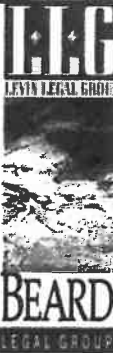


TITLE IX
SEXUAL HARASSMENT
AND THE NEW
REGULATIONS

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1

TODAY'S PRESENTERS




Michael Ira Levin Carl P. Beard

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DISCLAIMERS

- Although we have worked hard to ensure that the information in this training module is accurate, it does not constitute legal advice.
- We are not creating an attorney-client relationship through this training.
- The application of any of the rules to any particular fact pattern must be made by an attorney who is given all relevant facts.

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DISCLAIMERS


- There are exceptions to almost every rule!
- Training and recommendations are subject to change with time and the issuance of court decisions and administrative guidance.
- When we refer to Title IX and the Title IX regulations in this training, we are limiting our comments to the new sexual harassment requirements.
- Remember—Title IX applies to much more than sexual harassment!

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4

PRACTICAL TIPS



Throughout this training we will provide practical tips. When you see the stop sign, “really” pay attention—it will be on the test!


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5

TRAINING

The Regulations require that you receive training on specific topics. When you see the professor in a slide, that means that we will take a deeper dive into the required subject subsequently in the training.



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RECOMMENDATIONS

When we make a recommendation, you will see our cartoon lawyer on the slide.



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AGENDA FOR TODAY'S PROGRAM

Part I: The History Behind Sexual Harassment as a Legal Doctrine

Part II: A Deep Dive into the New Regulations

Part III: Integrating the New Requirements to Existing Legal Framework and Requirements



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UNDERSTANDING LEGAL CITATIONS

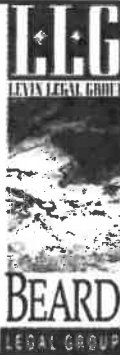
➤ **Statutes:**

- United States Code—20 U.S.C.A. §1401
- Purdon's Statutes—24 P.S. §1-101
- Pennsylvania Consolidated Statutes—24 Pa.C.S.A. §8101

➤ **Regulations:**

- Code of Federal Regulations—34 C.F.R., Part 106
- Pennsylvania Code—22 Pa. Code, Chapter 12

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UNDERSTANDING WORD USAGE

As used in this training, "school" means:

- School District;
 - Intermediate Unit;
 - Public Vocational-Technical school; and
 - Public charter and cyber charter school.
- Although the Title IX regulations apply to post secondary institutions, including community colleges, this training *does not!*

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UNDERSTANDING WORD USAGE

As used in this training, "law" or "applicable law" means applicable statutes, regulations and relevant case law interpreting the statutes and regulations.

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PENNSYLVANIA SCHOOL BOARDS ASSOCIATION ("PSBA")

Because virtually all school districts, Intermediate Units and Vocational-Technical Schools subscribe to the PSBA Policy Service, we have tailored this training to the recommended PSBA policy and attachments that were published by PSBA on Friday, July 31, 2020. We recommend that you review those publications.

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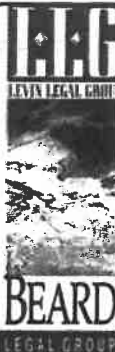


12

PART I

**THE HISTORY BEHIND SEXUAL HARASSMENT AS
A LEGAL CONCEPT AND BASIS FOR LEGAL
LIABILITY**

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**THE HISTORY OF SEXUAL HARASSMENT AND
THE LAW**

➤ Title VII of the Civil Rights Act of 1964:

➤ "It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, *or otherwise to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, *sex*, or national origin . . ." 42 U.S.C.A. §2000e-2 (Emphasis added)

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A SHORT HISTORY

➤ Title IX: enacted in 1972 as part of the Education Amendments of 1972.

➤ "No person in the United States shall, [1] *on the basis of sex*, [2] be [a] excluded from participation in, be [b] denied the benefits of, or be [c] subjected to discrimination under any education program or activity receiving Federal financial assistance, . . ." 20 U.S.C.A. § 1681 (Emphasis added)

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A SHORT HISTORY

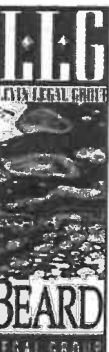
➤ Title VII—Applies only to employment discrimination; did not reach schools, colleges or universities in the capacity as protecting students;

➤ Title IX—Applies to "recipients of federal financial assistances," including

➤ Public schools;

➤ Colleges and Universities.

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A SHORT HISTORY—HOW DID "ON THE BASIS OF SEX" BECOME "SEXUAL HARASSMENT"?

The phrase "sexual harassment" was coined in 1975 by a group of feminist activists at Cornell University

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A SHORT HISTORY: HOW DID "DISCRIMINATION" BECOME "SEXUAL HARASSMENT"?

1975: New York Times Article: "Sexual harassment of women in their place of employment is extremely widespread. It is literally epidemic," said Lin Farley, director of the women's section of the Human Affairs Program at Cornell University. She listed the forms such harassment could take: Constant leering and ogling of a woman's body.; Continually brushing against a woman's body.; Forcing a woman to submit to squeezing or pinching.; Catching a woman alone for forced sexual intimacies.; Outright sexual propositions, backed by threat of losing a job."

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A SHORT HISTORY

- Neither Title VII nor Title IX said anything about "sexual harassment."
- 1976: The early cases: "In company with three of the four district courts that have considered the issue, *this Court holds that sexual harassment and sexually motivated assault do not constitute sex discrimination under Title VII. Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F.Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977)."

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A SHORT HISTORY

- 1975: First Set of Regulations Under Title IX:
- No mention of sexual harassment.
- No Title IX regulations until now have addressed sexual harassment.

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A SHORT HISTORY—QUID PRO QUO

This is not to say either that sexual harassment is never of concern under Title IX, or that a university may properly ignore the matter entirely. In plaintiff Price's case, for example, it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment . . . (cont'd on next slide)

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A SHORT HISTORY—QUID PRO QUO

When a complaint of such an incident is made, university inaction then does assume significance, for on refusing to investigate, the institution may sensibly be held responsible for condoning or ratifying the employee's invidiously discriminatory conduct. *Alexander v. Yale Univ.*, 459 F.Supp. 1, 4 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

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A SHORT HISTORY—FIRST REGULATIONS

April 11, 1980: EEOC published the Interim Guidelines on sexual harassment as an amendment to the Guidelines on Discrimination Because of Sex. 29 CFR Part 1604.11, 45 FR 25024. "This amendment will re-affirm that sexual harassment is an unlawful employment practice."

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A SHORT HISTORY—FIRST SUPREME COURT CASE

"Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a *hostile or abusive work environment*. As the Court of Appeals for the Eleventh Circuit wrote in *Henson v. Dundee*, 682 F.2d 897, 902 (1982):

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A SHORT HISTORY: FIRST SUPREME COURT CASE

'Sexual harassment which creates a *hostile or offensive environment* for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.' " *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57(1986).

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A SHORT HISTORY: MAJOR HOLDINGS

- Title IX applies to employment discrimination; not just student discrimination. *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979);
- Students can sue for money damages under Title IX. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992);

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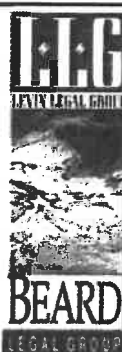


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A SHORT HISTORY: MAJOR HOLDINGS

- Same sex sexual harassment is actionable. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998);
- Title IX case will not lie by reason of teacher's sexual harassment of student in absence of *actual notice on part of school district*;

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A SHORT HISTORY: MAJOR HOLDINGS

A private right of action will not lie in absence of district's [1] *deliberate indifference* to teacher's conduct upon [2] *receipt of actual notice* thereof. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

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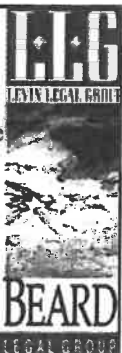


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A SHORT HISTORY: MAJOR HOLDINGS

A private damages action may lie against a school board under Title IX in cases of student-on-student harassment, but only where the funding recipient acts with [1] *deliberate indifference* and [2] *the harassment is so severe that it effectively bars the victim's access to an educational opportunity or benefit*. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

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A SHORT HISTORY: MAJOR HOLDINGS

- Title IX prohibits retaliation against those who complain of sex discrimination. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005);
- Title IX was not the exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights, and thus § 1983 suits based on the Equal Protection Clause were available in lawsuits alleging unconstitutional gender discrimination in schools. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009).

