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**Title IX & BP 3205 Basic Training in
Prevention of Sexual Harassment and Assault
for Title IX Coordinators, Decision Makers, Investigators,
and “any person who facilitates an informal resolution process”
by Donald F. Austin, MAT, JD
Patterson Buchanan Fobes & Leitch, Inc., P.S.
February 26, 2023**

I. General Rule of Law:

A. 20 U.S.C.A. § 1681(a):

1. Title IX prohibition against discrimination based on sex:

“No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be **subjected to discrimination** under any education program or activity **receiving Federal financial assistance**” 20 U.S.C. § 1681, originally enacted in 1972.)

- a. *Athletics*: Parity in sports and equal access to facilities.
- b. **Preventing discrimination on the basis of sex in programs or activities.** (The focus of this presentation)
- c. *Gender identity*: Biden administration “**Executive Order No. 14021**, “Guaranteeing and Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.” (March 8, 2021.)

d. *See also*, BP 3211/3211P, RCW 28A.640.477, RCW chpt. 28A.640, and WAC chpt. 162-32.¹

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2. The “teeth” in Title IX:

- a. Loss of federal funding.
- b. OCR or DOJ investigations and attendant “Resolution Agreements,” remedial actions, and federal oversight.
- c. Potential school district liability

3. Other applicable sexual harassment laws:

- a. **Title VII:** Sex discrimination in employment.
- b. **Washington Law Against Discrimination (WLAD):**
RCW 49.60.030(1) -- Freedom from
discrimination—Declaration of civil rights.

¹ See also, *Bostock v. Clayton Co.*, 140 S.Ct. 1731 (U.S. 2020) [held that an employer violates Title VII, which makes it unlawful to discriminate against an individual “because of” the individual's sex, by firing an individual for being homosexual or being a transgender person].

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“The right to be free from discrimination because of race, creed, color, national origin, citizenship or immigration status, **sex**, honorably discharged veteran or military status, **sexual orientation**, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. . . .”

c. BP 3205 & 3205P – Sexual Harassment of Students.

[Ultimately, refer to your district's BP3205/P.

WSSDA Policies vary depending on whether they have been updated or whether a district inserts revisions into them before enacting them.]

II. Training Necessary

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A. Title IX Trio:

1. Title IX Coordinator

- a. Coordinates the district's state and federal sex discrimination and sexual harassment regulation compliance efforts. (*See 3205P.*)

2. Title IX Investigator

- b. Must receive training in Title IX and parallel RCWs and in investigations; conducts Title IX investigations. (*See 3205P.*)
- c. No conflicts of interest or bias as to anything investigated.
- d. Responsible for a **prompt, thorough, fair, and accurate** investigation.
 - Unwarranted delay may violate Title IX
 - Whether an investigation is conducted and completed promptly depends on the situation
 - A rushed investigation may violate Title IX.

3. Title IX Decision Maker

- e. Reaches the final determination of responsibility for alleged Title IX sexual harassment will be the Superintendent or designee. (*See 3205P.*)

B. What training is required by Title IX?

- 1. 3205P at Tab 9, pp. 7-8 (quoted below at II.C.)
 - a. Title IX Coordinator
 - b. Title IX Decision Maker
 - c. Title IX Investigator
 - d. People facilitating Title IX informal resolution

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2. 34 C.F.R. § 106.45(b)(1)(iii). (Same as 3205P quoted below.)

3. ***But!!!!*** Check out Tab 5:

--DOJ settlement agreement training requirements.

B. 3205P at Tab 9, p. 7: “Any individual designated as **Title IX Coordinator, an investigator, or decision-maker, and any person who facilitates an informal resolution process** must not have a conflict of interest or bias for or against the individual(s) who made the complaint (“complainant(s)”) or the individual(s) reported to be the perpetrator of the conduct that could constitute sexual harassment (“respondent(s)”) in general or individually, and **must receive training on the following:**

a) **The definition of sexual harassment under Title IX and state law;**²

² Addressed today.

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- b) The scope of the District's education program or activity;
- c) **How to conduct an investigation and grievance process and informal resolution process;**³
- d) **How to serve impartially;**⁴
- e) Their responsibilities chapter WAC 392-190 WAC; and
- f) How to raise awareness of and eliminate bias based on sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, the presence of any sensory, mental or physical disability, or the use of a trained dog guide or service animal.

4. BP 3205 at Tab 9, p. 4 and **3205P** at Tab 9, p. 7:

- The superintendent will develop procedures to provide age-appropriate information and education to **District staff, students, parents and volunteers** regarding this policy and the recognition and prevention of sexual harassment. **At a minimum** sexual harassment recognition and prevention and the elements of this policy will be included **in staff, student, and regular volunteer orientation**. This policy and the procedure, which includes the complaint process, will be posted in each District building in a place available to staff, students, parents, volunteers, and visitors. Information about the policy and procedure will be clearly stated and **conspicuously posted** throughout each school building,

³ Introduced today.

⁴ Addressed today.

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provided to each employee and reproduced in each student, staff, volunteer, and parent handbook. Such notices will identify the District's Title IX coordinator and provide contact information, including the coordinator's email address.

- District **investigators** must also receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.
- District **decision-makers** must also receive training on any technology to be used during hearings if the District provides for a hearing, and on issues of relevance of questions and evidence, including the requirement that questions and evidence about a complainant's sexual predisposition or prior sexual conduct are not relevant unless 1) such questions and evidence is offered to prove that someone other than the respondent committed the alleged conduct or 2) questions and evidence concerning specific incidents of the complainant's prior sexual behavior with respect to the respondent is offered to prove consent.
- Any **training materials** used to train **Title IX** Coordinators, investigators, decision-makers, and **any person who facilitates an informal resolution process** must **not rely on sex stereotypes** and must promote **impartial investigations** and **adjudications** of complaints. The District shall **maintain** for a period of **seven years records of any informal resolution and the result**; and all **materials used to train** Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, and make such materials **available on the District's website**.

C. Highly Recommended Training:

---BP 5253 Professional Boundaries.

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III. Definitions of Sexual Harassment:

A. *Title IX definition:* 34 C.F.R. § 106.30(a).

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

(1) An **employee** of the recipient **conditioning** the provision of an aid, **benefit**, or service of the recipient on an individual's **participation in unwelcome sexual conduct**;⁵

(2) **Unwelcome conduct** determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it **effectively denies a person equal access** to the recipient's education program or activity;⁶ or

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

B. WAC 392-190-056:

WAC 392-190-056: Sexual harassment—Definitions.

(1) As used in this chapter, "sexual harassment" means **unwelcome sexual advances**, requests for sexual favors, sexually motivated physical

⁵ Quid pro quo sexual harassment.

⁶ Hostile educational environment sexual harassment. (**HEE**.)

⁷ Subsections (a) and (b) here are quid pro quo (this for that) sexual harassment.

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contact, or other verbal or physical conduct or communication of a sexual nature between two or more individuals if:

(a) Submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining an education or employment;⁷

(b) Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's education or employment; or

(c) That conduct or communication has the purpose or effect of **substantially interfering** with an individual's educational or work performance, or of **creating an intimidating, hostile, or offensive educational or work environment.**

(2) For the purpose of this definition, sexual harassment may include conduct or communication that involves adult to student, student to adult, student to student, adult to adult, male to female, female to male, male to male, and female to female.

C. Board Policy 3205 definition:



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For purposes of this policy, sexual harassment means **unwelcome conduct** or communication of a **sexual nature**. Sexual harassment can occur adult to student, student to student or can be carried out by a group of students or adults and will be investigated by the District even if the alleged harasser is not a part of the school staff or student body. The District prohibits sexual harassment of students by other students, employees, or third parties involved in District activities. The term “sexual harassment” **may include**:

- 1) acts of sexual violence;
- 2) unwelcome sexual or gender-directed conduct or communication that interferes with an individual’s educational performance or creates an intimidating, hostile, or offensive environment;
- 3) unwelcome sexual advances;
- 4) unwelcome requests for sexual favors;
- 5) sexual demands when submission is a stated or implied condition of obtaining an educational benefit;
- 6) sexual demands where submission or rejection is a factor in an academic, or other school-related decision affecting an individual.

The WAC and BP 3205/P both include quid pro quo and HEE sexual harassment. Title IX mentions the reasonable person standard which is in case law.

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D. Which definition applies in with a Title IX complaint?

1. All three. Consider them to be congruent.

- There is no evidence that the legislature, OSPI, or WSSDA aimed at coming up with a definition different from the definition in federal law.

5. Sexual harassment and sexism.

1. Is sexism sexual harassment?
2. What guidance is there determining when boorish behavior becomes discrimination?

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IV. Generally—Title IX and the Law of Sexual Harassment

A. Historical Context of Title IX and Discrimination Law:

1. ***Federal Civil Rights Acts:*** 1866, 1871, 1875, 1957, 1960, 1964.
2. ***The 1964 act*** prohibits discrimination based on race, color, religion, **sex**, and national origin; sexual orientation and gender identity later added.
3. ***Title IX of the Education Amendments Act of 1972:*** augmented the 1964 act, **prohibiting sex-based discrimination in any school** or any other education program receiving federal funding.
4. ***The Washington Law Against Discrimination***, RCW chpt. 49.60 (WLAD) enacted in 1949 and augmented many times since then:
 - a. ***Protected categories as of 2020:*** prohibits discrimination in places of public accommodation on the basis of: “race, creed, color, national origin, citizenship or immigration status, **sex**, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability” (RCW 49.60.030(1).)

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b. *Schools are places of public accommodation: WH v. Olympia SD*, 195 Wash.2d 779 (2020).

5. ***Meritor Savings Bank v. Vinson***, 477 U.S. 57 (1986) (19 yo bank teller sexually harassed and rated by a supervisor; recognizing for the first time that sexual harassment is a violation of Title VII of the Civil Rights Act of 1964.)
-
-

6. ***Ellison v. Brady***, 924 F.2d 872 (9th Cir. 1990) (rejected the “reasonable person” standard for determining whether actions constituted sexual harassment, replacing it with the “reasonable woman” standard).
-
-

7. ***Davis v. Monroe County Board of Education***, 526 U.S. 629 (1999) (alleged that a 5th grade boy was repeatedly attempting to fondle, touching, and directing offensive language toward a female classmate; holding that a school district may be liable for damages under Title IX.)

- for failing to stop student-to-student sexual harassment where the school has been **deliberately indifferent** to known acts of harassment, and

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- the court also required that the harassment be “serious enough to have the systemic effect of denying the victim equal access to an education program or activity.”

B. Liability burden of proof difference between Title IX and WLAD:

1. ***Title IX burden of proof:*** The discrimination must be “intentional.” Deliberate indifference to known acts of harassment or discrimination effectively depriving the victim of access to education. (*Davis v. Monroe Co. SD.*)
 - This is the standard for proving liability in a monetary damages case.
 - ***Note, OCR & DOJ lower standard:*** DOJ and OCR will follow a lower, preponderance of the evidence standard, as they are not looking to find a school district liable, but are looking to see whether the school district has taken proper actions with board policies, trainings, investigations, and response to harassment complaints.
2. ***WLAD burden of proof:*** Unnecessary to show intentional discrimination. (*SL-M v. Dieringer SD*, 614 F.Supp.2d 1152 (Wash. D.C. 2008). A preponderance of the evidence standard is applied. This is akin to deciding whether the school district was negligent in protecting kids from sexual harassment.

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3. **Example of burden of proof** for Title IX and WLAD differing in monetary damages cases:

----*Patel v. Kent School District*, 648 F.3d 965 (2011).

- **Facts:**
 - SpEd female student had a safety plan for one-one supervision going to the restroom
 - Fears she would be taken advantage of due to cognitive functioning
 - SpEd class next door to rest room
 - Teacher allowed girl to use restroom unaccompanied
 - Raped on a number of occasions by other students
- **Held:** No violation of Title IX or Davis v. Monroe Co. Bd. of Educ. since the teacher did not know that rapes were taking place
 - Therefore, the teacher was not “deliberately indifferent” to know acts of discrimination.
 - Therefore, the federal claims were dismissed.
- **But:** there was a negligence and WLAD claim too. The case would have proceeded on the negligent and WLAD claims with the prevailing plaintiff recovering attorney fees.

