7. any other training necessary to coordinate the *School’s* compliance with Title IX.

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RECORDKEEPING REQUIREMENTS:

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BRINGING RECORDKEEPING SYSTEM INTO COMPLIANCE

1. *Schools* must maintain for a period of at least seven (7) years:
2. Complete records regarding each *Complaint*;
3. Records related to each mandatory report from employees;
4. Records documenting what was done in response to each report;
5. All materials used for training.

The training materials, including this PowerPoint, are public records under the RTK law and are required to be provided on request under the Title IX regulations.

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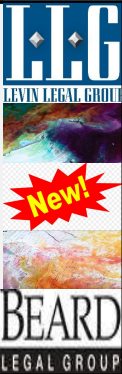
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STUDENTS WITH DISABILITIES

If a *Complainant* or *Respondent* is a *student with a disability*:

- The *Coordinator* must consult with one or more members, as appropriate, of the student's IEP team, if any, or one or more members, as appropriate, of the group of persons responsible for the student's placement decision, if any, to determine how to comply with the requirements of the IDEA and Section 504 throughout implementation of grievance procedures.

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PRE-EMPLOYMENT INQUIRIES

- Marital status.* Schools must not make a pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."
- Sex.* Schools may ask an applicant for employment to self-identify their sex, but only if this question is asked of all applicants and if the response is not used as a basis for discrimination prohibited by Title IX.

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PREGNANCY AND RELATED CONDITIONS

- Schools* must not discriminate in their education programs or activities against any student based on the student's current, potential, or past pregnancy or related conditions.
- It is not discrimination when a school allows a student, based on pregnancy or related conditions to participate voluntarily in a separate portion of its education program or activity provided the School ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions.

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PREGNANCY AND RELATED CONDITIONS

Schools must:

- Allow the student to voluntarily access any separate and comparable portion of the School's education program or activity.
- Allow the student to voluntarily take a leave of absence from the School's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's licensed healthcare provider.
- To the extent that a student qualifies for leave under a leave policy maintained by the School that allows a greater period of time than the medically necessary period, the School must permit the student to take voluntary leave under that policy instead if the student so chooses.

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PREGNANCY AND RELATED CONDITIONS

- **Return from Leave.** When the student returns to school, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the voluntary leave began.
- **Lactation Space.** *Schools* must ensure that the student can access a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.

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PREGNANCY AND RELATED CONDITIONS

- **Consistency of Treatment with Other Temporary Medical Conditions.** *Schools* must treat pregnancy or related conditions in the same manner and under the same policies as any other **temporary medical conditions** concerning any medical or hospital benefit, service, plan, or policy the *School* administers, operates, offers, or participates in concerning students admitted to the *School's* education program or activity.
- **Restrictions on Requiring Supporting Documentation.** *Schools* must not require supporting documentation unless the documentation is necessary and reasonable for the School to determine the reasonable modifications to make or whether to take additional action.

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PREGNANCY AND RELATED CONDITIONS

- **Consistency of Conditions.** Schools in the same metropolitan area must administer, or students admit activity.
- School must n documentation determine the take additiona

INTERRELATIONSHIP BETWEEN TITLE IX; ADA AND SECTION 504

- Physical or mental impairments related to pregnancy, childbirth or pregnancy related conditions may be disabilities under the Americans with Disabilities Act and/or Section 504.
- School may have a duty to engage in the interactive process under the ADA or Section 504.
- Chapter 15 of the regulations of the State Board of Education addresses students with disabilities but who do not need specially designed instruction and such children may be entitled to a service plan.

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PREGNANCY AND RELATED CONDITIONS

Examples of situations when requiring supporting documentation is not necessary or reasonable include:

- When the student's need for a specific action is obvious, such as when a student who is pregnant needs a bigger uniform;
- When the student has previously provided the **School** with sufficient supporting documentation;
- When the reasonable modification because of pregnancy or related conditions at issue is allowing a student to carry or keep water nearby and drink, use a bigger desk, sit or stand, or take breaks to eat, drink, or use the restroom; when the student has lactation needs; or when the specific action is available to students for reasons other than pregnancy or related conditions without submitting supporting documentation.

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PREGNANCY AND RELATED CONDITIONS

Certification to participate. Schools must **not** require a student who is pregnant or has related conditions to provide certification from a healthcare provider or any other person that the student is physically able to participate in class, program, or extracurricular activity unless:

1. The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;
2. The **School** requires such certification of all students participating in the class, program, or extracurricular activity; and
3. The information obtained is not used as a basis for discrimination prohibited by Title IX.

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PREGNANCY AND RELATED CONDITIONS

When a student informs **any employee** of the student's pregnancy or related conditions unless the employee reasonably believes that the **Coordinator** has been notified, **the employee** must:

1. promptly provide that person with the Title IX **Coordinator's** contact information; and
2. Informs that person that the **Coordinator** can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the **School's** education program or activity.

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PREGNANCY AND RELATED CONDITIONS

Reasonable modifications may include, but are not limited to:

1. Breaks during class to express breast milk, breastfeed, or attend to health needs, including eating, drinking, or using the restroom;
2. Intermittent absences to attend medical appointments;
3. Access to online or homebound education;
4. Changes in schedule or course sequence;
5. Extensions of time for coursework and rescheduling of tests and examinations;
6. Allowing a student to sit or stand, or carry or keep water nearby;
7. Counseling;
8. Changes in physical space or supplies (for example, access to a larger desk or a footrest);
9. Elevator access; or other changes to policies, practices, or procedures.

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PREGNANCY AND RELATED CONDITIONS

The **School** must take the following specific actions once the student notifies the **Coordinator** of the student's pregnancy or related conditions. The **Coordinator** must coordinate these actions.

The **School** must:

1. Inform the student of the **School's** obligations;
2. Provide the **School's** notice of nondiscrimination;
3. Consult with the student to determine individualized modifications that may be necessary to enable the student to participate in programs and activities;
4. Make reasonable modifications to the **School's** policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the **School's** programs and activities.

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PREGNANCY AND RELATED CONDITIONS

- A modification that would fundamentally alter the nature of the *School's* education program or activity is not a reasonable modification.
- The student has the discretion to accept or decline each reasonable modification offered.
- If a student accepts a *School's* offered reasonable modification, the *School* must implement it.



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EMERGENCY REMOVAL OF STUDENTS:

Title IX does not preclude a *School* from removing a *student Respondent* from the *School's* programs or activities on an emergency basis, provided that:

1. the *School* undertakes an *individualized safety and risk analysis*,
2. determines that an *imminent and serious threat to the health or safety of [a] a Complainant or [b] any students, employees, or [c] other persons arising from the allegations of sex discrimination justifies removal, and*
3. provides the *Respondent* with *notice and an opportunity to challenge the decision* immediately following the removal.



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EMERGENCY REMOVAL OF STUDENTS:

Title IX does not preclude a *School* from removing a *student Respondent* from the *School's* programs or activities on an emergency basis, provided that:

1. the *School* undertakes an *individualized safety and risk analysis*,
2. determines that an *imminent and serious threat to the health or safety of [a] a Complainant or [b] any students, employees, or [c] other persons arising from the allegations of sex discrimination justifies removal, and*
3. provides the *Respondent* with *notice and an opportunity to challenge the decision* immediately following the removal.



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EMERGENCY

Title IX does not
Respondent fire

2. determines
or safety of
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of sex discrimination

3. provides the
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§ 14.143. Exclusion from school.

(a) The governing board shall define and publish the types of offenses that would lead to exclusion from school. Exclusions affecting certain students with disabilities shall be governed by § 14.143 (relating to disciplinary placements) and 34 CFR 300.519—300.529 (relating to discipline procedures).

(b) Exclusion from school may take the form of suspension or expulsion.

(c) Suspension is exclusion from school for a period of three (3) to 18 consecutive school days.