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ASHORT HISTORY: MAJOR HOLDINGS

An employer violates Title VII, which makes it unlawful to discriminate against an individual “because of” the individual’s sex, by ~~firing an individual~~ ^{sexually harassing an individual} for being homosexual or being a transgender person. *Bostock v. Clayton Cty., Georgia*, 140 S.Ct. 1731 (2020).

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PART II

THE NEW REGULATIONS: A DEEP DIVE INTO THE NEW REGULATIONS

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SEXUAL WRONGDOING VS. SEXUAL HARASSMENT

- Fundamental Premise #1: Not all sexualized conduct constitutes “sexual harassment.”
- Fundamental Premise #2: Sexualized conduct **must not** be called “sexual harassment” by school or school officials until the process has been completed and the decision-maker concludes the conduct is sexual harassment.
- We will use the phrase “sexual wrongdoing” to refer to sexualized misconduct that may or may not rise to the level of sexual harassment.

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THE NEW REGULATIONS

- Adopted: May 6, 2020
- Effective: August 14, 2020

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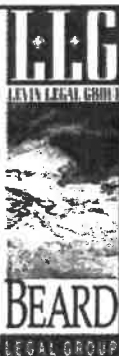


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THE NEW REGULATIONS: ROLES AND RESPONSIBILITIES

1. Title IX Coordinator;
2. Investigator;
3. Informal Facilitator;
4. First-level Decisionmaker;
5. Appeal Decisionmaker.

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AIDES TO UNDERSTANDING THESE SLIDES

- Defined terms will be in **blue font**;
- Action requirements will be in **red font**.

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THE NEW REGULATIONS: FUNDAMENTAL PREMISE

The regulations are premised on setting forth clear legal obligations that require schools to:

[1] promptly respond to individuals who are **alleged** to be victims of **sexual harassment** by **[2] offering supportive measures**;

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THE NEW REGULATIONS: FUNDAMENTAL PREMISE

[2] follow a fair grievance process to resolve **sexual harassment** allegations **[a] when a complainant** requests an investigation or **[b] a Title IX Coordinator** decides on the school's behalf that an investigation is necessary;

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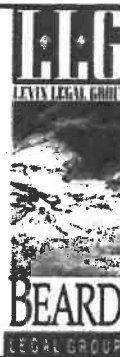
THE NEW REGULATIONS: FUNDAMENTAL PREMISE

and **[3] provide remedies** to victims of **sexual harassment**.

➤ Observations:

1. Conspicuously absent is reference to the alleged perpetrator—i.e., the **"respondent"**;
2. Remember, a witness may be a victim.

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"COMPLAINANT" DEFINED:

- **"Complainant** means an individual who is alleged to be the **victim** of conduct that could constitute sexual harassment."
- Can a witness to conduct that could constitute sexual harassment be a **complainant**?
- Yes.

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WHAT HAVE WE LEARNED?

➤ A **formal complaint** can only be made by:

1. The **Complainant**; or
2. A **Title IX Coordinator**.

➤ Why is this important?

➤ **No formal complaint**, the **grievance process** does not need to be followed.

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THE NEW REGULATIONS: THE BASIC REQUIREMENT

A School Entity with **actual knowledge** of **sexual harassment** in an education program or activity of the School Entity against a person in the United States, **must respond** promptly in a manner that is not **deliberately indifferent**.

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THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT

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

- (1) An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct [i.e., quid pro quo];

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THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT

(2) [1] **Unwelcome** conduct determined by a reasonable person to be [2] so **severe, pervasive, and objectively offensive** that [3] it effectively denies a person equal access to the school's education program or activity (i.e., "hostile environment"); or

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THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT

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

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THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT

"**Sexual assault**" means an offense classified as a **forcible or nonforcible** sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. 20 U.S.C.A. § 1092 (f)(6)(A)(v).

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THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT

➤ **Forcible:** Any sexual act directed against another person, without consent or where the victim is incapable of consent; includes:

- Forcible Rape;
- Forcible Sodomy;
- Sexual assault with an object; and/or
- Forcible fondling;

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THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT

Nonforcible: unlawful, nonforcible sexual intercourse includes:

- Incest; and
- Statutory rape.

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THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT


"Dating violence" means *violence* committed by a person--

(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

- The length of the relationship.
- The type of relationship.
- The frequency of interaction between the persons involved in the relationship. 34 U.S.C.A. § 12291.

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THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT

"Domestic violence" includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, . . ." 34 U.S.C.A. § 12291.

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THE NEW REGULATIONS: DEFINING SEXUAL HARASSMENT

"Stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to--

(A) fear for his or her safety or the safety of others; or

(B) suffer substantial emotional distress. 34 U.S.C.A. § 12291.

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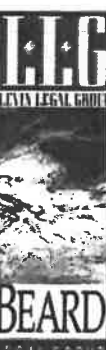
THE NEW REGULATIONS: ACTUAL KNOWLEDGE

"Actual knowledge" means:

- notice of **sexual harassment**; or
- notice of allegations of **sexual harassment**

➤ What's the difference between the two?

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THE NEW REGULATIONS: ACTUAL KNOWLEDGE

Notice to any of the following constitutes notice to the school:

- Title IX Coordinator;**
- Any official of the school who has authority to institute corrective measures on behalf of the school; or
- Any employee of an elementary and secondary school, including custodians, bus drivers, cafeteria workers, etc.*

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THE NEW REGULATIONS: FORMAL COMPLAINT

Formal complaint means:

- [1] a document [a] filed by a complainant or [b] signed by the Title IX Coordinator;
- [2] alleging sexual harassment against a respondent; and
- [3] requesting that the school investigate the allegation of sexual harassment.

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THE NEW REGULATIONS: FORMAL COMPLAINT

“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 School Entity with which the formal complaint is filed.”

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THE NEW REGULATIONS: FORMAL COMPLAINT

A **formal complaint** may be filed with the **Title IX Coordinator** [1] in person, [2] by mail, or [3] 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 school.

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THE NEW REGULATIONS: FORMAL COMPLAINT

[T]he 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 school) that contains the **complainant’s** physical or digital signature, or otherwise indicates that the **complainant** is the person filing the **formal complaint**.

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PRACTICAL TIPS



When there is a “**formal complaint**” do the following:

1. Notify school’s insurance broker of a possible claim; and
2. Institute “litigation hold procedures”
3. These actions may have to be taken even when there is no “**formal complaint**”

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THE NEW REGULATIONS: DEFINING SUPPORTIVE MEASURES

Supportive measures means [1] non-disciplinary, [2] non-punitive [3] individualized services offered [4] as appropriate, as reasonably available, and without fee or charge [5] to [A] the **complainant** or [B] the **respondent** before or after the filing of a **formal complaint** or where no **formal complaint** has been filed.

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THE NEW REGULATIONS: DEFINING SUPPORTIVE MEASURES

Supportive measures are designed [1] to restore or preserve equal access to the school’s education program or activity *without unreasonably burdening the other party*, including measures designed [2] to protect the safety of all parties or the school’s educational environment, or [3] **deter sexual harassment**.

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THE NEW REGULATIONS: DEFINING SUPPORTIVE MEASURES

Supportive measures may include [1] counseling, [2] extensions of deadlines or other course-related adjustments, [3] modifications of work or class schedules, [4] campus escort services, [5] mutual restrictions on contact between the parties, [6] changes in work . . . locations, [7] leaves of absence, [8] increased security and [9] monitoring of certain areas of the campus, and other similar measures.

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THE NEW REGULATIONS: DEFINING SUPPORTIVE MEASURES

The school must **maintain as confidential** any supportive measures provided to the **complainant or respondent**, to the extent that maintaining such confidentiality would not impair the ability of the school to provide the supportive measures.

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THE NEW REGULATIONS: DEFINING "DELIBERATELY INDIFFERENT"

A school is **deliberately indifferent** only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

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THE NEW REGULATIONS: RESPONDING TO SEXUAL WRONGDOING

With or without a formal complaint, school must do the following:

1. Promptly respond;
2. Title IX Coordinator must promptly contact complainant;
3. Must not be "deliberately indifferent";
4. Must treat complainant and respondents equitably by offering supportive measures to complainant;
5. Must follow grievance process when formal complaint is filed.

