

Introductions

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Who are you?

Where do you work and what do you do?

What is your biggest Title IX challenge?

**What is the question you want to be sure
that we answer during the webinar?**

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A Latte Changes in Title IX

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The Fundamentals of Title IX

Title IX, Education Amendments of (1972)

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

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A Quick Recap of Title IX

- Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, color, sex, national origin or religion
- Title VI of the Act prohibits discrimination in federally assisted programs – including education programs – on the basis of race, color and national origin, but not on the basis of sex
 - Title IX of the Education Amendments of 1972 is enacted to address that gap

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A Quick Recap on Title IX

- 1975: Title IX regulations for athletics
- 1976: The Title IX “Boston Tea Party”
 - Yale’s women’s rowing team
- 1979: HEW compliance standards for athletics, the “Three Part Test”

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Evolution

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

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Evolution

- **U.S. Supreme Court Decisions:**
 - *Gebser v. Lago Vista Independent School District*, 1998: (a claim involving a teacher and student) (Tab 2)
 - *Davis v. Monroe County Board of Education*, 1999: (student-on-student harassment) (Tab 3)
- **2001: U.S. Dept of Education** publishes “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties”

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Evolution

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

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Why A Latte Changes Right Now?

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Why Amend the Regulations?

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

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Why Amend the Regulations?

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

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Why Now?

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

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Why Now?

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

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What are the Regulations Designed to do?

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

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What Title IX does and does not do

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

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Venti Changes to the Definitions

34 C.F.R. 106.30(a)

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Terms Defined by the Regulations

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

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Terms Defined by the Regulations

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

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Terms Defined by the Regulations

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

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Terms Defined by the Regulations

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

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Our Old Friends . . .

- *Gebser v. Lago Vista Independent School District, 1998*: (a claim involving a teacher and student) (Tab 2)
- *Davis v. Monroe County Board of Education, 1999*: (student-on-student harassment)
(Tab 3)

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Terms Defined by the Regulations

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

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Terms Defined by the Regulations

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

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Terms Defined by the Regulations, continued

- Examples of ***supportive measures*** include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
- The school district must maintain as confidential any ***supportive measures*** provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the school district to provide the ***supportive measures***.
 - The Title IX Coordinator is responsible for coordinating the effective implementation of ***supportive measures***.

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Does the Employee have Actual Knowledge?

- Bean Affleck is a bus operator for Java County Schools. After driving the team home from an away basketball game, Bean sees the starting point guard, Danny Dolce, get into cheer coach Arianna Grande's car. The next day, Affleck tells his bus aide, Bean-yonce how Dolce scored the winning point and that Grande gave him a ride home. Bean-yonce tells Affleck that last year she heard Grande took a group of kids, including Dolce, to a bar in Morgantown following an away basketball game.
 - Poll: Does Bean have to report anything? Does Bean-yonce?
 - Poll: Does the school district have actual knowledge?

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Does the Employee have Actual Knowledge?

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

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Does the Employee have Actual Knowledge?

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

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A Latte Responsibilities

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

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

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

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

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

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

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

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

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

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

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Responsibilities of the Title IX Coordinator

- If there is actual knowledge of sexual harassment, the Title IX Coordinator must:
 - promptly contact the complainant to discuss the availability of supportive measures,
 - Consider the complainant's wishes with respect to supportive measures,
 - inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
 - Explain to the complainant the process for filing a formal complaint.

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To File or not to File . . .

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

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To File or not to File . . .

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

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To File or not to File . . .

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

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To File or not to File . . .

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

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A Latte Changes in the Grievance Process

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

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Discrimination on the Basis of Sex

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

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The Grievance Process

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

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Basic Requirements of the Policy

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

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Basic Requirements of the Policy

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

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Basic Requirements of the Policy

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

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Basic Requirement of the Policy

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

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Big Decision to Make

- Will you use the “clear and convincing” evidentiary standard or the “preponderance of the evidence” standard?
- If you use the clear and convincing standard for sexual harassment, what does that mean with other types of misconduct?
- How is that reconciled with our employee and student disciplinary statutes?
- Evidentiary standard must be the same for students and employees
 - Poll: Will you use the clear and convincing standard?

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Big Decision to Make

- Will your process provide for an informal resolution?
- What are the advantages and disadvantages to informal resolutions?
- Who facilitates informal resolutions?

