



# Title IX Coordinator Compliance Certification (K-12)

Session 1: Title IX Roles and Responsibilities

Presented by: Richard F. Verstegen



**Title IX Coordinator Compliance Certification (K-12)**  
**Session 1: Title IX Roles and Responsibilities**

**Presented by: Richard F. Verstegen**

# Overview



**I**

## Introduction

- Scope of Discussion
- Impact of Regulations

**II**

## Basics of Title IX

**III**

## Procedural Requirements

**IV**

## Responsibilities of Title IX Coordinator

**V**

## Conclusion





# Introduction





# Introduction

- **Discrimination Based on Sex**
  - **Sexual Harassment**
- **Trump Administration**
  - **U.S. Supreme Court vs. OCR**
  - **Due Process**
  - **Regulations**
- **2020 Amendments to Title IX Regulations (Trump)**
- **2022 Proposed Amendments to Title IX Regulations (Biden)**

A hand is shown placing a wooden block on top of a staircase-like structure made of wooden blocks. The structure is built on a wooden surface. A blue banner with diagonal stripes in blue, cyan, and orange is overlaid on the left side of the image.

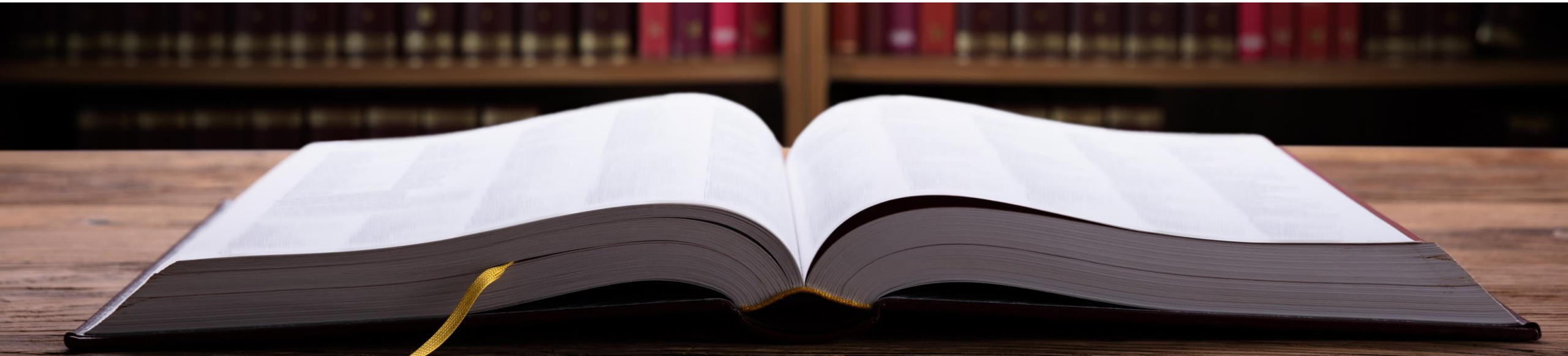
# The Basics



# History Leading to Title IX

## Road to Title IX

- Protections for women gained significant momentum from the racial movement of the 1960s.
- After the Civil Rights Act of 1964, women's rights activists sought greater protection in the law.
- In 1970, Representative Edith Green (D-Ohio) drafted legislation prohibiting sex discrimination in education.
- In 1972, Title IX was enacted.



# The Law

- **Title IX**
  - No person in the U.S. 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.
- **Title IX Regulations**
  - 34 C.F.R. 106
- **Enforced by Office of Civil Rights/state education agencies**





# Application of Title IX

## Scope of Title IX

- All public and private elementary and secondary schools, school districts, colleges and universities receiving federal funds (“recipients”) must comply with Title IX.
- Application of Title IX is institution-wide.
- All students (as well as other persons) at recipient institutions are protected by Title IX.



# Application of Title IX

## Programs or Activities

### General prohibition

- Except as provided elsewhere in this part, 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 academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance. 34 C.F.R. s. 106.31(a).





# Application of Title IX

## Programs or Activities

### Specific prohibitions

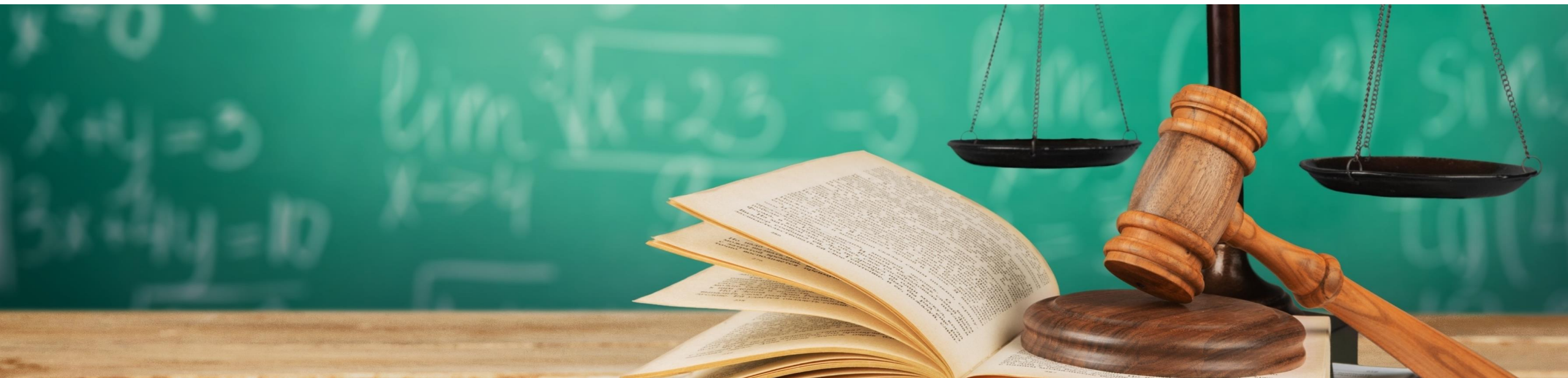
- Except as provided in this subpart, an educational institution in providing any aid, benefit, or service to a student, may not, on the basis of sex:
  - Treat one person differently from another in determining whether the person satisfies any requirement or condition for the provision of any aid, benefit, or service;
  - Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
  - Deny any person such aid, benefit, or service;
  - Subject any person to separate or different rules of behavior, sanctions, or other treatment; or
  - Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. s. 106.31(b)

# Application of Title IX

## Discipline

- Title IX prohibits a recipient from subjecting any person to separate or different rules of behavior, sanctions, or other treatment, such as discriminatory discipline, based on sex.
- See Dear Colleague Letter, Nondiscriminatory Administration of Discipline, January 8, 2014.





# Application of Title IX

## Employment and Benefits

- A recipient is also generally prohibited from discriminating on the basis of sex in employment or recruitment.
- This includes employment actions, such as hiring, promotion, compensation, grants of leave, and benefits.
- These provisions also protect against discrimination based on an applicant's or employee's pregnancy or marital or parental status.

# Application of Title IX

## Other Areas

- Single-sex education
- Pregnancy
- Sexual harassment
- Athletics





# Procedural Requirements



# Procedural Requirements

## Subpart A – Introduction

- Changes to Section 106.8 – procedural requirements
  - Must designate and authorize at least one employee to coordinate its efforts to comply with responsibilities under this part
  - Employee must be referred to as the “Title IX Coordinator.”
  - Must notify certain persons of the name or title, office address, email address, and telephone number of the Title IX Coordinator
  - The persons include 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 institution.

# Procedural Requirements

## Subpart A – Introduction

- Changes to Section 106.8 – procedural requirements
  - Must disseminate a policy of non-discrimination
  - Must notify same persons (1) that the institution does not discriminate on the basis of sex in the education program or activity that it is operates and (2) that it is required by Title IX and this part not to discriminate in such a manner
  - Must state in notice that this requirement not to discriminate extends to admission (if applicable) and employment
  - Must state in notice that inquires about the application of Title IX and this part may be referred to the Title IX Coordinator, the Assistant Secretary, or both

# Procedural Requirements

## Subpart A – Introduction

- Changes to Section 106.8 – procedural requirements
  - Must follow publication requirements
  - Must prominently display the contact information for the Title IX Coordinator (discussed above) and the policy (discussed above) on:
    - Its website, **and**
    - In each handbook or catalog that it makes available to the persons (discussed above).
- Must not distribute publication stating that the institution treats groups differently on the basis of sex, except as permitted under Title IX



# Procedural Requirements

## Subpart A – Introduction

- Changes to Section 106.8 – procedural requirements
- Must adopt and publish **grievance procedures** that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part
- Must adopt and publish a **grievance process** that complies with 34 CFR 106.45 for formal complaints of sexual harassment
- Must provide persons (above) notice of the grievance procedure 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 recipient will respond
- Applies only to sex discrimination occurring against a person in the U.S.

# Grievance Procedure

## Important Elements

- Notice to students and employees of the grievance procedures, including where complaints may be filed
- Application of the grievance procedure to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties
- Provisions for adequate, reliable, and impartial investigations of complaints
- Written notice to the complainant and alleged perpetrator of the outcome of the complaint
- Assurance that the institution will take steps to prevent recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate
- Designated and reasonably prompt time frames for the major stages of the complaint process





# Grievance Process

## Grievance Process Components

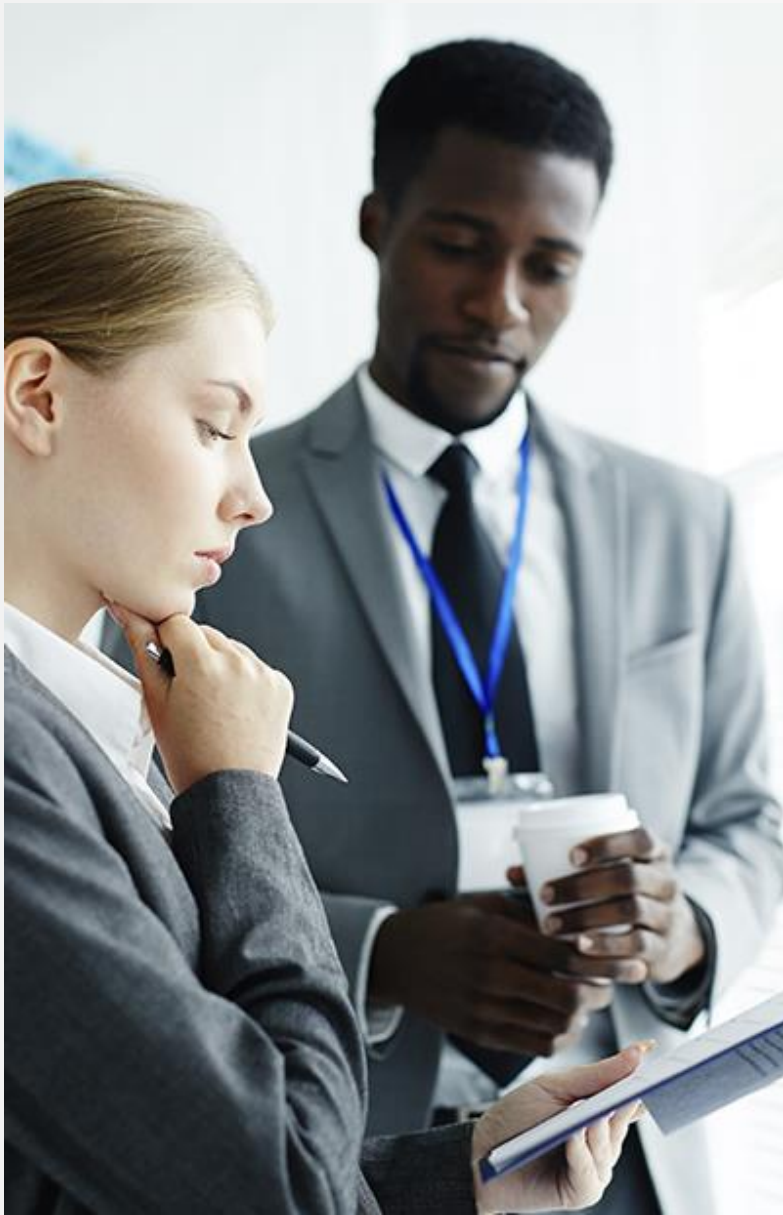
- Basic requirements
- Investigation
- Hearing (not required in K-12 Schools)
- Determination regarding responsibility
- Appeals





# Grievance Process – Basic Requirements

- **Must treat complainants and respondents equitably**
  - Provide remedies to a complainant where a determination of responsibility has been made against the respondent.
  - Follow a grievance process that complies with this part before the imposition of any disciplinary sanctions or other actions against a respondent.
- **Require an objective evaluation of all relevant evidence and provide that credibility determinations may not be based on person's status.**
- **Require that any individual designated by an institution as a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process not have a conflict of interest or bias.**



# Grievance Process – Basic Requirements

- Includes a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility is made at the conclusion of the grievance process.
- Includes reasonably prompt time frames for conclusion of the grievance process
  - Must include process that allows for temporary delay for good cause with written notice to complainant and respondent of the delay and the reasons for action
  - Good cause may include considerations such as absence of a party, a party's advisor, or witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.