C. **Burden of proof in a DOJ or OCR Title IX investigation:** Preponderance of the evidence.

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V. General Principles: School Legal Duties in Situations Requiring Investigation.

1. Potential claims or lawsuits should be **referred to your insurance promptly.**
2. **Train staff** in discrimination policies and procedures and what their responsibilities are.
 - **Recommendation:** Do not rely entirely on on-line trainings.
3. **Train students and employees** in what to do when HIB or unlawful harassment occurs.
4. **Protect the complainant and respondent** from retaliation.
 - Institute **supportive measures** for the complainant and respondent. (Title IX, 34 CFR § 106.44(a).)
 - **Practice Tip:** *Welfare checks and retaliation warnings* are key.
5. **Investigate with an experienced and/or trained investigator** to accurately determine **what happened.**
6. **Document what happened.** (*Via report or ESIS[®].*)
7. **Take appropriate, often corrective, action** based on your investigation.

VI. A Deep Dive into Title IX Regulations (Tabs 2 & 3)

[®] Electronic Student Information System.

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A. *Schadenfreude*: Mercer Island v. OSPI (Tab 16.)

B. Overview of the Title IX Process: (Tabs 2 & 3.)

- 1. Policy adopted (BP 3205) and kept up to date.**
- 2. Assign Title IX Coordinator, Investigator(s), and Decision Maker.**
- 3. Training:** Staff, students, parents.
- 4. Response to situations, generally:**
 - a. First report of the situation**
 - **Supportive measures**
 - b. Inform District Office (Title IX Coordinator)**
 - Title IX issue?
 - If so, oversee the process.
 - If not, District applies other policies⁹
 - c. Follow the Grievance Process for Title IX issues:**
 - i. Written notices to complainant and respondent
 - ii. Investigation of the complaint
 - iii. Investigation report provided to the parties
 - iv. Written determination of responsibility
 - v. Hearing after investigation (if BP 3205 requires)
 - vi. Appeals.
 - d. Recordkeeping**
 - e. Retaliation**

C. Additional definitions -- 34 C.F.R. § 106.30 & .31 at Tab 3.

D. Responding to a complaint -- 34 C.F.R. § 106.44, .45, and .71 (Tab 2).

VII. Have In Place Before Investigations

⁹ *I.e.*, BP 3207/P, BP 5253/P, BP 320/P, BP 3211/P.

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A. Maintain an updated version of BP 3205/P.

1. Title IX Coordinator should be in charge of reviewing any WSSDA updates to BP 3205/P.

B. Select the Title IX Coordinator, Investigator(s), and Decision Maker.

1. Title IX Coordinator and Site Administration should also be aware of other Board Policies requiring investigations (Tab 10).

C. Understand bias and understand yourself.

1. **A bias is a tendency to favor or disfavor** a group, an individual, or something. It may or may not amount to inappropriate prejudice. It may or may not affect the way one behaves. It may or may not be something of which one is aware.
2. Anyone dealing with Title IX situations needs to be reflective of their personal tendencies to favor or disfavor groups, individuals, or things.
3. Contemplate your reaction to “them”/”outsider” groups.
 - a. Where does it come from?
 - b. Does it make sense in the context of the situation?
 - c. Does it affect the way I interact with “them”?
 - d. Understanding that there may be a bias, are you able to deal objectively with a situation and make an “objective evaluation of the evidence”?

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D. DFA note: Caution concerning *implicit bias*, evidence, and Title IX investigations:

1. **Background:** This information on implicit bias was learned in working with a social psychologist in a case where the plaintiff was accusing her employer of not promoting her based on implicit bias against women.
 - a. There was no direct evidence, no smoking gun action which illustrated such bias by the employer.
 - b. A Snohomish County jury found in favor of the employer.
2. **Implicit bias:** “An implicit bias is [defined as] **an unconscious association, belief, or attitude toward any social group.**” Due to implicit biases, some social psychologists believe that “people may often attribute certain qualities or characteristics to all members of a particular group, a phenomenon known as stereotyping.” (“Explanations and Impacts of Unconscious Bias,” by Kendra Cherry, M.S. 9/18/20.)
3. However, other social psychologists are skeptical about the state of the research on implicit bias, including whether there is evidence that it truly exists or if it does

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exist, whether it causes people to behave in biased ways. (“Six Lessons for a Cogent Science of Implicit Bias and Its Criticism,” by Bertram Gawronski, Ph.D. article published in *Perspectives on Psychological Science* (2019).)

4. Some studies have found flaws in assessments which supposedly measure a person’s implicit bias. For instance, after taking a test on whether individuals are implicitly biased about a particular class of people, **post-testing also shows those same people are able to accurately predict their scores on implicit measures.** (See, e.g., Hahn & Gawronski, 2019, Hah, Judd, Hirsch, & Blair, 2014.) Ergo, if someone can tell you what their implicit biases are, are those biases unconscious?

5. Whether implicit bias exists, whether it can be measured with assessment tools, and whether it affects one’s actions unconsciously are question for social psychologists to answer through continued research.

6. Layers of potential implicit bias -- illustrative scenario:

¹⁰ E.g., B. Gawronski, A. Ledgerwood, and P. Eastwick, “Implicit Bias and Antidiscrimination Policy,” in *Behavioral and Brain Science*, Vol. 7(2) 99-106 (2020).

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Query: A 30 year old white, male sexual harassment investigator concludes that a 65 year old white, male construction site supervisor was implicitly biased against women and sexually harassing two younger women construction workers. The investigator believed that implicit bias was in play when the older male would refer to female workers as “the girls” and would unfairly criticize them when they did not work as quickly as male workers.

Question: Is implicit bias at play in this scenario? If so, how?

Key take-aways on current research regarding implicit bias and Title IX investigations:¹⁰

- 1) **Title IX investigation conclusions must be objectively based on the evidence.** (34 C.F.R. § 106.45(b)(1)(ii) states: The investigation must “[r]equire an **objective evaluation of all relevant evidence**—including both inculpatory and exculpatory evidence—and provide that **credibility determinations** may not be based on a person’s status as a complainant, respondent, or witness.”

--Nor should they depend on whether the respondent is a middle aged white male or a 20 year old Duke lacrosse player.)

- 2) **Pay attention to behaviors**, not your impressions which are not based on evidence. Unless your impressions are supported by articulable evidence, they should not be the basis of any conclusions. (Extensive conversations with Prof. Hart Blanton, Ph.D., social-psychologist and researcher at Texas A & M.)
- 3) The investigator in the “Query” scenario above may have been exercising his own implicit bias about older, white males with his conclusion. Or he may have been right. But whether it was implicit

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bias or outright bias made no difference to the finding. It was a red herring.

- 4) The investigator in the scenario actually had concrete, though limited, evidence of some degree of bias in the 70 year old supervisor which the investigator could base opinions on: calling the women “girls” and unfairly criticizing them.

Second query: Might interjecting implicit bias into an investigation’s evaluation of evidence create a trap for decision makers in that attributing an implicit bias to someone else may be an exercise of the decision maker’s own implicit bias?

Take-aways: Whatever the answer, **stick to an objective evaluation of the evidence.**

Whatever the answer, **as enlightened individuals who care about people, we can come to know and understand our own biases so that you are not trapped into acting upon them.**

E. General Counsel or other counsel to confer with.



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F. Role of the investigator:

1. Find out the facts and accurately document them.
2. Make credibility determinations where necessary.¹¹
3. As witness to tell about your investigation and possibly to defend its conclusions.

G. Be aware in selecting investigators of the eventual hearing or trial **cross-examination of the investigator will be aimed at showing:**

1. Untrained investigator
2. Inexperienced investigator
3. Incomplete investigation
4. Biased investigation or investigator
5. Preconceived result
6. Conclusions were not supported by evidence

H. Title IX Investigator attributes:

1. **Title IX trained**
2. **Experienced or trained** in conducting investigations (DCL 4/4/2011).
3. **Unbiased and without conflicts of interest** (34 C.F.R. § 106.45(b)(1)(iii).)
4. Goes where the facts take him/her.

¹¹ See 6/18/99 EEOC Guidelines re credibility determinations.

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5. ***Bird-walk*** on some other biases:
- a. **Famous last words** of site administration leading to sexual abuse claims: ***“I never saw it coming.”***
 - b. Sex Offender Treatment Providers tell us this is in part because the of following biases.

- ***Confirmation bias*** _____
- ***Authority bias*** _____
- ***Conformity bias*** _____
- ***Affinity bias*** _____

6. Be aware of ***how these biases can cause blind spots in one’s objectivity*** and thereby hopefully avoid decision making based on such biases.

Practice tip: How long should an investigation take?:

- Title IX requires a process which provides for a **“prompt and equitable resolution”** of Title IX complaints. (34 C.F.R. § 106.8(c).) DOJ says sexual assault investigations are normally completed within 60 days.

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VIII. Title IX Investigations, generally:

A. Situations not rising to the definition of being “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program”.

1. Follow BP 3207 and normal progressive discipline.

B. Informal Resolution process: where the complainant does not want to go through the Formal Complaint Title IX process.

1. Under 3205, see the Informal Resolution process and 34 C.F.R. § 106.45(9).
2. At the very least, document in the Electronic Student Information System (ESIS).

C. Note and meet any CBA requirements.

1. Timelines
2. Notice requirements.

D. What if the complainant will **not put their sexual complaint in writing?**

1. For 3205, 3207, 3210, and 3211 matters, as well as site administration or the Civil Rights/Title IX person should put it in writing.
 2. Investigate anyway.
-
-

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IX. Investigation Organization:

(Follow 34 C.F.R. § 106.45(b)(5), .)

A. Title IX Coordinator: Overseeing an investigation (Tab 12).

- a. **Recommend this be the Title IX Coordinator’s job.**
- b. See Tab 12 for general tips on overseeing investigations.
- c. Assure that Title IX/BP 3205 procedures are followed and documented.
- d. If the situation is a student complainant/”victim” and an employee/adult respondent, always use the **Professional Boundaries Checklist** in the investigation (Tab 15).
- e. Make sure that proper Title IX written notifications are sent to the complainant and respondent.

B. Plan the investigation.

- 1. Attorney, site administrator, Title IX Coordinator.
 - a. Determine who will investigate.
 - b. Determine who will be the primary contact with the investigator.
 - c. Determine the scope of the investigation.

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Scope of the investigation: _____

C. Get documents, records if any, to the investigator:

1. Make sure the investigator has the records necessary to conduct the investigation. Consider:
 - a. Board policies and procedures
 - b. CBA
 - c. Personnel file or excerpts
 - i. Evaluations
 - ii. Clock Hours (re training)
 - iii. Prior discipline or direction

D. Whom to interview:

1. Complainant
2. Witnesses around the situation
3. The person accused
4. Additional witnesses the complainant and person accused name.
5. Follow up interviews

Order of interviews _____

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X. Conducting the Investigation:

A. Consider piggy-back training with an experienced Investigator.

B. Investigation Interview Tips:

1. Dress appropriately (for the *comfort or discomfort* of the person you are interviewing).

2. Have as much background about the situation as feasible, especially when questioning anyone accused of anything.

3. Be courteous and somewhat friendly with witnesses.

4. Interview witnesses individually and as privately as possible.

- You may want someone else with you.
- Let the complainant and respondent have an “advisor” present during the interview. (34 C.F.R. § 106.45.(b)(2)(i)(B).).
- Otherwise, the witness should not have another person with them unless it is a parent or school counselor for a student you are interviewing
- Employee respondents may have union representation (Weingarten rights). Sometimes this may be an attorney.

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5. Begin with “Preliminaries”:

- i. Request confidentiality
- ii. But do not guarantee confidentiality
 1. Use initials, etc.
 2. At some point the witness may need to testify.
- iii. No retaliation
- iv. Report anything that seems like retaliation immediately

6. Throughout the interview, listen and watch.

7. Almost always: *General-to-specific.*

- Have an outline for your questioning
- Ask background questions to begin with, questions no one would lie about or feel nervous about in order to **establish a baseline** for how they normally respond to questions in the situation they are in with you.
- With most witnesses, questions should be general at first and then specific
 - Let the person ramble
 - Don’t interrupt for clarification

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- Get clarification after they have told you their story from their point of view

- Specific questions would be follow up to obtain clarification of what you heard
- Specific questions would relate to other things you want to know about.
- After asking the question, listen to the entire answer, especially the end of the answer. If a person is nervous, that is the place they may slip something in that they have been thinking about which they would like not to tell you.

