

The New Title IX Regulations: “Sexual Harassment”

Webinar
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Why are we here?

- New federal regulations go into effect on August 14, 2020
- Those regulations obligate school districts to train staff, including:
 - “Title IX Coordinators”
 - “Investigators”*
 - “Decision-Makers”*

* definitions will follow



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The Game Plan: Overview

- July 21 – Diving In: Foundations & Beyond
 - Background
 - Definitions
- July 22 – Take Us Down: Diving Deep
 - Investigative Process
 - Decision-Making
- July 23 – Tying It Together
 - Procedures & more



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Objectives

- Understanding the obligations under Title IX
- Getting a firm grasp on roles & responsibilities
- Planning and implementing appropriate procedures



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What is Title IX?

- Federal statute since 1972
- Prohibits sex discrimination in public schools
- Applies to other educational entities receiving federal funds (e.g., colleges, universities)



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What is Title IX?

“No person in the United States 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”
20 U.S.C. § 1681.



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“Program or Activity”

- A program or activity includes “all of the operations of” a school district. 20 U.S.C. § 1687.
- A program or activity “includes locations, events, or circumstances over which the [school district] exercised substantial control over both the **respondent** and the context in which the harassment occurs.” *Preamble** at 30,094.

* Preamble to the Title IX regulations, 85 Fed. Reg. 30,026 (May 19, 2020) (the “*Preamble*”)



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Sexual Harassment under Title IX

- U.S. Department of Education (“ED”) published NEW regulations May 19, 2020
- The new regulations modify, change, and expand the existing Title IX regulations in 34 C.F.R. Part 106
- The new regulations address “sexual harassment”



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Sexual Harassment under Title IX

- These are the first *regulations* addressing “sexual harassment” under Title IX
- Previously, the ED had issued “guidance” documents regarding sexual harassment
- The new regulations supersede and effectively replace the prior guidance



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Sexual Harassment: Defined -
(34 C.F.R. § 106.30)

- The Title IX regulations define “sexual harassment” as encompassing any one of three prongs.
- Conduct determined (via the outcome of the grievance process) to meet any one of the prongs will constitute “sex discrimination” under Title IX.



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Sexual Harassment: Defined

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:



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Sexual Harassment: Defined -
Prong 1

(1) An employee of the [school district] conditioning the provision of an aid, benefit, or service of the [school district] on an individual’s participation in unwelcome sexual conduct [aka, “*quid pro quo* sexual harassment”];



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Sexual Harassment: Defined - Prong 2

(2) Unwelcome conduct determined by a reasonable person to be so *severe, pervasive, and objectively offensive* that it effectively denies a person equal access to the [school district]’s education program or activity;



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Sexual Harassment: Defined - Prongs 1 & 2 Components defined

“Unwelcome conduct”

As used in prongs (1) and (2) of the definition of “sexual harassment”, the ED describes “unwelcome conduct” as follows:

- the [ED] interprets “unwelcome” ... as a subjective element; thus, even if a complainant in a *quid pro quo* situation pretended to welcome the conduct (for instance, due to fear of negative consequences for objecting to the employee’s suggestions or advances in the moment), the complainant’s subjective statement that the complainant found the conduct to be unwelcome suffices to meet the “unwelcome” element. *Preamble* at 30,148.



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Sexual Harassment: Defined - Prong 3

(3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).



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**Sexual Harassment: Defined -
Prong 3 - Components defined**

“Sexual Assault”

“[S]exual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation (FBI UCR). 20 U.S.C. § 1092(f)(6)(A)(v).



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**Sexual Harassment: Defined -
Prong 3 - Components defined**

“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.

34 U.S.C. § 12291(a)(10)



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**Sexual Harassment: Defined -
Prong 3 - Components defined**

“Domestic violence”

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.

34 U.S.C. § 12291(a)(8)



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**Sexual Harassment: Defined -
Prong 3 - Components defined**

“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.

34 U.S.C. § 12291(a)(30)



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**Sexual Harassment: Defined -
Some Differences in Criteria**

- Note that sexual harassment under prongs (1) (i.e., *quid pro quo*) and (3) (i.e., the specifically identified sexual offenses) do NOT require that the harassment be either severe, persistent, or objectively offensive. *Preamble* at 30,143 n.628.
- In other words, the criterion of “severe, pervasive, and objectively offensive” applies only to prong (2).