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Requirements for Certain Personnel

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

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Training Materials

- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

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Additional Requirements for Investigators

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

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Additional Requirements for Decision-Makers

- In addition, decision-makers must receive training on
 - any technology to be used at a live hearing; and
 - issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant

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The Keurig Version of Personnel Needs and Training

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Personnel Needs and Training

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

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A Latte Notice Requirements when you Receive a Formal Complaint

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Notice of Allegations

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

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Notice of Allegations, continued

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

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Dismissal of a Formal Complaint

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

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Dismissal of a Formal Complaint

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

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Consolidating Complaints

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

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Informal Resolution

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

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Informal Resolution

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

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Informal Resolution

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

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Informal Resolution

- Sally Espresso's dad, Double Shot, decides to file a formal complaint against Coach Dolce and his son, Danny, for patting Sally on the butt in the hallway. Double Shot tells you, the Title IX Coordinator, that he wants to pursue the formal complaint, but Sally wants an informal resolution and get this over with.
 - Poll: Do you offer an informal resolution to Sally?

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Investigating Formal Complaints

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

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Investigating Formal Complaints

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

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Investigation Reports of Formal Complaints

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

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Investigation Reports of Formal Complaints

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

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The Keurig Version of the Investigation Process

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Before Any Interviews Begin . . .

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

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Following the Hearing

- The “decision-makers” must provide “a statement of, and rationale for, the result as to each allegation.”
- The decision-maker cannot be the same person(s) as the Title IX Coordinator or the investigator(s).
- The written statement makes a determination regarding responsibility.
- To reach this determination, the school district must apply the chosen standard of evidence (clear and convincing or preponderance of evidence).
- Either party can appeal that decision on the basis of (1) procedural irregularity, (2) new evidence, or (3) bias on the part of the investigators or decision-makers.
 - If there is a right to appeal, it must be offered to both parties.

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The Written Determination Must Include:

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

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The Written Determination

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

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The Appeal

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

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The Bases for Appeal

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

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The Appeal

- As to all appeals, the school district must:
 - (A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 - (B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
 - (C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth for the bases for the appeal;
 - (D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
 - (E) Issue a written decision describing the result of the appeal and the rationale for the result; and
 - (F) Provide the written decision simultaneously to both parties.

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Retaliation

- No school district or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.
- Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation.

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Retaliation

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

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Retaliation

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

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Record Keeping

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

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Record Keeping

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

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A Regular Cup of Joe

Some things never change

94

Designation of a Title IX Coordinator

- Each school district must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities, which employee must be referred to as the “Title IX Coordinator.”
- The school district must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school district, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator.
- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.
 - Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

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The Title IX Coordinator should:

- Understand how the district’s policies and procedures work
- Train students and staff on the Title IX grievance procedures, reporting suspected sexual harassment and any other procedures used for investigating reports of sexual violence
- Identify and address any patterns or systemic problems
 - Cooperate with law enforcement and crisis centers

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The Title IX Coordinator must:

- Coordinate responses to all allegations of sex discrimination. This includes:
 - Implementing supportive measures
 - Monitoring outcomes
 - Identifying and addressing any patterns
 - Assessing effects on the district climate

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The Title IX Coordinator must:

- Be mindful of school culture and climate and collect and analyze data on school climate as appropriate
- Be available to meet with students as needed
- Avoid Conflicts of Interest
 - Title IX Coordinator should be independent
 - Report directly to Superintendent
 - Have no job responsibilities that create conflict even beyond that described in the regulations (e.g. making discipline decisions, general counsel, superintendent, principal, or athletics director)

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Notification of Policy

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

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Notification of Policy

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

100

Notification of Grievance Procedure

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

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Additional Training Considerations

- Provide specific (advanced) training to individuals that implement and respond to complaints of sexual harassment and sexual violence, including:
 - County Administrators
 - Principals/Assistant Principals
 - All teachers and service personnel
 - What about . . .
 - Board Members?
 - Substitutes?
 - Volunteers? Citizen Coaches?

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Additional Training Considerations

What should employees be looking for?

- Student-on-Student
 - Gender-based and sexually offensive jokes, teasing, pranks
 - Bullying
 - Offensive touching or sexual groping
 - Sexually explicit, vulgar, offensive gender-based language
 - Patterns of any of the above conduct

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Additional Training Considerations

What should employees be looking for?

- Employee-on-Student
 - Crossing normal, professional boundaries
 - Close relationship with student, overly affectionate
 - Student that may seek adult attention
 - Unusual interest in the personal life of the teacher or student
 - Employee acting more like a student than an adult

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Additional Training Considerations

What should employees be looking for?

