

# New Title IX Training: The Decision-Maker

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# Where the heck are we going?

- The Title IX Decision-Maker: Who they are and what they do
- Brief Overview of Grievance Process
- Sexual Harassment-new definitions
- School program or activity-defined
- Training Hot Topics
  - Bias, Impartiality, Prejudgment &
- Your Decision: Forms and Procedures
- Appeals
- ...and much, much more!



34 C.F.R 106.45

*requires decision-makers to be  
free of conflicts of interest and bias  
and  
trained to serve impartially without  
prejudging the facts at issue*

# Wait a minute, do we still have to worry about this??



Due to recent (political) events, what will happen to these regulations?

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Let me check the TV....

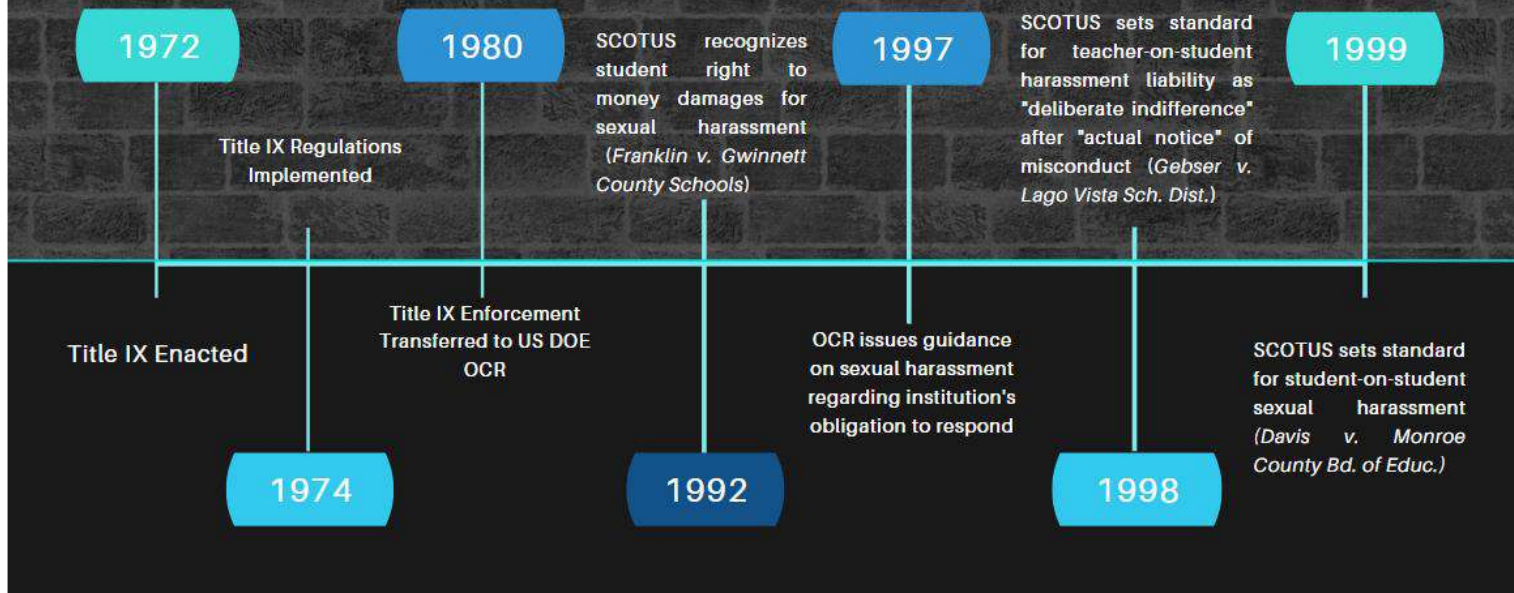
Ignore, gamble and ask for forgiveness, if necessary?

Follow these rules unless/until there are now ones??

Door number 3\_\_\_\_\_?