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“Complainant”

- “Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.” 34 C.F.R. § 160.30(a).
- A parent or legal guardian may exercise their rights on behalf of their minor child who is the “complainant”. *See* 34 C.F.R. § 160.6(g).
- Note that the definition of “complainant” does not include another individual who files a **formal complaint**, other than the alleged victim or their parent/guardian.



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“Respondent”

- “Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.” 34 C.F.R. § 160.30(a).
- A parent or legal guardian may exercise their rights on behalf of their minor child who is the “respondent”. See 34 C.F.R. § 160.6(g).



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“Actual Knowledge”

“Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a [school district]’s Title IX Coordinator or any official of the [school district] who has authority to institute corrective measures on behalf of the [school district], or to any employee of an elementary and secondary school.” 34 C.F.R. § 106.30(a) (emphasis added).



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“Actual Knowledge”

In addition, “actual knowledge” exists “if an employee of an elementary or secondary school personally observes sexual harassment” Preamble at 30,107 (emphasis added).



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“Notice”

“Notice results whenever any elementary and secondary school employee, any **Title IX Coordinator**, or any **official with authority**: Witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (*i.e.*, a person alleged to be the victim) or a third party (*e.g.*, the complainant’s parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means.” *Preamble* at 30,040; *see id.* at 30,110.



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“Notice”

“**[A]ny employee** of an elementary and secondary school may receive **notice** through an oral **report** of sexual harassment by a complainant or anyone else, a written **report**, through personal observation, through a newspaper article, through an anonymous report, or through various other means.” *Preamble* at 30,115 (emphasis added).



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“Notice”

“The [Title IX] regulations do not restrict the form that “**notice**” might take, so **notice** conveyed by an anonymous **report** may convey actual knowledge to the [school district] and trigger a [school district]’s response obligations.” *Preamble* at 30,132.



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“Supportive Measures”

Supportive measures means 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. 34 C.F.R. § 106.30(a).



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“Supportive Measures”

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. 34 C.F.R. § 106.30(a).



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“Supportive Measures”

Supportive measures may 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 [school] campus, and other similar measures. 34 C.F.R. § 106.30(a).



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“Supportive 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 recipient to provide the **supportive measures**. The Title IX Coordinator is responsible for coordinating the effective implementation of **supportive measures**. 34 C.F.R. § 106.30(a).



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“Supportive Measures”

The school district must offer **supportive measures** “whenever the recipient has **actual knowledge** that a person has been allegedly victimized by sexual harassment in the [school district]’s education program or activity, regardless of whether the complainant or Title IX Coordinator initiates a grievance process by filing or signing a **formal complaint**.” *Preamble* at 30,128.



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“Supportive Measures”

The school district’s grievance process must “[d]escribe the range of **supportive measures** available to complainants and respondents” 34 C.F.R. § 106.45(b)(1)(ix).



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“Formal Complaint”

“Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a [school district] and requesting that the [school district] investigate the allegation of sexual harassment.” 34 C.F.R. § 160.30(a).



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“Formal Complaint”

For a document from a complainant to be a formal complaint, it must be signed physically or electronically or otherwise indicate that the complainant is the individual filing the document. Therefore, a “formal complaint” does *not* include a paper or electronic document filed anonymously by a complainant. *Preamble* at 30,133.



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“Formal Complaint”

As reflected in the definition of “complainant”, the parent or legal guardian of a complainant may file a “formal complaint” on behalf of their minor child.



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“Formal Complaint”

A “formal complaint” *does* include a complaint signed by the Title IX Coordinator, even if the identity of the complainant is not known (e.g., a third party files a complaint regarding an anonymous complainant).



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“Formal Complaint”

The ED notes that “[t]he purpose of the formal complaint is to clarify that the complainant (or Title IX Coordinator) believes that the [school district] should investigate allegations of sexual harassment against a respondent.” *Preamble* at 30,135.



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“Grievance Process”

- The process by which a school district responds to a **formal complaint** of sexual harassment. 34 C.F.R. § 106.45(b).
- We will cover the **Title IX grievance process** in detail on Day 3 of this webinar.



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“Not Deliberately Indifferent”

This is the legal standard in the regulations by which the ED will assess a school district’s actions to **actual knowledge** of sexual harassment.



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“Not Deliberately Indifferent”

“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.” 34 C.F.R. § 106.44(a).