- Employee-on-Student
 - Communication or contact outside of school
 - Using poor judgment in relation to a particular student (letting student get away with inappropriate behavior)
 - Sexually related conduct (sexual innuendo, banter, jokes)
 - Favoritism

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Additional Training Considerations

- Provide age-appropriate training to students
 - Inform students on who to report to and how to report
 - Inform students on Title IX policies and procedures
 - Inform students they can report matter to both law enforcement and the school district
- Provide education and prevention programs

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Additional Training Considerations

- Don't forget:
 - Make information available, and provide training to, individuals with disabilities and students who are English Language Learners
 - Your "team" may also include outside agencies: Law enforcement or DHHR/CPS

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Creating a Positive School Culture and Climate

- Make clear to staff and students that discrimination of any kind, including sexual harassment, will not be tolerated
- Inform students on the types of behavior that constitute sexual harassment and how to report

108

Monitor Culture and Climate

- This includes the culture and climate of schools and other school activities (e.g., athletics, clubs, etc.)
- Off-campus activities that come on to the school campus (cyberbullying)
- If sexual harassment is reported, monitor for potential retaliation against the complainant or witnesses

109

Pour Me Another Cup

Additional Statutes and Policies to Remember

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Complaints & Allegations that must be investigated

- Allegations of student misconduct:
 - **Policy 4373 violations (Tab 9)**
 - **W. Va. Code 18-2C-1 (harassment, intimidation, or bullying) (Tab 6)**
- Allegations of employee misconduct:
- Allegations of harassment by students and employees
 - **race, disability, religious/ethnic**
 - **grievance definition of harassment, W. Va. 6C-2-2(I) (Tab 4)**

111

What do you do?

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

112

What do you do?

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

113

What do you do?

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

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Employee Misconduct Investigations

- W. Va. 18A-2-8 (Tab 5)
 - Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a finding of abuse by the Department of Health and Human Resources in accordance with §49-1-1 et seq. of this code, the conviction of a misdemeanor or a guilty plea or a plea of nolo contendere to a misdemeanor charge that has a rational nexus between the conduct and performance of the employee's job, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a please of nolo contendere to a felony charge.
 - A county board of education has the duty and authority to provide a safe and secure environment in which students may learn and prosper; therefore, it may take necessary steps to suspend or dismiss any person in its employment at any time should the health, safety, and welfare of students be jeopardized or the learning environment of other students has been impacted.
 - Your investigation skills can make or break the case before the School Board and the Grievance Board

115

What do you do?

- Tommy Roast, the transportation director, is randomly reviewing the bus video of Bean Affleck's extracurricular run. On it he sees the cheerleaders patting the butts of the football players when they get on the bus. Tommy reports this to you, the Title IX coordinator.
 - Poll: Who you discipline?

116

What do you do?

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

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What do you do?

- Bean Affleck tells the high school principal that Cheer Coach Barista has been patting the butt of Coach Dolce when he gets on the bus. The high school principal reports this to you, the Title IX coordinator.
 - Poll: Who you discipline?

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Rules of Thumb in Title IX Investigations (and others, too!)

- **DHHR/CPS: Reconciling your duty to investigate with CPS's duty to investigate the same charges**
 - Just like the school system, CPS is required to conduct investigations
 - Just like the school system, CPS must interview children and other witnesses

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Rules of Thumb in Title IX Investigations (and others, too!)

- **Working with DHHR/CPS:**
 - Problems with multiple interviews of the same students
 - Development of a protocol between school board and DHHR/CPS
 - If your county does not have one, you should get one
 - Ditto for protocols with law enforcement and prosecutor

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Rules of Thumb in Title IX Investigations (and others, too!)

- **DHHR/CPS – School Board Protocols:**
 - Designation of when protocol applies and when it does not
 - Designation of who takes the lead in the investigation
 - Determination of what information will be shared and in what format
 - Establishment of time frames and back-up plans

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Rules of Thumb in Title IX Investigations (and others, too!)

- **Working with Law Enforcement**
 - Criminal investigation is initiated at the discretion of law enforcement
 - Title IX investigation is not discretionary and the standards are different from a criminal investigation

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Working with Law Enforcement

- The school district should not wait for the conclusion of a criminal investigation or criminal proceedings to begin a Title IX investigation.
- **The school district should not wait for the conclusion of a criminal investigation or criminal proceedings to begin a Title IX investigation.**
- Consider establishing protocol on how the school district and law enforcement will work together.

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Hypothetical #1: Student-on-Student Sexual Harassment

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Hypothetical #2: Employee-on-Student Sexual Harassment

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Wrap-Up

**Have we answered all of your questions?
Please let us know if you have any follow up
questions. Attorneys can move into breakout
rooms to answer any one-on-one questions.**

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**Thank You for Spending the Day With
Us. Please Complete an Evaluation.**

**It's Been a Latte Fun, Enjoy a Cup o' Joe
on us!**