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THE NEW REGULATIONS: CONTACTING THE COMPLAINANT

The Title IX Coordinator must promptly contact the complainant to

- [1] discuss the availability of supportive measures,
- [2] consider the complainant's wishes with respect to supportive measures,
- [3] inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
- [4] explain to the complainant the process for filing a formal complaint.

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THE NEW REGULATIONS: AUTHORIZED ACTIONS

"Emergency Removal": This is allowed: "provided that the [school]

- [1] undertakes an individualized safety and risk analysis,
- [2] 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
- [3] provides the respondent with notice and an opportunity to challenge the decision *immediately* following the removal."

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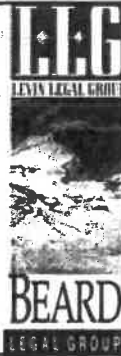


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THE NEW REGULATIONS: ADMINISTRATIVE LEAVE

School may place a “non-student” employee on administrative leave during the pendency of the grievance process.

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THE NEW REGULATIONS: RESPONSE TO FORMAL COMPLAINT

In response to a **formal complaint**, a school must follow a **grievance process** that complies with § 106.45.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS

- A school'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. §106.45(a).
- This requires meticulous professionalism, no threats, no rolling of the eyes, no patronizing behaviors.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS

Treat complainants and respondents equitably by:

- [1] providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by
- [2] 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.

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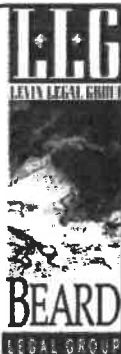


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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—REMEDIES

1. Remedies must be designed to restore or preserve equal access to the school's education program or activity;
2. Remedies may include **supportive measures**;
3. Remedies need not be [a] non-disciplinary, [b] non-punitive and [c] need not avoid burdening the respondent.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—OBJECTIVE EVALUATION

Requires:

- an [1] objective evaluation of all relevant evidence including both [a] inculpatory and [b] exculpatory evidence; and
- that [2] credibility determinations may not be based on a person's status as a [a] complainant, [b] respondent, or [c] witness.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—CONFLICT OF INTEREST

Requires that any individual designated by a school as a **Title IX Coordinator**, investigator, decision-maker, or a facilitator, not have a conflict of interest or bias for or against **complainants** or **respondents** generally or an individual **complainant** or **respondent**.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—TRAINING

➤The school **must ensure** that [1] **Title IX Coordinators**, [2] investigators, [3] decision-makers, and [4] facilitators, **receive training** on:

- [A] the definition of **sexual harassment**,
- [B] the scope of the school's education program or activity,
- [C] how to conduct an investigation and
- [D] the grievance process, including
 - [1] hearings,
 - [2] appeals, and
 - [3] informal resolution processes, and
 - [4] how to serve impartially, . . .

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—TRAINING

[E] Training to serve impartially, including by [1] avoiding prejudgment of the facts at issue, [2] conflicts of interest, and bias.

[F] A School **must ensure** that decision-makers receive training on:

- [1] any technology to be used at a live hearing; and on
- [2] issues of relevance of questions and evidence, including [i] 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.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATIVE REPORT

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

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—TRAINING MATERIALS

Any materials used to train **Title IX Coordinators**, investigators, decision-makers, and facilitators must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—PRESUMPTION OF INNOCENCE

[The grievance process **must**] **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.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—PROMPT TIME FRAMES

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 school 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.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS

[The process may allow temporary delays] with [1] **written notice** to the complainant and the respondent of the delay or extension and [2] the reasons for the action. Good cause may include considerations such as the [A] absence of a party, [B] a party's advisor, or [C] a witness; [D] concurrent law enforcement activity; or [E] the need for language assistance or accommodation of disabilities.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—DISCIPLINARY SANCTIONS

Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the school may implement following any determination of responsibility.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—BURDEN OF PROOF

[1] State whether the standard of evidence to be used to determine responsibility is the [a] *preponderance of the evidence* standard or the [b] *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.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS

- Include the procedures and permissible bases for the **complainant** and **respondent** to appeal.
- Describe the range of **supportive measures** available to **complainants** and **respondents**.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS

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

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—NOTICE OF ALLEGATIONS

Upon receipt of a “formal complaint,” School **must provide the following written notice to the complaint and respondent(s)** who are known:

1. Notice of grievance process;
2. Notice of informal resolution process;
3. Notice of the allegations potentially constituting sexual harassment “including sufficient details known at the time.”

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—NOTICE OF ALLEGATIONS

“Sufficient details” include:

1. The identities of the parties involved in the incident, if known,
2. the conduct allegedly constituting sexual harassment,
3. the date, and
4. location of the alleged incident, if known.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—NOTICE OF ALLEGATIONS

The written notice **must include** a statement that [1] the **respondent** is presumed not responsible for the alleged conduct and [2] that a determination regarding responsibility is made at the conclusion of the grievance process.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—NOTICE OF ALLEGATIONS

The written notice **must inform** the parties that:

1. they may have an advisor of their choice, who may be, but is not required to be, an attorney, and
2. they may inspect and review evidence.

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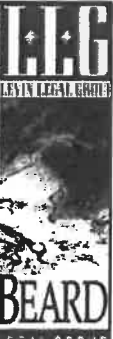


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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—NOTICE OF ALLEGATIONS

The written notice **must inform** the parties of any provision in the school’s **code of conduct** that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—AMENDED NOTICE OF ALLEGATIONS

If, in the course of an investigation, the school decides to investigate allegations about the **complainant** or **respondent** that are not included in the original notice, the school **must provide** notice of the additional allegations to the parties whose identities are known.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—DISMISSAL OF COMPLAINT

Complaint must be dismissed:

1. if the conduct alleged in the formal complaint would not constitute **sexual harassment** even if proved;
2. did not occur in the school's education program or activity, or
3. did not occur against a person in the United States; but-----

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—DISMISSAL OF COMPLAINT

Dismissal of a formal complaint does not preclude action under another provision of the school's code of conduct.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—PERMISSIVE DISMISSAL

A complaint may be dismissed if:

1. a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
2. the respondent is no longer enrolled or employed by the school; or
3. Specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS

Upon a dismissal, the school **must** [1] promptly send [a] written notice of the dismissal and [b] reason(s) therefor [2] simultaneously to the parties.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION

1. The burden of proof and burden of gathering evidence rests on the school.
2. The school cannot use a party's medical records developed for treatment purposes without consent of party, or party's parent if party is under 18.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION

- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
- Do not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION

➤ 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;

➤ However, the School Entity 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;

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION

Provide written notice to a party whose participation is invited or expected 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;

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION

Provide both parties an *equal opportunity to inspect and review any evidence obtained as part of the investigation* that is [1] directly related to the allegations raised in a formal complaint, including the [2] evidence upon which the School Entity does not intend to rely and [3] inculpatory or [4] exculpatory evidence whether obtained from a party or other source, *so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.*

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION

1. Prior to completion of the investigative report, the school **must send** to [1] each party and [2] the party's advisor, if any, [A] the evidence subject to inspection and review [B] in an electronic format or a hard copy.
2. The parties must have at least 10 days to submit a written response,
3. The investigator **must consider** the response(s) prior to completion of the investigative report.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE INVESTIGATION—EVIDENCE

The School Entity **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.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—INVESTIGATION—REPORT

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

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—PROCEDURES AFTER THE REPORT

After the School Entity has sent the investigative report to the parties *and before reaching a determination regarding responsibility*,

1. 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,
2. provide each party with the answers, and allow for additional, limited follow-up questions from each party.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—FOLLOW UP QUESTIONS

➤ 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 [1] to prove that someone other than the respondent committed the conduct alleged by the complainant, or [2] if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

➤ The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE WRITTEN DETERMINATION

- A written determination must be issued after the investigative report is finalized
- Written determination must be by the "decision-maker"
 - Decision-maker and "due process"
- Decision-maker may not be the Title IX Coordinator or the Investigator.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE WRITTEN DETERMINATION

Must include:

1. Allegations potentially constituting sexual harassment;
2. Description of the procedural steps from receipt of formal complaint to written determination, including:
 - a) Notifications to parties
 - b) Interviews
 - c) Site visits
 - d) Methods used to gather evidence
 - e) Hearings held.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE WRITTEN DETERMINATION

Must include:

3. Findings of fact supporting determination;
4. Conclusions regarding the application of Code of Conduct to facts;
5. The rationale for each allegation, including determination of responsibility disciplinary sanctions and whether remedies will be provided to victim to restore or preserve equal access;

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE WRITTEN DETERMINATION

Must include:

6. Procedures for appeal;
 7. Timeline for appeal;
 8. Bases for appeal by complainant and respondent.
- The Written Determination must be provided to the parties simultaneously.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE APPEAL

School Entity **must** offer both parties an appeal from:

1. A determination regarding responsibility;
2. Dismissal of a formal complaint or any allegation in a formal complaint.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—BASES OF APPEAL

The following bases for an appeal are required:

1. Procedural irregularity that affected the outcome of the matter.
2. New evidence that was not reasonably available at the time the determination.
3. 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 parties specifically.