## Title IX Timeline

### A Brief History



1974

1992

1998

obligation to respond regarding institution's

County Bd. of Educ.)  
(Davis v. Monroe  
sexual harassment  
the standard on student



## TITLE IX COORDINATOR

Coordinates compliance. 34 CFR 106.8 (a).  
Responsible for effective implementation of  
any remedies/supportive measures.  
34 CFR 106.45 (b)(7)(iv). Cannot be decision-  
maker or review any appeal.  
34 C.F.R. 106.45 (b)(6)-(8).

## INFORMAL RESOLUTION FACILITATOR

Offers informal resolution after formal  
complaint is filed but before decision-maker  
reaches a determination.  
34 C.F.R. 106.45 (b)(9).



## DECISION-MAKER

Cannot be the same person as the Title IX  
Coordinator or the investigator(s). Facilitates  
exchange of written questions after parties  
receive investigative report. Explains any  
decision regarding relevance of questions.  
Issues a detailed, written determination.  
34 C.F.R. 106.45 (b)(6)-(7).



## INVESTIGATOR

Cannot be decision-maker or consider appeal.  
Conducts duly noticed investigative interviews,  
considers evidence provided by parties and  
from other sources, provides parties equal  
opportunity to inspect and review evidence and  
prepares investigative report.  
34 C.F.R. 106.45 (b)(5).



## APPEAL

Cannot be the same person as the Title IX  
Coordinator, investigator(s) or decision-  
maker. Must provide parties equal  
opportunity to submit a written statement and  
provide a written decision on appeal.  
34 C.F.R. 106.45 (b)(8).



# Single-Investigator Model (RIP)



- What is (was) the single investigator model (SIM)?
- Disadvantages of SIM per the USDOE
  - Bias
  - Unfairness
  - Social pressure & false positives
- Possible advantages of SIM?
  - \_\_\_\_\_
- Panel of DM is allowed\*
- Disadvantages of separate DM?
  - Staffing, costs (\$), time+, \_\_\_\_\_

# Overview of Grievance Process

Federal grievance process is mandatory

USDOE-no discipline prior to completion of grievance process

Objective evaluation of all "relevant" evidence

Credibility cannot be based on party status

No conflict of interest or bias

Mandatory training requirements

Presumption that respondent is not responsible

Reasonably prompt time frames

Detailed rules for investigations

Final determination and appeal



# School program or activity?

- Program or activity *includes* locations, events, or circumstances over which the recipient exercised *substantial control* over both the respondent and the context in which the sexual harassment occurs
- Against a person in the United States
- Is this the scope, or just a floor?
- Are online classrooms covered?
- Study abroad?
- Post-pandemic, are off-campus activities covered?  
Away games?

## DEFINITION OF SEXUAL HARASSMENT

### OLD DEFINITION

...severe, pervasive or persistent, and to interfere with or limit a student's ability to participate in or benefit from school services, activities or opportunities

Unwelcome Conduct

Determined by a reasonable person to be...

### NEW DEFINITION

...so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity.



***QUID PRO QUO***

Sexual harassment  
is also defined to  
include...

...a school employee conditioning aid, benefit  
or service on an individual's participation in  
unwelcome sexual conduct

# Davis v. Monroe County Bd. of Educ.



## **STUDENT-ON-STUDENT SEXUAL HARASSMENT**

School District may be liable for money damages under Title IX if:



## **GEBSER STANDARDS MET**

The *Gebser* standards of "actual notice" and "deliberate indifference" are met.



## **+ SUBSTANTIAL CONTROL**

The school has substantial control over the "context" in which the harassment occurs and over the alleged harasser.



## **DENIED EQUAL ACCESS**

The conduct is "so severe, pervasive and objectively offensive" that it "effectively denie[s] equal access to an institutions resources or opportunities."



# Sexual harassment is (also)...

Sexual assault, which means...

- (v) An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- Forcible sex offenses
  - Rape
  - Sodomy
  - Assault w/ an object
  - Fondling
- Nonforcible
  - Incest
  - Statutory rape

# Sexual Harassment: Dating violence

The term “[dating violence](#)” means 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:

- (i) The length of the relationship.
- (ii) The type of relationship.
- (iii) The frequency of interaction between the persons involved in the relationship.





# Domestic violence

- (8) The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.