(d) Suspension may be given by the principal or person in charge of the public school.

(e) Exclusion from school shall not be made in one consecutively beyond the 18 school day period.

(f) Students shall have the responsibility to make up missed work and make missed while being assigned to suspension and shall be provided to complete their assignments within guidelines established by the governing board.

(g) Exclusion from school shall be by the governing board for a period exceeding 18 school days and shall be by suspension from the school staff. Exclusion requires prior approval by the governing board.

(h) During the period prior to the hearing and decision of the governing board in an exclusion case, the student shall be placed in the nearest class or grade or be held in seclusion.

(i) If it is determined after an individual hearing that a student's presence in his or her school class would materially disrupt the health, safety or welfare of others and it is not possible to hold a hearing within the period of a suspension, the student may be excluded from school for more than 18 school days. In addition, any student excluded from school shall be provided with alternative educational arrangements reasonably agreed upon by both parties. Any student so excluded shall be provided with alternative educational arrangements within 10 school days.

(j) Students who are under 18 years of age are not subject to the compulsory school attendance law even though expelled and shall be provided an education.

(k) The school responsibility for providing the required education rests with the student's parents or guardian, through placement in another school, based on correspondence only, or another educational program approved by the district's superintendent.

(l) Within 10 days of notice to the governing board, the parents or guardian shall submit to the school district written evidence that the required education is being provided as described in

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ADMINISTRATIVE LEAVES OF EMPLOYEES:

• Nothing in Title IX precludes a School from placing an employee Respondent on administrative leave from employment responsibilities during the pendency of the School's grievance procedures.

• But, due process is implicated and needs to be addressed!

• The Title IX regulations are not a license to dispense with due process.

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PROHIBITED DISCLOSURES OF PERSONALLY IDENTIFIABLE INFORMATION ("PII"):

Schools must not disclose PII obtained while complying with Title IX, except in the following circumstances:

1. When the School has obtained prior written consent to the disclosure;

2. When the information is disclosed to a Parent;

3. To carry out the purposes of Title IX, including action taken to address conduct that reasonably may constitute sex discrimination;

4. As required by Federal law, Federal regulations, or the terms and conditions of a Federal award, including a grant award or other funding agreement; or

5. To the extent such disclosures are not otherwise in conflict with Title IX when required by State or local law or when permitted under FERPA.

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DISCRETION TO OFFER INFORMAL RESOLUTION:

At any time prior to determining whether sex discrimination occurred *Schools* may offer to a *Complainant* and *Respondent* an informal resolution process, unless:

1. the *Complaint* includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student; or

2. such a process would conflict with Federal, State, or local law.

Schools that provide the parties an informal resolution process must, to the extent necessary, also require its *Coordinator* to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the School's education program or activity.

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DISCRETION TO OFFER INFORMAL RESOLUTION:

- The *School* has the **discretion** to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that reasonably may constitute sex discrimination under Title IX; and may decline to offer informal resolution despite one or more of the parties' wishes.
- Circumstances when *Schools* may decline to allow informal resolution include when the *School* determines that the alleged conduct would present a future risk of harm to others.
- Schools* must not require or pressure the parties to participate in an informal resolution process.
- Schools* must obtain the parties' voluntary consent to the informal resolution process and must not require a waiver of the right to an investigation and determination of a complaint as a condition of enrollment or continuing enrollment, employment or continuing employment, or exercise of any other right.

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DISCRETION TO OFFER INFORMAL RESOLUTION:

Before initiation of an informal resolution process, *Schools* must provide the parties with notice that explains:

1. The allegations;

2. The requirements of the informal resolution process;

3. That, before agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the grievance procedures;

4. That the parties' agreement to a resolution after the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;

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DISCRETION TO OFFER INFORMAL RESOLUTION:

Cont’d: Before initiation of an informal resolution process, **Schools** must provide the parties with notice that explains:

- The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties; and
- What information the **School** will maintain and whether and how the **School** could disclose such information for use in grievance procedures under § 106.45, and if applicable § 106.46, if grievance procedures are initiated or resumed.



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INFORMAL RESOLUTION—FACILITATOR:

- The **Facilitator** for the informal resolution process must not be the same person as the **Investigator** or the **Decisionmaker**
- Any person designated 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.
- Facilitators** must receive training.



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INFORMAL RESOLUTION—POTENTIAL TERMS:

Potential terms that may be included in an informal resolution agreement include:

- Restrictions on contact; and
- Restrictions on the **Respondent’s** participation in one or more of the **School’s** programs or activities or attendance at specific events, including restrictions the **School** could have imposed as remedies or disciplinary sanctions had the **School** determined at the conclusion of the **School’s** grievance procedures that sex discrimination occurred.



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BASIC PRINCIPLES OF THE GRIEVANCE PROCESS:

- *Complainants* and *Respondents* must be treated equitably.
- *Coordinators, Investigators, and Decision-makers* must not have a [1] conflict of interest or [2] bias for or against *Complainants* or *Respondents* [a] generally or [b] an individual *Complainant* or *Respondent*.
- The *Decisionmaker* may be the same person as the *Coordinator* or *Investigator*.

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BASIC PRINCIPLES OF THE GRIEVANCE PROCESS:

- Grievance procedures must be in writing;
- Must include provisions that incorporate the requirements of 34 C.F.R. § 106.45.
- The requirements apply only to sex discrimination and not other types of discrimination.
- **Recommendations:**
 1. Describe in full all provisions in the new Policy; and
 2. Include a provision that states: “All of the requirements contained in 34 C.F.R. § 106.45 are incorporated herein by this reference as if set forth herein in full.”

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BASIC PRINCIPLES OF THE GRIEVANCE PROCESS:

1. There must be a presumption that the *Respondent* is not responsible for alleged sex discrimination until a determination is made at the conclusion of the grievance procedures for *Complaints* of sex discrimination.
2. Establish reasonably prompt timeframes for the major stages of the grievance procedures.
3. Establish a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay.
4. Major stages include [a] evaluation (i.e., the School’s decision whether to dismiss or investigate a complaint of sex discrimination);[b] investigation; [c] determination; and [d] appeal.

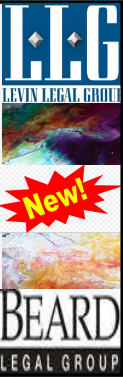
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BASIC PRINCIPLES OF THE GRIEVANCE PROCESS:
Schools must take reasonable steps to protect the privacy of [1] the parties and [2] witnesses during the pendency of the grievance procedures, provided that the steps do not restrict the ability of the parties to:

- obtain and present evidence, including by speaking to witnesses, subject to § 106.71;
- consult with their family members, confidential resources, or advisors; or
- otherwise prepare for or participate in the grievance procedures.



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BASIC PRINCIPLES OF THE GRIEVANCE PROCESS:
Decisionmakers must:

1. conduct an objective evaluation of all evidence that is [a] relevant and [b] not otherwise impermissible—including both [c] inculpatory and [d] exculpatory evidence—and
2. make credibility determinations that are not based on a person’s status as a *Complainant*, *Respondent*, or witness.