8. *Non-leading, general questions are brilliant* at the beginning:

i. Do you know why you are here?

ii. Tell me about it.

iii. Then what happened?

iv. What happened next?

v. Then ask the more specific questions in follow up.

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9. *What body language means.*

1. The person has a headache or their feet hurt.
2. The person just remembered they have a commitment they can not break and it happens in five minutes.
3. Your question for some reason unknown to you, struck an emotional nerve unrelated to the case.
4. The person just lied to you.

10. *Reading body language:*

- i. Through questions the person would not lie about, determine their **baseline** demeanor, expression, and body language.
- ii. When the person **deviates** suddenly from that baseline, seeming to be responding to the question with new and different body language, **go into terrier mode.**

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11. *Terrier mode: Chase the rabbit like a terrier:*

i. If an *admission* is made, or a *constellation of body language* goes off, or the answer *sounds like a lie*, or the person is *responding to the most important question* in the interview,

- immediately, and without changing your demeanor, pursue the topic with follow up questions, one after another, without allowing the person time to think.
- Then when your questions are exhausted, immediately go to another topic asking fast questions.

ii. Later circle back to the earlier topic for more details.

iii. Often your next question is in the last part of the person's answer.

iv. Circle back one more time and do the same.

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12. Abandon the outline and follow where the answers are taking you elsewhere productively, but come back to the outline later to make sure you are thorough.

13. Be able to **listen, type, and watch at the same time** and fix your typos later. Or have someone take notes.

- i. Typing notes.
- ii. Handwriting notes.
- iii. Someone else taking notes.
- iv. Court reporters, tape recorders, video.

14. *Credibility determinations: See: 6/18/99 EEOC 915.02 excerpt.*

15. *Recommended readings:*

- *What Every Body is Saying* by Joe Navarro. (Good on autonomic body language identification.)
- *Three Minutes to Doomsday: An Agent, a Traitor, and the Worst Espionage Breach in U.S. History* by Joe Navarro.
- *Spy the Lie* by Houston, Floyd, and Carnicero.

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16. Document your investigation and maintain the documentation.
 - i. Retain for at least 7 years. (34 C.F.R. § 106.46(b)(10).)
 - ii. For matters involving sexual misconduct of an employee against a student, retain the documentation for the length of the life of the student.
17. **BP 5352 Professional Boundary Investigations**
 - a. Use the Inappropriate Boundary Invasions Checklist

IX. Investigation Reporting – Useful Outline

A. Investigation Report Template

1. **Intro paragraph:** Identifying when the investigator was contacted and by whom, the number of witnesses interviewed and documents reviewed, and **why** the investigation is taking place. Identify any legal or board policy requirements the investigation is to accomplish.
2. **Scope of the Investigation:** One or two sentences which state **what** is being investigated.
3. **CPS or law enforcement reporting:** Was a report required and made. Many investigations do not include this if a child was not involved.
4. **List of Witnesses Interviewed:** Name and title.

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- 5. List of Records Reviewed:** Include everything including witness statements, school records, personnel file records, board policies, etc.
- 6. Conclusions of fact.** List them in numbered, often short paragraphs (as if in a pleading) telling the story in logical fashion and answering each of the topics that were to have been investigated.
- 7. Finding of responsibility or non-responsibility:**

(See 34 C.F.R. § 106.46(b)(7) for what this finding must include.)
- 8. Witness interview summaries: Use headings in each summary such as:** The witness; The Incident; After the Incident. These headings are like sign-posts for your reader.
- 9. The fifty-years-from-now-and-we're-all-dead evidence paragraph.** The following is a report retention section relating to alleged **sex abuse** of a child where there were no findings of abuse.

Report Retention

Though this investigation related to alleged inappropriate boundary invasions of an employee and failing to adhere to professional boundaries, it is necessary to retain this report permanently for the following reasons. There have been no findings of sexual molestation or sexual misconduct with any staff member in this investigation. However, where allegations

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of inappropriate boundary invasions are made, it is possible that someone many years later may allege more serious misconduct. In Washington State, the statute of limitations for child sexual molestation is technically three years after an individual comes to know that a molestation done to them in the past has caused them a particular kind of harm. (RCW 4.16.340(1)(a).) The courts have construed the statute of limitations so liberally that it is conceivable for a person 50 or 60 years after a molestation occurs to conclude that the molestation had caused the person sufficient harm that they would then be able to file a lawsuit.

Should this report become relevant to any future action against the District or its employees, the attorney handling the matter may wish to consider whether it would be admissible as evidence under hearsay exceptions for business records. (Fed. R. Evid. 803(6) and 803(8); RCW 5.45; Uniform Business Records As Evidence Act; RCW 5.44.040.)

10. If you can, after writing the report, let it sit several days or a week and then finalize it.

11. Note bene: As you are writing the report you may see follow up which is needed. Promptly pick up the phone and do that follow up.

34 C.F.R. § 106.44 ---
Recipient's response to sexual harassment.

Effective: August 14, 2020

(a) **General response to sexual harassment.** A recipient with **actual knowledge** of sexual harassment in an education program or activity of the recipient against a person in the United States, **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. For the purposes of this section, §§ 106.30, and 106.45, “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, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. A recipient’s response **must treat complainants and respondents equitably** by offering **supportive measures** as defined in § 106.30 to a complainant, and by **following a grievance process** that complies with § 106.45 **before the imposition of any disciplinary sanctions** or other actions that are not supportive measures as defined in § 106.30, against a respondent. The **Title IX Coordinator** must **promptly contact the complainant to discuss the availability of supportive measures** as defined in § 106.30, consider the complainant’s wishes with respect to supportive measures, **inform** the complainant of the availability of supportive measures with or without the filing of a formal complaint, and **explain** to the complainant the process for filing a formal complaint. The Department may not deem a recipient to have satisfied the recipient’s duty to not be deliberately indifferent under this part based on the recipient’s restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) **Response to a formal complaint.**

(1) In response to a formal complaint, a recipient must **follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).**

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, **solely because the Assistant Secretary would have reached a different determination** based on an independent weighing of the evidence.

(c) **Emergency removal.** Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an **individualized safety and risk analysis**, determines that an **immediate threat to the physical health or safety** of any student or other individual arising from the allegations of sexual harassment justifies removal, and **provides the respondent with notice and an opportunity to challenge** the decision **immediately following the removal.** This provision may **not be construed to modify any rights** under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) Administrative leave. Nothing in this subpart precludes a recipient from placing a **non-student employee respondent on administrative leave during the pendency of a grievance process** that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

34 C.F.R. § 106.45
Grievance process for formal complaints of sexual harassment.

Effective: August 14, 2020¹

(a) **Discrimination on the basis of sex.** A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) **Grievance process.** For the purpose of addressing formal complaints of sexual harassment, **a recipient's grievance process must comply with the requirements of this section.² Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.**

(1) **Basic requirements for grievance process.** A recipient's grievance process must—

(i) **Treat complainants and respondents equitably** by providing remedies to a complainant where a **determination of responsibility** for sexual harassment has been made against the respondent, and **by following a grievance process that complies with this section** before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in §

¹ Amendments to these regulations are currently under consideration. Be sure you rely on the most current regulations.

² BP 3205/P is that grievance process.

106.30, against a respondent. **Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity.** Such remedies may include the same **individualized services** described in § 106.30 as “supportive measures”;³ however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(ii) Require an **objective evaluation of all relevant evidence**—including both inculpatory and exculpatory evidence—and provide that **credibility determinations** may not be based on a person’s status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.** A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, **receive training** on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to

³ 34 C.F.R. § 106.30 in part states: “*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. Such measures are **designed to restore or preserve equal access** to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”

serve impartially, **including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.**⁴ A recipient must ensure that **decision-makers receive training on any technology** to be used at a live hearing and on **issues of relevance of questions and evidence**, including **when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant**, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that **investigators receive training on issues of relevance** to create an **investigative report** that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. **Any materials used to train** Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and **must promote impartial investigations and adjudications of formal complaints of sexual harassment;**

How to avoid prejudging the facts: *i.e.*, avoiding confirmation bias and authority bias:

(iv) Include a **presumption that the respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

⁴ **DFA’s note:** In addition to biases against a protected category, types of potential biases include: confirmation bias, beauty bias, authority bias, and hindsight bias.

(v) Include **reasonably prompt time frames** for conclusion of the grievance process, including **reasonably prompt time frames for filing and resolving appeals and informal resolution processes** if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the **limited extension of time frames for good cause with written notice to the complainant and the respondent** of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

What if you are using an outside investigator who can not begin the investigation until two months later?

(vi) **Describe the range of possible disciplinary sanctions and remedies** or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the **standard of evidence** to be used to determine responsibility is the **preponderance** of the evidence standard **or the clear and convincing** evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) **Include the procedures and permissible bases** for the complainant and respondent to **appeal**;

(ix) Describe the **range of supportive measures** available to complainants and respondents;⁵ and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) Notice of allegations—⁶

(i) Upon receipt of a formal complaint, a recipient must **provide the following written notice to the parties** who are known:

(A) **Notice of the recipient’s grievance process** that complies with this section, including any informal resolution process.

(B) **[1] Notice of the allegations of sexual harassment** potentially constituting sexual harassment as defined in § 106.30, **including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. [2] Sufficient details**⁸ include the **identities of the parties** involved in the incident, if known, **[3] the conduct allegedly constituting sexual harassment** under § 106.30, and the **[4] date and location of the alleged incident**, if known. The written notice must include a **[5]** statement that the respondent is

⁵ See Fn. 1 above and 34 C.F.R. § 106.30 for the definition of “supportive measures.”

⁶ **DFA’s note:** This section describes what must go into the letters provided to the complainant and respondent at the initiation of the grievance process.

⁷ **DFA’s note:** The bracketed numbers, i.e., “[1]”, are not in the regulation. DFA has inserted them to create a checklist for what must go into the letters to the complainant and respondent.

⁸ **DFA’s note:** Due Process here for the respondent means “notice” of the allegations being raised, specific enough that the respondent has a meaningful opportunity to defend him/herself.

presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must [6] inform the parties that they may have an **advisor of their choice**, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and [7] may **inspect and review evidence** under paragraph (b)(5)(vi) of this section. The written notice must [8] inform the parties of **any provision in the recipient's code of conduct that prohibits knowingly making false statements** or knowingly submitting false information during the grievance process.

[8] Also include a copy of your current BP 3205 and 3205P.

(ii) If, in the course of an investigation, the **recipient decides to investigate allegations** about the complainant or respondent that are **not included in the notice** provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must **provide notice of the additional allegations** to the parties whose identities are known.

(3) Dismissal of a formal complaint—

(i) The recipient **must investigate the allegations in a formal complaint**. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient **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.**⁹

(ii) The recipient **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 recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must **promptly send written notice of the dismissal and reason(s)** therefor simultaneously to the parties.

(4) Consolidation of formal complaints. A recipient 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. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular “party,” “complainant,” or “respondent” include the plural, as applicable.

⁹ If Title IX/BP 3205 do not apply, think: BP3207/P on HIB; BP 3210/P on Nondiscrimination; BP 3211/P on Gender Inclusive Schools; and/or normal school discipline process.

FERPA Issues: _____

(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the **burden of proof** and the **burden of gathering evidence** sufficient to reach a determination regarding responsibility **rest on the recipient** and not on the parties provided that the **recipient cannot access, consider, disclose, or otherwise use** a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are **made and maintained in connection with the provision of treatment to the party, unless** the recipient obtains that party’s voluntary, **written consent** to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR 99.3);

(ii) Provide an **equal opportunity for the parties to present witnesses**, including fact and expert witnesses, and other inculpatory and exculpatory evidence;¹⁰

(iii) **Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;**¹¹

¹⁰ Solicit such evidence from the parties.

¹¹ **Query:** How to do this and avoid retaliation, real or perceived; or avoid interfering with the investigation?