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“Investigator”

- An **investigator** is the individual or group of individuals who conducts the investigation of a formal complaint and issues a written report. See 34 C.F.R. § 160.45(b)(5).
- The **investigator** may also be the Title IX Coordinator, but the investigator may *not* also be the decision-maker.



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“Investigator”

The ED notes that “[t]he **investigator** is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the [school district]’s investigator does not believe the evidence to be credible and thus does not intend to rely on it).” *Preamble* at 30,248.



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“Decision-Maker”

- A **decision-maker** is the individual or group of individuals who “issue a written determination regarding responsibility [of the respondent].” 34 C.F.R. § 160.45(b)(7).
- The **decision-maker cannot** be the Title IX Coordinator or the investigator. The ED notes that “the decision-maker is obligated to objectively evaluate all **relevant evidence**” *Preamble* at 30,249.



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“Relevant Evidence”

“Evidence is relevant if:

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

Fed. R. Evid. 401.



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Part 2 - Focused Q & A



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1. Is a written document necessary to submit a “report” of sexual harassment?

No. A **report** may be written *or* verbal. Accordingly, a verbal report alone triggers the school district’s responsibilities to offer **supportive measures** to the complainant.



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2. In order for the school district to respond, does the report or notice need to have “proof” of equal access having been denied?

- **No.** The ED notes that “the [school district] need not have received notice of facts that definitively indicate whether a reasonable person would determine that the complainant’s equal access has been effectively denied in order for the [school district] to be required to respond promptly in a non-deliberately indifferent manner under § 106.44(a).” *Preamble* at 30,192 (emphasis added).



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2. In order for the school district to respond, does the report or notice need to have “proof” of equal access having been denied?

Note that a “third prong” offense (i.e., one of the named offenses under federal law) does not need to effectively deny equal access in order to meet the Title IX regulation’s definition of sexual harassment.



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3. Is there a specific time limit for when a complainant must file formal complaint after an individual (e.g., complainant, other individual) makes a report of sexual harassment?

No. If the complainant is a student in the school district (or attempting to enter the school district), there is no time limitation on when a complainant or the Title IX Coordinator can file a formal complaint.



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4. Are there any particular words which an individual must use when submitting a report or a complainant filing a formal complaint of sexual harassment? In other words, is it the complainant’s burden?

No. The ED states that “there is no magic language needed to “present” a report or formal complaint in a particular way to trigger a [school district]’s response obligations. Rather, the burden is on [school districts] to evaluate reports of sexual harassment in a common sense manner with respect to whether the facts of an incident constitute one (or more) of the three types of misconduct described in § 106.30.” *Preamble* at 30,156.



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4. Are there any particular words which an individual must use when submitting a report or a complainant filing a formal complaint of sexual harassment? In other words, is it the complainant's burden?

“This [evaluation process] includes taking into account a complainant's age, disability status, and other factors that may affect how an individual complainant describes or communicates about a situation involving unwelcome sex-based conduct.” *Preamble* at 30,156.



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4. Are there any particular words which an individual must use when submitting a report or a complainant filing a formal complaint of sexual harassment? In other words, is it the complainant's burden?

Again, **no**. The ED cautions that the regulations do NOT “require[] showing that a complainant dropped out of school, failed a class, had a panic attack, or otherwise reached a “breaking point” in order to report and receive a [school district]’s supportive response to sexual harassment.” *Preamble* at 30,169.



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4. Are there any particular words which an individual must use when submitting a report or a complainant filing a formal complaint of sexual harassment? In other words, is it the complainant's burden?

The ED further urges that the school district “carefully, thoughtfully, and reasonably evaluate each complainant's report or formal complaint.” *Preamble* at 30,156.



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5. Should the school district expect any particular “profile” or behaviors of a complainant?

No. The ED cautions that “[t]he § 106.30 definition [of sexual harassment] neither requires nor permits school officials to impose notions of what a “perfect victim” does or says, nor may a [school district] refuse to respond to sexual harassment because a complainant is “high-functioning” or not showing particular symptoms following a sexual harassment incident.” *Preamble* at 30,170.



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5. Should the school district expect any particular “profile” or behaviors of a complainant?

No. The ED states further, “School officials turning away a complainant by deciding the complainant was “not traumatized enough” would be *impermissible* under the final regulations because § 106.30 does *not* require evidence of concrete manifestations of the harassment.” *Preamble* at 30,170 (emphasis added).