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BASIC PRINCIPLES OF THE GRIEVANCE PROCESS:
Schools must exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed or considered, regardless of whether they are relevant):

1. evidence that is protected under a privilege as recognized by Federal or State law; or
2. evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality;



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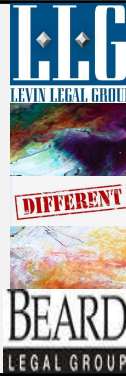
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BASIC PRINCIPLES OF THE GRIEVANCE PROCESS:

Schools must exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed or considered, regardless of whether they are relevant):

3. records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party or witness, **unless** the *School* obtains that party's or witness's voluntary, written consent for use in the *School's* grievance procedures; and

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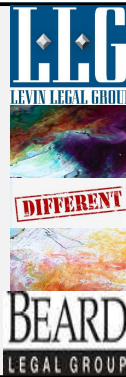
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BASIC PRINCIPLES OF THE GRIEVANCE PROCESS:

Schools must exclude the following types of evidence, and questions seeking that evidence, as impermissible:

4. Evidence that relates to [1] the *Complainant's* sexual interests or [2] prior sexual conduct, unless:
 - a. evidence about the *Complainant's* prior sexual conduct is offered to prove that someone other than the *Respondent* committed the alleged conduct; or
 - b. is evidence about specific incidents of the *Complainant's* prior sexual conduct with the *Respondent* that is offered to prove consent to the alleged sex-based harassment.
 - c. The fact of prior consensual sexual conduct between the *Complainant* and *Respondent* does not by itself demonstrate or imply the *Complainant's* consent to the alleged sex-based harassment or preclude a determination that sex-based harassment occurred.

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**BASIC PRINCIPLES OF THE GRIEVANCE PROCESS—
HARASSMENT COMPLAINTS:**

For *Complaints* alleging sex-based harassment, the grievance procedures must:

1. Describe the range of supportive measures available to *Complainants* and *Respondents*; and
2. List, or describe the range of, the possible disciplinary sanctions that the *School* may impose and remedies that the *School* may provide following a determination that sex-based harassment occurred.

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WHO CAN MAKE A COMPLAINT?

The following people may make a “*Complaint*” of either [1] discrimination or [2] sexual harassment:

1. A *Complainant*;

2. A Parent;

3. The *Coordinator*, after making the determination specified in § 106.44(f)(1)(v).

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WHO CAN MAKE A COMPLAINT?

The following may make a “*Complaint*” of discrimination other than sexual harassment:

1. Any student;

2. Any employee; or

3. Any person other than a student or employee who was participating or attempting to participate in the School’s program or activity at the time of the alleged sex discrimination—i.e., [a] applicants, [b] former students, [c] former employees.

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WHAT TRIGGERS ACTION BY TITLE IX COORDINATOR?

The following action triggers action by the *Coordinator*:

1. Receipt of a *Complaint*; or

2. When notified of conduct that reasonably may constitute sex discrimination under Title IX.

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COORDINATOR'S RESPONSE TO TRIGGERS:

The *Coordinator* must do the following after receipt of [1] a *Complaint* or [2] notice of conduct that may reasonably be unlawful discrimination:

1. Provide and coordinate supportive measures as appropriate;

2. Consider offering an informal resolution process;

3. If a *Complaint* has not been filed, consider whether to file a *Complaint*;

4. Notify the *Complainant*, or if the *Complainant* is unknown, the reporter, of the grievance and informal resolution processes;

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COORDINATOR'S RESPONSE TO TRIGGERS:

The *Coordinator* must do the following after receipt of [1] a *Complaint* or [2] notice of conduct that may reasonably be unlawful discrimination:

5. If a *Complaint* is made, notify the *Respondent* of the grievance and informal resolution processes;

6. In response to a *Complaint*, initiate the grievance procedures or the informal resolution process if appropriate and requested by all *Parties*.

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COORDINATOR'S RESPONSE TO TRIGGERS:

• If a *Complaint* has not been filed or is not pending, there are special rules regarding the *Coordinator's* decision whether to file a *Complaint* when receiving notice of conduct that may constitute sex discrimination or termination of the informal resolution process.

• The *Coordinator* must make a fact-specific determination that considers 8 separate factors.

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COORDINATOR'S RESPONSE TO TRIGGERS—
CONSIDERING WHETHER TO FILE A COMPLAINT

The *Coordinator* must make a fact-specific determination whether to file a **Complaint** considering the following:

1. **Complainant's** request not to proceed with initiation of a **Complaint**;

2. **Complainant's** reasonable safety concerns;

3. Risk that additional acts of sex discrimination would occur if a **Complaint** is not initiated;

4. The severity of the alleged discrimination and whether removal of **Respondent** or other disciplinary would be warranted if discrimination is established;

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COORDINATOR'S RESPONSE TO TRIGGERS—
CONSIDERING WHETHER TO FILE A COMPLAINT

The *Coordinator* must make a fact-specific determination whether to file a **Complaint** considering the following:

5. Age and relationship of parties, including whether the **Respondent** is an employee;

6. The scope of the alleged sex discrimination, including whether there is a pattern, ongoing discrimination, or effects on multiple individuals;

7. The availability of evidence in determining whether sex discrimination occurred; and

8. Whether the **School** could end the alleged discrimination and prevent its recurrence without utilizing the grievance process.

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COORDINATOR'S RESPONSE TO TRIGGERS—
CONSIDERING WHETHER TO FILE A COMPLAINT

Not only must the *Coordinator* undertake an evaluation of whether to file a **Complaint** by considering the 8 factors stated, but the **School** must be able to prove that the *Coordinator* did so. Records must include the evaluation and conclusion made.

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COORDINATOR'S RESPONSE TO TRIGGERS—
CONSIDERING WHETHER TO FILE A COMPLAINT

If, after considering these and other relevant factors, the *Coordinator* determines

1. that the conduct as alleged presents an imminent and serious threat to the health or safety of the [a] *Complainant* or [b] other person, or

2. that the conduct as alleged prevents the *School* from ensuring equal access on the basis of sex to its education program or activity, the *Coordinator* may initiate a *Complaint*.

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COORDINATOR'S RESPONSE TO TRIGGERS—
CONSIDERING WHETHER TO FILE A COMPLAINT

If initiating a *Complaint*, the *Coordinator* must:

1. notify the *Complainant* before doing so;

2. appropriately address reasonable concerns about the *Complainant's* safety or the safety of others; and

3. Appropriately address providing supportive measures.

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COORDINATOR'S RESPONSE TO TRIGGERS—
CONSIDERING WHETHER TO FILE A COMPLAINT

Regardless of whether a *Complaint* is initiated, the *Coordinator* must take other appropriate prompt and effective steps:

1. to ensure that sex discrimination does not continue or recur within the *School's* education program or activity; and

2. to effectuate the remedies provided to an individual *Complainant*, if any.

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COORDINATOR'S RESPONSE TO TRIGGERS— CONSIDERING WHETHER TO FILE A COMPLAINT

The *Coordinator* is not required to go through the process of determining whether to file a *Complaint* upon being notified of conduct that may constitute sex discrimination if the *Coordinator* reasonably determines that the conduct as alleged could not constitute sex discrimination under Title IX.

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SUPPORTIVE MEASURES

- *Schools* must offer and coordinate *Supportive Measures*, as appropriate.
- For allegations of sex discrimination *other than sex-based harassment or retaliation*, the *School's* provision of supportive measures does not require the *School*, its employee, or any other person authorized to provide aid, benefit, or service on the *School's* behalf to alter the alleged discriminatory conduct for the purpose of providing a supportive measure.

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SUPPORTIVE MEASURES

- Supportive measures may vary depending on what the School deems to be reasonably available.
- These measures may include:
 1. counseling;
 2. Extensions of deadlines and other course-related adjustments;
 3. campus escort services;
 4. increased security and monitoring of certain areas of the campus;

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SUPPORTIVE MEASURES

Supportive measures may include:
5. restrictions on contact applied to one or more parties;
6. leaves of absence; changes in class, work, housing, or extracurricular or any other activity,
7. regardless of whether there is or is not a comparable alternative; and training and education
8. programs related to sex-based harassment.

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SUPPORTIVE MEASURES:

1. Supportive measures must not unreasonably burden either party;
2. Supportive measures must be designed [a] to protect the safety of the parties or the *School's* educational environment, or [b] to provide support during the grievance procedures or during the informal resolution process
3. *Schools* must not impose such measures for punitive or disciplinary reasons.