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—APPEAL

When an appeal is filed, school **must**:

1. Notify the other party in writing and implement appeal procedures equally for both parties;
2. Assign a new decision-maker;
3. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

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THE NEW REGULATIONS: THE GRIEVANCE PROCESS—THE APPEAL

When an appeal is filed, school **must**:

4. Issue a written decision describing the result of the appeal and the rationale for the result;
5. Provide the written decision simultaneously to both parties.

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THE NEW REGULATIONS: RECORDKEEPING

Must maintain for minimum of 7 years the following:

1. Each sexual harassment investigation, including
 - a) Determinations;
 - b) Recordings and transcripts;
 - c) Disciplinary sanctions;
 - d) Remedies;
 - e) Appeals;

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THE NEW REGULATIONS: RECORDKEEPING

Must maintain for minimum of 7 years the following:

2. All materials used to train Title IX Coordinators; investigators; decision-makers and any person who facilitates an informal resolution process

➤ School entities **must** make these training materials publicly available on their websites

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THE NEW REGULATIONS: RECORDKEEPING

3. For each response to known sexual harassment, school must create records of actions, including supporting measures
 - a) Basis for conclusion that response was not deliberately indifferent
 - b) Measures designed to restore and preserve equal access
 - c) Reasons why complainant was not provided with supportive measures.

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THE NEW REGULATIONS: INFORMAL RESOLUTION-PROHIBITIONS

- Schools cannot require anyone to waive the minimum rights under the regulations.
- Schools may not require any party to participate in informal resolution process.
- Schools may not offer an informal resolution process unless a formal complaint is filed.
- Informal resolution not allowable when an employee allegedly harassed a student

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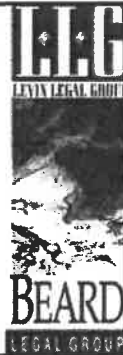


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THE NEW REGULATIONS: PRECONDITIONS TO INFORMAL RESOLUTION PROCESS

1. A formal complaint has been filed;
2. No determination of responsibility has been filed;
3. Parties have been provided with a written notice stating:
 - a) The allegations
 - b) The requirements of the informal resolution process, including when it precludes resumption of formal complaint process;

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THE NEW REGULATIONS: PRECONDITIONS TO INFORMAL RESOLUTION PROCESS

4. Obtains the parties' voluntary, written consent to the informal resolution process.
- At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process.

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THE NEW REGULATIONS: CONFIDENTIALITY

Schools must keep confidential the following:

1. identity of any individual who has made a report or complaint of sex discrimination,
2. any complainant,
3. any individual who has been reported to be the perpetrator,
4. any respondent, and
5. any witness.

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THE NEW REGULATIONS: EXCEPTIONS TO CONFIDENTIALITY

Disclosure can be made under the following circumstances:

1. As permitted by the FERPA;
2. As required by law; and
3. To carry out the purposes of 34 CFR, Part 106, including conducting an investigation, hearing, or judicial proceeding.

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THE NEW REGULATIONS: RETALIATION PROHIBITED—GENERALLY

No school 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 the new Title IX Regulations.

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THE NEW REGULATIONS: RETALIATION PROHIBITED—SPECIFIC PROHIBITIONS

Schools may not retaliate against an individual who:

1. Made a report or complaint;
2. Testified;
3. Assisted or participated in an investigation, proceeding or hearing;
4. Refused to participate in an investigation, proceeding or hearing under the Regulations.

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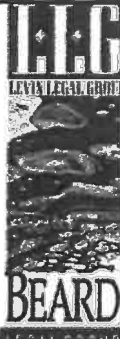


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Part 3:

Applying the New Requirement to the Existing School Environment

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TO-DO LIST—FOR BOARD

- ☐ Adopt Policy;
- ☐ Adopt Motion superseding all policies, codes of conduct or AR's inconsistent with Title IX or new Policy;
- ☐ Designate (or Re-designate) Title IX Coordinator(s); and
- ☐ Amend Code of Student Conduct.

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TO DO LIST —FOR ADMINISTRATION

- ☐ Create and adopt necessary AR's
- ☐ Designate:
 - ☐ Investigators;
 - ☐ Facilitators;
 - ☐ First-level decision-makers; and
 - ☐ Appeal-level decision-makers;
- ☐ Create list of duties to include in job descriptions of the foregoing personnel;

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TO DO LIST —FOR ADMINISTRATION

- ☐ Review current governing documents and remove inconsistencies with Title IX Requirements;
- ☐ Make sure everyone knows the rules through:
 - ☐ Posting;
 - ☐ Distribution;
 - ☐ Include policy in student and employee handbooks; and
 - ☐ Training;

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TO DO LIST –FOR ADMINISTRATION**❑ Create templates for:**

- ❑ Incident report;
- ❑ Intake form;
- ❑ Notices;
- ❑ Formal complaint form;
- ❑ Notice to Complainant;
- ❑ Notice to Respondent;
- ❑ Notice to witnesses;

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TO DO LIST –FOR ADMINISTRATION**Templates, cont'd:**

- ❑ Notice when delay or extension is necessary;
- ❑ The investigative report;
- ❑ Answer form for questions asked by party(ies);
- ❑ Explanations for excluding response to any questions;
- ❑ Written Determination and notices;

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TO DO LIST –FOR ADMINISTRATION**Templates, cont'd:**

- ❑ Appeal form;
- ❑ Notice of filing of appeal form;
- ❑ Notice to parties of procedure and rights on appeal;
- ❑ Form for Appeal Decision; and
- ❑ Chain of Custody form.

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TO DO LIST –FOR ADMINISTRATION

- ❑ Create the following services:
 - ❑ supportive services; and
 - ❑ informal resolution processes;
- ❑ Write and adopt an extensive Code of Employee Conduct or amend existing Code of Employee Conduct;
- ❑ Create a training program;

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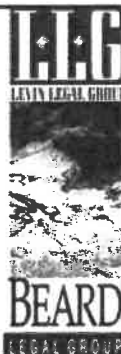


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TO DO LIST –FOR ADMINISTRATION

- ❑ Establish process to train all new Coordinators, Investigators, Facilitators and Decisionmakers as they assume that role;
- ❑ Create effective and secure record keeping system that meets regulatory requirements;

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TO DO LIST –FOR ADMINISTRATION

- ❑ Make all required postings on website:
 - ❑ Title IX Coordinator(s) name and contact information;
 - ❑ Process to file complaint or report sexual harassment;
 - ❑ Anti-discrimination/anti-harassment Policy; and
 - ❑ All training materials.

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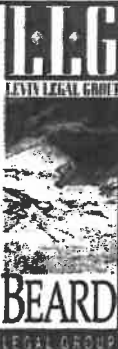


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**TO DO LIST –FOR ADMINISTRATION;
ADMINISTRATIVE REGULATIONS**

The authority for Administrative Regulations (“AR’s”) is both implied in law and expressly authorized in Policy 000 if your school subscribes to the PSBA Policy Service.

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TO DO LIST –ADMINISTRATIVE REGULATIONS

➤ Policy 000 provides:

“The policies of the Board shall consist of the policies and procedures adopted by the Board and contained in the Policy Manual, and such other separate documents approved by the Board that are expressly incorporated by reference in particular policies and declared to constitute Board policy, such as the Code of Student Conduct.

Administrative regulations are not part of Board policy and may be altered by the administration without Board action.
Administrative regulations may not conflict with Board policy or with applicable law.”

