



MONROE  
SCHOOL DISTRICT

TITLE IX UPDATE  
AUGUST 11, 2020

## MAY - 2020 TITLE IX RULE CHANGES

MADE SWEEPING CHANGES TO THE WAY  
K-12 MUST ADDRESS SEXUAL HARASSMENT  
UNDER FEDERAL LAW.

## BACKGROUND

- The department received over 124,000 comments on its proposal and held scores of meetings with interested parties. Its detailed explanation of the final rule ran to more than 2,000 pages.



Generally, the federal rules now require a District to “promptly” respond in a manner that is not “deliberately indifferent” when it has “actual knowledge” of “sexual harassment” in its “education program or activity” against a person in the United States.

STANDARDS AND PROCEDURES FOR RESPONDING TO SEXUAL HARASSMENT IN WASHINGTON K-12 SCHOOLS IN ACCORDANCE WITH STATE AND FEDERAL LAW



(1) Harassing conduct creates a “hostile environment” under state law when it is sufficiently severe, persistent, or pervasive that it **limits or denies** a student’s ability to participate in or benefit from a school district’s course offerings, including any educational program or activity

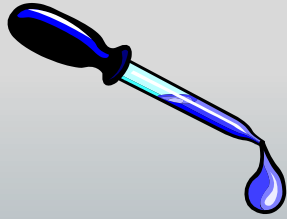
(2) In accordance with WAC 392-190-0555, upon notice of possible sexual harassment, a district shall take prompt and appropriate action to investigate and take prompt and effective steps reasonably calculated to end harassment, eliminate the hostile environment, prevent its recurrence, and as appropriate, remedy its effects. This is true whether or not a formal Title IX complaint has been filed.

\* This can be “actual” or “constructive”



(1) A district’s responsibility to respond is when it would be “determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively **denies** a person equal access to the education program or activity.

(2) When a District has “actual knowledge” then schools must respond to sexual harassment in a manner that is not “deliberately indifferent.” A school is deliberately indifferent only if its response is clearly unreasonable in light of the known circumstances.



REASONABLY  
ANTICIPATED TO  
STOP THE  
UNDERLYING  
BEHAVIOR

# STANDARDS AND PROCEDURES FOR RESPONDING TO SEXUAL HARASSMENT IN WASHINGTON K-12 SCHOOLS IN ACCORDANCE WITH STATE AND FEDERAL LAW

(3) When a complaint is filed, a district must provide parties a copy of the district's sexual harassment complaint procedures.

A school district must complete its investigation and provide parties a written decision within 30 days unless agreed upon by the parties or if an exceptional circumstance require an extension. If an extension to this timeline is necessary, the school district must notify the parties in writing of the reasons for the extension and the anticipated response date.

The district's written decision must include all components outlined in WAC 392-190-065(6)

Any corrective measures must be instituted as expeditiously as possible but no later than 30 days after the school district's written response, unless otherwise agreed to by the complainant.

A school district must provide an option to appeal the determination.

If a Title IX formal complaint is dismissed in accordance with 34 CFR § 106.45(b)(3), a school district may be required to continue its investigation in accordance with the state complaint process outlined in WAC 392-190-065.



(3) The new Title IX rules require a complaint (or grievance) process for responding to complaints that is more prescriptive than before. For example, who can file a complaint; specific due process requirements, including written notices to parties and witnesses; an opportunity for each party to review relevant evidence; and an opportunity for each party to review the investigative report and submit written questions to the other party or witnesses before a final determination is made.



## QUICK TERMINOLOGY TITLE IX AND HIB

### Title IX

1. Complainant
2. Respondent
3. Supportive Measures

### HIB

1. Targeted Student
2. Aggressor
3. Corrective Measures



## ROLES

### Designate qualified personnel

Before the changes, Districts were already required to have a “Title IX Coordinator” to lead compliance efforts.

Now the federal rules require a District to designate additional positions, including investigators and decision-makers. The regulations specify decision-makers cannot be the same person as the Title IX Coordinator or an investigator.