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SUPPORTIVE MEASURES:

1. *Schools* may, as appropriate, modify or terminate supportive measures at the conclusion of the grievance procedures or at the conclusion of the informal resolution process; or
2. *Schools* may continue supportive measures beyond that point.

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SUPPORTIVE MEASURES:

- *Schools* must provide a *Complainant* or *Respondent* with a timely opportunity to seek, from an appropriate and impartial employee, modification or reversal of the *School's* decision to provide, deny, modify, or terminate supportive measures applicable to them.
- The impartial employee must be someone other than the employee who made the challenged decision and must have the authority to modify or reverse the decision if the impartial employee determines that the decision to provide, deny, modify, or terminate the supportive measure was inconsistent with the definition of supportive measures in § 106.2.

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SUPPORTIVE MEASURES:

Schools must also provide a party with the opportunity to seek additional modification or termination of a supportive measure applicable to them if circumstances change materially.

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SUPPORTIVE MEASURES:

Schools must not disclose information about any supportive measures to persons other than the person to whom they apply, including informing one party of supportive measures provided to another party, unless necessary to provide the supportive measure or restore or preserve a party's access to the education program or activity, or when an exception in § 106.44(j)(1) through (5) applies.

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INITIATION OF GRIEVANCE PROCEDURES

Upon initiation of the grievance procedures, *Schools* must provide notice of the allegations to the parties whose identities are known. The notice must include:

1. The grievance procedures;

2. The informal resolution process;

3. Sufficient information available at the time to allow the parties to respond to the allegations.

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INITIATION OF GRIEVANCE PROCEDURES

"Sufficient information" includes:

1. the identities of the parties involved;

2. the conduct alleged to constitute sex discrimination;

3. the date(s) and location(s) of the alleged incident(s), to the extent that information is available to the *School*;

4. A statement that retaliation is prohibited;

5. A statement that the *Parties* are entitled to [a] an equal opportunity to access the relevant and not otherwise impermissible evidence; or [b]an accurate description of this evidence; and

6. if the *School* provides a description of the evidence, the parties are entitled to an equal opportunity to access to the relevant and not otherwise impermissible evidence upon the request of any party.

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INITIATION OF GRIEVANCE PROCEDURES

If, during an investigation, the *School* decides to investigate additional allegations of sex discrimination by the *Respondent* toward the *Complainant* that are not included in the original notice, the *School* must provide notice of the additional allegations to the parties whose identities are known.

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CONSOLIDATION OF COMPLAINTS

Schools may consolidate complaints of sex discrimination against more than one *Respondent*, or by more than one *Complainant* against one or more *Respondents*, or by one *Party* against another *Party*, when the allegations of sex discrimination arise out of the same facts or circumstances.

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INVESTIGATION OF COMPLAINTS

- *Schools* must provide for [1] adequate, [2] reliable, and [3] impartial investigation of complaints.
- Investigations must comply with the regulations.

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INVESTIGATION OF COMPLAINTS

Schools must:

1. Ensure that the burden is on the *School*—not on the parties—to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred;
2. Provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that is relevant and not otherwise impermissible;
3. Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance; and
4. Provide each party with an equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible.

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INVESTIGATION OF COMPLAINTS—ACCESS TO EVIDENCE

Schools must:

1. provide an equal opportunity to access either [1] the relevant and not otherwise impermissible evidence, or [2] an accurate description of this evidence (If the *School* describes the evidence, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party);
2. provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence; and
3. take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures. (For purposes of this paragraph, disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized.)

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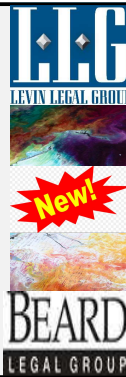


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INVESTIGATION OF COMPLAINTS—QUESTIONING BY DECISIONMAKERS

Schools must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

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DETERMINATION WHETHER DISCRIMINATION OCCURRED

- *Schools* must use the "preponderance of the evidence" standard of proof to determine whether sex discrimination occurred unless the *School* uses the "clear and convincing evidence standard" of proof in all other comparable proceedings.
- Both standards of proof require the *Decisionmaker* to evaluate relevant and not otherwise impermissible evidence *for its persuasiveness*.
- If the *Decisionmaker* is not persuaded under the applicable standard by the evidence that sex discrimination occurred, regardless of the quantity of the evidence, the decisionmaker must not determine that sex discrimination occurred.

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DETERMINATION WHETHER DISCRIMINATION OCCURRED

Schools must notify the Parties in writing of :

1. The determination of whether sex discrimination occurred under Title IX;
2. The rationale for such determination, and
3. The procedures and permissible bases to appeal.

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DETERMINATION WHETHER DISCRIMINATION OCCURRED

If there is a determination that sex discrimination occurred, as appropriate, Coordinator must:

1. Coordinate the provision and implementation of remedies to a Complainant and other persons the School identifies as having had equal access to the School's education program or activity limited or denied by sex discrimination;
2. Coordinate the imposition of any disciplinary sanctions on a Respondent, including notification to the Complainant of any such disciplinary sanctions;
3. Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur.

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DETERMINATION WHETHER DISCRIMINATION OCCURRED

- Schools may not impose discipline on a Respondent for sex discrimination unless there is a determination at the conclusion of the School's grievance procedures that the Respondent engaged in prohibited sex discrimination.
- Schools may discipline students and employees for conduct that violates applicable codes of conduct that do not rise to the level of unlawful sex discrimination! **BUT DON'T CALL IT DISCRIMINATION OR HARASSMENT!**

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DETERMINATION WHETHER DISCRIMINATION OCCURRED

Schools may not discipline:

1. a *Party*,
2. witness, or
3. others

participating in the grievance procedures for

1. making a false statement; or
2. engaging in consensual sexual conduct,

based solely on the School’s determination whether sex discrimination occurred.

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DETERMINATION OF WHETHER DISCRIMINATION OCCURRED

Schools must provide an appeal process from determinations whether sex discrimination occurred.

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DISMISSAL OF A COMPLAINT

Schools may dismiss a complaint of sex discrimination for any of the following reasons:

1. *School* is unable to identify the *Respondent* after taking reasonable steps to do so;
2. The *Respondent* is not participating in the *School's* education program or activity and is not employed by the *School*;
3. The *Complainant* voluntarily withdraws any or all the allegations in the complaint, the *Coordinator* declines to initiate a complaint, and the *School* determines that, without the *Complainant's* withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination even if proven;

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DISMISSAL OF A COMPLAINT

Schools may dismiss a complaint of sex discrimination for any of the following reasons:

4. The *School* determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX (Before dismissing the complaint for this reason, the *School* must make reasonable efforts to clarify the allegations with the *Complainant*.)

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DISMISSAL OF A COMPLAINT

- Upon dismissal, the *School* must promptly notify the *Complainant* of the basis for the dismissal.
- If the dismissal occurs after the *Respondent* has been notified of the allegations, then the *School* must also notify the *Respondent* of the dismissal and the basis for the dismissal promptly *following notification to the Complainant*, or *simultaneously if notification is in writing*.
- *Parties* must be notified of the right to appeal.

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DISMISSAL OF A COMPLAINT—MINIMUM DUTIES

A *School* that dismisses a *Complaint* must, at a minimum:

1. Offer supportive measures to the *Complainant* as appropriate;
2. For dismissals under paragraph (d)(1)(iii) or (iv) of § 106.45 in which the *Respondent* has been notified of the allegations, offer supportive measures to the *Respondent* as appropriate; and
3. Require the *Coordinator* to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur.