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TO DO LIST –FOR ADMINISTRATION

- ❑ Two of the recommended AR’s are:
 - ❑ a detailed “Complaint Procedure”; and
 - ❑ a detailed “Grievance Process.
- Both should be prepared with counsel;
- PSBA has provided samples as “Attachments” to the recommended Policy


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**INTEGRATING THE TITLE IX
PROCEDURES INTO THE
SCHOOL’S EXISTING
PROCEDURES**

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WHO SHOULD FILL THE REQUIRED ROLES?

Title IX Coordinator:

- Remember, at least one is required, several can be appointed
- HR Director; Director of Pupil Services; Athletic Director

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WHO SHOULD FILL THE REQUIRED ROLES?

Investigators:

- For student matters—principals
- For employee matters—HR Office or supervisors

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WHO SHOULD FILL THE REQUIRED ROLES?

Decisionmakers:

First level: someone from HR or Pupil Services

Second level: Superintendent, Assistant Superintendent, someone else from HR or Pupil Services

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WHO SHOULD FILL THE REQUIRED ROLES?

Informal Facilitator:

➤ Someone from HR or Pupil Services

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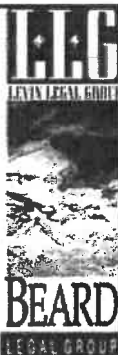


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ONE PUBLIC SCHOOL, TWO SYSTEMS

- System 1: Everything that does not come within the scope of Title IX
- System 2: Everything that comes within the scope of Title IX
- They are separate systems that run on separate tracks, but (1) sometimes the tracks intersect; and (2) sometimes a matter will change tracks

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ONE PUBLIC SCHOOL, TWO SYSTEMS

"The obligation to comply with [the Regulations] is not obviated or alleviated by any State or local law." 34 C.F.R. §106.6(h).

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ONE PUBLIC SCHOOL, TWO SYSTEMS

Comments: "Recipients may continue to address harassing conduct that does not meet the § 106.30 definition of sexual harassment, as acknowledged by the Department's change to §106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, **does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient's own code of conduct.**"

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ONE PUBLIC SCHOOL, TWO SYSTEMS

Comments: "Nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment *occurring outside the recipient's education program or activity*, or occurring against a person who is not located in the United States." (Emphasis added)

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CODE OF STUDENT CONDUCT

"(c) Each governing board shall adopt a code of student conduct that includes policies governing student discipline and a listing of students' rights and responsibilities as outlined in this chapter. This conduct code shall be published and distributed to students and parents or guardians. Copies of the code shall also be available in each school library." 22 Pa. Code, §12.3(c).

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CODE OF EMPLOYEE CONDUCT

"The Board directs that all district employees **shall be informed of conduct that is required and is prohibited during work hours** and the disciplinary actions that may be applied for violation of Board policies, administrative regulations, rules and procedures." Policy 317.

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THE NEW REGULATIONS: EXCEPTIONS TO RETALIATION

1. The exercise of First Amendment rights does not constitute retaliation;
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;
3. But, 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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REFERENCES TO "CODE OF CONDUCT" IN NEW REGULATIONS

§106.45(b)(2): The notice of allegations **must inform** the parties of any provision in school's "**code of conduct**" that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

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REFERENCES TO "CODE OF CONDUCT" IN NEW REGULATIONS

§106.45(b)(3): 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 [school] **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.

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REFERENCES TO "CODE OF CONDUCT" IN NEW REGULATIONS

§106.45(b)(7)(D): the written determination **must include** "Conclusions regarding the application of the [school's] **code of conduct** to the facts . . ."

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CODES OF CONDUCT—THE BOTTOM LINE

- Public School Entities Need a Code of Employee Conduct as well as a Code of Student Conduct
- The Codes of Conduct must contain provisions that incorporate the new rules and standards

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THE INVESTIGATION; INVESTIGATIVE INTERVIEWS

- Select the investigator
- The Investigator plans investigation process
- The Investigator determines whether and how School Attorney will be involved
- The Investigator ensures proper notices given to complainant, respondent and witnesses

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THE INVESTIGATION; INVESTIGATIVE PLAN

Investigators are encouraged to have a **flexible** plan that can be and is changed as warranted, identifying:

- witness list
- order of interviews
- topics to cover for each witness (be prepared to change and supplement—**this is different than interviewing for job applicants—you are not to ask the same questions of each witness!**)

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THE INVESTIGATION; INVESTIGATIVE PLAN

Investigative plan, cont'd:

- list of physical evidence needed, such as
 - ❖ records
 - ❖ reports
 - ❖ documents
 - ❖ calendars
 - ❖ measurements
 - ❖ etc.
- where will witness interviews take place, what confidentiality is needed?

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THE INVESTIGATION; INVESTIGATIVE PLAN

Investigative plan, cont'd:

- Interviewing member of a collective bargaining unit—remember employee's *Weingarten* rights!
 - ❖ Should union be contacted by school or by employee?
 - ❖ Generally by employee due to confidentiality rules

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THE INVESTIGATION; MISC. ISSUES

- Don't promise anything other than the promise to do a thorough and fair investigation
- Don't promise confidentiality
- Don't promise or offer "immunity"
- What do you do with an uncooperative witness who refuses to be interviewed or answer certain questions?
- Answer: Call counsel for District

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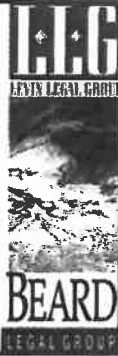


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THE INVESTIGATION; INVESTIGATIVE INTERVIEWS

- How will investigative interviews be conducted?
- Notes only?
- Audio recording?
- Court reporter?

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THE INVESTIGATION; NOTE TAKERS

- If Investigator uses a "note taker," be careful:
- give written directives to note taker to:
 - ❖ keep everything confidential;
 - ❖ Not to give copies of the notes to anyone, except Investigator, counsel for school, Title IX Coordinator or Superintendent/Executive Director
 - ❖ Not to destroy any handwritten or other notes used to prepare the final "record" of the interview

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THE INVESTIGATION

Investigations include more than interviews—they may involve:

- security video (make sure it is preserved and not automatically deleted);
- Records from the FOB system;
- Sign-in sheets;
- Time sheets for non-exempt employees;
- Applicable policies, code of conduct, collective bargaining agreement(s), individual contracts

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THE INVESTIGATION

Investigations include more than interviews—they may involve:

- Calls to prior employers;
- Personnel files;
- Investigation of social media;
- Forensic study of computers and electronic devices
- Etc., etc., etc.

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THE INVESTIGATION

Investigations include more than interviews—they may involve:

- Searches of lockers, bookbags, pockets, desks, etc.
 - ❖ Caution—Remember the 4th Amendment and State Board regulations

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THE INVESTIGATION

Investigations include more than interviews—they may involve:

- Confiscation and search of electronic device:
 - ❖ Use a chain of custody form
 - ❖ Have student or employee turn it off before you take it
 - ❖ Decide whether forensic IT consultant will be hired; is a forensic image needed
 - ❖ Decide who turns it on and searches it

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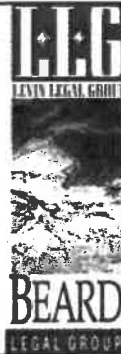


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THE INVESTIGATION; SCHOOL COUNSEL

- What is the role of counsel for the school?
- Counsel represents the entity—i.e., the School District, Intermediate Unit or Vocational-Technical School, **not**:
 - ❖ the superintendent;
 - ❖ the board; or
 - ❖ any administrator, investigator, decision-maker
- Counsel has many ethical duties as he/she is involved in an investigation or decision

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THE INVESTIGATION; SCHOOL COUNSEL

- There are different ways that counsel can be used:
 - ❖ as a “passive advisor” answering specific questions; to
 - ❖ hands-on planner and interviewer
- It is strongly recommended that counsel be and remain legal counsel performing only work within the scope of a legal counsel—this will preserve the attorney-client privilege
- Even as “hands-on” planner and interviewer, these are roles of a lawyer

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THE INVESTIGATION; PRESERVING COUNSEL'S ROLE AS AN ATTORNEY

- Counsel is not to make decisions, only offer recommendations and advice
- The school—be it the Title IX coordinator, the Investigator, the Facilitator or the Decisionmakers—makes the decisions based on counsel's advice
- Counsel should not be sending any of the notices or correspondence required by Title IX—those must come from the school on school letterhead