# Grievance Process – Basic Requirements

- Describe the range of (or list) possible disciplinary sanctions and remedies that the institution may implement following determination of responsibility.
- State whether the standard of evidence to be used to determine responsibility is preponderance of the evidence or clear and convincing evidence.
- Must apply same standard for formal complaints against students as for formal complaints against employees
- Must apply same standard to all formal complaints of sexual harassment





## Grievance Process – Basic Requirements

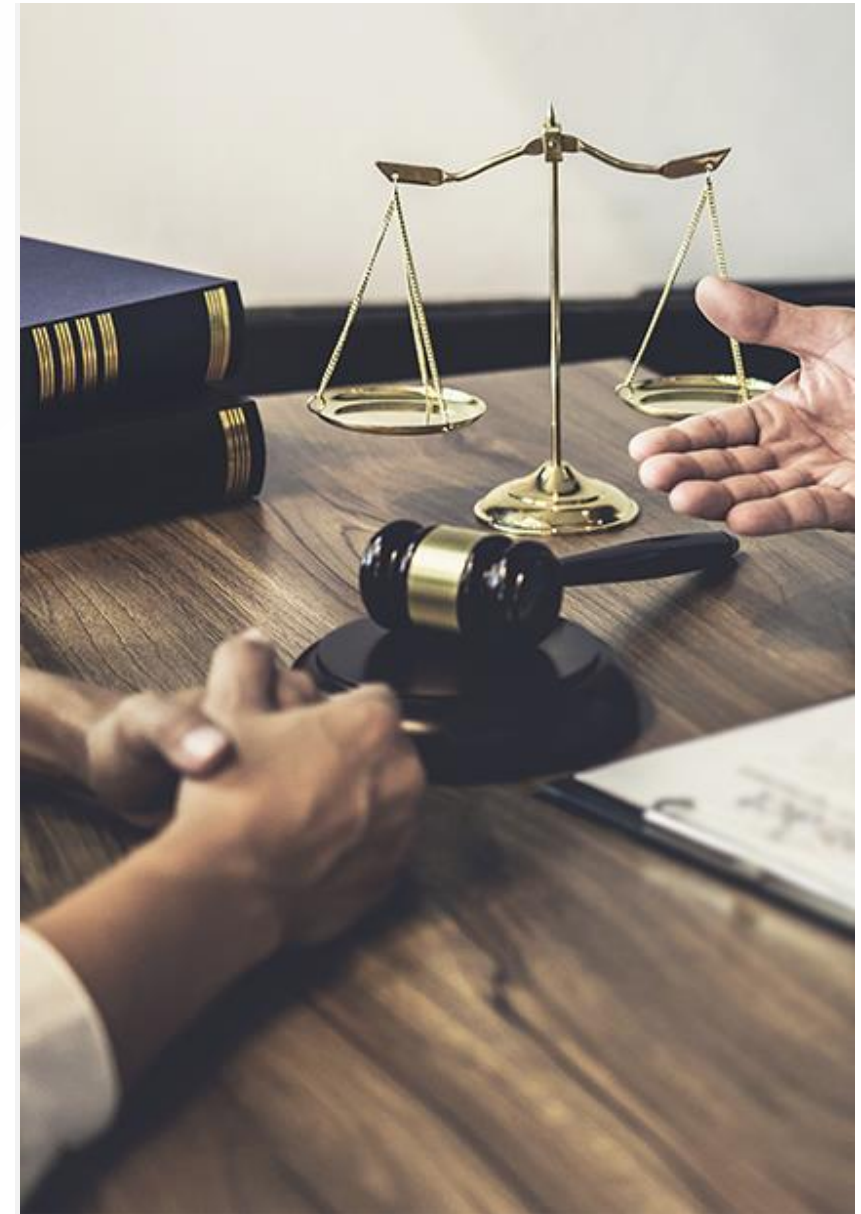
- Include the procedures and permissible bases for the complainant and the respondent to appeal.
- Describe the range of supportive measures available to complainants and respondents.
- Must not require, allow, rely upon, or otherwise use questions or evidence that constitute information protected under a legally recognized privilege, unless person has waived privilege

A close-up photograph of two hands, one on the left and one on the right, both wearing white sleeves. The hands are positioned over a dark, textured surface. Between the hands are several small, light-colored wooden figures that resemble stylized people. The figures are arranged in a loose circle, with some standing upright and others slightly tilted. The lighting is warm, creating soft shadows.

# Responsibilities of Title IX Coordinator

# Designating a Title IX Coordinator

- An institution must designate at least one employee to coordinate its efforts to comply with Title IX.
- An institution may choose to have a number of employees responsible for Title IX matters.
- However, it is advisable to give one official responsibility for overall coordination and oversight of sexual harassment complaints to ensure consistent practices and standards.







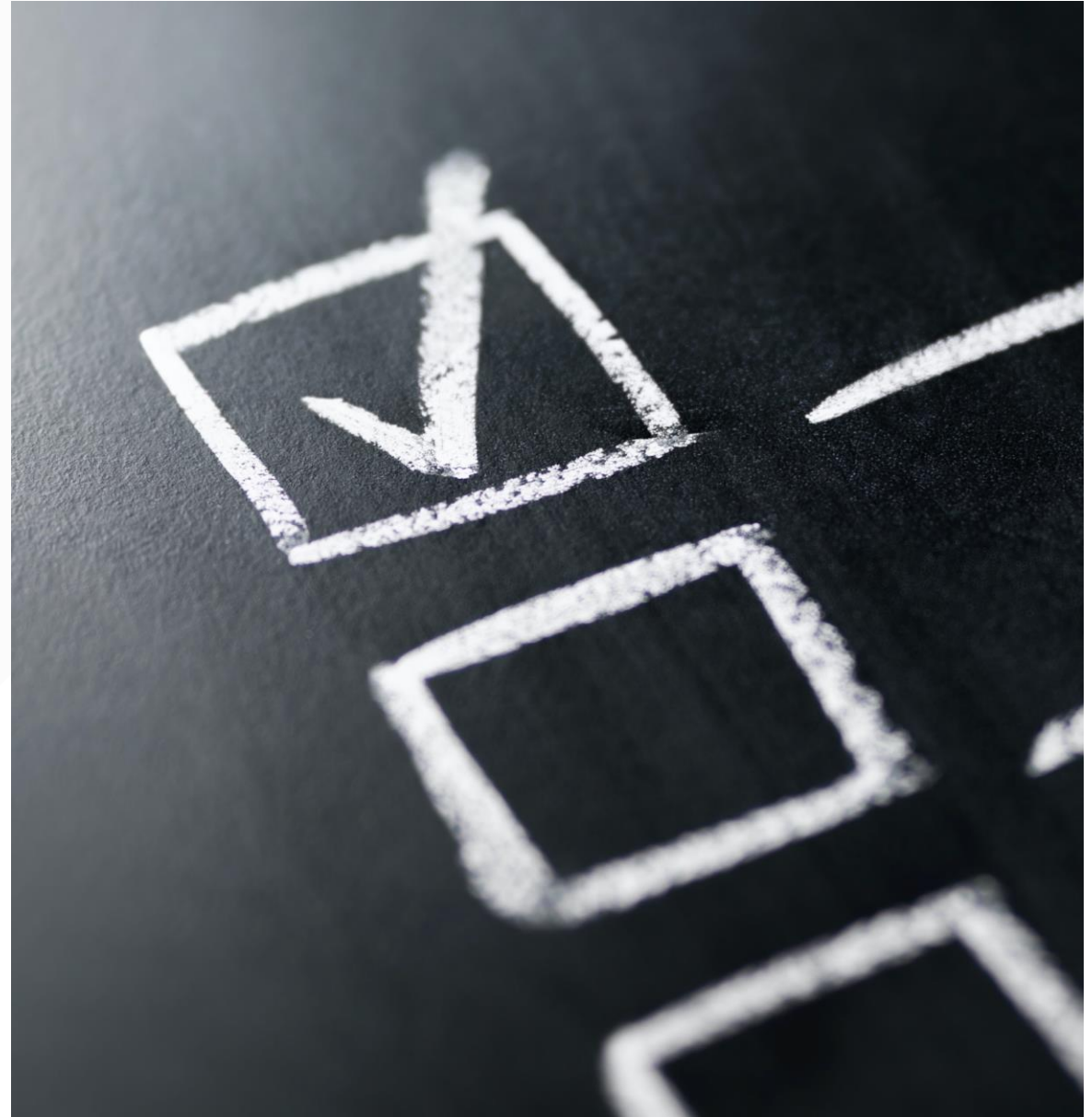
# Title IX Coordinator Conflicts of Interest

## Title IX Coordinator Role

- The Title IX coordinator's role should be independent to avoid any potential conflicts of interest.
- The Title IX coordinator should report directly to the institution's senior leadership.
- Title IX does not categorically exclude certain employees from serving as Title IX coordinators. However, institutions should not select an employee whose job responsibilities might create a conflict of interest.

# Obligation to Title IX Coordinators

- Institutions have specific obligations to ensure that the Title IX coordinator is visible to the institution's community.
- Provide coordinators with access to information regarding incidents of sex-based harassment and other relevant information.
- Ensure that Title IX coordinators receive appropriate training and have thorough knowledge in the areas over which they have responsibility.





# Title IX Coordinator Responsibilities

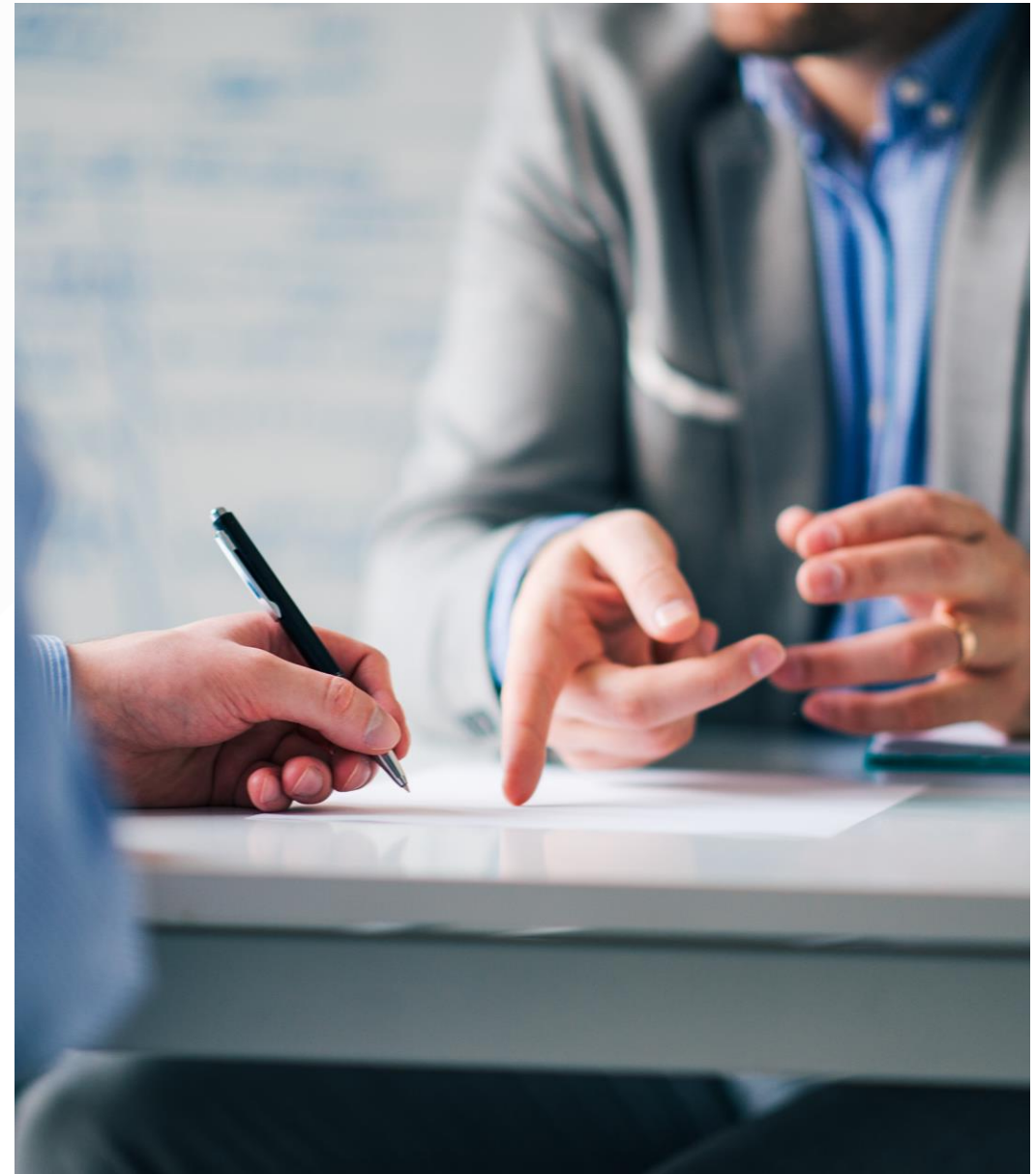
- Title IX coordinator responsibilities
- Coordinate institution's compliance with Title IX, including grievance procedures for resolving Title IX complaints.
- Coordinate institution's response to all complaints involving sex discrimination.
- Remain knowledgeable and updated about Title IX and the institution's policies and procedures.
- Provide training and technical assistance on school policies related to sex discrimination.
- Assist with surveying the school climate and analyze the information obtained from any survey.
- Monitor participation in athletics and across academic fields to identify disproportionate enrollment based on sex.