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APPEAL OF DISMISSAL OF A COMPLAINT

If a dismissal is appealed, the *School* must:

1. Notify the *Parties* of any appeal, including notice of the allegations consistent with paragraph (c) of this section if notice was not previously provided to the respondent;
2. Implement appeal procedures equally for the *Parties*;
3. Ensure that the **Decisionmaker** for the appeal did not take part in an investigation of the allegations or dismissal of the complaint;
4. Ensure that the *Decisionmaker* for the appeal has been trained;

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APPEAL OF DISMISSAL OF A COMPLAINT

If a dismissal is appealed, the *School* must:

5. Provide the *Parties* a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome; and
6. Notify the *Parties* of [a] the result of the appeal, and [b] the rationale for the result.

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Part 4:

Applying the New Requirement to the Existing School Environment

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TO-DO LIST—FOR BOARD

☐ Adopt Policy;

☐ Adopt Motion superseding all policies, codes of conduct or AR’s inconsistent with Title IX or new Policy;

☐ Designate (or Re-designate) Title IX Coordinator(s); and

☐ Amend Code of Student Conduct.

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TO DO LIST –FOR ADMINISTRATION

☐ Create and adopt necessary AR’s

☐ Designate:

☐ Investigators;

☐ Facilitators;

☐ Decision-makers;

☐ Create a list of duties to include in job descriptions of the foregoing personnel;

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TO DO LIST –FOR ADMINISTRATION

☐ Review current governing documents and remove inconsistencies with Title IX Requirements;

☐ Make sure everyone knows the rules through:

☐ Posting;

☐ Distribution;

☐ Include policy in student and employee handbooks; and

☐ Training;

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TO-DO LIST –FOR ADMINISTRATION

☐ Create templates for:

☐ Incident report;

☐ Intake form;

☐ Notices;

☐ Complaint form;

☐ Notice to Complainant;

☐ Notice to Respondent;

☐ Notice to witnesses;

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TO DO LIST –FOR ADMINISTRATION

Templates, cont’d:

☐ Notice when delay or extension is necessary;

☐ Written Determination and notices;

☐ Dismissal Form and Notices.

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TO DO LIST –FOR ADMINISTRATION

Templates, cont’d:

☐ Appeal form;

☐ Notice of filing of appeal form;

☐ Notice to parties of procedure and rights on appeal;

☐ Form for Appeal Decision; and

☐ Chain of Custody form.

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TO DO LIST –FOR ADMINISTRATION

☐ Create the following services:

☐ supportive services; and

☐ informal resolution processes;

☐ Write and adopt an extensive Code of Employee Conduct or amend existing Code of Employee Conduct;

☐ Create a training program;

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TO-DO LIST –FOR ADMINISTRATION

☐ Establish a process to train all new Coordinators, Investigators, Facilitators and Decisionmakers as they assume their roles;

☐ Create an effective and secure record-keeping system that meets regulatory requirements;

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TO DO LIST –FOR ADMINISTRATION

☐ Make all required postings on website:

☐ Title IX Coordinator(s) name and contact information;

☐ Process to file complaint or report sexual harassment;

☐ Anti-discrimination/anti-harassment Policy; and

☐ All training materials.

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TO DO LIST –FOR ADMINISTRATION;
ADMINISTRATIVE REGULATIONS

The authority for Administrative Regulations (“AR’s) is both implied in law and expressly authorized in Policy 000 if your school subscribes to the PSBA Policy Service.

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TO-DO LIST –ADMINISTRATIVE REGULATIONS

➤ Policy 000 provides:

“The policies of the Board shall consist of the policies and procedures adopted by the Board and contained in the Policy Manual, and such other separate documents approved by the Board that are expressly incorporated by reference in particular policies and declared to constitute Board policy, such as the Code of Student Conduct.

Administrative regulations are not part of Board policy and may be altered by the administration without Board action.

Administrative regulations may not conflict with Board policy or with applicable law.”

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TO DO LIST –FOR ADMINISTRATION

☐ Two of the recommended AR’s are:

☐ a detailed “Complaint Procedure”; and

☐ a detailed “Grievance Process”.

➤ Both should be prepared with counsel;

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**INTEGRATING THE TITLE IX
PROCEDURES INTO THE
SCHOOL'S EXISTING
PROCEDURES**

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WHO SHOULD FILL THE REQUIRED ROLES?

Coordinator:

- Remember, at least one is required, several can be appointed
- HR Director; Director of Pupil Services; Athletic Director

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WHO SHOULD FILL THE REQUIRED ROLES?

Investigators:

For student matters—principals

For employee matters—HR Office or supervisors

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WHO SHOULD FILL THE REQUIRED ROLES?

Decisionmakers:

- people from HR;
- People from pupil services; or
- Legal counsel.

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WHO SHOULD FILL THE REQUIRED ROLES?

Informal Facilitator:

- Someone from HR; or
- Someone from pupil services.

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ONE SCHOOL, TWO SYSTEMS

- System 1: Everything that does not come within the scope of Title IX
- System 2: Everything that comes within the scope of Title IX
- They are separate systems that run on separate tracks, but (1) sometimes the tracks intersect; and (2) sometimes a matter will change tracks

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ONE PUBLIC SCHOOL, TWO SYSTEMS

“Effect of State or local law or other requirements. The obligation to comply with Title IX and this part is not obviated or alleviated by any State or local law or other requirement that conflicts with Title IX or this part.” 34 C.F.R. § 106.6.

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CODE OF STUDENT CONDUCT

“Each governing board shall adopt a code of student conduct that includes policies governing student discipline and a listing of students’ rights and responsibilities as outlined in this chapter. This conduct code shall be published and distributed to students and parents or guardians. Copies of the code shall also be available in each school library.” 22 Pa. Code, § 12.3(c).

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CODE OF EMPLOYEE CONDUCT

“The Board directs that all district employees **shall be informed of conduct that is required and is prohibited during work hours** and the disciplinary actions that may be applied for violation of Board policies, administrative regulations, rules and procedures.” Policy 317.

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THE NEW REGULATIONS: EXCEPTIONS TO RETALIATION

1. The exercise of First Amendment rights does not constitute retaliation;

2. Charging an individual with a **code of conduct** violation for making a materially false statement in bad faith during a grievance proceeding under this part does not constitute retaliation;

3. But a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

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CODES OF CONDUCT—THE BOTTOM LINE

➤ *Schools* Need a Code of Employee Conduct as well as a Code of Student Conduct.

➤ The Codes of Conduct must contain provisions that incorporate the Title IX rules.

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THE INVESTIGATION; INVESTIGATIVE INTERVIEWS

➤ Select the investigator

➤ The Investigator plans the investigation process

➤ The Investigator determines whether and how the School Attorney will be involved

➤ The Investigator ensures proper notices are given to *Complainant*, *Respondent* and witnesses

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THE INVESTIGATION; INVESTIGATIVE PLAN

Investigators are encouraged to have a **flexible** plan that can be and is changed as warranted, identifying:

- witness list
- order of interviews
- topics to cover for each witness (be prepared to change and supplement—**this is different than interviewing for job applicants—you are not to ask the same questions of each witness!**)

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THE INVESTIGATION; INVESTIGATIVE PLAN

Investigative plan, cont'd:

- list of physical evidence needed, such as
 - ❖ records
 - ❖ reports
 - ❖ documents
 - ❖ calendars
 - ❖ measurements
 - ❖ etc.
- where will witness interviews take place, what confidentiality is needed?

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THE INVESTIGATION; INVESTIGATIVE PLAN

Investigative plan, cont'd:

- Interviewing member of a collective bargaining unit—remember employee's *Weingarten* rights!
 - ❖ Should the union be contacted by school or by employee?
 - ❖ Generally, by employee due to confidentiality rules

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THE INVESTIGATION; MISC. ISSUES

➤ Don't promise anything other than the promise to do a thorough and fair investigation

➤ Don't promise confidentiality

➤ Don't promise or offer "immunity"

➤ What do you do with an uncooperative witness who refuses to be interviewed or answer certain questions?