# Harassment is...Stalking

The term "stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

- (A) fear for his or her safety or the safety of others; or
- (B) suffer substantial emotional distress.



# Investigations-Notice of Report

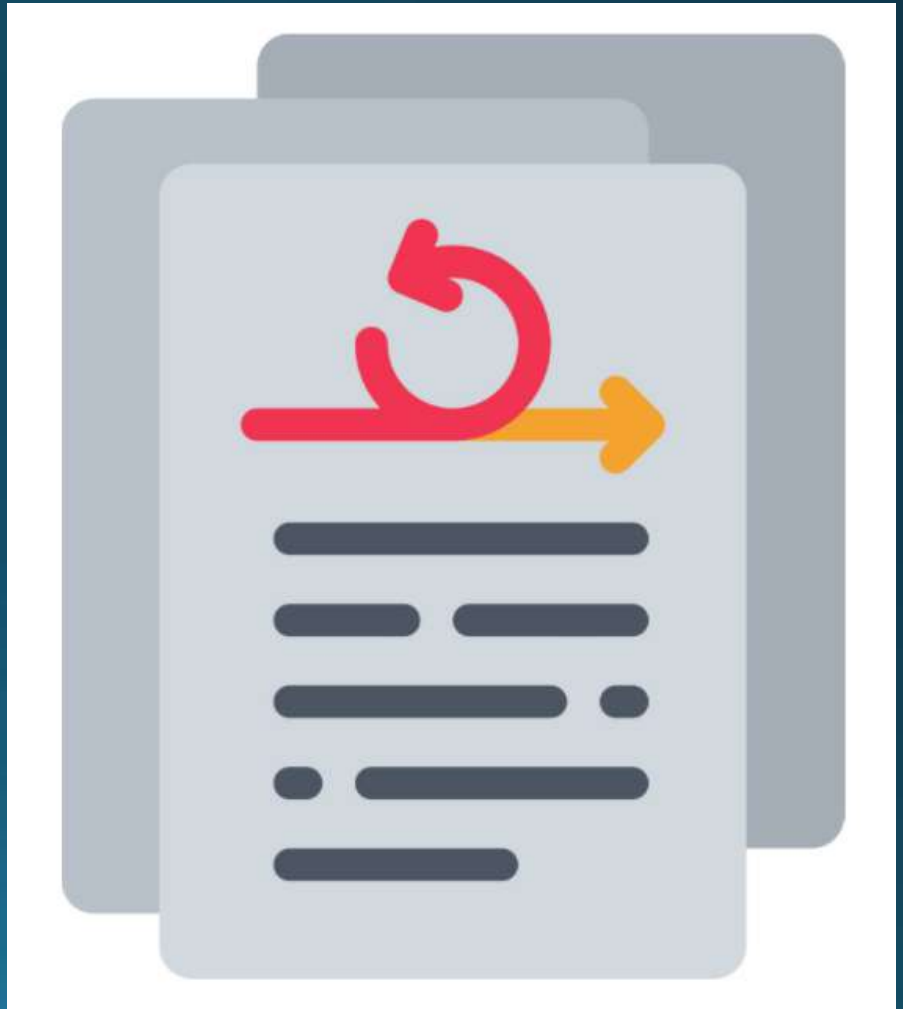
A fair summary of relevant evidence

What is relevance?

Tendency of a piece of evidence to prove/disprove a violation of Title IX

Each party 10 days to respond

Investigative report (draft) v. completed report v. final determination of responsibility



\_\_\_\_\_ COUNTY/CITY SCHOOL DISTRICT/SYSTEM  
Title IX Investigative Report Circle one (Draft/Final)  
Provided to both parties  
(Optional)

RE: Sexual Harassment Complaint No. \_\_\_\_\_

Dear \_\_\_\_\_:

As the assigned Investigator on the above referenced complaint, this is my investigative report regarding the above-referenced complaint.

**A. Allegations**

The allegations potentially constituting sexual harassment as defined in 34 C.F.R. § 106.30 are as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**B. Procedure**

The procedural steps taken from the receipt of the formal complaint through this summary, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence, were as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**C. Prior Notice**

Pursuant to the \_\_\_\_\_ County/City School District/System Grievance procedures, the following notice(s) and/or response(s) have previously been provided to the indicated parties.