# Title IX Reporting

## Reports of Discrimination/Harassment

- 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).
- Any person may report in person, by mail, by telephone, or by email, 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.



# Title IX Reporting

## Reports of Discrimination/Harassment

- A person may report sex discrimination, including sexual harassment, at any time (including during non-business hours) by using the telephone number or email address or by mail to the office address listed for the Title IX Coordinator.
- Notice of sexual harassment (actual knowledge) includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator.



# Title IX Complaints

## Other Options

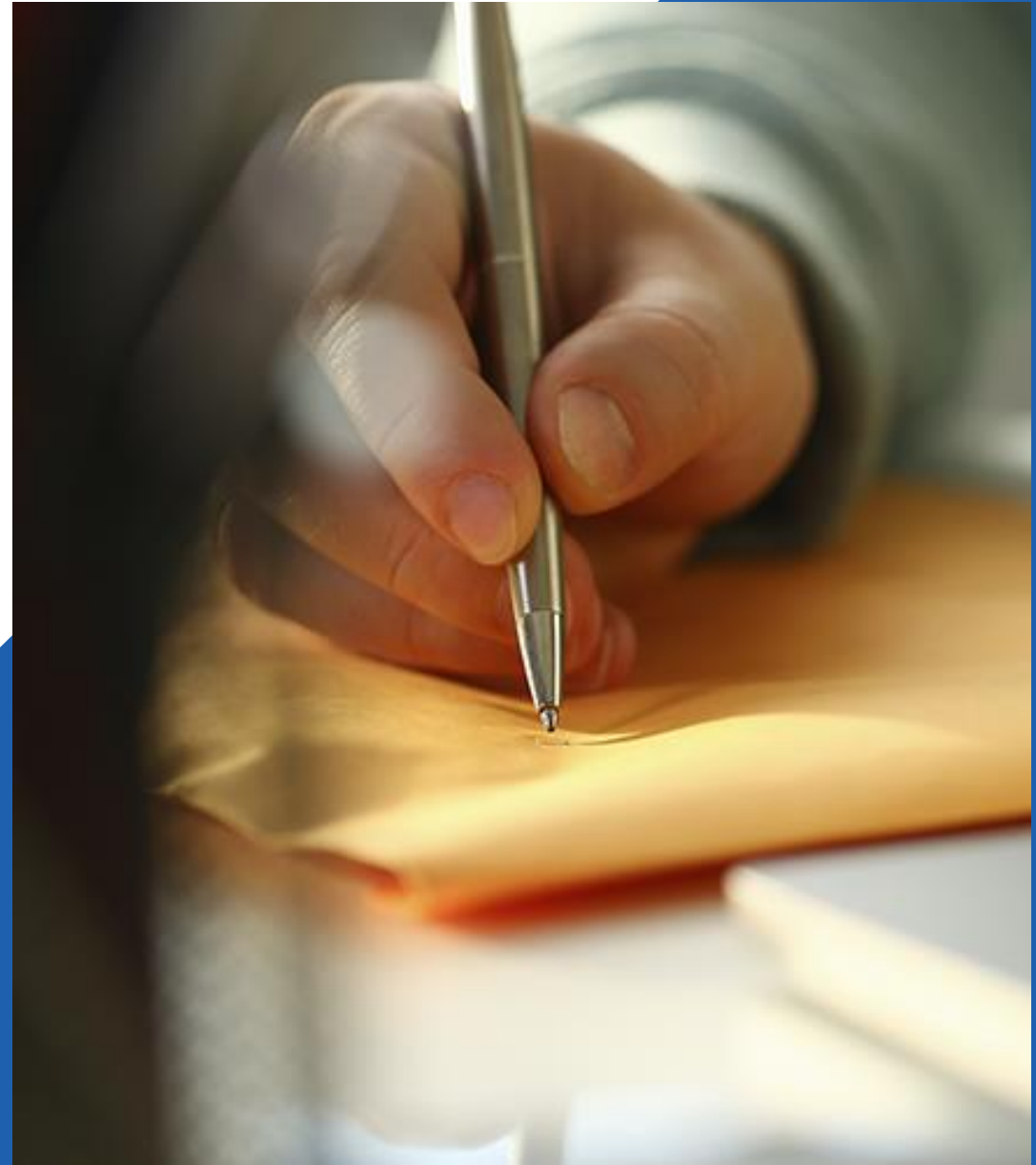
- File a complaint with OCR.
- Send a letter to OCR enforcement officer.
- Not required to use the school's grievance process before filing a complaint
- File a lawsuit in court claiming a violation; there is no need to file with OCR before filing a suit in court.





# Recordkeeping Requirements

- An institution must maintain for a period of seven years the following records:
  - Each sexual harassment investigation including (1) any determination regarding responsibility and any audio or audiovisual recording or transcript, (2) any disciplinary sanctions imposed on the respondent, and (3) any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
  - Any appeal and the result therefrom;
  - Any informal resolution and the result therefrom; **and**





# Recordkeeping Requirements

- For each response for an allegation of sexual harassment, an institution must create, and maintain for a period of seven years, the following records:
  - Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment
  - The institution 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 education program or activity.

# Recordkeeping Requirements

- For each response for an allegation of sexual harassment, an institution must create, and maintain for a period of seven years, the following records:
  - If a recipient does not provide a complainant with supportive measures, then the recipient 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 recipient in the future from providing additional explanations or detailing additional measures taken.





# Recordkeeping Requirements

- An institution must maintain for a period of seven years the following records:
  - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process
  - An institution must make these training materials publicly available on its website.



# Training Required

- **An institution must ensure that Title IX Coordinators, investigators, decision-makers, and anyone who facilitates an informal resolution process must receive training on:**
- The definition of sexual harassment
- The scope of the institution's education program or activity
- How to conduct investigations and the grievance process, including hearings, appeals and informal resolution processes
- How to serve impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias

# Training Required

- **An institution must ensure that decision-makers receive training on:**
  - Issues of relevance of questions and evidence, including when questions and evidence of the complainant's sexual predisposition or prior sexual behavior are not relevant
  - Any technology to be used at a live hearing
- **An institution must ensure that investigators receiving training on:**
  - Issues of relevance to create an investigative report that fairly summarizes evidence
- **Any materials must not rely on sex stereotypes and must promote impartial investigations and adjudications.**



# Title IX Complaints

- **Policies need to consider**
- Interaction when claims also involve other protected classes (race, disability, etc.)
- Interaction with other state laws
- Interaction with overlapping federal laws (Title VII)
- Interaction with student code of conduct





# Conclusion



## Conclusion

- Need to recognize roles and responsibilities
- Need to monitor activity on campus in all areas
- Need to maintain records in all areas





**Richard Verstegen**  
**Attorney**

# Questions?



**Boardman & Clark, LLP**



<https://www.boardmanclark.com>



**(608) 286-7233**



[rverstegen@boardmanclark.com](mailto:rverstegen@boardmanclark.com)

# Disclaimer

Our webinars are designed to be accurate and authoritative, but we do not provide legal, accounting, medical or similar professional services. Client remains solely responsible for compliance with all applicable laws, regulations, accounting standards and official health guidance. If legal, accounting, medical or other expert advice is desired, Client should retain the services of an appropriate professional.

Photocopying, distributing or using these copyrighted materials electronically without the copyright owner's express written consent is strictly prohibited. Consent is granted for the use of purchasers of webinars and then solely for the use of registered attendees of the webinars. No right or license is given to reproduce the materials in any form or format or to place the materials in any format on any website or blog or to otherwise republish it in any manner without the express written permission of the copyright holder.




# Title IX Coordinator Compliance Certification (K-12)

Session 2: Developing Policies and Conducting Investigations

Presented by: Richard F. Verstegen





Policies

**CareerLearning**

**Title IX Coordinator Compliance Certification (K-12)**  
**Session 2: Developing Policies and Conducting Investigations**

**Presented by: Richard F. Verstegen**

# Overview

I

## Policies and Procedures

- Grievance Procedure
- Grievance Process

II

## Investigations

- Reports
- Formal Complaints
- Investigation
- Determination
- Appeal

III

## Conclusion

The image shows a desk setup with two blue binders standing upright. The left binder is labeled 'POLICIES' and the right one is labeled 'PROCEDURES' in large, bold, black capital letters on white labels. To the left of the binders is a stack of brown cardboard boxes. To the right is a black mesh pencil holder containing several colored pencils. A blue and yellow diagonal graphic element is positioned between the binders and the text overlay.

**POLICIES**

**PROCEDURES**

# Policies and Procedures



# Title IX Complaints

- Policies need to consider
  - Interaction when claims also involve other protected classes (race, disability, etc.)
  - Interaction with other state laws
  - Interaction with overlapping federal laws (Title VII)
  - Interaction with student code of conduct



# Grievance Procedure

- **Important elements**

- Notice to students and employees of the grievance procedures, including where complaints may be filed
- Application of the grievance procedure to complaints filed by students or on their behalf alleging sexual violence carried out by employees, other students, or third parties
- Provisions for adequate, reliable, and impartial investigations of complaints
- Written notice to the complainant and alleged perpetrator of the outcome of the complaint
- Assurance that the institution will take steps to prevent the recurrence of any sexual violence and remedy discriminatory effects on the complainant and others, if appropriate
- Designated and reasonably prompt time frames for the major stages of the complaint process

# Grievance Procedure

- **April 2014 Guidance (rescinded)**
  - The April 2014 Guidance (now rescinded) included additional suggestions for grievance procedures.
  - No longer suggested, but may be included:
    1. A statement of the school's jurisdiction over Title IX complaints;
    2. Adequate definitions of sexual discrimination;
    3. Reporting policies and protocols, including provisions for confidential reporting



# Grievance Procedure

- **April 2014 Guidance (rescinded)**
  4. Identification of the employee or employees responsible for evaluating requests for confidentiality;
  5. Notice that Title IX prohibits retaliation;
  6. Notice of a student's right to file a criminal complaint and a Title IX complaint simultaneously;
  7. Notice of available interim measures that may be taken to protect the student in the educational setting;
  8. The evidentiary standard that must be used in resolving a complaint;
  9. Notice of potential remedies for students;
  10. Notice of potential sanctions against perpetrators; **and**
  11. Sources of counseling, advocacy, and support.



# Grievance Process

- **Grievance process components**
  - Basic requirements
  - Notice of allegations
  - Dismissal of formal complaint
  - Consolidation
  - Informal resolution
  - Investigation
  - Hearing (not required in K-12 schools)
  - Determination regarding responsibility
  - Appeals
  - Recordkeeping



# Sexual Harassment Complaint Form

## Reports and Investigations of Sexual Harassment



## Poll Question

- **How many sexual harassment cases have you addressed since August 2020?**
  - Around 0 to 5
  - Around 6 to 10
  - Around 11-20
  - More than 20



# Responding to Sexual Harassment Allegations

- Absence of formal complaint, must still respond in a manner that is not deliberately indifferent. No investigation is required, but the institution must do something.
- Schools must treat complainants and respondents equitably by offering supportive measures to a complainant and by following a grievance process under 106.45 before the imposition of any disciplinary sanctions or other actions against a respondent.

# Definitions – Recognizing Sexual Harassment

- **Sexual harassment**
  - An employee of the institution **conditioning** the provision of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct (quid pro quo);
  - 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 institution's education program or activity; **or**
  - Sexual assault, dating violence, domestic violence, or stalking (as defined by law).