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THE INVESTIGATION; PRESERVING COUNSEL'S ROLE AS AN ATTORNEY

- If counsel will be present for an investigative interview and conduct the questioning, counsel should clearly identify his/her role, saying something like the following:
- “You may be wondering why the School District has an attorney here and what my role is. I have been asked to provide legal assistance to the School District to ensure that it is complying with applicable law and to ask appropriate questions in accordance with legal rules. I will not be making any of the decisions in this matter—the decisions will be made by the appropriate officials of the school, which may be based on legal advice that I provide. I represent the School District and not anyone else in these proceedings.”
- Make sure your lawyer says something like that “on the record”

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MUST BE IMPARTIAL AND FAIR

All investigations, decisions and actions **must be fair and impartial**

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MUST BE FAIR AND IMPARTIAL

- Don't prejudge the facts—wait until you hear all the evidence from all of the witnesses;
- presumes the non-responsibility of respondents until conclusion of the grievance process when a decision is made based on a fair assessment of evidence;
- Both parties must have equal opportunity to present witnesses and other evidence;

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MUST BE FAIR AND IMPARTIAL

- written notice of the allegations to both parties;
- does not restrict the parties from discussing the allegations or gathering evidence (What about confidentiality?);
- gives the parties equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney);

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SCHOOL ATTORNEY

Can school be represented by counsel at each step of the process?

- Yes!
- **Caveat:** Perhaps same lawyer should not be involved at appeal step who was involved in initial decision step?

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SCHOOL ATTORNEY

When are the times when it is important to have counsel involved?

- When the complainant, the respondent or any witness is represented by counsel;
- When there are unusual legal issues at play;
- When there are threats of litigation;
- When the alleged conduct is significant, or the possible disciplinary consequences are significant;

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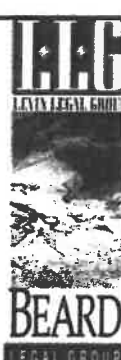


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EFFECT OF CRIMINAL PROCEEDINGS OR INVESTIGATION

- Does not relieve school of its duties under Title IX—you must investigate promptly, decide promptly, provide supportive measures promptly, and take appropriate action based on decision
- Decision of police is not determinative of whether there was unlawful harassment, unless there is guilty plea or verdict of an offense whose elements establish "sexual harassment"

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MUST BE FAIR AND IMPARTIAL

- Both parties have equal opportunity to review and respond to the evidence gathered during the investigation
- Cannot be biased in any way:
 - Due to nature of allegations;
 - Due to the identity of the parties or the witnesses;
 - Due to the status of the parties or the witnesses;

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MUST BE FAIR AND IMPARTIAL

- Must not rely upon or consider stereotypes or other irrelevant facts:
 - Manner of dress;
 - Most past disciplinary issues;
 - Occupation of parents;

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MUST BE FAIR AND IMPARTIAL

- Must not rely upon untrustworthy evidence;
- Uncorroborated hearsay
 - go to the source;
- Summaries or descriptions of a document;
 - get the document;

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MUST BE FAIR AND IMPARTIAL—RECUSAL

When must you “recuse” yourself?

- Knowledge of parties or witnesses—not a reason to recuse;
- Friendship, socializing out of school, membership in same clubs, organizations or religious congregations—may be a reason to recuse;
- Your belief that you cannot perform your function fairly and without bias to any party;
- You are named as the alleged Perpetrator;

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MUST BE FAIR AND IMPARTIAL—RECUSAL

When must you recuse yourself?

- Prior significant event with either party or a witness, such as:
- Unsatisfactory rating to teacher—probably not enough to require recusal;
- Prior suspension of a student—probably not enough to require recusal;
- Testified against a student or teacher—probably should recuse;

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MUST BE FAIR AND IMPARTIAL—RECUSAL

When must you recuse yourself?

- There's a picture of you and the respondent in a pool together in Los Vegas—you should recuse
- You are Facebook “friends” with a party or witness—you should recuse
- You posted 👎 (thumbs down) on social media—it depends whether you should recuse

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MUST BE FAIR AND IMPARTIAL—RECUSAL

When must you recuse yourself?

- You previously dated one of the parties—you must recuse yourself;
- You dated a witness—maybe you need to recuse yourself
- **Bottom line:** You must be alert to see the situations that may require your recusal and get the advice of counsel when necessary!

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MUST BE FAIR AND IMPARTIAL—RECUSAL

When must you recuse yourself?

- You are the Title IX Coordinator, and you signed the formal complaint—no
- You filed a report to Childline—no
- You notified law enforcement—no
- You wrote an op-ed for the Washington Post denouncing a party—yes

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PRACTICAL TIPS

STOP We recommend that notice be provided to the parties of their ability to raise the issue of bias and conflict and to state the reasons—it should be in writing.

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RULES OF EVIDENCE

- Formal legal rules of evidence do not apply
- Evidence should be heard that is reasonably probative of relevant facts

Note: Virtually every rule we will discuss today has exceptions!

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RULES OF EVIDENCE

Although formal or legal rules of evidence do not apply, there are several substantive laws that apply to the evidence gathering process

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RULES OF EVIDENCE—RELEVANCY

- "Relevant evidence" is that which tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference or presumption regarding a material
- A "material fact" is a fact that directly affects the outcome of the investigation

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RULES OF EVIDENCE—RELEVANCY

The kinds of evidence that would **usually** be relevant include the following:

- "Inculpatory" evidence—evidence which tends to prove that the alleged respondent is guilty;
- "Exculpatory" evidence—evidence which tends to prove that the alleged respondent is innocent;

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RULES OF EVIDENCE—RELEVANCY

Relevancy, cont'd:

- Who, what, where, when and why
- Alibi
- DNA, fiber, fingerprint,
- Electronic data; meta data
- Names of witnesses
- Motive

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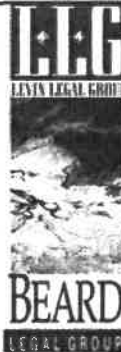
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RULES OF EVIDENCE—RELEVANCY**Relevancy, cont'd:**

- Admission
- Prior inconsistent statements;
- Lying about an important material fact;
- Etc., etc., etc.

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RULES OF EVIDENCE—PRIVILEGE

- Lawful privilege: legally recognized privilege may not be pierced
- Attorney-client confidential communications;
- Attorney Work Product;
- Medical Records

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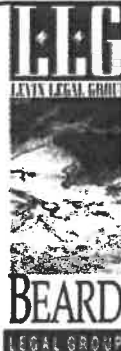
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RULES OF EVIDENCE—JUDICIAL CODE

"No guidance counselor, school nurse, school psychologist, or home and school visitor in the public schools . . . including any clerical worker of such schools . . . who, while in the course of his professional or clerical duties . . . shall be compelled or allowed:

- (1) without the consent of the student, if the student is 18 years of age or over; or
 - (2) without the consent of his parent or guardian, if the student is under the age of 18 years;
- to disclose such information in any legal proceeding, trial, or investigation before any government unit." 42 Pa.C.S.A. § 5945

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RULES OF EVIDENCE—JUDICIAL CODE

- (1) No sexual assault counselor or an interpreter translating the communication between a sexual assault counselor and a victim may, without the written *consent of the victim*, disclose the victim's confidential oral or written communications to the counselor nor consent to be examined in any court or criminal proceeding.
- (2) No coparticipant who is present during counseling may disclose a victim's confidential communication made during the counseling session nor consent to be examined in any civil or criminal proceeding without the written consent of the victim" 42 Pa.C.S.A. § 5945.1 (Emphasis added)

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RULES OF EVIDENCE—ABUSE OF FAMILY

"Unless a victim waives the privilege in a signed writing prior to testimony or disclosure, a domestic violence counselor/advocate or a coparticipant who is present during domestic violence counseling/advocacy shall not be competent nor permitted to testify or to otherwise disclose confidential communications made to or by the counselor/advocate by or to a victim. The privilege shall terminate upon the death of the victim.

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RULES OF EVIDENCE—ABUSE OF FAMILY

Neither the domestic violence counselor/advocate nor the victim shall waive the privilege of confidential communications by reporting facts of physical or sexual assault under Chapter 63 (relating to child protective services), a Federal or State mandatory reporting statute or a local mandatory reporting ordinance." 23 Pa.C.S.A. § 6116.