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6. Does the school district have a responsibility to respond appropriately even when no one has made a report or filed a formal complaint of sexual harassment?

Yes. The ED provides the following example:

“[S]chool [staff] may observe sexualized insults scrawled on school hallways, and even where no student has reported the incident, the school employees’ notice of conduct that could constitute sexual harassment as defined in § 106.30 (i.e., unwelcome conduct that a reasonable person would conclude is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education) charges the [school district] with **actual knowledge**, ...”



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6. Does the school district have a responsibility to respond appropriately even when no one has made a report or filed a formal complaint of sexual harassment?

and the [school district] must respond in a manner that is not clearly unreasonable in light of the known circumstances, which could include the [school district] removing the sexually harassing insults and communicating to the student body that sexual harassment is unacceptable.” *Preamble* at 30,210.



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7. Does the school district have the flexibility to decide the supportive measures to be provided to the complainant and the respondent?

Yes. The ED states that school districts have the “flexibility to make those determinations by taking into the account the specific facts and circumstances and unique needs of the parties in individual situations.” *Preamble* at 30,181.



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7. Does the school district have the flexibility to decide the supportive measures to be provided to the complainant and the respondent?

However, the ED advises that “if a recipient determines that a particular supportive measure was not appropriate even though requested by a complainant, the recipient must document why the recipient’s response to the complainant was not deliberately indifferent.” *Preamble* at 30,181 n.801.



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8. Can a supportive measure “burden” a respondent?

Yes. However, it may not *unreasonably* burden the respondent. *See* 34 C.F.R. § 106.30. The extent of the burden and whether it’s unreasonable will likely depend on the circumstances.



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9. Can a “remedy” burden a respondent?

Yes. *See* 34 C.F.R. § 106.45(b)(1)(i). There is no qualification/limitation as with supportive measures. Further, it may include disciplinary measures. *Preamble* at 30,244.



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10. Can a school district ignore federal statutes (e.g., IDEA, Section 504, ADA) when preparing to implement an “emergency removal” of a student under the Title IX regulations?

No. For students with disabilities, the days of “emergency removal” will likely constitute disciplinary removals. Recall that school districts have a *limited* number of days for which a student may be removed for disciplinary reasons without implicating free appropriate public education (FAPE) issues.



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10. Can a school district ignore federal statutes (e.g., IDEA, Section 504, ADA) when preparing to implement an “emergency removal” of a student under the Title IX regulations?

It would very likely be *inconsistent* with a student’s rights under IDEA or 504/ADA to consider “emergency removal” days under Title IX separate from disciplinary removal (e.g., suspension) days under district/school code of conduct.



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10. Can a school district ignore federal statutes (e.g., IDEA, Section 504, ADA) when preparing to implement an “emergency removal” of a student under the Title IX regulations?

Federal statutes have greater legal weight than federal regulations. Accordingly, the Title IX regulation regarding emergency removals states that “[it] 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.” 34 C.F.R. § 106.44(c).



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11. If report of alleged sexual harassment does not (or will not subsequently) identify the complainant (i.e., alleged victim), can the school district provide supportive measures to the complainant?

No. “A [school district]’s ability to offer supportive measures to a complainant, or to consider whether to initiate a grievance process against a respondent, will be affected by whether the report disclosed the identity of the complainant or respondent.



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11. If report of alleged sexual harassment does not (or will not subsequently) identify the complainant (i.e., alleged victim), can the school district provide supportive measures to the complainant?

In order for a [school district] to provide supportive measures to a complainant, it is not possible for the complainant to remain anonymous because at least one school official (e.g., the Title IX Coordinator) will need to know the complainant's identity in order to offer and implement any supportive measures." *Preamble* at 30,132.



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12. Does the Complainant's choice not to file a formal complaint end the school district's responsibilities to address the alleged conduct?

Not necessarily. The Title IX Coordinator must respect the complainant's autonomy to file or not file a formal complaint. However, "the Title IX Coordinator, after having considered the complainant's wishes, [can] decide[] that it would be clearly unreasonable for the school [district] not to investigate the complainant's allegations." *Preamble* at 30,194.



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12. Does the Complainant's choice not to file a formal complaint end the school district's responsibilities to address the alleged conduct?

In other words, the factual allegations may reflect respondent conduct which, if school district does not pursue via the grievance process, would be evidence of the school district being deliberately indifferent under the circumstances.