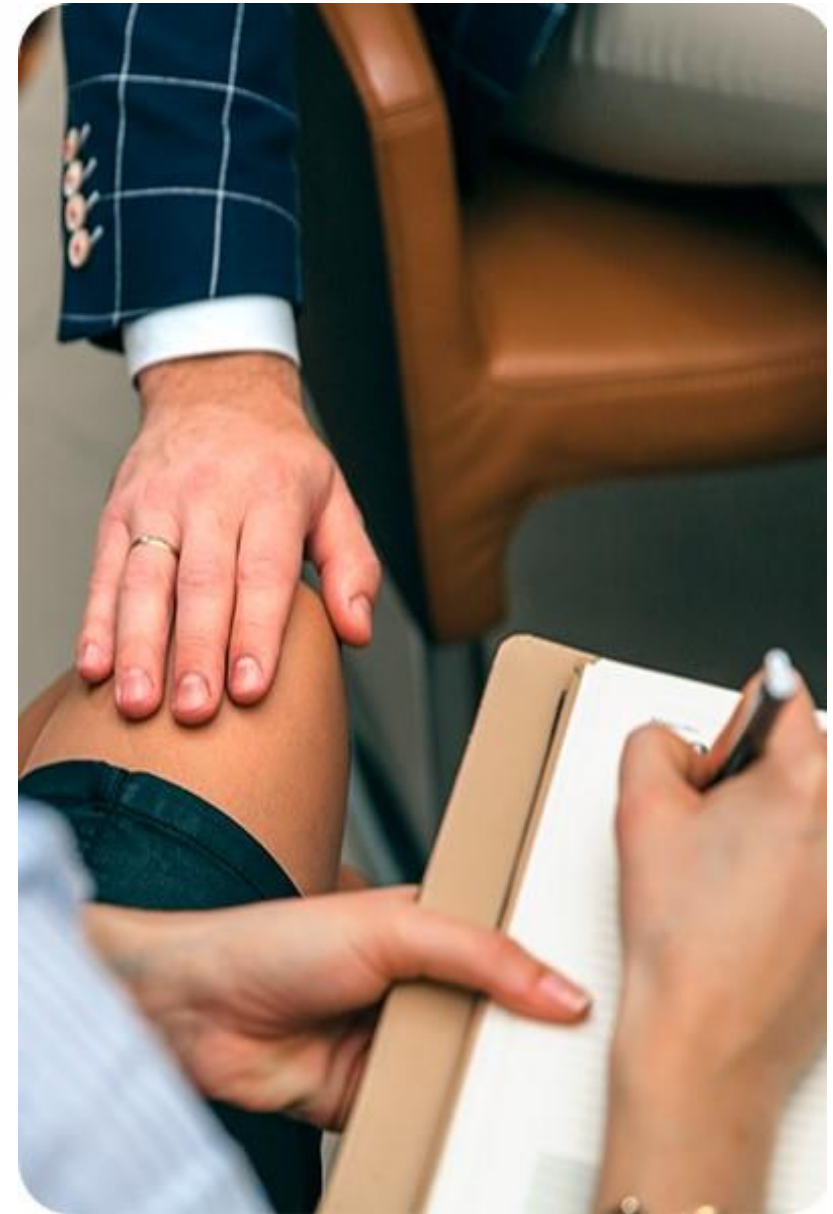


# Responding to Sexual Harassment

- An institution with **actual knowledge** of **sexual harassment** in an **education program or activity** of the institution against a **person in the U.S.** must **respond** promptly in a manner that is not deliberately indifferent.
- A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

# Obligation to Respond – Actual Knowledge

- **Notice of sexual harassment or allegations of sexual harassment to:**
  - Title IX Coordinator
  - Any official of the institution who has the authority to institute corrective measures on behalf of the institution
  - Any employee of an elementary or secondary school
- **Imputation of knowledge-based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.**





## Obligations for Responding Within the Education Program or Activity

- **Within the education 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



# Definitions – Parties

- **Complainant**

- An individual who is alleged to be the victim of conduct that could constitute sexual harassment
- The complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed

- **Respondent**

- An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

# Responding to Sexual Harassment Allegations

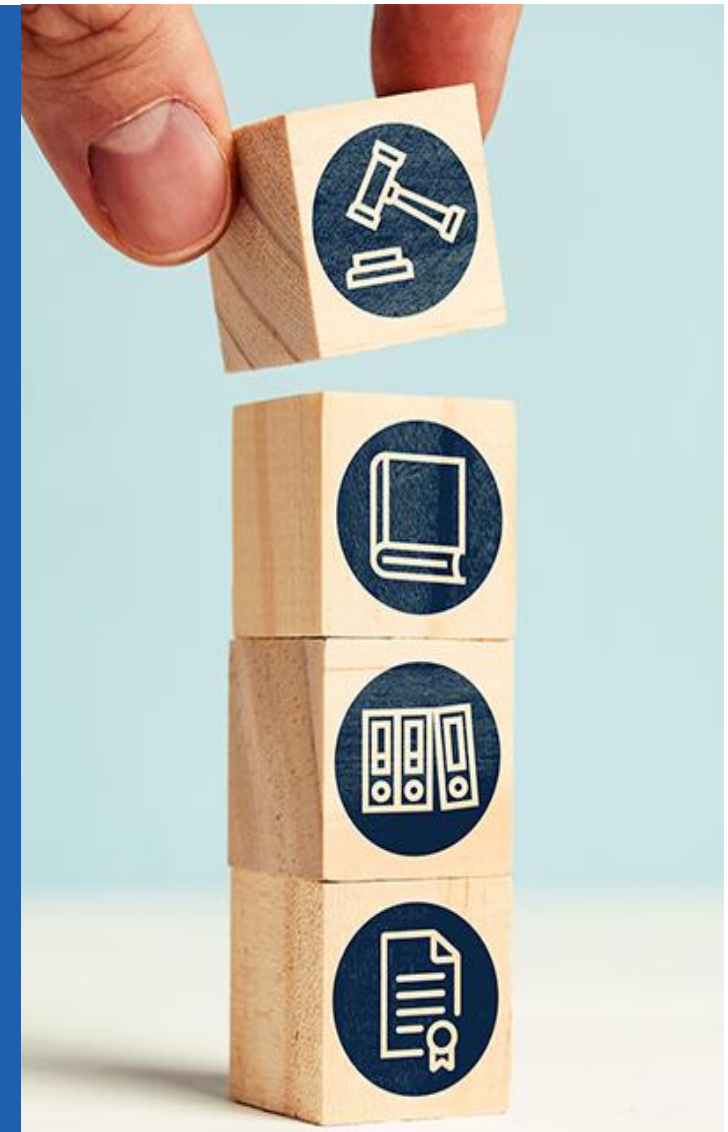
- Title IX Coordinator must promptly:
- Contact the complainant to discuss the availability of supportive measures,
- Consider the complainant's wishes with respect to supportive measures,
- Inform the complainant of the availability of support measures, **and**
- Explain to the complainant the process for filing a formal complaint.



The image shows a document titled "Sexual Harassment Complaint Form". Below the title, there is a paragraph of text that reads: "By signing and submitting this Sexual Harassment Complaint Form, I certify that the information provided is true and accurate and contains no misrepresentation. I understand that falsifications, representations, or omissions from consideration to this position. I hereby authorize responsible parties to conduct a background check on previous employers for verification, conduct a background check on my record." Below this text, there are several lines for personal information, including "Full legal name", "Last Name", "Home Phone:", and "City". A pen is resting on the form near the "City" field.

# Responding to Sexual Harassment Allegations

- **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
  - Are designed to restore or preserve equal access to the institution's education program or activity without unreasonably burdening the other party



# Responding to Sexual Harassment Allegations

- **Supportive measures**
  - Includes measures designed to protect the safety of all parties or the institution's environment or deter sexual harassment
  - May include counseling, extensions of deadlines or 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



# Response to Sexual Harassment Allegations

- **Supportive measures**
  - The institution 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 institution to provide the supportive measures.
  - The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.



# Response to Sexual Harassment Allegations – Emergency Removal

- **Nothing precludes the institution from removing a respondent from the education program or activity on an emergency basis.**
  - The institution must undertake an individualized safety and risk analysis, determine that immediate threat to health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provide the respondent with notice and opportunity to challenge following the removal.
  - This provision may not be construed to modify any rights under IDEA, Section 504, and ADA.

# Response to Sexual Harassment Allegations – Administrative Leave

- Nothing precludes the institution from placing a non-student employee respondent on administrative leave during the pendency of a grievance process.
- These provisions may not be construed to modify any rights under Section 504 or the ADA.





# Formal Complaints

- **Formal complaint**
  - A document filed by the complainant or signed by the Title IX Coordinator (1) alleging sexual harassment against a respondent and (2) requesting the institution investigate the allegation of sexual harassment
  - A document filed by the complainant means a document or electronic submission that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.



# Formal Complaints

- **Formal complaint**
  - Complainant must be participating or attempting to participate in the education program or activity of the institution with which the formal complaint is filed.
  - Complaints may be filed with the Title IX Coordinator in person, by mail, by email, by using contact information, or by another method designated by the institution.
  - Institution must follow the grievance process.
  - Supportive measures must be offered as appropriate.



# Grievance Process – Dismissal

- **Dismissal of complaint**
  - If conduct, if proved, would not constitute sexual harassment
  - If conduct did not occur in the education program or activity
  - If conduct did not occur against a person in the U.S.
  - Institution must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part.
  - Such a dismissal does not preclude action under another provision of the recipient's code of conduct.
- **Upon dismissal, the institution must promptly send written notice of the dismissal and reasons for dismissal.**

# Grievance Process – Dismissal

- **Dismissal of complaint**
  - The institution 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 institution; **or**
    - Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- **Upon dismissal, the institution must promptly send written notice of the dismissal and reasons for dismissal.**

# Grievance Process – Informal Resolution

- An institution may not require (as a condition of enrollment, employment, or another right) a waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.
- An institution may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.





# Grievance Process – Informal Resolution

- At any time, prior to reaching a determination regarding responsibility, the institution may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.
- Informal resolution requires an institution to follow certain requirements, including (1) providing the parties a written notice disclosing certain information (described below); (2) obtaining the parties' voluntary, written consent to the informal resolution process; and (3) ensuring that it does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

# Grievance Process – Informal Resolution

- The written notice to the parties must disclose:
  1. The allegations;
  2. 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 grievance process with respect to the formal complaint); **and**
  3. Any consequences resulting from participating in the informal resolution process, including records that will be maintained and could be shared.

## Poll Question

- **Have you used any informal resolution process in your sexual harassment cases?**
  - Yes for both students and employees
  - Yes, for students only
  - Yes, for employees only
  - No



# Grievance Process – Consolidation

- An institution 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.







# Grievance Process – Investigations

- Upon receipt of a formal complaint, an institution must provide written notice to parties who are known.
- Written notice must include:
  - Notice of recipient's grievance process
  - Notice of allegations of sexual harassment, including sufficient details known at that time (i.e., 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)

# Grievance Process – Investigations

- **Written notice must also:**
  - 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.
  - Inform the parties that they may have an advisor of their choice who may be an attorney and that they may inspect and review evidence.
  - Inform the parties of any provision in the institution's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.



## Grievance Process – Investigations

- Written notice must be provided with sufficient time to prepare a response before any initial interview.
- If other allegations are investigated later, notice must be provided of the additional allegations to the parties whose identities are known.

# Grievance Process – Investigations

- **An institution must:**
  - Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the institution and not on the parties.
  - The institution cannot access, consider, disclose, or otherwise use a party's records that are made and 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 recipient obtains that party's voluntary, written consent to do so for the grievance process.

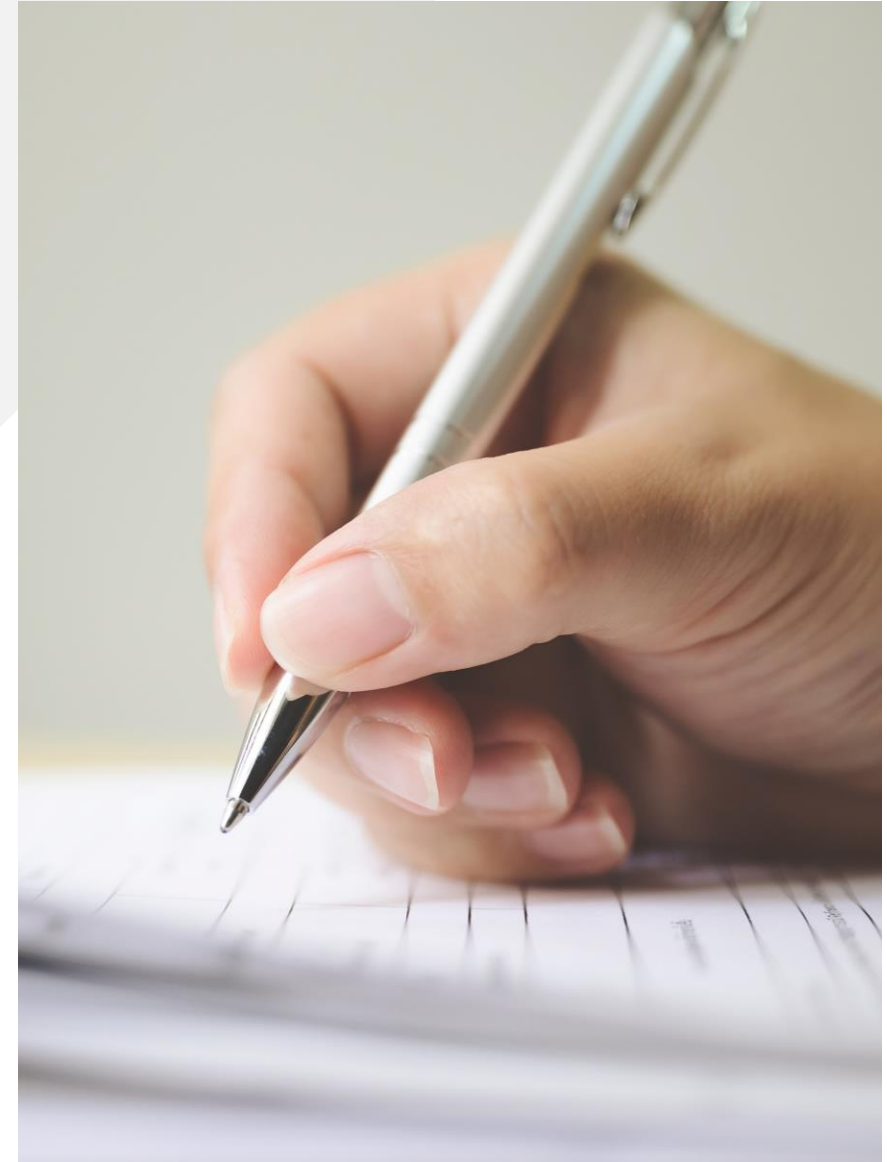


# Grievance Process – Investigations

- **An institution must:**
  - Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
  - Not restrict the ability of either party to discuss the allegations under investigation or gather and present relevant evidence; **and**
  - Provide parties with the same opportunities to have others present during any grievance proceeding, including an advisor of their choice, but may establish reasonable restrictions regarding participation.