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RULES OF EVIDENCE

Neither husband nor wife shall be competent or permitted to testify to confidential communications unless privilege is waived. 42 Pa.C.S.A. § 5923.

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RULES OF EVIDENCE—OTHER PRIVILEGES

- Confidential communications to clergy;
- Confidential communications with human trafficking caseworkers;
- Confidential communications to news reporters;
- Educator misconduct complaints
- First Amendment Rights;

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RULES OF EVIDENCE—STUDENT RECORDS

- Student records are generally considered “confidential”
- FERPA, 20 U.S.C.A. § 1232g; 34 C.F.R., Part 99
- State Board Regulations, 22 Pa. Code, §§12.31, 12.32
- School Board Policy

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PRACTICAL TIPS

Have consent forms, HIPAA compliant authorization forms, and school records authorization forms ready to be used as necessary!

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RULES OF EVIDENCE—ILLEGAL RECORDINGS

- “Wiretapping and Electronic Surveillance Control Act.” 18 Pa.C.S.A. § 5701
- Prohibits—
 - Unlawful recording of private conversation
 - Disclosure of illegal recording
 - Use of illegal recording
- You can be fired if you violate the Act!

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PRACTICAL TIPS—RECORDINGS

- Do not listen to, take or use a recording until you are positively sure that it is not illegal!
- Contact legal counsel if there is any doubt at all!

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RULES OF EVIDENCE—HEARSAY

What is hearsay?

- (c) Hearsay. “Hearsay” means a statement that:
 - (1) the declarant does not make while testifying at the current trial or hearing; and
 - (2) a party offers in evidence to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801

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RULES OF EVIDENCE—EXCEPTIONS

- There are many exceptions to hearsay, such as:
 - Some prior inconsistent statements;
 - Admissions;
 - Excited utterance
 - Statement made for medical diagnosis or treatment
 - Statement is supported by sufficient guarantees of trustworthiness

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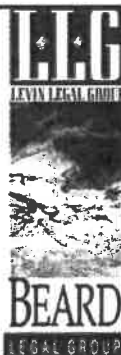


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PRACTICAL TIPS

Listen to all evidence, including hearsay, but do not “rely upon” hearsay for making any decisions unless it is corroborated by competent evidence

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RULES OF EVIDENCE

- Direct evidence vs. Circumstantial evidence
- Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw, heard, or did.
- Circumstantial evidence is proof of one or more facts from which you could find another fact.

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EVIDENCE OF COMPLAINT'S SEXUAL PREDISPOSITION AND PRIOR SEXUAL BEHAVIOR

- General rule—NOT RELEVANT!
- Exceptions:
 - Offered to prove that someone other than the respondent committed the conduct alleged by complainant;
 - Offered to prove consent, Really?

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EVIDENCE OF COMPLAINT'S SEXUAL PREDISPOSITION AND PRIOR SEXUAL BEHAVIOR

“[T]he Court concludes that Plaintiff did not have the legal capacity to welcome Oakes's sexual advances.” *Chancellor v. Pottsgrove Sch. Dist.*, 501 F.Supp.2d 695, 706 (E.D. Pa. 2007)

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RULES OF EVIDENCE

- You should consider both kinds of evidence—direct evidence and circumstantial evidence.
- The law makes no distinction between the weight to be given to either direct or circumstantial evidence.
- You may decide the case solely based on circumstantial evidence.

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BURDEN OF PROOF—PREPONDERANCE

What does it mean that a fact has been proven by a preponderance of the evidence?

- This means that you are persuaded that the fact is more probably accurate and true than not

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BURDEN OF PROOF—PREPONDERANCE

- Judges explain it as follows:

Think of an ordinary balance scale, with a pan on each side. Onto one side of the scale, place all of the evidence favorable to the complainant; onto the other, place all of the evidence favorable to the respondent. If, after considering the comparable weight of the evidence, you feel that the scales tip, ever so slightly or to the slightest degree, in favor of one or the other, then the fact has been proven by a preponderance of evidence.

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BURDEN OF PROOF—CLEAR AND CONVINCING

For evidence to be clear and convincing, the witnesses must be found credible; the facts to which they testify must be distinctly remembered, and the testimony must be so clear, direct, weighty, and convincing that you can reach a clear conviction, without hesitancy, of the truth of the precise facts in issue. Although this is a significant burden of proof, it is not necessary that the evidence be uncontradicted, as long as the evidence leads you to a clear conviction of its truth.

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PRACTICAL TIPS

Adoption of the “preponderance of evidence” standard is recommended.

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SHE SAID—HE SAID

- An argument can be made that a decision based on the notion of “she said/he said” is a cop out
- Decide based on the standard adopted by your school, in accordance with your credibility determinations, and the weight of the evidence.

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"LIVE HEARING"

- Schools have the discretion to include a "live hearing" as part of the grievance process.
- This is different than the School Board or arbitration "live hearing" under law or collective bargaining agreement.
- Numerous rules apply to live hearings, including training regarding technology used at the hearing.

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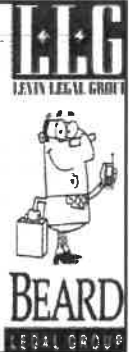


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PRACTICAL TIPS

- It is recommended that the grievance process not mandate a live hearing.
- If your school has live hearings, your decision-makers will need to receive additional training on technology used at the hearing.

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DECIDING CREDIBILITY

- Judges say: You must consider and weigh the testimony of each witness and give it the weight that, in your judgment, it is fairly entitled to receive.
- The matter of the credibility of a witness, that is, whether the testimony is believable in whole or in part, is solely for your determination.

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DECIDING CREDIBILITY

- I will mention some of the factors that might bear on that determination: whether witnesses have any interest in the outcome of the case or have friendship or animosity toward other persons concerned in the case;
- the behavior of the witness, the witness' demeanor; the manner of testifying and whether witnesses show any bias or prejudice that might color their testimony;

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DECIDING CREDIBILITY

- the accuracy of witnesses' memory and recollection;
- witnesses' ability and opportunity to acquire knowledge of or to observe the matters they are testifying about; and the consistency or inconsistency of their testimony as well as its reasonableness or unreasonableness in the light of all the evidence in the case.

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DECIDING CREDIBILITY

When you judge credibility, you are doing something you do every day of your life. You do it with your family, with friends and business associates, you do it whenever you go shopping or when you are out. That is, you have to decide what is it that you see and hear? What is it that you are being told that you will accept as true, that you will accept as something on which you will base a decision?

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DECIDING CREDIBILITY


What do you believe? What has the ring of truth about it amongst all of the answers, all of the evidence that you hear? What are you willing to base an important decision on?

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN



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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN

Students: Track 1: The regular disciplinary process governed principally by:

- 22 Pa. Code, Chapter 12 (Students and Student Services)
- Code of Student Conduct (22 Pa. Code §12.3(c))
- 24 P.S. §13-1318 (Suspension and expulsion of pupils)
- 20 U.S.C.A. § 1415(k) (Placement in alternative educational setting [of a student with a disability])

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN

Track 1 applies to all student matters unless they are governed by the Title IX regulations!

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN

Employees: Track 1: The regular disciplinary process governed principally by:

- 24 P.S. §11-1122 (Causes for termination);
- 24 P.S. §5-514 (Removal of employees);
- *Rike v. Com., Sec'y of Educ.*, 508 Pa. 190, 494 A.2d 1388 (1985) (districts possess authority to impose other forms of discipline);
- Code of Employee Conduct;
- Just Cause.

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN

Track 1 applies to all employee matters unless they are governed by the Title IX regulations!

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN

Understanding our perspective and assumptions:

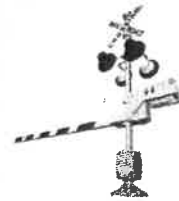
1. Virtually all matters will at least initially be reported to the principal(s) or supervisor(s) rather than the Title IX Coordinator(s);
2. Principals and supervisors generally have the power to take some level of disciplinary or corrective action, and commonly do;
3. The following slides are directed to you—principals and supervisors!