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13. Does the Title IX Coordinator’s signing a formal complaint (over the complainant’s choice not to file) make the Coordinator adverse to the respondent?

No. The ED states that “when a Title IX Coordinator signs a formal complaint, that action does not place the Title IX Coordinator in a position adverse to the respondent; the Title IX Coordinator is initiating an investigation based on allegations of which the Title IX Coordinator has been made aware, but that does not prevent the Title IX Coordinator from being free from bias or conflict of interest with respect to any party.” *Preamble* at 30,123.



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14. When the Title IX Coordinator initiates the grievance process (via formal complaint) over the complainant’s choice to not file, is the complainant then compelled to participate in the grievance process, including the investigation?

No. The ED states, “Where a Title IX Coordinator signs a formal complaint knowing the complainant did not wish to do so, the recipient must respect the complainant’s wishes regarding whether to participate or not in the grievance process.” *Preamble* at 30,129 n.569.



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15. When the Title IX Coordinator initiates the grievance process (via formal complaint) over the Complainant’s choice to not file, does the Title IX Coordinator still need to provide written notices to the Complainant if the Complainant chooses not to participate (in the grievance process)?

Yes. The ED states,

“Although a complainant who did not wish to file a formal complaint and does not want to participate in a grievance process may not want to receive notifications throughout the grievance process, the [school district] must treat the complainant as a party by sending required notices, and must not retaliate against the complainant for choosing not to participate. ...



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15. When the Title IX Coordinator initiates the grievance process (via formal complaint) over the Complainant's choice to not file, does the Title IX Coordinator still need to provide written notices to the Complainant if the Complainant chooses not to participate (in the grievance process)?

Nothing in the final regulations precludes a [school district] from communicating to a nonparticipating complainant that the [school district] is required under these final regulations to send the complainant notices throughout the grievance process and that such a requirement is intended to preserve the complainant's right to choose to participate, not to pressure the complainant into participating. Such a practice adopted by a [school district] would need to be applied equally to respondents who choose not to participate in a grievance process[.]” Preamble at 30,122.



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16. In the determination of whether behavior constitutes “sexual harassment” under the Title IX regulations, does the respondent's knowledge or understanding of inappropriateness of their actions matter?

No. The ED noted that “a respondent's lack of comprehension that conduct constituting sexual harassment violates the bodily or emotional autonomy and dignity of a victim does not excuse the misconduct, though genuine lack of understanding may (in a [school district]'s discretion) factor into the sanction decision affecting a particular respondent” Preamble at 30,144.



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16. In the determination of whether behavior constitutes “sexual harassment” under the Title IX regulations, does the respondent's knowledge or understanding of inappropriateness of their actions matter?

In other words, an individual's knowledge of whether their behavior was inappropriate or not is only a factor after the school district determined that the conduct was sexual harassment and then considers what discipline or other consequences the respondent should receive.



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17. Did the “respondent” have to “intend” the conduct which is alleged to be sexual harassment?

No. With a single exception, the Title IX regulations require the school district to “respond to allegations of sexual harassment as defined in [34 C.F.R.] § 106.30, irrespective of whether the alleged conduct was intentional or unintentional on the part of the respondent” *Preamble* at 30,090.



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17. Did the “respondent” have to “intend” the conduct which is alleged to be sexual harassment?

The sole exception: the behavior of “fondling” – as part of “sexual assault” – has an intent element. *Preamble* at 30,090 n.437.



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18. In the determination of whether behavior constitutes “sexual harassment” under the Title IX regulations, do the respondent’s beliefs or perceptions about the target’s sex, sexual orientation, or gender identity matter?

No. The ED stated, “Where [the respondent’s] conduct is sexual in nature, or where conduct references one sex or another, that suffices to constitute conduct “on the basis of sex.” *Preamble* at 30,146. The focus is on the behavior directed to the complainant, not thoughts or beliefs.



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19. Does the inappropriate behavior need to be in-person contact (verbally or non-verbally) in order to constitute “sexual harassment”?

No. The ED states that “[t]he § 106.30 sexual harassment definition does not make sexual harassment dependent on the method by which the harassment is carried out; use of email, the internet, or other technologies may constitute sexual harassment as much as use of in[-]person, postal mail, handwritten, or other communications.” *Preamble* at 30,146.



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20. If the respondent (e.g., a student) used a personal device (e.g., cell phone) to engage in inappropriate conduct at school, does that automatically remove the respondent from being a part of a situation over which the school district has “substantial control”?