# Grievance Process – Investigations

- **An institution must:**
  - 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
  - Create an investigation report that fairly summarizes relevant evidence.
  - Investigator must be able to assess credibility and identify relevant evidence.
  - Relevant evidence is evidence and testimony that directly relates to the issues disputed or discussed.





# Grievance Process – Investigations

- **An institution must:**
  - Prior to the completion of the investigative report, the recipient must send to each party and the party's advisor, the evidence subject to review and inspection in an electronic format or a hard copy.
  - The parties must have 10 days to submit a written response, which the investigator must consider prior to completing the investigation report.

# Grievance Process – Investigations

- **An institution must:**
  - At least 10 days prior to a hearing (if a hearing is required) or other time of determination regarding responsibility, send to each party and the party's advisor the investigation report in an electronic format or hard copy, for their review and written response.





# Grievance Process – Investigations

- **Possible investigation report contents**
  - Summary of the complainant's allegations and response of the accused
  - Summary of the persons interviewed and a statement about their credibility
  - Presentation of the findings of fact.
  - Summary of relevant standards and other statements concerning process
  - Careful consideration should be given concerning whether the report should include conclusions about the allegations and recommendation for disciplinary or other corrective action.

# Responsibility Decision-Maker

- Not Title IX Coordinator or Investigator
- Must issue written determination regarding responsibility
- Determination must apply evidence standard.



## Poll Question

- **Who do you use as responsibility decision-makers?**
  - School employees
  - Outside legal counsel
  - Outside administrators



# Grievance Process – No Live Hearing

- Elementary and secondary schools may, but need not, provide for a hearing.
- With or without a hearing, after the institution has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.



# Grievance Process – No Live Hearing

- The decision-maker must explain to the party proposing the questions any decision to exclude a question as not relevant.
- With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless (1) 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 (2) 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.

# Grievance Process – Live Hearings

- **Post-secondary institutions must provide a live hearing.**
  - The decision-maker must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
  - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally (notwithstanding the discretion of the institution to otherwise restrict the extent to which advisors may participate in the proceedings).
  - At the request of either party, the institution must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or the witness answer questions.

# Grievance Process – Live Hearings

- **Post-secondary institutions must provide a live hearing.**
  - Only relevant cross-examination and other questions may be asked of a party or witness.
  - Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
  - If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

# Grievance Process – Live Hearings

- **Post-secondary institutions must provide a live hearing.**
  - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility (provided however that the decision-maker cannot draw an inference about the determination regarding responsibility based solely on the party's or witnesses absence from the live hearing or refusal to answer cross-examination or other questions).



# Grievance Process – Live Hearings

- **Post-secondary institutions must provide a live hearing.**
  - Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the institution's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
  - Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

# Determination

## Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint to the determination, including any notifications to the parties, interviews, site visits, methods used to gather other evidence, and hearings held;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct to the facts;



# Determination

## Written determination must include:

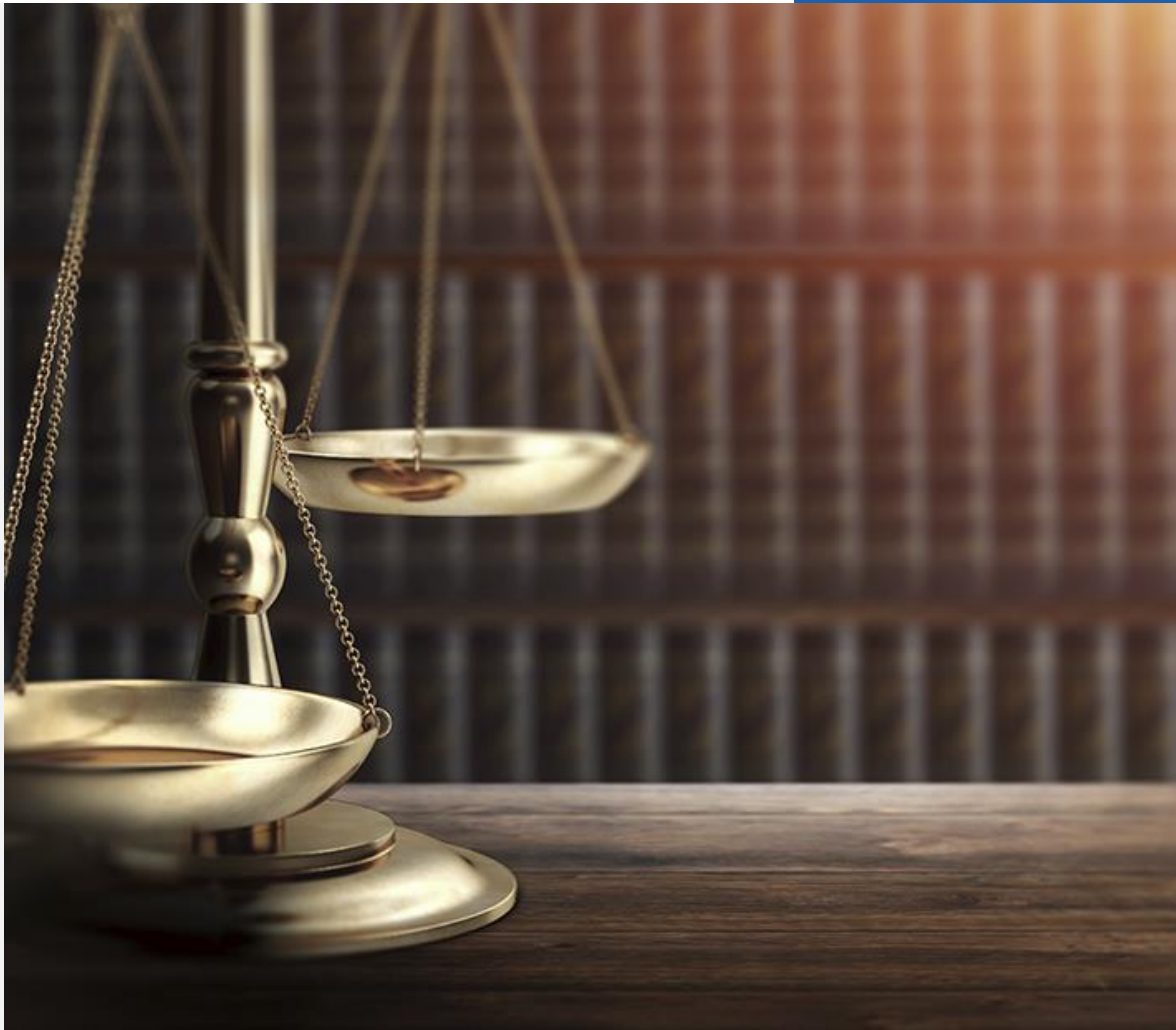
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the institution imposes on the respondent, and whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the institution to the complainant; **and**
- The institution's procedures and permissible bases for the complainant and respondent to appeal.

# Determination

- **Written determination**
  - The institution must provide the written determination to the parties simultaneously.
  - The Title IX Coordinator is responsible for the effective implementation of any remedies.







# Appeal

- An institution must offer both parties an appeal from a determination of responsibility, and from an institution's dismissal of a formal complaint or any allegations contained therein.
- If appeal, the decision is final after appeal.
- If no appeal, then the decision is final on the date on which an appeal would no longer be considered timely.

# Appeal

- **The appeal must be on the following bases:**
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal that could affect the outcome of the matter;
  - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against the complainants or respondents that affected the outcome of the matter;
- **The institution may offer an appeal equally to both parties on additional bases.**

# Appeal

- **For any appeal, the institution must:**
  - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties.
  - Ensure that the appeal decision-maker is not investigator, responsibility decision-maker, or Title IX Coordinator.
  - Ensure that the appeal decision-maker complies with standards (no conflict of interest).





# Appeal

- **For any appeal, the institution must:**
  - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
  - Issue a written decision describing the result of the appeal and the rationale for the result.
  - Provide the written decision simultaneously to both parties.





# Conclusion

# Title IX Proposed Regulations

- **June 23, 2022 Proposed Regulations**
  - Sex discrimination applies to sexual orientation, gender identity, and sex characteristics.
  - New definition of sex-based harassment, including hostile environment that looks at “sufficiently severe or pervasive” conduct.
  - New definition of confidential employees.
  - New response requirements, including eliminating the definition of actual knowledge and deliberately indifferent.

# Title IX Proposed Regulations

- **June 23, 2022 Proposed Regulations**
  - Requires institutions to address off-campus conduct
  - Expands the definition of complainant
  - Requires institutions to provide supportive measures to students and employees in instances involving any sex discrimination
  - Sets forth additional training requirements
  - Combining grievance procedures for sex discrimination and sexual harassment complaints in certain instances

# Title IX Proposed Regulations

- **June 23, 2022 Proposed Regulations**
  - Sets forth additional requirements for sex-based harassment complaints involving a post-secondary student
  - Revised informal resolution procedures
  - New regulations relate to protecting students from discrimination based on pregnancy, including providing reasonable modifications for students, reasonable break time for employees for lactation, and lactation space for students and employees
  - Revised retaliation provisions



# Conclusion

- Need to review policies
- Need to include a grievance process in your policies
- Need to identify different individuals to serve as investigators and follow the process



# COMING SOON

**Join us!**  
I have upcoming webinars with CareerLearning.





# What was your key takeaway?

Please let us know in the Q&A.

We will use your response with your first name and last initial on our website so others can benefit!





**Richard Verstegen**  
**Attorney**

# Questions?



**Boardman & Clark, LLP**



<https://www.boardmanclark.com>



**(608) 286-7233**



[rverstegen@boardmanclark.com](mailto:rverstegen@boardmanclark.com)



# Disclaimer

Our webinars are designed to be accurate and authoritative, but we do not provide legal, accounting, medical or similar professional services. Client remains solely responsible for compliance with all applicable laws, regulations, accounting standards and official health guidance. If legal, accounting, medical or other expert advice is desired, Client should retain the services of an appropriate professional.

Photocopying, distributing or using these copyrighted materials electronically without the copyright owner's express written consent is strictly prohibited. Consent is granted for the use of purchasers of webinars and then solely for the use of registered attendees of the webinars. No right or license is given to reproduce the materials in any form or format or to place the materials in any format on any website or blog or to otherwise republish it in any manner without the express written permission of the copyright holder.



# Title IX Coordinator Compliance Certification (K-12)

Session 3: Specific Topics for Title IX Coordinators

Presented by: Richard F. Verstegen



**Title IX Coordinator Compliance Certification (K-12)**  
**Session 3: Specific Topics for Title IX Coordinators**

**Presented by: Richard F. Verstegen**



# Overview



I

## Specific Topics

- Athletics
- Pregnancy
- Employment
- LGBTQ

II

## Policy Considerations

III

## Conclusion



# Title IX

- Title IX regulations
  - “The purpose of this part is to effectuate Title IX of the Education Amendments of 1972... which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance...” 34 C.F.R. s. 106.1.
  - Other regulations found under 34 C.F.R. part 106.





# Athletics

## Poll Question

- **Have you had to address any issues with discrimination in athletics within the last 5 years?**
  - Yes, dealing with lack of sports based on student interests
  - Yes, dealing with financial issues
  - Yes, dealing with other issues
  - No







# Title IX Athletics

- Regulations

- The regulations implementing Title IX contain specific provisions relating to athletic opportunities.
- “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.” 34 C.F.R. s. 106.41(a)



# Title IX Athletics

- **Regulations – equal opportunity**
  - A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. 34 C.F.R. s. 106.41(c).
  - In determining whether equal opportunities are available the Director will consider, among other factors:
    1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
    2. The provision of equipment and supplies;
    3. Scheduling of games and practice time;

# Title IX Athletics



- **Regulations – equal opportunity**
  - *Equal opportunity*
  - In determining whether equal opportunities are available the Director will consider, among other factors:
    4. Travel and per diem allowance;
    5. Opportunity to receive coaching and academic tutoring;
    6. Assignment and compensation of coaches and tutors;
    7. Provision of locker rooms, practice, and competitive facilities;
    8. Provision of medical and training facilities and services;
    9. Provision of housing and dining facilities and services;
    10. Publicity.

# Title IX Athletics

- The Department's Title IX regulations prohibit sex discrimination in interscholastic, intercollegiate, club, or intramural athletics offered by a recipient institution, including with respect to:
  - a) Student interests and abilities;
  - b) Athletic benefits and opportunities; and
  - c) Athletic financial assistance.