➤ Answer: Call counsel for District

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THE INVESTIGATION; INVESTIGATIVE INTERVIEWS

➤ How will investigative interviews be conducted?

➤ Notes only?

➤ Audio recording?

➤ Court reporter?

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THE INVESTIGATION; NOTE TAKERS

➤ If the *Investigator* uses a "note taker," be careful:

➤ give written directives to note taker to:

❖ keep everything confidential;

❖ Not to give copies of the notes to anyone, except *Investigator*, counsel for school, *Coordinator* or Superintendent/Executive Director

❖ Not to destroy any handwritten or other notes used to prepare the final "record" of the interview

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THE INVESTIGATION

Investigations include more than interviews—they may involve:

➤ security video (make sure it is preserved and not automatically deleted);

➤ Records from the FOB system;

➤ Sign-in sheets;

➤ Time sheets for non-exempt employees;

➤ Applicable policies, code of conduct, collective bargaining agreement(s), individual contracts

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THE INVESTIGATION

Investigations include more than interviews—they may involve:

➤ Calls to prior employers;

➤ Personnel files;

➤ Investigation of social media;

➤ Forensic study of computers and electronic devices

➤ Etc., etc., etc.

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THE INVESTIGATION

Investigations include more than interviews—they may involve:

➤ Searches of lockers, bookbags, pockets, desks, etc.

❖ **Caution**—Remember the 4th Amendment and State Board regulations

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THE INVESTIGATION

Investigations include more than interviews—they may involve:

- Confiscation and search of electronic devices:
 - ❖ Use a chain of custody form.
 - ❖ Have student or employee turn it off before you take it.
 - ❖ Decide whether a forensic IT consultant will be hired; is a forensic image needed?
 - ❖ Decide who turns it on and searches it.

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THE INVESTIGATION; SCHOOL COUNSEL

- What is the role of counsel for the school?
- Counsel represents the entity—i.e., the School District, Intermediate Unit or Vocational-Technical School, **not**:
 - ❖ the superintendent;
 - ❖ the board; or
 - ❖ any administrator, investigator, decision-maker
- Counsel has many ethical duties as he/she is involved in an investigation or decision

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THE INVESTIGATION; SCHOOL COUNSEL

- There are different ways that counsel can be used:
 - ❖ as a “passive advisor” answering specific questions; to
 - ❖ hands-on planner and interviewer.
- It is strongly recommended that counsel be and remain legal counsel performing only work within the scope of a legal counsel—this will preserve the attorney-client privilege.
- Even as a “hands-on” planner and interviewer, these are roles of a lawyer

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THE INVESTIGATION; PRESERVING COUNSEL'S
ROLE AS AN ATTORNEY

➤ Unless an attorney is expressly and specifically hired to be the decision-maker, Counsel is not to make decisions, only offer recommendations and advice.

➤ The *School*—be it the Coordinator, the Investigator, the Facilitator, or the Decisionmakers—makes the decisions based on counsel's advice.

➤ Counsel should not be sending any of the notices or correspondence required by Title IX—those must come from the *School* on *School's* letterhead.

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THE INVESTIGATION; PRESERVING COUNSEL'S
ROLE AS AN ATTORNEY

➤ If counsel will be present for an investigative interview and conduct the questioning, counsel should clearly identify his/her role, saying something like the following:

➤ “You may be wondering why the School District has an attorney here and what my role is. I have been asked to provide legal assistance to the School District to ensure that it is complying with applicable law and to ask appropriate questions in accordance with legal rules. I will not be making any of the decisions in this matter—the decisions will be made by the appropriate officials of the school, which may be based on legal advice that I provide. I represent the School District and not anyone else in these proceedings.”

➤ Make sure your lawyer says something like that “on the record”

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MUST BE IMPARTIAL AND FAIR

All investigations, decisions and
actions **must be fair and
impartial**

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MUST BE FAIR AND IMPARTIAL

- Don't prejudge the facts—wait until you hear all the evidence from all of the witnesses;
- Presume the non-responsibility of respondents until the conclusion of the grievance process when a decision is made based on a fair assessment of evidence;
- Provide both parties with equal opportunity to present witnesses and other evidence;

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MUST BE FAIR AND IMPARTIAL

- Provide written notice of the allegations to both parties;
- Do not restrict the parties from discussing the allegations or gathering evidence (What about confidentiality?);
- Give the parties equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney);

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SCHOOL ATTORNEY

Can the *School* be represented by counsel at each step of the process?

- Yes!
- **Caveat:** Perhaps the same lawyer should not be involved at the appeal step who was involved in the initial decision step?

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SCHOOL ATTORNEY

When is it important to have counsel involved in an advisory role (*i.e.*, not the decisionmaker)?

- When the **Complainant**, the **Respondent**, or any witness is represented by counsel;
- When there are unusual legal issues at play;
- When there are threats of litigation;
- When the potential legal liability is significant;
- When the alleged conduct is significant, or the possible disciplinary consequences are significant;

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EFFECT OF CRIMINAL PROCEEDINGS OR INVESTIGATION

- Criminal proceedings do **not** relieve the school of its duties under Title IX—you must investigate promptly, decide promptly, provide supportive measures promptly, and take appropriate action based on the decision.
- The decision of police is not determinative of whether there was unlawful harassment, unless there is a guilty plea or verdict of an offense whose elements establish “sexual harassment.”

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MUST BE FAIR AND IMPARTIAL

- Both parties have equal opportunity to review and respond to the evidence gathered during the investigation
- Cannot be biased in any way:
 - Due to nature of allegations;
 - Due to the identity of the parties or the witnesses;
 - Due to the status of the parties or the witnesses;

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MUST BE FAIR AND IMPARTIAL

- Must not rely upon or consider stereotypes or other irrelevant facts:
 - Manner of dress;
 - Most past disciplinary issues;
 - Occupation of parents;

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MUST BE FAIR AND IMPARTIAL

- Must not rely upon untrustworthy evidence;
- Uncorroborated hearsay
 - go to the source;
- Summaries or descriptions of a document;
 - get the document;

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MUST BE FAIR AND IMPARTIAL—RECUSAL

When must you “recuse” yourself?

- Knowledge of parties or witnesses—not a reason to recuse;
- Friendship, socializing out of school, membership in same clubs, organizations or religious congregations—may be a reason to recuse;
- Your belief that you cannot perform your function fairly and without bias to any party;
- You are named as the alleged Perpetrator;

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MUST BE FAIR AND IMPARTIAL—RECUSAL

When must you recuse yourself?

- Prior significant event with either party or a witness, such as:
- Unsatisfactory rating to teacher—probably not enough to require recusal;
- Prior suspension of a student—probably not enough to require recusal;
- Testified against a student or teacher—probably should recuse;

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MUST BE FAIR AND IMPARTIAL—RECUSAL

When must you recuse yourself?

- There's a picture of you and the *Respondent* in a pool together in Las Vegas—you should recuse
- You are Facebook "friends" with a party or witness—you should recuse
- You posted  (thumbs down) on social media—it depends on whether you should recuse

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MUST BE FAIR AND IMPARTIAL—RECUSAL

When must you recuse yourself?

- You previously dated one of the parties—you must recuse yourself;
- You dated a witness—maybe you need to recuse yourself
- **Bottom line:** You must be alert to see the situations that may require your recusal and get the advice of counsel when necessary!

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MUST BE FAIR AND IMPARTIAL—RECUSAL

When must you recuse yourself?

- You are the Title IX Coordinator, and you signed the complaint—no
- You filed a report to Childline—no
- You notified law enforcement—no
- You wrote an op-ed for the Washington Post denouncing a party—yes

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PRACTICAL TIPS

We recommend that notice be provided to the parties of their ability to raise the issue of bias and conflict and to state the reasons—it should be in writing.