(iv) Provide the parties with the **same opportunities to have others present** during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) **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;

(vi) Provide both parties an **equal opportunity to inspect and review any evidence** obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, **including the evidence upon which the recipient does not intend to rely** in reaching a determination regarding responsibility and **inculpatory or exculpatory** evidence whether obtained from a party or other source, **so that each party can meaningfully respond** to the evidence prior to conclusion of the investigation. **Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review** in an electronic format or a hard copy, and **the parties must have at least 10 days to submit a written response**, which the investigator will consider prior to completion of the investigative report. The recipient must **make all such evidence** subject to the parties' inspection and review **available at any hearing** to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(vii) Create an **investigative report** that **fairly summarizes relevant evidence** and, **at least 10 days prior to a hearing** (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, **for their review and written response.**

(6) Hearings.

(i) For **postsecondary institutions**, the recipient’s grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) 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 recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to

simultaneously see and hear the party or the witness answering questions. 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(s) 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. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility;¹² provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient'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.

(ii) For recipients that are **elementary and secondary schools**, and other recipients that are not postsecondary institutions, **the recipient's grievance process may, but need not, provide for a hearing.**¹³ With or without a

¹² DFA's Note: This provision has been determined to be invalid as arbitrary and capricious. *Victims Rights Law Center v. Cardona*, 2021 WL 3185743 (D.Mass. 7/28/21). If a victim did not testify, under the original language, that victim's statement to police or as part of a Title IX investigation would not have been considered.

¹³ See 3205P at p. 19 of the handout at Tab 9: Regarding formal complaints, "The District's Title IX investigative and grievance process is not required to include investigative hearings."

However:

hearing, after the recipient **has sent the investigative report to the parties** pursuant to paragraph (b)(5)(vii) of this section and **before reaching a determination** regarding responsibility, the decision-maker(s) 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**. With or without a hearing, questions and evidence about the **complainant's sexual predisposition or prior sexual behavior are not relevant, unless** such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered **to prove consent**. The decision-maker(s) must **explain** to the party proposing the questions **any decision to exclude a question as not relevant**.

(7) Determination regarding responsibility.

(i) The **decision-maker(s)**, who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must **issue a written determination** regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

RCW 28A.645.010 Appeals—Notice of—Scope—Time limitation. (1) **Any person**, or persons, either severally or collectively, aggrieved **by any decision** or order **of any school official or board**, within **thirty days** after the rendition of such decision or order, or of the failure to act upon the same when properly presented, may **appeal the same to the superior court** of the county in which the school district or part thereof is situated, by filing with the secretary of the school board if the appeal is from board action or failure to act, otherwise with the proper school official, and filing with the clerk of the superior court, a notice of appeal which shall set forth in a clear and concise manner the errors complained of.

(ii) The **written determination** must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must **provide the written determination to the parties simultaneously**. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The **Title IX Coordinator is responsible for effective implementation of any remedies.**

(8) Appeals.

(i) A recipient must offer both parties an **appeal from a determination regarding responsibility**, and from a recipient's **dismissal of a formal complaint or any allegations therein**, on the following bases:

(A) **Procedural irregularity** that affected the outcome of the matter;

(B) **New evidence** that was **not reasonably available** at the time the determination regarding responsibility or dismissal was made, that **could affect the outcome** of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a **conflict of interest** or **bias** for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) **Notify** the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the **decision-maker(s) for the appeal is not the same person as the decision-maker(s)** that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii)¹⁴ of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) Informal resolution. A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient 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.** However, at any time prior to reaching a determination regarding responsibility the recipient **may facilitate an informal resolution process,** such as **mediation,** that does not involve a full investigation and adjudication, provided that the recipient—

¹⁴ See pp. 5-6. The appeal decision maker must be trained, unbiased, and neutral, among other things.

(i) Provides to the parties a **written notice** disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) Obtains the parties' **voluntary, written consent** to the informal resolution process; and

(iii) Does **not** offer or facilitate an informal resolution process to resolve **allegations that an employee sexually harassed a student.**

(10) Recordkeeping.

(i) A recipient must **maintain** for a period of **seven years** records of—

(A) Each sexual harassment **investigation** including any determination regarding responsibility and any **audio** or **audiovisual recording** or **transcript** required under paragraph (b)(6)(i) of this section, any **disciplinary sanctions** imposed on the respondent, and any **remedies** provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any **appeal** and the **result** therefrom;

(C) Any **informal resolution** and the result therefrom; and

(D) **All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal**

resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient 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 recipient's education program or activity. 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.

34 C.F.R. § 106.71 Retaliation.

Effective: August 14, 2020

(a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the **purpose of interfering with any right or privilege secured by title IX or this part, 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 under this part.** Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20

U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(b) Specific circumstances.

(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) 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 under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

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Title 34: Education

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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Appendix A to Part 106—Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs

AUTHORITY: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.
SOURCE: 45 FR 30955, May 9, 1980, unless otherwise noted.

Subpart A—Introduction

§106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.2 Definitions.

As used in this part, the term:

- (a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.
- (b) *Department* means the Department of Education.
- (c) *Secretary* means the Secretary of Education.
- (d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.
- (e) *Reviewing Authority* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.
- (f) *Administrative law judge* means a person appointed by the reviewing authority to preside over a hearing held under this part.
- (g) *Federal financial assistance* means any of the following, when authorized or extended under a law administered by the Department:
 - (1) A grant or loan of Federal financial assistance, including funds made available for:
 - (i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
 - (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
 - (2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.
 - (3) Provision of the services of Federal personnel.

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(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *Program or activity* and *program* means all of the operations of—

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or local government; or

(ii) The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A *local educational agency* (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity that is established by two or more of the entities described in paragraph (h)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 20 U.S.C. 1687)

(i) *Recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.

(j) *Applicant* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(k) *Educational institution* means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (l), (m), (n), or (o) of this section.

(l) *Institution of graduate higher education* means an institution which:

- (1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or
- (2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or
- (3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(m) *Institution of undergraduate higher education* means:

- (1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or
- (2) An institution offering academic study leading to a baccalaureate degree; or
- (3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(n) *Institution of professional education* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(o) *Institution of vocational education* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(p) *Administratively separate unit* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(q) *Admission* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(r) *Student* means a person who has gained admission.

(s) *Transition plan* means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

[45 FR 30955, May 9, 1980; 45 FR 37426, June 3, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c)(ii) of this section and of any remedial steps taken pursuant to paragraph (c)(iii) of this section.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30572, 30579, May 19, 2020]

§106.4 Assurance required.

(a) *General.* Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of subpart B of this part.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.6 Effect of other requirements and preservation of rights.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Authority: Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives Federal financial assistance.

(d) *Constitutional protections.* Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA).* The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

(f) *Title VII of the Civil Rights Act of 1964.* Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.

(g) *Exercise of rights by parents or guardians.* Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

(h) *Preemptive effect.* To the extent of a conflict between State or local law and title IX as implemented by §§106.30, 106.44, and 106.45, the obligation to comply with §§106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30573, 30579, May 19, 2020]

§106.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19 2020]

§106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

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

(b) *Dissemination of policy—(1) Notification of policy.* Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

(2) *Publications.* (i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.

(c) *Adoption of grievance procedures.* A recipient 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 and a grievance process that complies with §106.45 for formal complaints as defined in §106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

(d) *Application outside the United States.* The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

[85 FR 30573, May 19, 2020]

§106.9 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30573, May 19, 2020]

Subpart B—Coverage

§106.11 Application.

Except as provided in this subpart, this part 106 applies to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.

[45 FR 86298, Dec. 30, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Assurance of exemption.* An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part

and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

(c) *Eligibility.* Any of the following in paragraphs (c)(1) through (6) of this section shall be sufficient to establish that an educational institution is controlled by a religious organization, as contemplated under paragraph (a) of this section, and is therefore eligible to assert a religious exemption to the extent application of this part would not be consistent with its religious tenets:

(1) That the educational institution is a school or department of divinity.

(2) That the educational institution requires its faculty, students, or employees to be members of, or otherwise engage in religious practices of, or espouse a personal belief in, the religion of the organization by which it claims to be controlled.

(3) That the educational institution, in its charter or catalog, or other official publication, contains an explicit statement that it is controlled by a religious organization or an organ thereof, or is committed to the doctrines or practices of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

(4) That the educational institution has a doctrinal statement or a statement of religious practices, along with a statement that members of the institution community must engage in the religious practices of, or espouse a personal belief in, the religion, its practices, or the doctrinal statement or statement of religious practices.

(5) That the educational institution has a published institutional mission that is approved by the governing body of an educational institution and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings.

(6) Other evidence sufficient to establish that an educational institution is controlled by a religious organization, pursuant to 20 U.S.C. 1681(a)(3).

(d) *Severability.* If any provision of this section or its application to any person, act, or practice is held invalid, the remainder of this section or the application of its provisions to any person, act, or practice shall not be affected thereby.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30573, 30579, May 19, 2020; 85 FR 59980, Sept. 23, 2020]

§106.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§106.16 and 106.17, and subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of subpart C.* Except as provided in paragraphs (d) and (e) of this section, subpart C applies to each recipient. A recipient to which subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980; 85 FR 30579, May 19, 2020]

§106.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of subpart C unless it is carrying out a transition plan approved by the Secretary as described in §106.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.17 Transition plans.

(a) *Submission of plans.* An institution to which §106.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which §106.16 applies shall result in treatment of applicants to or students of such recipient in violation of subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b) (3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b) (4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which §106.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment which emphasizes the institution's commitment to enrolling students of the sex previously excluded.

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.18 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30573, May 19, 2020]

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§106.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§106.16 and 106.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits

as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to §106.3(a), and may choose to undertake such efforts as affirmative action pursuant to §106.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.24 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30574, May 19, 2020]

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§106.30 Definitions.

(a) As used in this part:

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in §106.8(a).

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Consent. The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a 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. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under §106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under §106.45, and must comply with the requirements of this part, including §106.45(b)(1)(iii).

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

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

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or
- (3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

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. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

(b) As used in §§106.44 and 106.45:

Elementary and secondary school means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.

Postsecondary institution means an institution of graduate higher education as defined in §106.2(l), an institution of undergraduate higher education as defined in §106.2(m), an institution of professional education as defined in §106.2(n), or an institution of vocational education as defined in §106.2(o).

[85 FR 30574, May 19, 2020]

§106.31 Education programs or activities.

(a) *General.* 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. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which subpart C does not apply, or (2) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

- (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- (3) Deny any person any such aid, benefit, or service;
- (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;
- (5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;
- (6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;
- (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided*, a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aid, benefits or services not provided by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

[45 FR 30955, May 9, 1980, as amended at 47 FR 32527, July 28, 1982; 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and

(ii) Comparable in quality and cost to the student.

A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.34 Access to classes and schools.

(a) *General standard.* Except as provided for in this section or otherwise in this part, a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex.

(1) *Contact sports in physical education classes.* This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(2) *Ability grouping in physical education classes.* This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) *Human sexuality classes.* Classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls.

(4) *Choruses.* Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

(b) *Classes and extracurricular activities—(1) General standard.* Subject to the requirements in this paragraph, a recipient that operates a nonvocational coeducational elementary or secondary school may provide nonvocational single-sex classes or extracurricular activities, if—

(i) Each single-sex class or extracurricular activity is based on the recipient's important objective—

(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;

(ii) The recipient implements its objective in an evenhanded manner;

(iii) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and

(iv) The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.

(2) *Single-sex class or extracurricular activity for the excluded sex.* A recipient that provides a single-sex class or extracurricular activity, in order to comply with paragraph (b)(1)(ii) of this section, may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether classes or extracurricular activities are substantially equal include, but are not limited to, the following: the policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty.

(4) *Periodic evaluations.* (i) The recipient must conduct periodic evaluations to ensure that single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex and that any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities.

(ii) Evaluations for the purposes of paragraph (b)(4)(i) of this section must be conducted at least every two years.

(5) *Scope of coverage.* The provisions of paragraph (b)(1) through (4) of this section apply to classes and extracurricular activities provided by a recipient directly or through another entity, but the provisions of paragraph (b)(1) through (4) of this section do not apply to interscholastic, club, or intramural athletics, which are subject to the provisions of §§106.41 and 106.37(c) of this part.