	Complainant (Date)	Respondent (Date)
1. Initial Response to Complaint	_____	_____
2. Notice of Allegations	_____	_____
3. Notice of Emergency Removal	_____	_____
4. Notice of Dismissal	_____	_____
5. Notice of Interview/Meeting	_____	_____

- Notice of Interview/Meeting \_\_\_\_\_
- Notice of Interview/Meeting \_\_\_\_\_
6. Notice of Evidence \_\_\_\_\_
7. Notice of Investigative Report \_\_\_\_\_

**D. Undisputed Facts**

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**E. Disputed Facts**

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**G. Summary of Relevant Evidence as to Disputed Facts**

Having thoroughly reviewed and considered all the evidence, my summary of the relevant evidence is as follows:

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**H. Credibility Issues (if any) and factors related to resolution of same (optional)**

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**I. Special Considerations of any responses received to draft report, if any (optional)**

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# Do you want to have hearings?

Hearings are optional in the K-12 setting

High school only? > Age?

Peers?

Live-hearing, cross-examination and due process

Credibility w/ or w/o hearing?

No hearing? "plausibility" & "consistency"

Confidentiality still applies

LEA may adopt 'rules of decorum' IF hearings are conducted



34 C.F.R 106.45(B)(7)

*must apply the standard of evidence  
designated for use in all formal complaints  
of sexual harassment*



# The Investigator & You:

## Opportunity to submit questions

If no hearing, written, relevant questions may be asked of any party or witness

Answers provided to both parties

Limited follow-up questions and answers must also allowed

Timing? After final report, before final determination

Relevancy in general

Relevancy of complainant's sexual predisposition or prior sexual behavior exceptions

Consent

Someone else committed the conduct

Relevancy decisions must be explained in the final determination



"OCR will not substitute its judgment for that of the recipient's decision-maker with respect to weighing of the relevant evidence at issue in a particular case."

**COUNTY/CITY SCHOOL DISTRICT/SYSTEM**  
**Title IX Notice of Right to Written Questions**  
**(to both parties and their advisors)**

RE: Sexual Harassment Complaint No. \_\_\_\_\_

Dear \_\_\_\_\_:

This is notification to each party of his/her opportunity to submit written, relevant questions that the party wants asked of any party or witness. The procedure for same is as follows:

1. Written questions must be received by me within \_\_\_ days of the date hereof.
2. I will provide the person(s) to whom such questions are submitted a copy thereof.
3. Answers to the questions must be submitted to me within \_\_\_ days of the date I provide the questions.
4. I will provide copies of the questions and answers thereto to both parties.
5. Either party may submit to me additional, limited follow-up questions. Such questions must be submitted to me within \_\_\_ days of the date I provide the original answers to you pursuant to no. 4 above.
6. I will provide the person(s) to whom such additional questions are submitted a copy thereof.
7. Answers to the additional questions must be submitted to me within \_\_\_ days of the date I provide the additional questions.
8. I will provide copies of the questions and answers thereto to both parties.

Please note that questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Neither party may be forced to answer a question, and any person may object to a question on the grounds it is irrelevant. If I decide to exclude a question as irrelevant, I will explain that decision to the party proposing the question.

Sincerely,

\_\_\_\_\_  
Decision-Maker





prior  
sexual history

# Final Determination (by you!)

- May not be Title IX Coordinator OR investigator
- *Must be written & include...*
- *ID of alleged violations of Title IX*
- *Procedural steps taken*
- *Findings of Fact*
- *Conclusions re: Code of Conduct*
- *Statement & rationale for each result*
- *Procedures for appeals*
- Becomes final after either
  - Decision on appeal, OR
  - Time to appeal expires
- Implemented by Title IX Coordinator
  - Again, not YOU!

\_\_\_\_\_ COUNTY/CITY SCHOOL DISTRICT/SYSTEM  
**Title IX Determination**  
**(to both parties and their advisors)**

RE: Sexual Harassment Complaint No. \_\_\_\_\_

Dear \_\_\_\_\_:

As the assigned Decision-Maker on the above referenced complaint, this is my written determination regarding responsibility. This Written Determination has been made using the preponderance of the evidence standard, and is being provided to both parties simultaneously.