# Title IX Athletics

- **Three-part test**
  - Under the three-part test, an institution must meet at least one of three benchmarks:
    1. Whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
    2. Where the members of one sex have been and are underrepresented among athletes, whether the institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the members of that sex; **or**



# Title IX Athletics



- **Three-part test**
  3. Where the members of one sex are underrepresented among athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

# Title IX Athletics

- **Part one – substantial proportionality**
  - Where an institution provides athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time student enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.
  - This part of the test establishes a safe harbor for institutions that have distributed athletic opportunities in numbers substantially proportionate to the gender composition of their student bodies.

# Title IX Athletics

- **Part one – substantial proportionality**
  - Analysis:
    - First, determine the number of participation opportunities afforded to male and female athletes in the school's athletic program.
    - Second, determine whether athletic opportunities are substantially proportionate.
    - OCR recognizes that exact proportionality is not required in order to satisfy this test. Disparities are acceptable where they result from modest fluctuations in enrollment patterns.

# Title IX Athletics

- **Part two – history of program expansion**
  - OCR finds compliance where an institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the members of that sex.
  - This test is satisfied where an institution is continually expanding athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender and persists in this approach as interest and ability levels in its student body rise.



# Title IX Athletics

- **Part two – history of program expansion**
  - OCR will review the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex.
  - To meet the requirements, it is not necessary to show annual or constant efforts, but only continuing efforts of program expansion.



# Title IX Athletics

- **Part three – accommodating interests/abilities**
  - This part considers whether there are concrete and viable interests among the underrepresented sex that should be accommodated.
  - An institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination.



# Title IX Athletics

- **Part three – accommodating interests/abilities**
  - To ascertain whether the interests of students are being fully and effectively accommodated, OCR will consider whether there is:
    1. Is there unmet interest in a particular sport?
    2. Is there sufficient ability to sustain a team in the sport?
    3. Is there a reasonable expectation of competition for the team?
  - If all of these conditions are met, the Department of Education will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

# Title IX Athletics

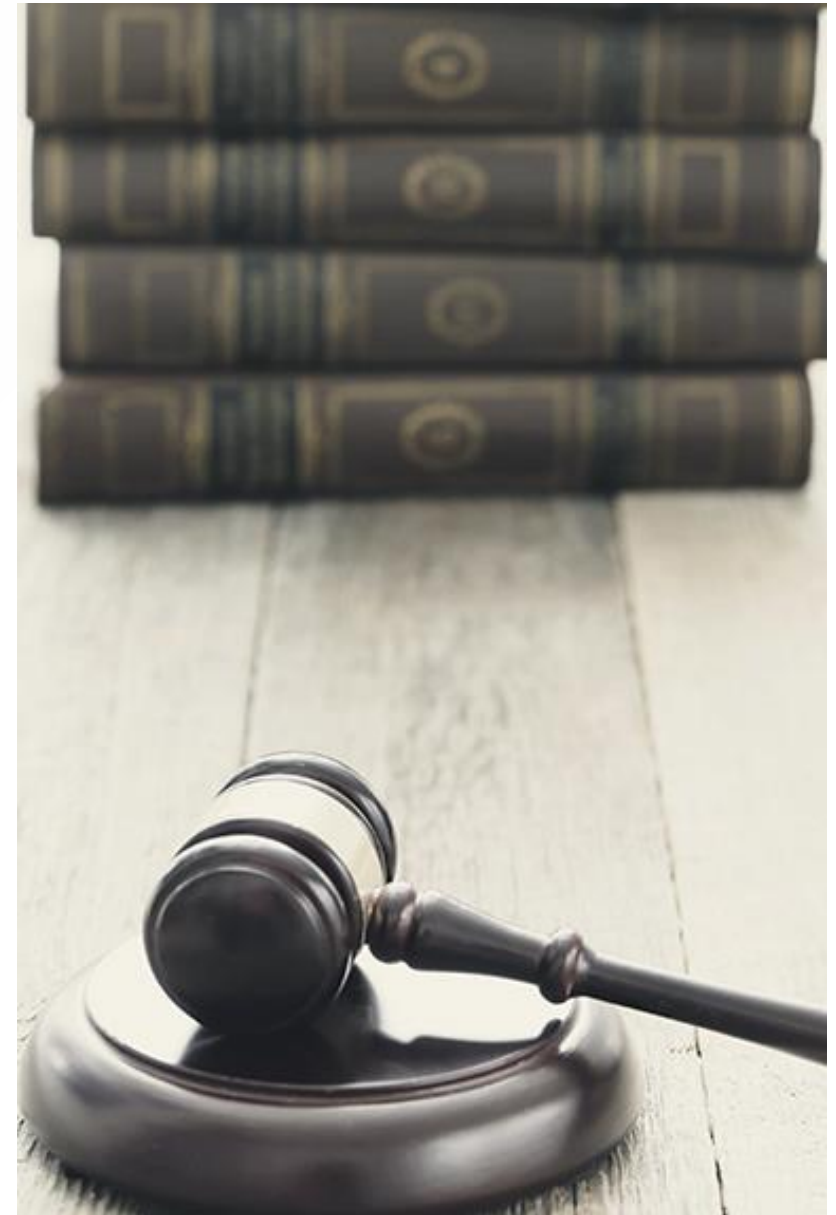


- **Benefits and opportunities**
  - In determining whether an institution is providing equal opportunity in athletics, the regulations require the Department to consider, among others, the following factors (*a.k.a. the “laundry list”*):
    1. The provision of equipment and supplies;
    2. Scheduling of games and practice time;
    3. Travel and per diem allowances;
    4. Opportunity for coaching and academic tutoring;
    5. Assignment and compensation of coaches and tutors;
    6. Provision of locker rooms, and practice and competitive facilities;



# Title IX Athletics

- **Benefits and opportunities**
  - In determining whether an institution is providing equal opportunity in athletics, the regulations require the Department to consider, among others, the following factors (*a.k.a. the “laundry list”*):
    7. Provision of medical and training facilities and services;
    8. Housing and dining services;
    9. Publicity;
    10. Recruitment; **and**
    11. Support services.





# Title IX Athletics

- **Nondiscriminatory justifications**
  - Sports that require more resources because of the nature of the game (i.e., football = \$\$\$\$)
  - Special circumstances, like a surge in demand
  - Special operational expenses, such as tournaments

# Title IX Athletics

- **Scheduling**
  - OCR will evaluate the scheduling of the athletic program as a whole.
  - Five factors for consideration:
    1. The number of competitive events offered per sport
    2. The number and length of practices
    3. Time of day competitive events are scheduled
    4. Time of day practices are scheduled
    5. Number of pre-season and post-season competitive opportunities







# Title IX Athletics

- **Coaching**
  - Three factors to compare:
    - Availability of coaches and volunteer assistants
    - Assignment of coaches
    - Compensation
  - Coaching equivalency is evaluated as a whole and not by comparing the boys' and girls' coaches in each sport.



# Title IX Athletics

## Locker rooms and facilities

- Compliance factors for locker room, practice, and competition facilities:
  - The quality and availability of the facilities provided for practice and competitive events;
  - Exclusivity of use of facilities for practice and competitive events;
  - Availability of locker rooms;
  - Quality of locker rooms;
  - Maintenance of practice and competitive facilities; and
  - Preparation of facilities for practice and competitive events.

# Title IX Athletics

- **Fundraisers and donations**
  - Once a school accepts a donation, the money becomes public money that is subject to Title IX.
  - Schools are not obligated to accept donations, but by accepting the donation, the school must ensure that it remains in compliance with Title IX.



# Title IX Athletics

- **Evansville-Vanderburgh Schools (IN)**
  - On February 4, 2013, OCR resolved a Title IX compliance review of Evansville-Vanderburgh School Corporation (Corporation).
  - The review examined whether the Corporation discriminated against female students under Title IX by denying them an equal opportunity to participate in its high school interscholastic athletics program and by not providing to female athletes locker rooms, practice and competitive facilities that are equivalent to those provided to male athletes.

# Title IX Athletics

- **Evansville-Vanderburgh Schools (IN)**
  - Under the terms of the agreement, the Corporation will assess whether there are unmet athletics interests and abilities among female students and, if so, it will take steps by 2013-14 to increase opportunities for females, including new sports teams for girls.
  - The agreement also requires the Corporation to assess the locker rooms, practice, and competitive facilities at each high school by comparing males and females, the quality, availability, exclusivity, maintenance, and preparation of practice and competitive facilities, and the availability and quality of locker rooms.



# Title IX Athletics

- **Additional resources**
  - For more information about the obligation to provide equal athletic opportunities and to effectively accommodate students' athletic interests and abilities, please review:
    - Dear Colleague Letter: Part Three of the Three-Part Test (April 20, 2010), available at <http://www.ed.gov/ocr/letters/colleague-20100420.html>;
    - Dear Colleague Letter: Athletic Activities Counted for Title IX Purposes (September 17, 2008), available at <http://www.ed.gov/ocr/letters/colleague-20080917.pdf>

# Title IX Athletics

- **Additional resources**

- For more information about the obligation to provide equal athletic opportunities and to effectively accommodate students' athletic interests and abilities, please review:
  - Dear Colleague Letter: Further Clarification of Intercollegiate Athletics Policy Guidance (July 11, 2003), available at <http://www.ed.gov/ocr/title9guidanceFinal.html>;
  - Dear Colleague Letter: Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (January 16, 1996), available at <http://www.ed.gov/ocr/docs/clarific.html>; **and**
  - Title IX Policy Interpretation: Intercollegiate Athletics (December 11, 1979), available at <http://www.ed.gov/ocr/docs/t9interp.html>.

# Pregnancy



## Poll Question

- **Have you had to address any issues with discrimination in pregnancy within the last 5 years?**
  - Yes, dealing with harassment
  - Yes, dealing with discrimination
  - Yes, dealing with both harassment and discrimination
  - No





# Title IX – Pregnancy

- **General requirements**
  - Title IX prohibits generally discrimination on the basis of sex in education programs and activities.
  - Title IX regulations specifically prohibit discrimination against any student based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from any of these conditions.
  - Title IX regulations also prohibit a school from applying any rule related to a student's parental, family, or marital status that treats students differently based on their sex.





# Title IX – Pregnancy

- **General requirements**
  - Title IX prohibits discrimination on the basis of sex in many aspects of education.
    - Programs and services
    - Employment
- Title IX's focus has been on not making certain stereotypes of pregnant students or employees within education.

# Title IX – Pregnancy

- **General requirements**
  - Title IX regulations also emphasize the need to treat certain pregnant students similar to students with temporary disabilities.
  - In this respect, certain accommodations may need to be provided to students who are pregnant.





# Title IX Pregnancy



- **OCR guidance**
  - On June 25, 2013, the Office for Civil Rights (OCR) issued a Dear Colleague Letter on pregnancy and parenting discrimination.
  - The Department of Education also issued Supporting the Academic Success of Pregnant and Parenting Students in June 2013.



# Title IX Pregnancy

- **OCR guidance**
  - Focus on concerns with 16 through 24-year-olds who were not enrolled in high school and had not earned a high school diploma or alternative credential.
  - Students give a range of reasons for dropping out of high school, both school-and family-related.
  - Pregnancy is consistently the most common family-related reason given by female students.



# Title IX Pregnancy

- **OCR guidance**
  - Title IX guidance details how the law applies to a range of specific educational activities and policies that affect pregnant and parenting students, including:
    - Class and school activities;
    - Excused absences and medical leave;
    - Accommodations;
    - Harassment; and
    - Policies and procedures.

# Title IX Pregnancy

- **Regulations**

- A recipient shall not discriminate against any student or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient. 34 C.F.R. s. 106.40(b)(1)
- A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students. 34 C.F.R. s. 106.40(b)(3).

# Title IX Pregnancy

- **OCR guidance**
  - Under Title IX, it is illegal for schools to exclude a pregnant student from participating in any part of an educational program or activity.
  - This applies to specific classes, extracurricular activities, honor societies, and other activities.
  - Educational institutions must allow students to continue to participate in classes even though they are pregnant.



# Title IX Pregnancy

- **OCR guidance**
  - Educational institutions can allow students to choose whether to participate in special instructional programs or classes for pregnant students. Students can participate if they want to, but schools cannot pressure them to do so.
  - Any alternative program must provide the same types of academic opportunities as the institution's regular program.
  - Educational institutions must allow students to participate even though they are pregnant and not require them to submit a doctor's note.



# Title IX Pregnancy

- **Regulations**
- A recipient may require such a student to obtain certification of a physician that the student is physically and emotionally able to continue participation, so long as such certification is required of all students for other physical or emotional conditions requiring the attention of the physician. 34 C.F.R. s. 106.40(b)(2).

# Title IX Pregnancy

- **OCR guidance**
  - Educational institutions may require a pregnant student or student who has given birth to submit medical certification for school participation but only if the school also requires such certification from all students with physical or emotional conditions requiring the attention of a physician.
  - Schools should not presume that a pregnant student is unable to attend school or participate in school.

# Title IX – Pregnancy

- **Excused absences and medical leave**
  - In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began. 34 C.F.R. 106.40(b)(5).