(c) *Schools—(1) General Standard.* Except as provided in paragraph (c)(2) of this section, a recipient that operates a public nonvocational elementary or secondary school that excludes from admission any students, on the basis of sex, must provide students of the excluded sex a substantially equal single-sex school or coeducational school.

(2) *Exception.* A nonvocational public charter school that is a single-school local educational agency under State law may be operated as a single-sex charter school without regard to the requirements in paragraph (c)(1) of this section.

(3) *Substantially equal factors.* Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether schools are substantially equal include, but are not limited to, the following: The policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the quality and range of extracurricular offerings, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources, and intangible features, such as reputation of faculty.

(4) *Definition.* For the purposes of paragraph (c)(1) through (3) of this section, the term “school” includes a “school within a school,” which means an administratively separate school located within another school.

[71 FR 62542, Oct. 25, 2006, as amended at 85 FR 30579 May 19, 2020]

§106.35 Access to institutions of vocational education.

A recipient shall not, on the basis of sex, exclude any person from admission to any institution of vocational education operated by that recipient.

[71 FR 62543, Oct. 25, 2006, as amended at 85 FR 30579, May 19, 2020]

§106.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and §106.41.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

- (1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and
- (2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates subpart E of this part.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) 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.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) 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.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) 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.

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

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

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, 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;
- (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.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.43 Standards for measuring skill or progress in physical education classes.

If use of a single standard of measuring skill or progress in physical education classes has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have that effect.

(Authority: 20 U.S.C. 1681, 1682)

[71 FR 62543, Oct. 25, 2006, as amended at 85 FR 30579, May 19, 2020]

§106.44 Recipient's response to sexual harassment.

(a) *General response to sexual harassment.* A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, 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. For the purposes of this section, §§106.30, and 106.45, "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, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in §106.30 to a complainant, and by following a grievance process that complies with §106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in §106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in §106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) *Response to a formal complaint.* (1) In response to a formal complaint, a recipient must follow a grievance process that complies with §106.45. With or without a formal complaint, a recipient must comply with §106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) *Emergency removal.* Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with §106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

[85 FR 30574, May 19, 2020]

§106.45 Grievance process for formal complaints of sexual harassment.

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) *Grievance process.* For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in §106.30, must apply equally to both parties.

(1) *Basic requirements for grievance process.* A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in §106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in §106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-

makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in §106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

(ix) Describe the range of supportive measures available to complainants and respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) *Notice of allegations*—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in §106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under §106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(3) *Dismissal of a formal complaint*—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient 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.

(ii) The recipient 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 recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) *Consolidation of formal complaints*. A recipient 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. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

(5) *Investigation of a formal complaint*. When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity,

and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) 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;

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(vii) **Create an investigative report** that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

(6) *Hearings.* (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) 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 recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. 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(s) 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. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient'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.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) 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. With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

(7) *Determination regarding responsibility.* (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

- (A) Identification of the allegations potentially constituting sexual harassment as defined in §106.30;
- (B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- (C) Findings of fact supporting the determination;
- (D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

(8) *Appeals.* (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) *Informal resolution.* A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient 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. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient—

(i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) *Recordkeeping.* (i) A recipient must maintain for a period of seven years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under §106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient 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 recipient's education program or activity. 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.

[85 FR 30575, May 19, 2020]

§106.46 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30578, May 19, 2020]

**Subpart E—Discrimination on the Basis of Sex in
Employment in Education Programs or Activities Prohibited**

§106.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including those that are social or recreational; and

(10) Any other term, condition, or privilege of employment.

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

§106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

- (a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and
- (b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

- (a) Makes distinctions in rates of pay or other compensation;
- (b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.55 Job classification and structure.

A recipient shall not:

- (a) Classify a job as being for males or for females;
- (b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or
- (c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in §106.61.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.56 Fringe benefits.

(a) *Fringe benefits defined.* For purposes of this part, *fringe benefits* means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §106.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) 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.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to 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 without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

§106.62 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

[85 FR 30578, May 19, 2020]

Subpart F – Retaliation

SOURCE: 85 FR 30578, May 19, 2020, unless otherwise noted.

§106.71 Retaliation.

(a) *Retaliation prohibited.* No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, 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 under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under §106.8(c).

(b) *Specific circumstances.* (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) 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 under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

§106.72 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subpart G—Procedures

SOURCE: 85 FR 30579, May 19, 2020, unless otherwise noted.

§106.81 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR part 101. The definitions in §106.30 do not apply to 34 CFR 100.6-100.11 and 34 CFR part 101.

§106.82 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Appendix A to Part 106—Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs

EDITORIAL NOTE: For the text of these guidelines, see 34 CFR part 100, appendix B.

[44 FR 17168, Mar. 21, 1979]

Index of Board Policy Required School Investigations

Presented by Donald F. Austin, MAT, JD
Patterson Buchanan Fobes & Leitch, Inc., P.S.
Seattle
November 10, 2022

Main WSSDA Model Board Policies and Procedures requiring investigations:

1. BP 3205 & 3205P: **Sexual Harassment** (Title IX)
2. BP 3207 & 3207P: **HIB**
3. BP 3210 & 3210P: **Nondiscrimination** (student)
4. BP 3211 & 3211P: **Transgender**
5. BP 4220 & 4220P: **Citizen Complaints**
6. BP 5010 & 5010P: **Nondiscrimination** (employees)
7. BP 5011 & 5011P: **Sexual Harassment** (Title VII, employees)
8. BP 5253 & 5253P: **Professional Boundaries**¹
9. BP 5270 & 5270P: **Staff Complaints**
10. BP 5271 & 5271P: **Whistleblowers**

¹ BP 5253 investigations are also BP 3207 investigations following 3207P.

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BP 3205-Sexual Harassment of Students

Last Revised - October 21, 2021

The _____ School District (District) is committed to a positive and productive education free from discrimination, including sexual harassment. This commitment extends to all students involved in academic, educational, extracurricular, athletic, and other programs or activities of the school, whether that program or activity is in a school facility, on school transportation or at a class or school training held elsewhere.

Definitions

For purposes of this policy, sexual harassment means unwelcome conduct or communication of a sexual nature. Sexual harassment can occur adult to student, student to student or can be carried out by a group of students or adults and will be investigated by the District even if the alleged harasser is not a part of the school staff or student body. The District prohibits sexual harassment of students by other students, employees, or third parties involved in District activities.

The term "sexual harassment" may include:

- acts of sexual violence;
- unwelcome sexual or gender-directed conduct or communication that interferes with an individual's educational performance or creates an intimidating, hostile, or offensive environment;
- unwelcome sexual advances;
- unwelcome requests for sexual favors;

- sexual demands when submission is a stated or implied condition of obtaining an educational benefit;
- sexual demands where submission or rejection is a factor in an academic, or other school-related decision affecting an individual.

A "hostile environment" has been created for a student when sexual harassment is sufficiently serious to interfere with or limit the student's ability to participate in or benefit from the school's program. The more severe the conduct, the less need there is to demonstrate a repetitive series of incidents. In fact, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe, violent, or egregious.

Investigation and Response

If the District knows, or reasonably should know, that sexual harassment has created a hostile environment, it will promptly investigate to determine what occurred and take appropriate steps to resolve the situation. If an investigation reveals that sexual harassment has created a hostile environment, the District will take prompt and effective steps reasonably calculated to end the sexual harassment, eliminate the hostile environment, prevent its recurrence and as appropriate, remedy its effects. The District will take prompt, equitable and remedial action within its authority on reports, complaints and grievances alleging sexual harassment that come to the attention of the District, either formally or informally. The District will take these steps every time a complaint, alleging sexual harassment comes to the attention of the District, either formally or informally.

Allegations of criminal misconduct will be reported to law enforcement and suspected child abuse will be reported to law enforcement and Child Protective Services. Regardless of whether the misconduct is reported to law enforcement, school staff will promptly investigate to determine what occurred and take

appropriate steps to resolve the situation, to the extent that such investigation does not interfere with an ongoing criminal investigation. A criminal investigation does not relieve the District of its independent obligation to investigate and resolve sexual harassment.

Engaging in sexual harassment will result in appropriate discipline or other appropriate sanctions against offending students, staff or other third parties involved in District activities. Anyone else who engages in sexual harassment on school property or at school activities will have their access to school property and activities restricted, as appropriate.

Retaliation and False Allegations

Retaliation against any person who makes or is a witness in a sexual harassment complaint is prohibited and will result in appropriate discipline. The District will take appropriate actions to protect involved persons from retaliation.

It is a violation of this policy to knowingly report false allegations of sexual harassment. Persons found to knowingly report or corroborate false allegations will be subject to appropriate discipline.

Staff Responsibilities

The superintendent will develop and implement formal and informal procedures for receiving, investigating and resolving complaints or reports of sexual harassment. The procedures will include reasonable and prompt timelines and delineate staff responsibilities under this policy.

Any school employee who witnesses sexual harassment or receives a report, informal complaint, or written complaint about sexual harassment is responsible for informing the District **Title IX** Compliance Coordinator. All staff are also responsible for directing complainants to the formal complaint process.

Reports of discrimination and discriminatory harassment will be referred to the District's **Title IX**/Civil Rights Compliance Coordinator. Reports of disability discrimination or harassment will be referred to the District's Section 504 Coordinator.

District/school staff, including employees, contractors, and agents shall not provide a recommendation of employment for an employee, contractor, or agent that the District/school, or the individual acting on behalf of the District/school, knows or has probable cause to believe, has engaged in sexual misconduct with a student or minor in violation of the law.

Notice and Training

The superintendent will develop procedures to provide age-appropriate information and education to District staff, students, parents and volunteers regarding this policy and the recognition and prevention of sexual harassment. At a minimum sexual harassment recognition and prevention and the elements of this policy will be included in staff, student, and regular volunteer orientation. This policy and the procedure, which includes the complaint process, will be posted in each District building in a place available to staff, students, parents, volunteers, and visitors. Information about the policy and procedure will be clearly stated and conspicuously posted throughout each school building, provided to each employee and reproduced in each student, staff, volunteer, and parent handbook. Such notices will identify the District's Title IX coordinator and provide contact information, including the coordinator's email address.

Policy Review

The district will review the policy internally on an annual basis.

Cross References:

- 3207 - Prohibition of Harassment, Intimidation, and Bullying
- 3210 - Nondiscrimination
- 3211 - Transgender Students
- 3241 - Student Discipline
- 5010 - Nondiscrimination and Affirmative Action

5011 - Sexual Harassment of District Staff Prohibited

Legal References:

20 U.S.C. 1681-1688

WAC 392-190-058 Sexual harassment

RCW 28A.640.020 Regulations, guidelines to eliminate discrimination — Scope — Sexual harassment policies

34 C.F.R. 106

3205P - Procedure Sexual Harassment of Students

Last Revised - December 16, 2022

Procedure Sexual Harassment of Students Prohibited

The procedure is intended to set forth the requirements of Policy 3205, including the process for a prompt, thorough, and equitable investigation of allegations of sexual harassment and the need to take appropriate steps to resolve such situations. If sexual harassment is found to have created a hostile environment, staff must take immediate action to eliminate the harassment, prevent its reoccurrence, and address its effects.

This procedure applies to sexual harassment (including sexual violence) targeted at students carried out by other students, employees or third parties involved in school District activities. Because students can experience the continuing effects of off-campus harassment in the educational setting, the District will consider the effects of off-campus conduct when evaluating whether there is a hostile environment on campus. The District has jurisdiction over these complaints pursuant to **Title IX** of the Education Amendments of 1972, Chapter 28A.640, RCW and Chapter 392-190 WAC.

Title IX Coordinator, Investigator, and Decision-maker

The District will designate and authorize one employee to act as "**Title IX Coordinator**" to coordinate the District's state and federal sex discrimination and sexual harassment regulation compliance efforts. The **decision-maker** who reaches the final determination of responsibility for alleged Title IX sexual harassment will be the Superintendent or designee. The decision-maker cannot be the same person who serves as the Title IX Coordinator or the investigator of the Title IX complaint.

The **Title IX** coordinator's name, title, office address, telephone number, and email address must be available on the district website; in handbooks/catalogs that are made available to staff, students, and parents; and in the district's nondiscrimination statement.