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN



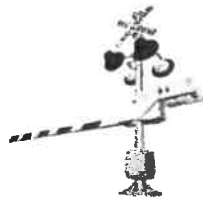
- Always keep Title IX in your mind
- Always consider whether Title IX may apply
- Always remember that the usual rules do not apply as usual when Title IX applies

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN



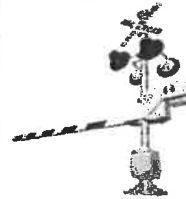
If you originally thought that the matter did not involve Title IX, **always** reassess whether it does involve Title IX and change tracks as appropriate

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Always send matter to applicable Title IX Coordinator if it seems like it might involve Title IX in any way **and** stop what you are doing!

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN

What kinds of matters are governed by the Title IX Regulations?

- “Sexual harassment” in a school program or activity
- “Sexual harassment” is a legal conclusion that can only be made in accordance with the Title IX processes

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN



- So if you don't know whether a matter is sexual harassment until later, how do you know when to get off Track 1 and proceed on Track 2?
- By the nature of the information or allegations
- If it is sexual in any way, switch to Track 2!

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN—EXAMPLES

- “Johnny told me a sex joke”
- Send it to the Title IX Coordinator
- “The Assistant Principal keeps staring at me”
- Send it to the Title IX Coordinator
- “He keeps looking at my chest”
- Send it to the Title IX Coordinator
- “She is harassing me”
- Send it to the Title IX Coordinator

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN—EXAMPLES

- The custodian tells you, “I saw two kids kissing”
- Send it to the Title IX Coordinator
- You walk by two people talking about a teacher having an affair with the assistant principal
- Send it to the Title IX Coordinator
- You hear a rumor of a student having sex with another student or an employee
- Send it to the Title IX Coordinator

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN—EXAMPLES

- You hear that a student or employee is using sexually charged profanity towards another, “you are an F---- B----”
- Send it to the Title IX Coordinator
- You hear a student bullying a transgender student
- Send it to the Title IX Coordinator
- You hear that a teacher refuses to use the correct name or pronoun for a transgender student or colleague
- Send it to the Title IX Coordinator

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN—EXAMPLES

- A teacher talks about his/her sexual experiences as part of a lesson
- Send it to the Title IX Coordinator
- An employee swats a student on the rump with a rolled-up magazine
- Send it to the Title IX Coordinator
- A science teacher buys a telescope for a student and gazes at the stars in the student's back yard
- Send it to the Title IX Coordinator

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN—EXAMPLES

- The examples are infinite—be on the lookout to recognize when you must refer the matter to the Title IX Coordinator!
- If in doubt—refer it!
- When you have referred it, stop your usual process until told otherwise by the Title IX Coordinator

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INTAKE PROCESS—ONE SCHOOL; TWO SYSTEMS—DECIDING WHICH TRACK TO GO DOWN—EXAMPLES

- The Title IX Coordinator will act as the signalman in determining whether to proceed down Track 2 (the Title IX track) or whether, when and how to return the matter to Track 1 (the usual disciplinary procedures)
- Whether, when and how is based upon both substantive law and procedural law.

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ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES

After initial interviews, including interviews of the alleged victim, Title IX Coordinator concludes that the conduct, if true:

1. Do not meet the definition of “sexual harassment”;
2. Did not occur within the school’s program or activity;
3. Did not occur to a person within the United States

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ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES—NOT “SEXUAL HARASSMENT”

1. Conduct wasn’t “sexual” in nature, objectively determined;
2. Conduct was not objectively “severe, pervasive and objectively offensive”;
3. Conduct was “welcomed” by the alleged victim(s); . . .

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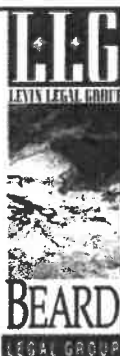


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ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES—NOT “SEXUAL HARASSMENT”

4. Conduct did not deny alleged victim(s) equal access to school’s program or activity;
5. Conduct did not meet the elements of the crimes enumerated in subsection (3) of the definition;
6. There were no elements of “quid pro quo”.

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ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES—NOT A SCHOOL PROGRAM OR ACTIVITY

Usually not an issue, but consider:

1. Foreign travel sponsored by a foreign language teacher?
2. Summer sports camp sponsored by a team coach?
3. Activities sponsored by a booster club?
4. Student-on-student online sexual harassment published out of school, but accessed at school?

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ONE SCHOOL; TWO SYSTEMS—GETTING OFF TRACK 2—THE SUBSTANTIVE RULES—NOT IN THE UNITED STATES

The sexual harassment occurs in a foreign country during a school trip.

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ONE SCHOOL; TWO SYSTEMS—WHEN THE TWO TRACKS MERGE: EMERGENCY REMOVAL OF STUDENT



Track 2: Title IX Regulations allow removing a respondent “on an emergency basis” provided:


1. there is an “individualized safety and risk analysis”
2. Respondent is provided with notice and opportunity to challenge removal;
3. But . . .

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ONE SCHOOL; TWO SYSTEMS—WHEN THE TWO TRACKS MERGE: EMERGENCY REMOVAL OF STUDENT



Track 1: Before emergency removal, Student respondent entitled to:


1. Student must be given rights under IDEA if applicable;
2. “Informal hearing” and “formal hearing” under 22 Pa. Code, §12.8
3. School board hearing under School Code and Local Agency Law if removal is for more than 10 days

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ONE SCHOOL; TWO SYSTEMS—WHEN THE TWO TRACKS MERGE: ADMINISTRATIVE LEAVE OF EMPLOYEE



Track 1:


- Administrative leave with pay generally does not require any prior process;
- If school contemplates an administrative leave without pay, informal hearing is required that meets standards of *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985);

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ONE SCHOOL; TWO SYSTEMS—WHEN THE TWO TRACKS MERGE: ADMINISTRATIVE LEAVE OF EMPLOYEE



Track 1:

- Collective bargaining agreements or individual employment agreements sometimes contain provisions requiring prior notice or other process in addition to “due process”
- If administrative leave without pay is decided upon, it cannot be for “sexual harassment” until the entire grievance process has been completed—i.e., track 2

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NO CONTACT ORDERS

- Among the permissible “supportive measures” are “*mutual restrictions*” on contact between the parties” 34 C.C.R. §106.30(a).
- This is not retaliation;
- This treats both parties equally.

Note: the definition of “mutual restrictions” seems to be inconsistent with 34 C.F.R. §106.44 that speaks to offering supportive measures to a complainant—not a respondent.

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NO CONTACT IMPOSED ONLY ON ONE PARTY?

- It is questionable whether a “no contact” order can be imposed on only one of the parties—there are arguments pro and con
- **Pro Argument:** If you can have an emergency removal of a student, or an administrative leave of an employee, surely you can have a less drastic measure
- **Con Argument:** A restriction of contact by only one of the parties is not authorized while you are on the Title IX track

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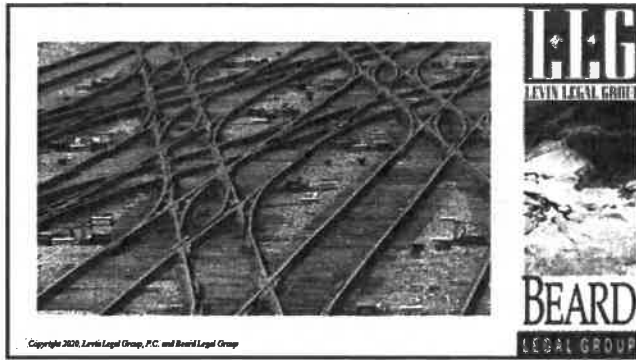
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We leave you with a pictorial representation of what we endeavored to teach you today—to follow the right track!

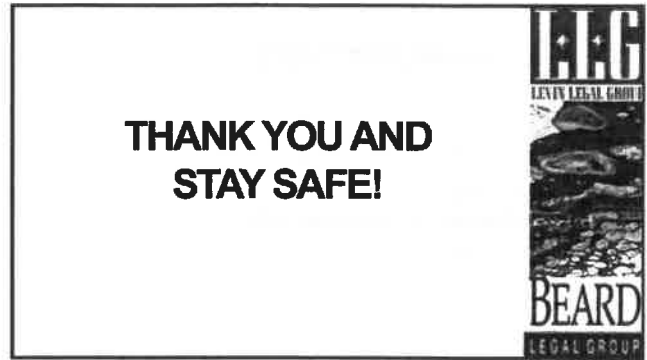
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