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RULES OF EVIDENCE

- Formal legal rules of evidence do not apply
- Evidence should be heard that is reasonably probative of relevant facts

Note: Virtually every rule we will discuss today has exceptions!

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RULES OF EVIDENCE

Although formal or legal rules of evidence do not apply, there are several substantive laws that apply to the evidence gathering process

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RULES OF EVIDENCE—RELEVANCY

- "Relevant evidence" is that which tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference or presumption regarding a material
- A "material fact" is a fact that directly affects the outcome of the investigation

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RULES OF EVIDENCE—RELEVANCY

The kinds of evidence that would **usually** be relevant include the following:

- "Inculpatory" evidence—evidence which tends to prove that the alleged respondent is guilty;
- "Exculpatory" evidence—evidence which tends to prove that the alleged respondent is innocent;

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RULES OF EVIDENCE—RELEVANCY

Relevancy, cont'd:

- Who, what, where, when and why
- Alibi
- DNA, fiber, fingerprint,
- Electronic data; meta data
- Names of witnesses
- Motive

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RULES OF EVIDENCE—RELEVANCY

Relevancy, cont'd:

- Admission
- Prior inconsistent statements;
- Lying about an important material fact;
- Etc., etc., etc.

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RULES OF EVIDENCE—PRIVILEGE

- Lawful privilege: legally recognized privilege may not be pierced
- Attorney-client confidential communications;
- Attorney Work Product;
- Medical Records

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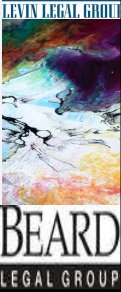


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RULES OF EVIDENCE—ABUSE OF FAMILY

“Unless a victim waives the privilege in a signed writing prior to testimony or disclosure, a domestic violence counselor/advocate or a coparticipant who is present during domestic violence counseling/advocacy shall not be competent nor permitted to testify or to otherwise disclose confidential communications made to or by the counselor/advocate by or to a victim. The privilege shall terminate upon the death of the victim.

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RULES OF EVIDENCE—ABUSE OF FAMILY

Neither the domestic violence counselor/advocate nor the victim shall waive the privilege of confidential communications by reporting facts of physical or sexual assault under Chapter 63 (relating to child protective services), a Federal or State mandatory reporting statute or a local mandatory reporting ordinance.” 23 Pa.C.S.A. § 6116.

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RULES OF EVIDENCE

Neither husband nor wife shall be competent or permitted to testify to confidential communications unless privilege is waived. 42 Pa.C.S.A. § 5923.

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RULES OF EVIDENCE—OTHER PRIVILEGES

➤Confidential communications to clergy;

➤Confidential communications with human trafficking caseworkers;

➤Confidential communications to news reporters;

➤Educator misconduct complaints

➤First Amendment Rights;


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RULES OF EVIDENCE—STUDENT RECORDS

➤Student records are generally considered “confidential”

➤FERPA, 20 U.S.C.A. §1232g; 34 C.F.R., Part 99

➤State Board Regulations, 22 Pa. Code, §§12.31, 12.32

➤School Board Policy


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PRACTICAL TIPS



Have consent forms,

HIPAA compliant

authorization forms, and

school records

authorization forms ready

to be used as necessary!


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RULES OF EVIDENCE—ILLEGAL RECORDINGS

- “Wiretapping and Electronic Surveillance Control Act.” 18 Pa.C.S.A. § 5701
- Prohibits—
 - Unlawful recording of private conversation
 - Disclosure of illegal recording
 - Use of illegal recording
- You can be fired if you violate the Act!

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PRACTICAL TIPS—RECORDINGS



- Do not listen to, take or use a recording until you are positively sure that it is not illegal!
- Contact legal counsel if there is any doubt at all!

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RULES OF EVIDENCE—HEARSAY

What is hearsay?

- (c) Hearsay. “Hearsay” means a statement that:
 - (1) the declarant does not make while testifying at the current trial or hearing; and
 - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Fed. R. Evid. 801

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RULES OF EVIDENCE—EXCEPTIONS

- There are many exceptions to hearsay, such as:
- Some prior inconsistent statements;
- Admissions;
- Excited utterance
- Statement made for medical diagnosis or treatment
- Statement is supported by sufficient guarantees of trustworthiness

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PRACTICAL TIPS



Listen to all evidence, including hearsay, but do not “rely upon” hearsay for making any decisions unless it is corroborated by competent evidence

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RULES OF EVIDENCE

- Direct evidence vs. Circumstantial evidence
- Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw, heard, or did.
- Circumstantial evidence is proof of one or more facts from which you could find another fact.

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**EVIDENCE OF COMPLAINT'S SEXUAL
PREDISPOSITION AND PRIOR SEXUAL BEHAVIOR**

- General rule—NOT RELEVANT!
- Exceptions:
 - Offered to prove that someone other than the responsee committed the conduct alleged by complainant;
 - Offered to prove consent, Really?

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**EVIDENCE OF COMPLAINT'S SEXUAL
PREDISPOSITION AND PRIOR SEXUAL BEHAVIOR**

“[T]he Court concludes that Plaintiff did not have the legal capacity to welcome Oakes's sexual advances.” *Chancellor v. Pottsgrove Sch. Dist.*, 501 F.Supp.2d 695, 706 (E.D. Pa. 2007)

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RULES OF EVIDENCE

- You should consider both kinds of evidence—direct evidence and circumstantial evidence.
- The law makes no distinction between the weight to be given to either direct or circumstantial evidence.
- You may decide the case solely based on circumstantial evidence.

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BURDEN OF PROOF—PREPONDERANCE

What does it mean that a fact has been proven by a preponderance of the evidence?

➤ This means that you are persuaded that the fact is more probably accurate and true than not



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BURDEN OF PROOF—PREPONDERANCE

➤ Judges explain it as follows:
Think of an ordinary balance scale, with a pan on each side. Onto one side of the scale, place all of the evidence favorable to the complainant; onto the other, place all of the evidence favorable to the respondent. If, after considering the comparable weight of the evidence, you feel that the scales tip, ever so slightly or to the slightest degree, in favor of one or the other, then the fact has been proven by a preponderance of evidence.

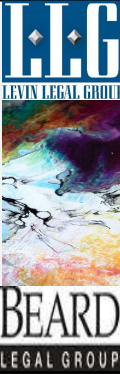


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BURDEN OF PROOF—CLEAR AND CONVINCING

For evidence to be clear and convincing, the witnesses must be found credible; the facts to which they testify must be distinctly remembered, and the testimony must be so clear, direct, weighty, and convincing that you can reach a clear conviction, without hesitancy, of the truth of the precise facts in issue. Although this is a significant burden of proof, it is not necessary that the evidence be uncontradicted, as long as the evidence leads you to a clear conviction of its truth.



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DECIDING CREDIBILITY

- I will mention some of the factors that might bear on that determination: whether witnesses have any interest in the outcome of the case or have friendship or animosity toward other persons concerned in the case;
- the behavior of the witness, the witness' demeanor; the manner of testifying and whether witnesses show any bias or prejudice that might color their testimony;

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DECIDING CREDIBILITY

- the accuracy of witnesses' memory and recollection;
- witnesses' ability and opportunity to acquire knowledge of or to observe the matters they are testifying about; and the consistency or inconsistency of their testimony as well as its reasonableness or unreasonableness in the light of all the evidence in the case.

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DECIDING CREDIBILITY

When you judge credibility, you are doing something you do every day of your life. You do it with your family, with friends and business associates, you do it whenever you go shopping or when you are out. That is, you have to decide what is it that you see and hear? What is it that you are being told that you will accept as true, that you will accept as something on which you will base a decision?

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DECIDING CREDIBILITY

What do you believe? What has the ring of truth about it amongst all of the answers, all the evidence that you hear? What are you willing to base an important decision on?