**A. Allegations**

The allegations potentially constituting sexual harassment as defined in 34 C.F.R. § 106.30 are as follows:

**B. Procedure**

The procedural steps taken from the receipt of the formal complaint through this determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence, are as follows:

**C. Excluded questions**

I have decided to exclude the following question(s) submitted by the parties as irrelevant for the following reasons:

**D. Findings of Fact**

Having thoroughly reviewed and considered all the evidence, my findings of fact are as follows:

**E. Code of Student Conduct**

My conclusions regarding the application of the District's code of student conduct to the facts as determined above is that the respondent has or has not violated the following provisions of the code of conduct:

Code Section	Description of Offense	Violation (yes or no)

**F. Determination of Responsibility**

Allegation No. 1

Description of Allegation:

Respondent Responsible (yes or no):

Rationale for Determination:

Discipline to be Imposed on respondent:

Remedies to be provided to complainant:

### Allegation No. 2

Description of Allegation:

Respondent Responsible (yes or no):

Rationale for Determination:

Discipline to be Imposed on respondent:

Remedies to be provided to complainant:

### **G. Appeal**

Either or both complainant and respondent may appeal from this Determination of Responsibility.

The possible grounds for appeal are as follows:

1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time the determination regarding responsibility was made and that could affect the outcome of the matter; and
3. 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 party wishing to appeal must submit written notice thereof to me within 10 days of the date hereof. The appeal must specify the grounds for appeal and, as to each ground specified, a description of the evidence supporting such ground. If the evidence was not previously submitted, it must be included with the notice of appeal.

The notice of appeal may be submitted in person, by mail or by email, but in any event must be received by me within 10 days of the date hereof. My contact information is as follows:

Name:

Title:

Office address:

Electronic mail address:

Telephone number:



- Dismissal mandatory if...
  - Conduct alleged is not sexual harassment per new definitions
  - Conduct not a part of a school program/activity
  - Victim not a person in the U.S.
- Dismissal discretionary when...
  - Complainant withdraws
  - Respondent no longer enrolled/employed
  - School cannot gather evidence to make final decision
    - Respondent cooperation?
- Prompt, written notice to both parties

\_\_\_\_\_ COUNTY/CITY SCHOOL DISTRICT/SYSTEM  
Title IX Notice of Dismissal  
(to both parties and their advisors)

RE: Sexual Harassment Complaint No. \_\_\_\_\_

Dear \_\_\_\_\_:

Upon investigation, the District has determined to dismiss the above referenced complaint for the following reason(s):

\_\_\_\_\_ The conduct alleged in the formal complaint would not constitute sexual harassment as defined in 34 C.F.R. § 106.30 even if proved.


\_\_\_\_\_ The conduct alleged in the formal complaint did not occur in the District's education programs or activities.

\_\_\_\_\_ The conduct alleged in the formal complaint did not occur against a person in the United States.

\_\_\_\_\_ The complainant has notified the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint.\*

\_\_\_\_\_ The respondent is no longer enrolled or employed by the District.\*

\_\_\_\_\_ Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Those circumstances are as follows: \_\_\_\_\_.\*



# Appeal

- Final determination or dismissal
- Grounds for appeal
  - Procedural irregularity
  - New evidence
  - Conflict of interest or bias
  - Added bases, if to both
- Different decision-maker
- Written result & rationale



- Record-keeping (7 yrs)
  - Investigations, sanctions & remedies
    - All your notes...
  - Training materials, appeals & informal resolution



# Whew...so what have we learned?

- Decision-maker v. Investigator
- After you get the Investigative Report-now what?
- Hearing or no hearing?
- Your determination
  - Form and Key Elements
- Guard against conflict of interest and bias

- Compliance will be a team sport
- Role of the Decision-maker
  - \_\_\_\_\_
  - \_\_\_\_\_
  - \_\_\_\_\_
  - \_\_\_\_\_
- You are all underpaid!



Thank you so much...

...for your kind attention