No. The ED provides the following example: “[A] student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the [school district] exercises substantial control.” *Preamble* at 30,202.



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20. If the respondent (e.g., a student) used a personal device (e.g., cell phone) to engage in inappropriate conduct at school, does that automatically remove the respondent from being a part of a situation over which the school district has “substantial control”?

The ED stated further that the “regulations apply to sexual harassment perpetrated through use of cell phones or the internet if sexual harassment occurred in the [school district]’s education program or activity.” *Preamble* at 30,202.



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21. In review whether inappropriate behavior constitutes the *quid pro quo* form of sexual harassment, does the school/district employee need to tell the student that the sexual behavior is in trade for or a bargain for something?

No. The ED provides the following guidance:

Determining whether unwelcome sexual conduct is proposed, suggested, or directed at a complainant, by a [school district]’s employee, as part of the employee “conditioning” an educational benefit on participation in the unwelcome conduct, does not require the employee to expressly tell the complainant that such a bargain is being proposed, and the age and position of the complainant is relevant to this determination.



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21. In review whether inappropriate behavior constitutes the *quid pro quo* form of sexual harassment, does the school/district employee need to tell the student that the sexual behavior is in trade for or a bargain for something?

For example, elementary and secondary school students are generally expected to submit to the instructions and directions of teachers, such that if a teacher makes a student feel uncomfortable through sex-based or other sexual conduct (*e.g.*, back rubs or touching students’ shoulders or thighs), it is likely that elementary and secondary school students will interpret that conduct as implying that the student must submit to the conduct in order to maintain educational benefits (*e.g.*, not getting in trouble, or continuing to please the teacher and earn good grades). *Preamble* at 30,148-149 n.643.



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22. Do non-employees of the school district (e.g., volunteers, others) fall under the definition of *quid pro quo* sexual harassment (i.e., first prong) under the Title IX regulations?

No. However, the ED notes that “the unwelcome conduct of a non-employee individual may constitute sexual harassment under the second or third prongs of the § 106.30 definition.” *Preamble* at 30,149.



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23. In order to be “sexual harassment” under Title IX, does a “third prong” offense need to effectively deny a complainant’s equal access to educational opportunities?

No. The ED notes that the third prong prohibiting sexual assault, dating violence, domestic violence, and stalking **assumes** that such conduct effectively denies equal access to education. *Preamble* at 30,151.



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24. Is there any “subjective” element in the second prong?

Yes. The ED notes that “whether harassment is actionable turns on both subjectivity (*i.e.*, whether the conduct is unwelcome, according to the complainant) and objectivity (*i.e.*, “objectively offensive”).” *Preamble* at 30,167.



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25. Does verbal harassment of an individual based on actual or perceived sexual orientation or gender identity fall under “sexual harassment” under the Title IX regulations?

No. The ED explains that “actions [which] do not involve conduct of a sexual nature ... would not be sexual harassment covered by Title IX.” *Preamble* at 30,179.



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26. Does “sexual harassment” under the Title IX regulations depend on the complainant’s or respondent’s sex, sexual orientation, or gender identity?

No. The focus is on *sexual behavior* as defined by the regulations as “sexual harassment”. See *Preamble* at 30,179.



100

27. Does dismissal of a Title IX complaint prevent consequences for non-Title IX sexually related conduct?

No. The ED notes that “dismissal [of sexual harassment allegations] is only for purposes of Title IX and does not preclude the [school district] from responding to the allegations under the [school district]’s own code of conduct.” *Preamble* at 30,150; see 34 C.F.R. 106.45(b)(3)(i).



101

27. Does dismissal of a Title IX complaint prevent consequences for non-Title IX sexually related conduct?

For example, such prohibited conduct could include sexually based behavior which implicates possible bullying under La. R.S. 17.416.13 and the school board’s anti-bullying policies and procedures.



102

27. Does dismissal of a Title IX complaint prevent consequences for non-Title IX sexually related conduct?

More generally, the ED comments, “[T]he fact that not every harassing or offensive remark is prohibited under Title IX in no way condones or encourages crude, insulting, demeaning behavior, which recipients may address through a variety of actions” *Preamble* at 30,161.



103

28. What about child abuse or neglect?

- A school district’s obligations under Title IX are “[i]n addition to any obligations imposed on school employees under State child abuse laws” At 30,107.
- Following Title IX procedures does NOT discharge any obligation a mandatory reporter has under Louisiana law for the reporting of suspected child neglect or abuse.