# Title IX Pregnancy

- **Excused absences and medical leave**
  - Educational institutions must excuse absences due to pregnancy and childbirth for as long as the doctor deems the absences medically necessary.
  - Educational institutions must allow the student to return to the same academic status as before the student's medical leave began, which should include giving students the opportunity to make up any work missed while the student was out.
  - Other options may also be offered, such as retaking a semester.

# Title IX Pregnancy

- **OCR guidance**
  - To ensure a pregnant student's access to its educational program, when necessary, an educational institution must make adjustments to the regular program that are reasonable and responsive to the student's temporary pregnancy status.
  - Educational institutions must provide pregnant students with the same special services it provides to students with temporary medical conditions.
  - This includes at-home tutoring or independent study.

# Title IX Pregnancy

- **Pregnancy and athletics**
  - NCAA has provided significant guidance on this issue.
  - See NCAA Pregnant and Parenting Student-Athletes, Resources, and Model Policies.

<http://www.ncaa.org/about/resources/inclusion/pregnant-parenting-student-athletes>



# Title IX Pregnancy

- **Relevant cases**

- *Ivan v. Kent State University*, 863 F.Supp. 581 (concluding that the university articulated legitimate reasons to overcome any claim of discrimination).
- *Varlesi v. Wayne State University*, Case No. 14-1862 (affirming a jury award of nearly \$850,000 after finding discrimination against a pregnant student).
- *Stewart v. City University of New York* (2013) (settlement after an administrative complaint after allegations that the university refused to allow her to make up assignments).
- *Kostal v. Logan University* (2013) (settlement after an administrative complaint allegations that the university refused to allow her to make up work).





# Other Areas

## Poll Question

- **Have you had to address issues with discrimination within LGBTQ students within the last 5 years?**
  - Yes, dealing with harassment
  - Yes, dealing with discrimination
  - Yes, dealing with both harassment and discrimination
  - No





# Title IX Employment

- **Employment**
  - In recruitment, hiring, rates of pay, job assignments, benefits, and other terms or conditions of employment, an educational institution may not discriminate against persons on the basis of sex. 34 C.F.R. s. 106.51.
  - Recruitment. 34 C.F.R. s. 106.53.
  - Compensation. 34 C.F.R. s. 106.54.
  - Job classification and structure. 34 C.F.R. s. 106.55.



# Title IX Employment

- **Employment**
  - Fringe Benefits. 34 C.F.R. s. 106.56.
  - Advertising. 34 C.F.R. s. 106.59.
  - Pre-employment Inquiries. 34 C.F.R. s. 106.60.
  - Sex as bona-fide occupational qualification. 34 C.F.R. s. 106.61.





# Title IX Employment

- **Employment and status**
  - Under 34 C.F.R. s. 106.57, an educational institution shall not apply any policy or take any employment action:
    - Concerning the potential marital, parental, or family status of an employee or applicant for employment that treats persons differently on the basis of sex; or
    - Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.



# Title IX LGBTQ

- **Students and LGBTQ**
  - On February 22, 2017, the Department of Justice and the Department of Education rescinded their respective prior guidance on gender identity issues. The Department of Justice and the Department of Education withdrew the statements of policy and guidance.
  - [DOJ Dear Colleague Letter February 22, 2017](#)

# Title IX LGBTQ

- **Students and LGBTQ**
  - In 2017, the Seventh Circuit decided an appeal from the U.S. District Court for the Eastern District of Wisconsin. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.D.A. 1034, 1039-42 (7th Cir. 2017).
  - The *Whitaker* case involved the following topics:
    - Restroom use,
    - Title IX, **and**
    - The Equal Protection Clause.



# Title IX LGBTQ

- **Students and LGBTQ**
  - Fourth Circuit Court of Appeals decided that restroom policies segregating transgender students and denying transgender students accurate transcripts are unconstitutional and violate Title IX. *Grimm v. Gloucester*, 972 F.3d 586 (4th Cir. 2020).
  - The District argued that it had the ability to create sex-segregated restrooms and that the act in and of itself isn't discriminatory. The court stated that while the act of creating the sex-segregated restrooms may not have been discriminatory – the school board's notion of what "sex" means was discriminatory.



# Title IX LGBTQ

- **Students and LGBTQ**
- On June 15, 2020, the U.S. Supreme Court held that discrimination on the basis of an individual's status as homosexual or transgender constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964. [See Bostock v. Clayton Cty., Ga., 140 S. Ct. 1731, 1741 \(2020\).](#)
- The Supreme Court held: “[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

# Title IX LGBTQ

- **Students and LGBTQ**
  - Biden Executive Order
    - The Executive Order makes the policy statement that all persons should receive equal treatment under the law without regard to their gender identity or sexual orientation.
    - The Order bases these policy statements on Title VII of the Civil Rights Act of 1964 and the Supreme Court's recent ruling on that law, *Bostock v. Clayton County*.



# Title IX



- **DOE Notice of Interpretation**
  - On June 16, 2021, the U.S. Department of Education (DOE) issued a Notice of Interpretation (Notice) explaining that it will enforce Title IX's prohibition on discrimination on the basis of sex to include: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity.
  - This Notice can be found at:  
<https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>

# Title IX

- **DOE Notice of Interpretation**

- This Notice also informs schools that the Office for Civil Rights (OCR) will investigate complaints of discrimination based on sexual orientation and gender identity and will address compliance concerns or violations when necessary.
- In fact, OCR has stated that it will investigate “allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied benefits of such programs or activities or otherwise treated differently because of their sexual orientation or gender identity.”
- Earlier this year, the U.S. Department of Justice came to the same conclusion as DOE: Title IX protects against discrimination based on sexual orientation and gender identity.





## Title IX

- **Policy implications**
  - School districts should take careful note of DOE's recent Notice and review nondiscrimination policies and procedures with respect to sexual orientation and gender identity.
  - If a district's nondiscrimination policy prohibits discrimination on the basis of sex, there is no need to include sexual orientation or gender identity as a subset of "sex" to avoid OCR scrutiny, provided the district interprets "sex" to include sexual orientation and gender identity and its practices reflect such interpretation.

# Title IX LGBTQ

- **Students and LGBTQ**
  - Safest route is to assume that students who are transgender are protected under Title IX and to work with these students on an individual basis to accommodate them with respect to the use of restrooms and locker rooms, preferred names and pronouns, school-sponsored activities, and athletics.
  - In responding to requests from students who are transitioning or transgender, a district should consider:
    1. District policies and procedures;
    2. The age of the student;
    3. The parents' involvement and support;
    4. How to maintain student confidentiality;
    5. How to make the district's facilities accessible for the student; **and**
    6. Possible harassment/retaliation.

# Title IX LGBTQ

- **Tehachapi USD (CA)**

- Tehachapi Unified School District (District) agreed to resolve a Title IX complaint alleging sexual and gender-based harassment of a gender non-conforming male student (Student), who attended Jacobsen Middle School
- The investigation found that the Student was targeted for harassment over two school years because of his nonconformity with gender stereotypes.
- The District signed a Resolution Agreement in which it agreed to take all reasonable steps to ensure that all students enrolled in the District are not subject to sex-based harassment, and to respond promptly and appropriately to all reports of harassment.

A hand is placing a wooden block with a lightbulb icon on top of a row of four wooden blocks with gear icons. The lightbulb is yellow and glowing. The gear icons are black. The blocks are light-colored wood. The background is a light blue gradient.

# Conclusion



# Title IX Proposed Regulations

- **June 23, 2022, Proposed Regulations**
  - Sex discrimination applies to sexual orientation, gender identity, and sex characteristics.
  - New definition of sex-based harassment, including hostile environment that looks at “sufficiently severe or pervasive” conduct
  - New definition of confidential employees
  - New response requirements, including eliminating the definition of actual knowledge and deliberately indifferent

# Title IX Proposed Regulations

- **June 23, 2022, Proposed Regulations**
  - Requires institutions to address off-campus conduct
  - Expands the definition of complainant
  - Requires institutions to provide supportive measures to students and employees in instances involving any sex discrimination
  - Sets forth additional training requirements
  - Combining grievance procedures for sex discrimination and sexual harassment complaints in certain instances

# Title IX Proposed Regulations

- **June 23, 2022, Proposed Regulations**
  - Sets forth additional requirements for sex-based harassment complaints involving a post-secondary student
  - Revised informal resolution procedures
  - New regulations relate to protecting students from discrimination based on pregnancy, including providing reasonable modifications for students, reasonable break time for employees for lactation, and lactation space for students and employees.
  - Revised retaliation provisions

# Conclusion

- Need to consider various areas
- Need to identify policies
- Need to ensure staff is trained in various areas







# COMING SOON

**Join us!**  
I have upcoming webinars with CareerLearning.



# What was your key takeaway?

Please let us know in the Q&A.

We will use your response with your first name and last initial on our website so others can benefit!





**Richard Verstegen**  
**Attorney**

# Questions?



**Boardman & Clark, LLP**



<https://www.boardmanclark.com>



**(608) 286-7233**



[rverstegen@boardmanclark.com](mailto:rverstegen@boardmanclark.com)



# Disclaimer

Our webinars are designed to be accurate and authoritative, but we do not provide legal, accounting, medical or similar professional services. Client remains solely responsible for compliance with all applicable laws, regulations, accounting standards and official health guidance. If legal, accounting, medical or other expert advice is desired, Client should retain the services of an appropriate professional.

Photocopying, distributing or using these copyrighted materials electronically without the copyright owner's express written consent is strictly prohibited. Consent is granted for the use of purchasers of webinars and then solely for the use of registered attendees of the webinars. No right or license is given to reproduce the materials in any form or format or to place the materials in any format on any website or blog or to otherwise republish it in any manner without the express written permission of the copyright holder.





# Title IX Coordinator Compliance Certification (K-12)

Session 4: Case Studies and Compliance Audits

Presented by: Richard F. Verstegen



**Title IX Coordinator Compliance Certification (K-12)**  
**Session 4: Case Studies and Compliance Audits**

**Presented by: Richard F. Verstegen**



# Overview



I

## Case Studies

- On-Campus Discrimination
- Off-Campus Harassment
- Sexual Assault

II

## Working With Law Enforcement

III

## Retaliation/Confidentiality

III

## Other Issues

III

## Conclusion



Study

Case

# Case Studies



# Case Study

- **Discrimination – athletics**
  - The district chooses a new girls softball coach, who is a current teacher in the district.
  - The district had received other applications, but the district believed that the current teacher would be a good fit for the position.
  - A parent is very upset with this selection, arguing that the boys baseball team has more competent and experienced coaches, and therefore the district is violating Title IX because it has failed to provide the girls with the same type of coaching.
  - The parent wants to file a complaint.

## Poll Question

- **How should the District handle this issue?**
  - A. Inform the parent of the ability to file a complaint under your Title IX grievance procedure
  - B. Inform the parent of the ability to file a complain under your Title IX grievance process
  - C. Inform the parent that we are not going to address these types of issues
  - D. Do nothing



# Case Study

- **Harassment – in school**
  - A staff member observes an exchange between a boy and girl in the high school hallway. The boy tells the girl, “Here comes the hottest thing in this hallway. Looking good as always Maddy!” The girl responds, “Shut up, Jake!” The boy responds, “Ok, but I’m great kisser. Text me.” The girl responds, “Cut it out. We’ll see you later.”
  - The staff member has never observed any similar conduct by Jake in the past.
  - The staff member wonders whether to report this conduct.



## Poll Question

- **Must the staff member report this conduct to the Title IX Coordinator as Title IX harassment?**
- Yes
- No
- Not sure







# Case Study

- **Harassment – in school**
  - A female high school student meets with an academic advisor. She tells the advisor that she broke up with her ex-boyfriend about a month ago, and he has been following her.
  - He cornered her that morning in an isolated stairwell of the school and said that he's been watching her all the time. He said he can't stand the thought of her dating someone else, and that if she doesn't stop hanging out with this new guy, someone is going to end up hurt.
  - The advisor reports this information to the Title IX Coordinator.