Any individual designated as **Title IX Coordinator**, an **investigator**, or **decision-maker**, and any person who facilitates an informal resolution process must not have a conflict of interest or bias for or against the individual(s) who made the complaint ("complainant(s)") or the individual(s) reported to be the perpetrator of the conduct that could constitute sexual harassment ("respondent(s)") in general or individually, and must receive training on the following:

- The definition of sexual harassment under **Title IX** and state law;
- The scope of the District's education program or activity;
- How to conduct an investigation and grievance process and informal resolution process;
- How to serve impartially;
- Their responsibilities chapter WAC 392-190 WAC; and
- How to raise awareness of and eliminate bias based on sex, race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation, gender expression, gender identity, the presence of any sensory, mental or physical disability, or the use of a trained dog guide or service animal.

District investigators must also receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

District decision-makers must also receive training on any technology to be used during hearings if the District provides for a hearing, and on issues of relevance of questions and evidence, including the requirement that questions and evidence about a

complainant's sexual predisposition or prior sexual conduct are not relevant unless 1) such questions and evidence is offered to prove that someone other than the respondent committed the alleged conduct or 2) questions and evidence concerning specific incidents of the complainant's prior sexual behavior with respect to the respondent is offered to prove consent.

Any training materials used to train **Title IX** Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must not rely on sex stereotypes and must promote impartial investigations and adjudications of complaints. The District shall maintain for a period of seven years records of any informal resolution and the result; and all materials used to train **Title IX** Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, and make such materials available on the District's website.

Notice of Sexual Harassment Policy and Procedure

- Information about the District's sexual harassment policy and complaint procedure will be easily understandable and conspicuously posted throughout each school building, be reproduced in each student, staff, volunteer, and parent handbook. Upon request, this notice will be provided in a language that each parent and guardian can understand.
- In addition to the posting and reproduction of this procedure and Policy 3205, the District will provide annual notice to employees that complaints pursuant to this procedure may be filed at _____ School District Resource Center at _____, Washington.

Responding to Notice of Sexual Harassment

The District is on notice and required to take action when any employee knows, or in the exercise of reasonable care should

know, about possible sexual harassment. This includes informal and formal reports made to any staff member.

Upon notice of possible sexual harassment, staff will always notify the **Title IX** Coordinator. In addition, in the event of an alleged sexual assault, the school principal will immediately inform law enforcement and Child Protective Services consistent with procedure 3241P notify the targeted student(s) and their parents/guardians of their right to file a criminal complaint and a sexual harassment complaint simultaneously.

- Once the District will inform the complainant and their parent/guardian how to report any subsequent problems. Additionally, the District will conduct follow-up inquiries to see if there have been any new incidents or instances of retaliation, and to promptly respond and appropriately address continuing or new problems. Follow-up inquiries will follow a timeline agreed to by the District and complainant.

A complainant may file a formal complaint at any time while receiving supportive measures. A complainant, their parent or guardian, or the **Title IX** Coordinator may file a formal complaint because, for example, they feel the complaint needs to be more thoroughly investigated or discipline may be warranted for individual alleged to have engaged in sexually harassing conduct.

Confidentiality

- The District will 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 district to provide the supportive measures.
- If a complainant requests that his or her name not be revealed to the alleged perpetrator or asks that the District not investigate or seek action against the alleged

perpetrator, the request will be forwarded to the **Title IX** Coordinator for evaluation.

- The **Title IX** Coordinator should inform the complainant that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator.
- If the complainant still requests that his or her name not be disclosed to the alleged perpetrator or that the District not investigate or seek action against the alleged perpetrator, the District will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students, staff, and other third parties engaging in District activities, including the person who reported the sexual harassment. Although a complainant's request to have his or her name withheld may limit the District's ability to respond fully to an individual allegation of sexual harassment, the District will use other appropriate means available to address the sexual harassment.

Retaliation

Title IX and state law prohibit retaliation against any individual who files a complaint under these laws or participates in a complaint investigation. When an informal or formal complaint of sexual harassment is made, the District will take steps to stop further harassment and prevent any retaliation against the person who made the complaint, was the subject of the harassment, or against those who provided information as a witness. The District will investigate all allegations of retaliation and take actions against those found to have retaliated.

Formal Complaint Process

Level One – Complaint to District

Anyone may initiate a formal complaint of sexual harassment, even if the informal complaint process is being utilized.

Filing of Complaint

- All formal complaints will be in writing and will set forth the specific acts, conditions or circumstances alleged to have occurred and to constitute sexual harassment. The **Title IX** Coordinator may draft the complaint based on the report of the complainant for the complainant to review and approve. The **Title IX** Coordinator may also conclude that the District needs to conduct an investigation based on information in his or her possession, regardless of the complainant's interest in filing a formal complaint.
- The time period for filing a complaint is one year from the date of the occurrence that is the subject matter of the complaint. However, a complaint filing deadline may not be imposed if the complainant was prevented from filing due to: 1) Specific misrepresentations by the District that it had resolved the problem forming the basis of the complaint; or 2) Withholding of information that the District was required to provide under WAC 392-190-065 or WAC 392-190-005.
- Complaints may be submitted by mail, fax, e-mail or hand-delivery to the District **Title IX** Coordinator. Any District employee who receives a complaint that meets these criteria will promptly notify the Coordinator.

Determining Whether to Incorporate Additional Title IX Complaint Procedures

The **Title IX** Coordinator will assess whether a formal complaint of sexual harassment meets the criteria for a **Title IX** complaint.

If so, the District will implement investigation and response procedures under state law, as well as the following additional procedures as required by **Title IX** regulations.

Under **Title IX**, the term "sexual harassment" means:

- an employee of the District conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct;
- conduct that creates a "hostile environment," meaning 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 education program or activity; or
- "sexual assault," as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

The District will implement additional **Title IX** procedures in response to a sexual harassment complaint when the alleged conduct constitutes sexual harassment as defined by **Title IX** regulations, and:

- The written complaint is filed by the complainant of the alleged sexual harassment, by the complainant's legal guardian, or by the **Title IX** Coordinator;
- The complaint requests that the District investigate the allegation(s) of sexual harassment, as defined under **Title IX** regulations;
- The complaint is against a named respondent who, at the time of the alleged harassment, was under the control of the school District (such as a student, employee, or volunteer);
- The alleged sexually harassing conduct occurred in the United States; and
- The complainant is participating in or attempting to participate in the District's educational program or activity at the time.

If the formal complaint is determined to meet the criteria for a **Title IX** complaint, the District will conduct the investigation implementing the **additional Title IX** procedures. **Skip to *Standard Complaint Process with Additional Title IX Requirements***.

If the formal complaint is determined not to meet the criteria for a **Title IX** complaint, the District will conduct the investigation without implementing the additional **Title IX** procedures. **Continue to *Standard Complaint Process***.

STANDARD COMPLAINT PROCESS

Acknowledging a Complaint - *Standard Complaint Process*

- Upon receipt of a complaint, the Coordinator will provide the complainant a copy of this procedure in a language the complainant can understand.

Investigating a Formal Complaint - *Standard Complaint Process*

- Investigations will be carried out in a manner that is prompt, thorough, reliable, and impartial. During the investigation process, the complainant and respondent(s), if the complainant has identified an accused harasser(s), will have an equal opportunity to present witnesses and relevant evidence. Complainants, respondents, and witnesses may have a trusted adult with them during any district-initiated investigatory activities. The school district and complainant may also agree to resolve the complaint in lieu of an investigation.
- When the investigation is completed, the investigator will compile a full written report of the complaint and the results of the investigation.

Mediation - Standard Complaint Process

At any time during the complaint procedure set forth in WAC 392-190-065 through 392-190-075, a District may, at its own expense, offer mediation. The complainant and the District may agree to extend the complaint process deadlines in order to pursue mediation.

The purpose of mediation is to provide both the complainant and the district an opportunity to resolve disputes and reach a mutually acceptable agreement through the use of an impartial mediator. Mediation must be voluntary and requires the mutual agreement of both parties. It may be terminated by either party at any time during the mediation process. It may not be used to deny or delay a complainant's right to utilize the complaint procedures.

Mediation must be conducted by a qualified and impartial mediator who may not:

1) Be an employee of any school district, public charter school, or other public or private agency that is providing education related services to a student who is the subject of the complaint being mediated; or 2) Have a personal or professional conflict of interest. A mediator is not considered an employee of the district or charter school or other public or private agency solely because he or she serves as a mediator.

If the parties reach agreement through mediation, they may execute a legally binding agreement that sets forth the resolution and states that all discussions that occurred during the course of mediation will remain confidential and may not be used as evidence in any subsequent complaint, due process hearing or civil proceeding. The agreement must be signed by the complainant and a district representative who has authority to bind the District.

Superintendent's Response to a Formal Complaint - Standard Complaint Process

- The superintendent or their designee will respond in writing to the complainant and the respondent within thirty (30) calendar days of receipt of the complaint, unless otherwise agreed to by the complainant or if exceptional circumstances related to the complaint require an extension of the time limit. In the event an extension is needed, the District will notify the parties in writing of the reason for the extension and the anticipated response date. At the time the District responds to the complainant, the District must send a copy of the response to the office of the superintendent of public instruction.
- The response of the superintendent or designee will include: 1) a summary of the results of the investigation; 2) a statement as to whether a preponderance of the evidence establishes that the complainant was sexually harassed; 3) if sexual harassment is found to have occurred, the corrective measures the district deems necessary, including assurance that the district will take steps to prevent recurrence and remedy its effects on the complainant and others, if appropriate; 4) notice of the complainant's right to appeal to the school board and the necessary filing information; and 5) any corrective measures the district will take, remedies for the complainant (e.g., sources of counseling, advocacy and academic support), and notice of potential sanctions for the perpetrator(s) (e.g., discipline).
- The superintendent's or designee's response will be provided in a language the complainant can understand and may require language assistance for complainants with limited English proficiency in accordance with **Title VI** of the Civil Rights Act of 1964. If the complaint alleges discriminatory harassment by a named respondent or respondent(s), the coordinator will provide the respondent(s) with notice of the outcome of the investigation and notice of their right to appeal any discipline or corrective action imposed by the district.
- Any corrective measures deemed necessary will be instituted as quickly as possible, but in no event more than thirty (30) days after the superintendent's mailing of a written

response, unless the accused is appealing the imposition of discipline and the district is barred by due process considerations or a lawful order from imposing the discipline until the appeal process is concluded. Staff may also pursue complaints through the appropriate collective bargaining agreement process or anti-discrimination policy.

- The district will inform the complainant and their parent/guardian how to report any subsequent problems. Additionally, the district will conduct follow-up inquiries to see if there have been any new incidents or instances of retaliation, and to promptly respond and appropriately address continuing or new problems. Follow-up inquiries will follow a timeline agreed to by the district and complainant.

Resume “Standard Complaint Process” at Level Two - Appeal to Board of Directors.

STANDARD COMPLAINT PROCESS WITH ADDITIONAL TITLE IX REQUIREMENTS

The following sections outline the process the district will take to respond to complaints of sexual harassment under state law and **Title IX**.

Acknowledging a Formal Title IX Complaint

The **Title IX** Coordinator will receive and investigate all formal, written complaints of sexual harassment or information in the coordinator’s possession that they believe requires further investigation. The Coordinator will delegate his or her authority to participate in this process if such action is necessary to avoid any potential conflicts of interest. Upon receipt of a complaint, the Coordinator will offer supportive measures to both parties.

The District will acknowledge receipt of the formal complaint by providing the following written notice to the respondent(s) and complainant:

- A copy of the school's discrimination complaint procedure in a language the parties can understand.
- Notice of the allegations of sexual harassment with sufficient time for the parties to prepare a response before any initial interview and with sufficient detail. Such sufficient detail includes the identities of the parties involved in the incident if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident if known.
- Notice that the parties may have an advisor of their choice who may be an attorney or non-attorney, and who may inspect and review evidence of the alleged sexual harassment.
- Notice that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility for alleged sexual harassment is made at the conclusion of the grievance process.
- Notice of any provision in student conduct policies and procedures that prohibits false statements or submitting false information.