104

29. What about criminal charges?

The ED warns that “a [school district] cannot discharge its legal obligation to provide education programs or activities free from sex discrimination by referring Title IX sexual harassment allegations to law enforcement (or requiring or advising complainants to do so), because the purpose of law enforcement differs from the purpose of a [school district] offering education programs or activities free from sex discrimination. ...”



105

29. What about criminal charges?

“Whether or not particular allegations of Title IX sexual harassment also meet definitions of criminal offenses, the [school district]’s obligation is to respond supportively to the complainant and provide remedies where appropriate, to ensure that sex discrimination does not deny any person equal access to educational opportunities. ...



106

29. What about criminal charges?

“Nothing in the final regulations prohibits or discourages a complainant from pursuing criminal charges in addition to a § 106.45 grievance process.” *Preamble* at 30,099 (emphasis added).



107

30. What about School Resource Officers (SROs)?

For most Louisiana LEAs, SROs are not employees of the LEA. As such, under the Title IX regulations, a person’s report of alleged sexual harassment to a non-employee SRO would not automatically qualify as “actual knowledge” by the LEA of sexual harassment.

See also, Doe v. Englewood Indep. Sch. Dist., No. 19-50737, — F.3d —, 2020 WL 3634519 (5th Cir. 2020) (stating that, under Title IX, law enforcement official for a school does not have authority to take corrective action on behalf of school district).



108

30. What about School Resource Officers (SROs)?

Accordingly, SRO's having received such allegations would not trigger the LEA's obligations to respond to the allegations (e.g., supportive measures, investigation). Still, under the Title IX regulations, the SRO may report allegations to the Title IX coordinator.



109

30. What about School Resource Officers (SROs)?

However, an agreement or memorandum of understanding between the LEA and the law enforcement agency from which the SROs come can and should include an obligation and procedures for the SRO to communicate sexual harassment to the LEA's Title IX Coordinator or other authorized official (e.g., school principal).



110

31. Can the complainant or respondent appeal the final determination of the "decision-maker" at the completion of grievance process?

Yes. "The final regulations require recipients to offer appeals, equally to both parties, on at least the three following bases: (1) Procedural irregularity that affected the outcome; (2) new evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome; or (3) the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome."

Preamble at 30,276 (referencing 34 C.F.R. § 106.45(b)(8)).



111

31. Can the complainant or respondent appeal the final determination of the “decision-maker” at the completion of grievance process?

Note that the regulations specify the three bases which school districts must address an appeal; however, a school district *may* allow for an additional basis for appeal.



112

32. Can there be disciplinary consequences for sexual harassment?

Yes. “Because Title IX is a civil rights law concerned with equal educational access, these [Title IX] regulations do not require or prescribe disciplinary sanctions. ... [The regulations] leav[e] discipline decisions within the discretion of the LEA.” *Preamble* at 30,070. The ED “believes that disciplinary decisions are best left to the sound discretion of recipients.” *Preamble* at 30,104.



113

33. Can there be consequences for conduct outside of Title IX’s definition but within the definition of sexually inappropriate behavior under the district’s code of conduct?

Yes. ED explains that “dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, does not preclude a [school district] from addressing the alleged misconduct under other provisions of the [school districts]’s own code of conduct.”

Preamble at 30,038 (emphasis added).



114

34. How do teachers address classroom behavior?

“Nothing in the final regulations reduces or limits the ability of a teacher to respond to classroom behavior. If the in[-]class behavior constitutes Title IX sexual harassment, the school is responsible for responding promptly without deliberate indifference, including offering appropriate supportive measures to the complainant, which may include separating the complainant from the respondent, counseling the respondent about appropriate behavior, and taking other actions that meet the § 106.30 definition of “supportive measures” while a grievance process resolves any factual issues about the sexual harassment incident. ...



115

34. How do teachers address classroom behavior?

“If the in-class behavior does not constitute Title IX sexual harassment (for example, because the conduct is not severe, or is not pervasive), then the [Title IX] regulations do not apply and do not affect a decision made by the teacher as to how best to discipline the offending student or keep order in the classroom.” *Preamble* at 30,069.



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35. Who is responsible for enforcement of a school district’s compliance with the Title IX?

The ED’s Office for Civil Rights (OCR).



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Thank you!



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