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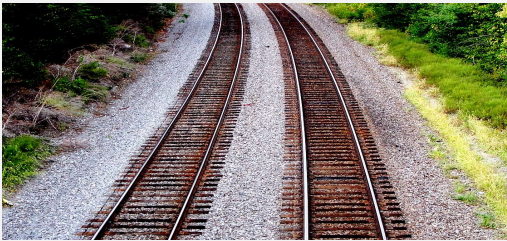


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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN



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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN

Students: **Track 1:** The regular disciplinary process governed principally by:

➤ 22 Pa. Code, Chapter 12 (Students and Student Services)

➤ Code of Student Conduct (22 Pa. Code §12.3(c))

➤ 24 P.S. §13-1318 (Suspension and expulsion of pupils)

➤ 20 U.S.C.A. § 1415(k) (Placement in alternative educational setting [of a student with a disability])

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN

Track 1 applies to all student matters unless they are governed by the Title IX regulations!

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN

Employees: Track 1: The regular disciplinary process governed principally by:

- 24 P.S. §11-1122 (Causes for termination);
- 24 P.S. §5-514 (Removal of employees);
- *Rike v. Com., Sec’y of Educ.*, 508 Pa. 190, 494 A.2d 1388 (1985)(districts possess authority to impose other forms of discipline);
- Code of Employee Conduct;
- Just Cause.

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN

Track 1 applies to all employee matters unless they are governed by the Title IX regulations!

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN

Understanding our perspective and assumptions:

1.

Virtually all matters will at least initially be reported to the principal(s) or supervisor(s) rather than the Title IX Coordinator(s);

2.

Principals and supervisors generally have the power to take some level of disciplinary or corrective action, and commonly do;

3.

The following slides are directed to you—**principals and supervisors!**

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN



➤**Always** keep Title IX in your mind

➤**Always** consider whether Title IX may apply

➤**Always** remember that the usual rules do not apply as usual when Title IX applies

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN



If you originally thought that the matter did not involve Title IX, **always** reassess whether a it does involve Title IX and change tracks as appropriate

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN



Always send matter to the applicable **Coordinator** if it seems like it might involve Title IX in any way **and** stop what you are doing!

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN

What kinds of matters are governed by the Title IX Regulations?

- “Sexual discrimination” (which includes “sexual harassment”) in a school program or activity
- “Sexual discrimination” is a legal conclusion that can only be made in accordance with the Title IX processes

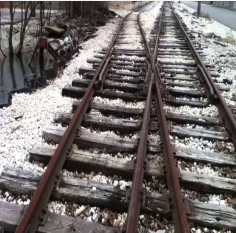
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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN



- So if you don’t know whether a matter is sexual discrimination until later, how do you know when to get off Track 1 and proceed on Track 2?
- By the nature of the information or allegations
- If it is sex discrimination in any way, switch to Track 2!

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN—EXAMPLES

➤“Johnny told me a sex joke”

➤Send it to the Title IX Coordinator

➤“The Assistant Principal keeps staring at me”

➤Send it to the Title IX Coordinator

➤“He keeps looking at my chest”

➤Send it to the Title IX Coordinator

➤“She is harassing me”

➤Send it to the Title IX Coordinator

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN—EXAMPLES

➤The custodian tells you, “I saw two kids kissing”

➤Send it to the Title IX Coordinator

➤You walk by two people talking about a teacher having an affair with the assistant principal

➤Send it to the Title IX Coordinator

➤You hear a rumor of a student having sex with another student or an employee

➤Send it to the Title IX Coordinator

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN—EXAMPLES

➤You hear that a student or employee is using sexually charged profanity towards another, “you are an F---- B---”

➤Send it to the Title IX Coordinator

➤You hear a student bullying a transgender student

➤Send it to the Title IX Coordinator

➤You hear that a teacher refuses to use the correct name or pronoun for a transgender student or colleague

➤Send it to the Title IX Coordinator

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN—EXAMPLES

➤ A teacher talks about his/her sexual experiences as part of a lesson

➤ **Send it to the Title IX Coordinator**

➤ An employee swats a student on the rump with a rolled-up magazine

➤ **Send it to the Title IX Coordinator**

➤ A science teacher buys a telescope for a student and gazes at the stars in the student’s back yard

➤ **Send it to the Title IX Coordinator**

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN—EXAMPLES

➤ The examples are infinite—be on the lookout to recognize when you must refer the matter to the Title IX Coordinator!

➤ **If in doubt—refer it!**

➤ When you have referred it, stop your usual process until told otherwise by the Title IX Coordinator

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN—EXAMPLES

➤ The *Coordinator* will act as the signalman in determining whether to proceed down Track 2 (the Title IX track) or whether, when, and how to return the matter to Track 1 (the usual disciplinary procedures)

➤ Whether, when, and how is based upon both substantive law and procedural law.

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ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES

After initial interviews, including interviews of the alleged victim, *Coordinator* concludes that the conduct, if true:

1. Does not meet the definition of “sexual harassment”;

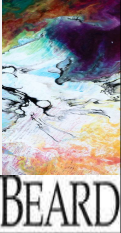
2. Did not occur within the *School’s* program or activity;

3. Did not occur to a person within the United States

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ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES—NOT “SEXUAL HARASSMENT”

1. Conduct wasn’t “sexual” in nature, objectively determined;

2. Conduct was not objectively “severe, pervasive and objectively offensive”;

3. Conduct was “welcomed” by the alleged victim(s); . . .

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ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES—NOT “SEXUAL HARASSMENT”

4. Conduct did not deny alleged victim(s) equal access to school’s program or activity;

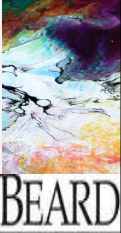
5. Conduct did not meet the elements of the crimes enumerated in subsection (3) of the definition;

6. There were no elements of “quid pro quo”.

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ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES—NOT A SCHOOL PROGRAM OR ACTIVITY

Usually not an issue, but consider:

1. Foreign travel sponsored by a foreign language teacher?
2. Summer sports camp sponsored by a team coach?
3. Activities sponsored by a booster club?
4. Student-on-student online sexual harassment published out of school, but accessed at school?

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ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES—NOT IN THE UNITED STATES

The sexual harassment occurs in a foreign country during a school trip.

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ONE SCHOOL; TWO SYSTEMS—WHEN THE TWO TRACKS MERGE: EMERGENCY REMOVAL OF STUDENT



Track 1: Before emergency removal, Student *Respondent* entitled to:

1. Student must be given rights under IDEA if applicable;
2. “Informal hearing” and “formal hearing” under 22 Pa. Code, §12.8
3. School board hearing under School Code and Local Agency Law if removal is for more than 10 days

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ONE SCHOOL; TWO SYSTEMS—WHEN THE TWO TRACKS MERGE: ADMINISTRATIVE LEAVE OF EMPLOYEE



Track 1:

- Administrative leave with pay generally does not require any prior process;
- If school contemplates an administrative leave without pay, informal hearing is required that meets standards of *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985);




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ONE SCHOOL; TWO SYSTEMS—WHEN THE TWO TRACKS MERGE: ADMINISTRATIVE LEAVE OF EMPLOYEE



Track 1:

- Collective bargaining agreements or individual employment agreements sometimes contain provisions requiring prior notice or other process in addition to “due process”
- If administrative leave without pay is decided upon, it cannot be for “sexual harassment” until the entire grievance process has been completed—i.e., track 2

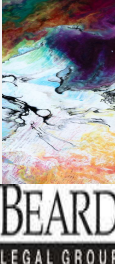



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NO CONTACT ORDERS

- Among the permissible “supportive measures” are no contact requirements between the parties
- This is not retaliation;
- This treats both parties equally.

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We leave you with a pictorial representation of what we endeavored to teach you today—to follow the right track!

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**THANK YOU AND
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