Investigation of a Title IX Formal Complaint

The District must investigate allegations contained in a formal complaint. If the conduct alleged would not constitute sexual harassment under **Title IX** regulations even if proved, did not occur in the District's education program or activity, or did not occur against a person in the United States, then the District must dismiss the formal complaint under **Title IX**. Such dismissal does not preclude action under another provision of District policy or procedure or under sexual harassment investigation procedures as required by state law (See Standard Complaint Process).

The District adopts preponderance of the evidence/clear and convincing evidence as the standard or proof it will use in reaching decisions regarding complaints.

The District's investigation of a Title IX complaint must:

- Include a prompt and thorough investigation into the allegations in the complaint.
- Ensure that the District bears the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility for the alleged sexual harassment. The District may not access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting or assisting in their professional capacity and made and maintained in connection with the provision of treatment to the party unless the District obtains the party's voluntary, written consent to do so.
- 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 to gather and present relevant evidence;
- Provide the parties with the same opportunities to have others present during any grievance proceeding; including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be an attorney or non-attorney. The District will apply any restrictions regarding the extent to which an advisor may participate equally to both parties;
- Provide to a party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, interviews, or other meetings, with sufficient time for the parties to prepare to participate;
- Prior to the completion of an investigative report, provide an equal opportunity for the parties to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation. This includes

evidence that the District does not intend to rely on in reaching a determination of responsibility for the alleged sexual harassment, regardless of the source of the evidence. The parties will have at least ten (10) days to submit a written response for the investigator to consider prior to completion of the investigative report.

- At least ten (10) days prior to a determination regarding responsibility, create an investigative report that fairly summarizes relevant evidence, and send the investigative report in an electronic or hard copy format to each party and each party's advisor for their review and written response.
- After transmitting the investigative report to the parties, but before reaching a final determination regarding responsibility, the decision maker must give 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. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant unless they are offered to prove that someone other than the respondent committed the conduct alleged by the complainant or unless they concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker must explain to the party proposing the questions any decision to exclude a question as not relevant.

The District's **Title IX** investigative and grievance process is not required to include investigative hearings.

Discipline and Emergency Removals for Alleged Sexual Harassment under Title IX

A respondent who is accused of sexual harassment under **Title IX** is presumed not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion

of the grievance process. The District may not impose any disciplinary sanctions, or other actions that are not supportive measures, against the respondent until the District has determined the respondent was responsible for the sexual harassment at the conclusion of the grievance process.

These additional **Title IX** sexual harassment procedures do not preclude a school district from removing a student from school on an emergency basis consistent with Policy and Procedure 3241 – Student Discipline and the associated student discipline regulations for emergency expulsion.

Title IX Informal Resolution Process

At any time prior to a determination in a formal **Title IX** complaint, the District may permit a complainant to waive the formal complaint grievance process in favor of an informal resolution process not involving a full investigation and adjudication, provided that the district obtains the parties' voluntary, written consent; the District does not offer informal resolution of sexual harassment allegations against a respondent who is an employee of the district, the district provide reasonably prompt time frames for the informal resolution process; and the district provides the parties with written notice disclosing the allegations, the requirements for the informal resolution process, and the circumstances in which the parties would be precluded from continuing with a formal resolution process for the same allegations.

A party has the right to withdraw from the informal resolution process and resume the formal **Title IX** grievance process at any time prior to agreeing to a resolution. The District may not require the waiver of the right to an investigation and adjudication of formal complaints of sexual harassment under **Title IX** as a condition of enrollment, employment, or enjoyment of any other right, nor may the district require the parties to participate in an informal resolution process. The District will not offer an information resolution process unless a formal complaint is filed.

Superintendent's Response to a Formal Title IX Complaint

At the conclusion of the investigation, the decision-maker (superintendent or designee) must issue a written determination of responsibility regarding the alleged sexual harassment within thirty (30) calendar days of receipt of the completed investigation report, unless otherwise agreed to by the complainant or if exceptional circumstances related to the complaint require an extension of the time limit. In the event an extension is needed, the District will notify the parties in writing of the reason for the extension and the anticipated response date.

The superintendent's written determination must be issued to the parties simultaneously and must include the following:

- Identification of the allegations potentially constituting sexual harassment under **Title IX** regulations;
- A description of the procedural steps taken from the time of the District's receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Findings supporting the determination;
- A summary of the results of the investigation;
- Conclusions regarding the application of the District's code of conduct policies to the facts;
- A statement as to whether a preponderance of the evidence establishes that the complainant was sexually harassed;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary or other sanctions imposed on the respondent, and whether remedies designed to restore or preserve equal access to the education program or activity will be provided to the complainant; and
- If sexual harassment is found to have occurred, the corrective measures the district deems necessary, including assurance that the district will take steps to prevent

- recurrence and remedy its effects on the complainant and others, if appropriate; and
- Notice of the parties' right to appeal to the school board and the necessary filing information.

The superintendent's or designee's response will be provided in a language the complainant can understand and may require language assistance for complainants with limited English proficiency in accordance with **Title VI** of the Civil Rights Act of 1964.

At the time the district responds to the parties, the district must send a copy of the response to the office of the superintendent of public instruction.

Any corrective measures deemed necessary will be instituted as quickly as possible, but in no event more than thirty (30) days after the superintendent's mailing of a written response, unless the accused is appealing the imposition of discipline and the district is barred by due process considerations or a lawful order from imposing the discipline until the appeal process is concluded. Staff may also pursue complaints through the appropriate collective bargaining agreement process or anti-discrimination policy.

Level Two - Appeal to a District-appointed hearing officer

Notice of Appeal and Hearing

- If the complainant or respondent(s) disagrees with the superintendent's or designee's written decision, the disagreeing party may appeal the decision by filing a written notice of appeal with the superintendent within ten (10) calendar days following the date upon which the complainant received the response.
- If the complaint involves a named respondent, the District will implement appeal procedures equally for both parties

and provide written notice to the other party when an appeal is filed.

- The District will ensure that the decision-maker for the appeal is not the same decision-maker who reached the determination regarding responsibility or dismissal, the investigator, or the **Title IX** Coordinator;
- The District will ensure that the decision-maker for the appeal has received the training required for decision-makers as required by this procedure.
- The board will ensure that a hearing commences by the twentieth (20th) calendar day following the filing of the written notice of appeal, unless otherwise agreed to by the complainant and the superintendent or for good cause.
- Both parties will be allowed a reasonable, equal opportunity to submit a written statement in support of or challenging the outcome of the initial determination.

Decision on Appeal

- Unless otherwise agreed to by the complainant, the decision maker on appeal will render a written decision within thirty (30) calendar days following the filing of the notice of appeal and provide the complainant with a copy of the decision.
- The written decision will describe the result of the appeal and the rationale for the result.
- The decision will include notice of the complainant's right to appeal to the Superintendent of Public Instruction and will identify where and to whom the appeal must be filed. The district will send a copy of the appeal decision to the office of the superintendent of public instruction.
- The decision will be provided in a language that the complainant can understand, which may require language assistance for complainants with limited English proficiency in accordance with Title VI of the Civil Rights Act.

Level Three - Complaint to the Superintendent of Public Instruction

Filing of Complaint

- If a complainant disagrees with the decision of the board of directors, or if the district fails to comply with this procedure, the complainant may file a complaint with the superintendent of public instruction.
- A complaint must be received by the Superintendent of Public Instruction on or before the twentieth (20) calendar day following the date upon which the complainant received written notice of the board of directors' decision, unless the Superintendent of Public Instruction grants an extension for good cause. Complaints may be submitted by mail, fax, electronic mail, or hand delivery.
- A complaint must be in writing and include: 1) A description of the specific acts, conditions or circumstances alleged to violate applicable anti-sexual harassment laws; 2) The name and contact information, including address, of the complainant; 3) The name and address of the district subject to the complaint; 4) A copy of the district's complaint and appeal decision, if any; and 5) A proposed resolution of the complaint or relief requested. If the allegations regard a specific student, the complaint must also include the name and address of the student, or in the case of a homeless child or youth, contact information.

Investigation, Determination and Corrective Action

- Upon receipt of a complaint, the Office of the Superintendent of Public Instruction may initiate an investigation, which may include conducting an independent on-site review. OSPI may also investigate additional issues related to the complaint that were not included in the initial complaint or appeal to the superintendent or board.

- Following the investigation, OSPI will make an independent determination as to whether the District has failed to comply with RCW 28A.642.010 or Chapter 392-190, WAC and will issue a written decision to the complainant and the District that addresses each allegation in the complaint and any other noncompliance issues it has identified. The written decision will include corrective actions deemed necessary to correct noncompliance and documentation the District must provide to demonstrate that corrective action has been completed.
- All corrective actions must be completed within the timelines established by OSPI in the written decision unless OSPI grants an extension. If timely compliance is not achieved, OSPI may take action including but not limited to referring the District to appropriate state or federal agencies empowered to order compliance.

A complaint may be resolved at any time when, before the completion of the investigation, the District voluntarily agrees to resolve the complaint. OSPI may provide technical assistance and dispute resolution methods to resolve a complaint.

Level Four - Administrative Hearing, State Requirement

A complainant or school District that desires to appeal the written decision of the Office of the Superintendent of Public Instruction may file a written notice of appeal with OSPI within thirty (30) calendar days following the date of receipt of that office's written decision. OSPI will conduct a formal administrative hearing in conformance with the Administrative Procedures Act, Chapter 34.05, RCW.

Other Complaint Options

Office for Civil Rights (OCR), U.S. Department of Education
OCR enforces several federal civil rights laws, which prohibit discrimination in public schools on the basis of race, color,

national origin, sex, disability, and age. File complaints with OCR within 180 calendar days of the date of the alleged discrimination. 206-607-1600 | TDD: 1-800-877-8339 | OCR.Seattle@ed.gov | www.ed.gov/ocr

Washington State Human Rights Commission (WSHRC)
WSHRC enforces the Washington Law Against Discrimination (RCW 49.60), which prohibits discrimination in employment and in places of public accommodation, including schools. File complaints with WSHRC within six months of the date of the alleged discrimination.
1-800-233-3247 | TTY: 1-800-300-7525 | www.hum.wa.gov

Investigation Recordkeeping

The district will maintain, for a period of years consistent with Washington State Archive rules, records of all sexual harassment investigations.

The District will maintain, for a period of years consistent with Washington State Archive rules, records of each **Title IX** sexual harassment investigation, including any determination regarding responsibility and any audio or audiovisual recording or transcript; any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant; and any appeal from the result of a determination regarding responsibility.

The District will maintain, for a period of years consistent with Washington State Archive rules, records of any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment under **Title IX**.

Training and Orientation

A fixed component of all District orientation sessions for staff, students and regular volunteers will introduce the elements of this procedure and the corresponding policy. Staff will be provided information on recognizing and preventing sexual harassment. Staff will be fully informed of their responsibilities when on notice

of sexual harassment, of the formal complaint procedures, and their roles and responsibilities under the policy and procedure.

Certificated staff will be reminded of their legal responsibility to report suspected child abuse, and how that responsibility may be implicated by some allegations of sexual harassment. Regular volunteers will get the portions of this component of orientation relevant to their rights and responsibilities.

Students will be provided with age-appropriate information on the recognition and prevention of sexual harassment and their rights and responsibilities under this and other district policies and rules at student orientation sessions and on other appropriate occasions, which may include parents.

As part of the information on the recognition and prevention of sexual harassment staff, volunteers, students and parents will be informed that sexual harassment may include, but is not limited to:

- Demands for sexual favors in exchange for preferential treatment or something of value;
- Stating or implying that a person will lose something if he or she does not submit to a sexual request;
- Penalizing a person for refusing to submit to a sexual advance, or providing a benefit to someone who does;
- Making unwelcome, offensive or inappropriate sexually suggestive remarks comments, gestures, or jokes; or remarks of a sexual nature about a person's appearance, gender or conduct;
- Using derogatory sexual terms for a person;
- Standing too close, inappropriately touching, cornering or stalking a person; or
- Displaying offensive or inappropriate sexual illustrations on school property.