## Poll Question

- **Must the advisor report this conduct to the Title IX Coordinator as Title IX harassment?**
- Yes
- No
- Not sure



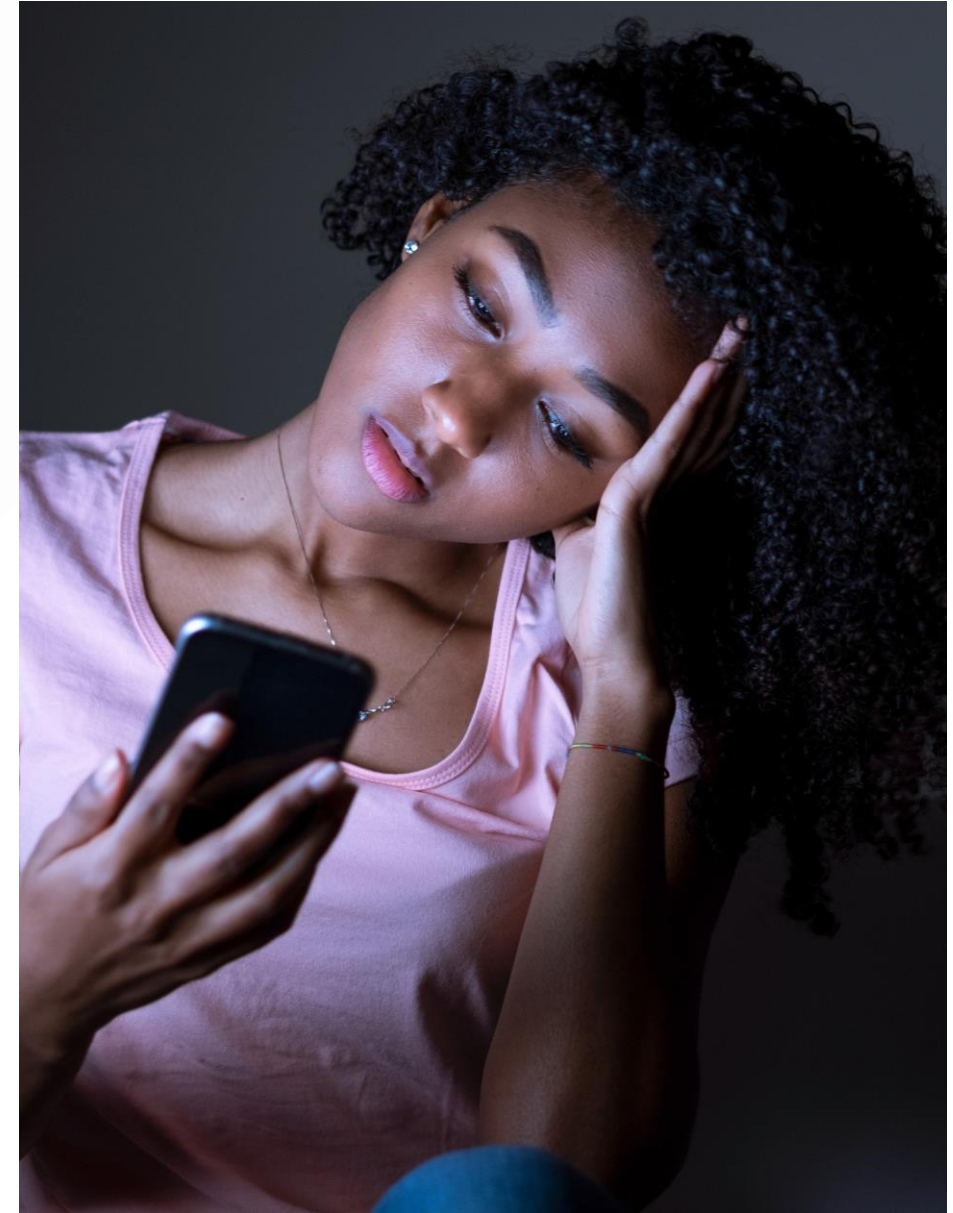
# Case Study

- **Harassment – employment**

- A female employee reports that she overheard her supervisor state that “some days there is a too much estrogen in this office.” Three other women share the workspace. She reports this statement to the Title IX Coordinator. No action taken.
- During her evaluation, her supervisor meets with her and cites her need for improvement in certain areas. The female employee reacted by getting very upset and crying during the meeting. The supervisor then stated that “I know women can be emotional, but you’ve got to address this calmly and professionally.”
- The female employee believes the comments showed harassing conduct toward her. She reports this conduct to the Title IX Coordinator.

# Case Study

- **Harassment – off campus**
  - A high school male student sends a Snapchat message to a high school female student after school hours. The Snapchat contains inappropriate sexual comments about the student and inappropriate images. It is sent after school and over personal devices.
  - In school the next day, the male student asks the female student about the Snapchat. The male student's friends have also been asking her about the Snapchat at school that morning and pressuring her to “hook up” with their friend.
  - The student reports this conduct to the high school principal who is not the Title IX Coordinator.







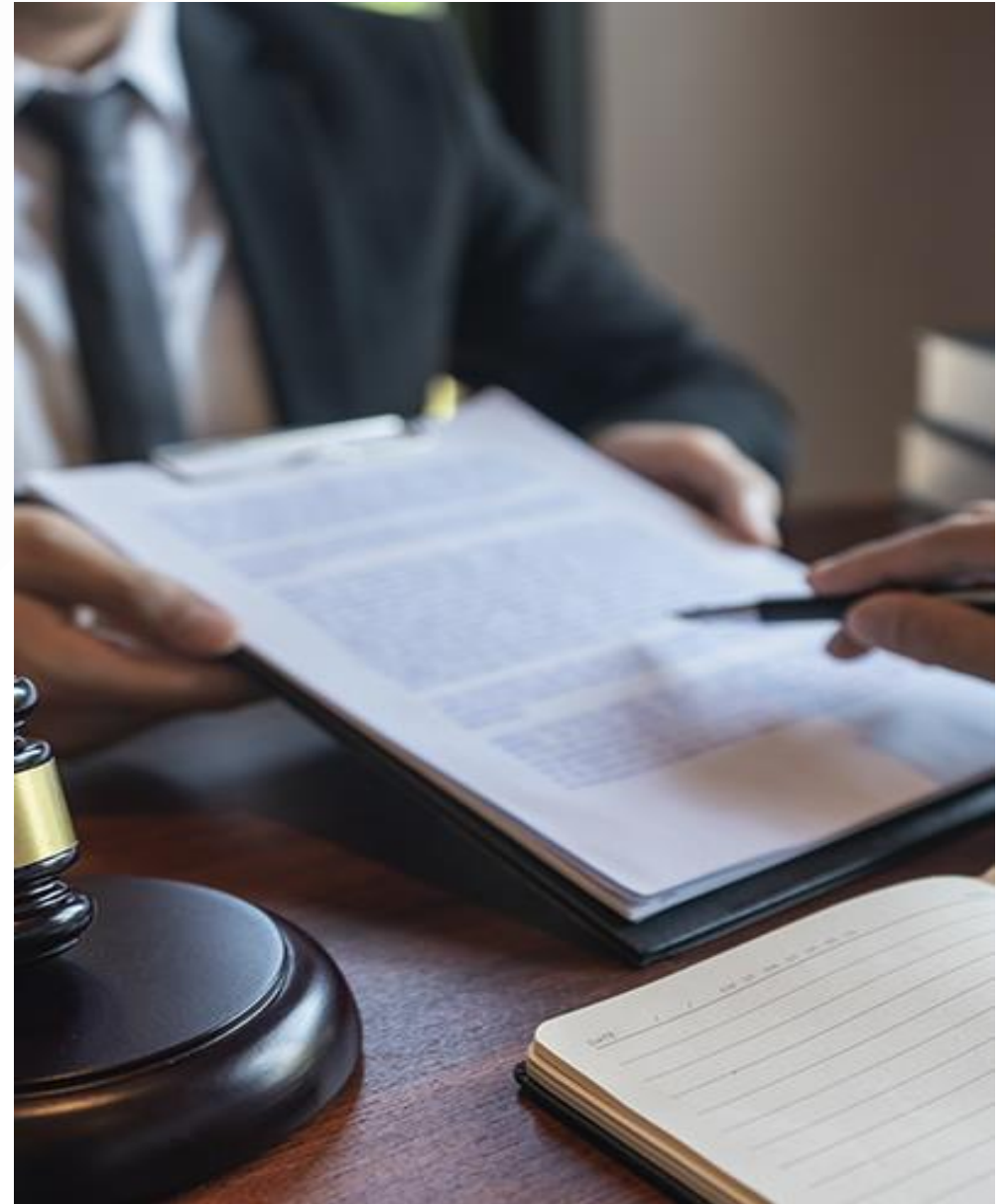
**Complaints**

# Addressing Complaints

# Addressing Complaints

## Working With Law Enforcement

- An institution should notify complainants of the right to file a criminal complaint, if applicable.
- If applicable, an institution should work with law enforcement to learn when the evidence gathering stage of the criminal investigation is complete.
- A Title IX investigation will never result in incarceration.



# Addressing Complaints – Retaliation

- No institution or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right 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 sexual 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.

# Addressing Complaints – Retaliation

- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under Title IX.
- The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under this section.
- 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 a party made a materially false statement in bad faith).



# Addressing Complaints – Confidentiality

- An institution must keep confidential the identity of any individual who 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.
- This confidentiality applies except as may be permitted by FERPA, or as required by law, or to carry out the purposes of Title IX (including the conduct of any investigation, hearing, or judicial proceeding arising thereunder).

# Addressing Complaints – First Amendment

- **Consider First Amendment issues.**
  - In cases of alleged harassment, the First Amendment must be considered if issues of speech or expression are involved.
  - First Amendment rights may apply to the rights of complainants, respondents, or third parties.





# Addressing Complaints – FERPA

- **Consider student records issues.**
  - There will need to be a balance between confidentiality of student records and due process considerations.
  - Institutions may need to disclose evidence as part of the process which may bring concerns with disclosure of confidential student records.

# Addressing Complaints – Recordkeeping

- For each response for an allegation of sexual harassment, an institution must create, and maintain for a period of seven years, the following records:
  - Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment
  - The institution 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 education program or activity.



# Addressing Complaints – Recordkeeping

- **For each response for an allegation of sexual harassment, an institution must create, and maintain for a period of seven years, the following records:**
  - If a recipient does not provide a complainant with supportive measures, then the recipient 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 recipient in the future from providing additional explanations or detailing additional measures taken.

# Addressing Complaints – Recordkeeping

- An institution must maintain for a period of seven years the following records:
  - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.
  - An institution must make these training materials publicly available on its website.





# Compliance Review





# Compliance Review

- **Focus of review**
  - Content of your policies and forms
  - Training provided by the District on sexual violence
  - Knowledge of various individuals who are responsible for investigating such sexual violence issues, and
  - Overall application of the policies on sexual violence incidents



# Compliance Review

- **Key questions**
  - When you receive a report, what steps do you take? Do you notify the alleged target or his/her parents?
  - When you receive a report, what sort of steps do you take to prevent recurrence of the alleged sexual harassment? Do you consider changes to the interim measures during the course of the investigation? How do you monitor these interim measures?
  - When you conduct your investigation, do you allow the alleged perpetrator to have a representative present? Do you approach such investigations in an objective and impartial manner?





# Compliance Review

- **Key questions**
  - Based on the alleged conduct, at what point do you contact law enforcement? At what point do you resume your investigation?
  - When you receive a report of alleged sexual violence, do you report such conduct as alleged child abuse?
  - When you receive allegations of inappropriate behavior by students or staff, do you follow up on such allegations?

# Compliance Review

- **Key questions**
  - After completing an investigation, how do you document your final outcome or conclusions?
  - After completing your investigation, do you follow up with the victim or perpetrator to determine whether there has been any recurrence?
  - In what circumstances do you recommend discipline for any sort of sexual violence?





# Compliance Review

- **Review of policies**
  - Interim steps;
  - Evidentiary standard;
  - Definitions of sexual harassment;
  - Reporting policies and protocols;
  - Potential remedies for student victims and potential sanctions for perpetrators;
  - Sources of counseling, advocacy, and support; **and**
  - Notice of prohibition of retaliation.



# Compliance Review

- **Review of personnel**
  - Specific training that they have received on the sexual harassment and violence policies;
  - Knowledge of the policies and forms in the District; **and**
  - Application of these policies and forms in specific matters in the District.





# Compliance Review


- **Possible issues**
  - Referral of matters to others;
  - Investigations of issues consistent with policies;
  - Interim measures considered, but mostly with alleged perpetrator;
  - Filling out forms in a meaningful manner; **and**
  - Delay in investigation or resuming investigations, when law enforcement involved.



# Compliance Review

- **Revisions to various policies**
  - Designating coordinators
  - Notice of non-discrimination
  - Grievance procedures
  - Determination of harassment





**FINAL  
THOUGHTS**

# Conclusion



# Conclusion

- **Need to consider how to work with law enforcement**
- **Need to maintain and create records as necessary**
- **Need to consider other requirements, including retaliation and First Amendment**





# COMING SOON

**Join us!**  
I have upcoming webinars with CareerLearning.





# What was your key takeaway?

Please let us know in the Q&A.

We will use your response with your first name and last initial on our website so others can benefit!





**Richard Verstegen**  
**Attorney**

# Questions?



**Boardman & Clark, LLP**



<https://www.boardmanclark.com>



**(608) 286-7233**



[rverstegen@boardmanclark.com](mailto:rverstegen@boardmanclark.com)



# Disclaimer

Our webinars are designed to be accurate and authoritative, but we do not provide legal, accounting, medical or similar professional services. Client remains solely responsible for compliance with all applicable laws, regulations, accounting standards and official health guidance. If legal, accounting, medical or other expert advice is desired, Client should retain the services of an appropriate professional.

Photocopying, distributing or using these copyrighted materials electronically without the copyright owner's express written consent is strictly prohibited. Consent is granted for the use of purchasers of webinars and then solely for the use of registered attendees of the webinars. No right or license is given to reproduce the materials in any form or format or to place the materials in any format on any website or blog or to otherwise republish it in any manner without the express written permission of the copyright holder.