Adopted:
09/01/20

Revised:

10/25/21

12/16/22

LEGAL REFS.:

WAC 392-190-065

RCW 28A.640.020

20 U.S.C. 1681-1688

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Overseeing an Outside Investigation

by Don Austin

Before the Investigation Begins

1. **Who:** Select an investigator who has training or experience in the kind of investigation you are contemplating.
2. **Initial discussion with the investigator:**
 - a. **Scope:** Specify what the scope of the investigation is in writing. If counsel is involved in the situation, this is something that should be determined with counsel ahead of time before talking with the investigator. If the investigator through the course of the investigation finds more that needs investigation, s/he should phone you to discuss whether that additional matter is part of the investigation. Any expansion of the scope of the investigation should be in writing.
 - b. **Type of Investigation:** Identify the **controlling board policies** and procedures, providing the correct versions of them to the investigator.
 - i. Note that some investigations involve more than one board policy. For instance, Professional Boundary investigations fall under the umbrella of BP 5253 but BP 3207 applies. If the investigation involves current students, 3207P would be the appropriate procedure to follow.
 - c. Identify any **CBA requirements** that must be met and make sure the investigator has these.
 - d. Discuss with the investigator whether s/he is to reach and provide **factual conclusions**, which might include making **credibility determinations**, or whether the investigator is merely reporting in detail what each person interviewed has shared.
 - e. **Timeline:** Obtain a tentative timeline for when any interviews will take place.

¹ See chart below for index of WSSDA board policies commonly requiring investigations.

- f. **Witnesses:** Review the investigator's list of whom s/he will be interviewing and assist with suggestions for additional witnesses.
 - g. **Sexual misconduct and professional boundaries investigations:** When the investigation involves alleged sexual misconduct or violation of professional boundaries with students, make sure the investigator uses the **Professional Boundary Checklist** and knows how to use it in an investigation. (See checklist below.)
3. **Facilitate providing all documentation the investigator** should have before s/he begins to interview people. Keep a record of everything provided. (A folder in Outlook for the investigation would suffice.)

During the Investigation

4. Facilitate witness being available for interviews and getting parent permission to interview students.
5. Be alert that the employee(s) being investigated abide by any directives relating to the investigation, including non-retaliation.

After Investigation Interviews Are Completed

6. **Phone call before putting anything in writing:** Before the investigator puts anything in writing, have the person phone and discuss what they have found and determined. You should not attempt to change the investigator's mind, but make sure they have looked everywhere they need to look and that the tentative conclusions will translate into well supported conclusions in the final investigation report.
7. **Upon receipt of investigation report:**
 - a. Follow the pertinent board policy and Title IX, where applicable, concerning communicating findings to the complainant and the person who was the subject of the investigation.
 - b. Maintain sexual misconduct and professional boundaries investigations permanently due to Washington's open-ended statute of limitations for sexual abuse of minors. (RCW 4.16.340.2)

² A lawsuit may be brought within three years of *discovering* that the abuse occurred and *that a particular injury or condition was caused by the act*. Full realization might not happen for decades.

Appendix

WSSDA Model Board Policies and Procedures Requiring Investigations

1. BP 3205 & 3205P: Sexual Harassment (Title IX³)
2. BP 3207 & 3207P: Harassment, Intimidation, and Bullying
3. BP 3210 & 3210P: Nondiscrimination (student)
4. BP 3211 & 3211P: Transgender
5. BP 4220 & 4220P: Citizen Complaints
6. BP 5010 & 5010P: Nondiscrimination (employees)
7. BP 5011 & 5011P: Sexual Harassment (Title VII, employees)
8. BP 5253 & 5253P: Professional Boundaries⁴
9. BP 5270 & 5270P: Staff Complaints
10. BP 5271 & 5271P: Whistleblowers

Professional Boundaries Checklist

Taking an Undue Interest in a Particular Student:

1. Having a "special" friend or a "special relationship" with a particular student.
2. Favoring certain students by giving them special privileges.
3. Favoring certain students, inviting them to come to the classroom at non-class times.
4. Getting a particular student out of class to visit the teacher during the teacher's prep period.
5. Engaging in peer-like behavior with students including rough-housing.

Using Poor Judgment in Relation to a Particular Student:

6. Allowing a particular student to get away with inappropriate behavior.
7. Being alone with the student behind closed doors at school.
8. Giving gifts or money to a particular student.

³ As of 2022, BP 3205 has been criticized by DOJ as a Title IX policy.

⁴ BP 5352 investigations are also BP 3207 investigations following 3207P.

9. Being overly “touchy” with a certain students.
10. Touching students for no educational or health reason.
11. Giving students rides in the educator’s personal vehicle, especially alone.
12. Frequent electronic communication or phone contacts with a particular student.

Becoming Involved in the Student’s Private Life:

13. Talking to the student about the educator’s personal problems.
14. Talking to the student about the student’s personal problems to the extent that the adult becomes a confidant of the student when it is not the adult’s job role to do so.
15. Initiating or extending contact with students beyond the school day in a private or non-group setting.
16. Taking a particular student on personal outings, away from protective adults.
17. Using e-mail, text-messaging, instant messaging, or social networking, etc. to discuss personal topics or interests with students.

Not Respecting Normal Boundaries:

18. Invading the student’s physical privacy (e.g., walking in on the student in the bathroom).
19. Inviting students to the educator’s home.
20. Visiting the student’s home.
21. Asking the student to keep certain things secret from his/her parents.

Sexually Related Conduct:

22. Engaging in sex talk with students (sexual innuendo, sexual banter, or sexual jokes).
23. Talking with a student about sexual topics that are not related to specific curriculum.
24. Showing pornography to the student.
25. Asking for or sending nude pictures (sexting).
26. Hugging, kissing, or other affectionate physical contact with a student.

The U.S. Equal Employment Opportunity Commission [Excerpt]

		Number
EEOC	NOTICE	915.002
		Date
		6/18/99

* * *

Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

Possible Inappropriate Boundary Invasions

See BP 5253 and 5253P

Taking an Undue Interest in a Particular Student:

1. Having a "special" friend or a "special relationship" with a particular student.
2. Favoring certain students by giving them special privileges.
3. Favoring certain students, inviting them to come to the classroom at non-class times.
4. Getting a particular student out of class to visit the teacher during the teacher's prep period.
5. Engaging in peer-like behavior with students including rough-housing.

Using Poor Judgment in Relation to a Particular Student:

6. Allowing a particular student to get away with inappropriate behavior.
7. Being alone with the student behind closed doors at school.
8. Giving gifts or money to a particular student.
9. Being overly "touchy" with a certain students.
10. Touching students for no educational or health reason.
11. Giving students rides in the educator's personal vehicle, especially alone.
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15. Initiating or extending contact with students beyond the school day in a private or non-group setting.
16. Taking a particular student on personal outings, away from protective adults.
17. Using e-mail, text-messaging, instant messaging, or social networking, etc. to discuss personal topics or interests with students.

Not Respecting Normal Boundaries:

18. Invading the student's physical privacy (e.g., walking in on the student in the bathroom).
19. Inviting students to the educator's home.
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24. Showing pornography to the student.
25. Asking for or sending nude pictures (sexting).
26. Hugging, kissing, or other affectionate physical contact with a student.

Problems to avoid in school district investigations:

Mercer Island Sch. Dist. v. OSPI, 186 Wn.App. 939 (2015).

DFA's preface: The portion of this case provided below is of the Court's discussion of the inadequacies of a school based informal investigation and the inadequacies of an outside investigation done by an attorney.

In this case OSPI had investigated a parent racial discrimination complaint, finding that the site administration and outside counsel had not conducted a fair and complete investigation.

The Court found that the school district's response to the allegations of discrimination had been **unreasonable** and **deliberately indifferent**.

* * *

[This excerpt from the case begins 39 pages into the decision at p. 978, focusing on the problems with the investigation]

¶ 89 We begin with the District's informal investigations. As an initial matter, the District failed to conform in a timely manner to both the mandates of the EEOL [Washington's Equal Education Opportunity Law] and the OSPI's May 2011 regulations. Specifically, it neglected both to amend its Nondiscrimination Policy and Procedure to extend coverage to racial discrimination and to appoint a nondiscrimination compliance coordinator. As a result of the District's failure to amend its Nondiscrimination Policy and Procedure, the Parents were not aware of their rights at the time that they filed their initial complaint on behalf of B.W. As a result of the District's failure to appoint a compliance coordinator, the coprincipals were not informed of the District's obligations under the EEOL and the OSPI's May 2011 regulations.

¶ 90 The coprincipals conducted inadequate investigations. While the District's failure to appoint a compliance coordinator may, perhaps, be partially to blame, both Budzius and Mr. Miller failed to follow the procedure under which they were purporting to investigate. For example, following the first incident, Budzius interviewed only two of the four students working together on the same group project. While Mr. Miller did manage to interview all of the students involved in the second incident, he failed to consider the two incidents in concert. Thus, as found by ALJ *978 Mentzer, both failed to meet the minimum investigative requirements imposed by the District's procedure on "Prohibition of Harassment, Intimidation, and Bullying."

¶ 91 To make matters worse, the reasons Budzius provided for not interviewing two of the four students were found by the ALJ to be not credible. Budzius stated that she believed that Student A was telling the truth and had no reason to lie, whereas she believed that B.W., who has Asperger’s syndrome and who, according to Budzius, had difficulty reading social cues, heard the word “stupid” but added “Black” in his own mind. However, Budzius could not explain how B.W.’s condition would affect his ability to hear a racial epithet and accurately report what was said.

¶ 92 In addition, Mr. Miller’s brief interviews failed to reveal critical facts that Ms. Miller [outside investigator] later uncovered—specifically, that the group had been discussing Mexico, which, as found by the ALJ, contextualized the remark made by B.W. to Student B, and gave further credence to B.W.’s allegations. Even more troubling is the fact that Mr. Miller continued to informally investigate the incident, despite the fact that R.W. had told him she wished to file a formal complaint, which would have been handled by the District, as opposed to the school. Although he continued with his informal investigation, Mr. Miller failed, ultimately, to include in his report any mention of the Moment Essay. The Moment Essay undeniably constituted corroborating evidence of B.W.’s allegations. Yet, Mr. Miller did not address it in his report and the school’s staff proceeded to shield it from the Parents until its existence was disclosed by Ms. Miller.

¶ 93 As with the informal investigations, the formal investigation was fraught with inadequacies. Ms. Miller did not ask B.W. about the two disturbing essays he had written; she did not ask Brousseau, Budzius, or Mr. Miller to explain why they had withheld the existence of the essays from the Parents; in fact, she made no mention of *979 B.W.’s two disturbing essays in her report;²⁹ she did not account for the conspicuous discrepancy between B.W.’s grades in other classes and his grades in the class he shared with his harasser; and she did not address the ostensible connection between the discussion of Mexico and Mexican food and the racially charged comments between Students A and B and B.W.

²⁹ She did append the essays to her report. Upon reading the report, the Parents learned, for the first time, of the existence of the second essay.

**945 ¶ 94 In addition to its failure to conduct an adequate investigation, the District failed to meaningfully and appropriately discipline Student A. In fact, it appears that the only discipline Student A received as a consequence of his acts of racial harassment was a reminder from Brousseau not to use race as the basis for angry comments and a request that he sign an “anti-harassment contract.”³⁰ Whether this can be characterized as “discipline” is debatable; whether the response was proportional to the harassment is not.

³⁰ The District suggests that it also disciplined Student A by suspending him for one day. The record rebuts this suggestion.

Student A was suspended as a consequence of his role in the crab apple incident.

¶ 95 Furthermore, the District refused to consider any scenario in which B.W. was not to blame for the conflict with Student A. As found by ALJ Mentzer, the District's staff believed that the conflict was due to B.W.'s social deficits. They were frustrated that, because B.W.'s Parents had withdrawn their consent to allow B.W. access to special education, they were unable to provide B.W. with assistance in overcoming his perceived social deficits. As a result, they refused to consider the possibility that B.W.'s claims of harassment could be legitimate, despite knowing that Student A had had a slew of serious behavior problems.

¶ 96 Considered together, these facts establish that the District's response to the harassment suffered by B.W. was clearly unreasonable. Thus, ALJ Mentzer did not err in concluding that the District was deliberately indifferent. *980 Yet, we must also consider whether the harassment was sufficiently severe, pervasive, and objectively offensive so that it can be said to have deprived B.W. of access to the educational opportunities or benefits provided by the school.

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