# AGAIN, WHAT CONSTITUTES SEXUAL HARASSMENT

The definition has three parts.

1. First, any form of *quid pro quo* harassment—that is, conditioning any educational opportunity or benefit on the granting of sexual favors—constitutes a *per se* violation of Title IX, regardless of its severity or pervasiveness.
2. Sexual assault, dating violence, domestic violence, or stalking. These forms of misconduct are so serious in themselves that no finding of “pervasiveness” is required.



Possible Mandatory Report

# AGAIN, WHAT CONSTITUTES SEXUAL HARASSMENT



3. To violate Title IX, all other forms of “unwelcome conduct” must be “so serious, pervasive, and objectively offensive that it **effectively denies** a person equal access” to an educational program. The Education Department rejected the position that Title IX requires schools to prohibit comments that might seem minor in themselves but contribute to a broader “hostile environment”:

*The Department understands that research shows that even “less severe” forms of sexual harassment may cause negative outcomes for those who experience it. The Department believes, however, that severity and pervasiveness are needed elements to ensure that Title IX’s non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom, and that Districts are not held responsible for controlling every stray, offensive remark that passes between members of the District’s community.*



3. Harassing conduct creates a “hostile environment” under state law when it is sufficiently severe, persistent, or pervasive that it **limits or denies** a student’s ability to participate in or benefit from a school district’s course offerings, including any educational program or activity.



The federal rules ensure that complainants have any/all of the following options as reporters:

- The ability to report anonymously (though a District will be unable to provide supportive measures without knowing the complainant's identity);

The ability to report and receive supportive measures while keeping the complainant's identity confidential from the respondent (unless the respondent must know the complainant's identity in order for the District to implement a supportive measure);

- The right to file a formal complaint against the respondent, realizing that doing so means the respondent will know the complainant's identity, yet as to people outside the grievance process the complainant's identity must be kept confidential except as permitted by FERPA, required by law, or as necessary to conduct the grievance process.

## DISTRICT ON NOTICE

Title IX allows parents or guardians of K-12 students to file complaints on their behalf, and then requires District to provide parent/guardian of respondent notification of the complaints against their children/wards.

## DISTRICT ON NOTICE

The federal rule states that a school district will be deemed to have “actual knowledge” of sexual harassment, thereby triggering the district’s response obligations under the Rule, whenever *any* employee has notice of potential sexual harassment or assault.

Schools are *required* to respond when they have “actual knowledge” of a complaint of sexual harassment, which can include a report to any employee of an elementary or secondary school.

## CONFIDENTIALITY



- If the complainant's identity is discovered during the investigation, the District would need to **send supplemental notice** of allegations to the parties and treat the complainant as a party throughout the grievance process. See § 106.45(b)(2)(ii).

# CONFIDENTIALITY

Nothing in the notice of a **formal complaint** should divulge the complainant's (or respondent's) medical information or other sensitive information, nor does § 106.45(b)(2) require disclosure of such information.

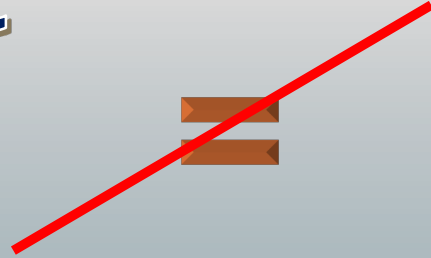
Think counselors or PBIS coaches.



The Department agrees with commenters that it is unacceptable for any person to leak or disseminate information to retaliate against another person, and the final regulations add § 106.71, which **prohibits the District** or any other person from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX.



# First Amendment & Due Process



Tamper  
Intimidate  
Retaliate

- Knowingly False Complaint
  - Threat of or actual harm to a person
  - Threat of or actual harm to property
  - Threat of or actual harm to reputation
- Speech that would chill current or future involvement in process
  - Speech that would chill current or future exercising of rights

§ 106.45(b)(5)(iii) recognizes the parties have a right to discuss the allegations under investigations, but this right does not preclude a District from warning the parties not to discuss or disseminate the allegations in a manner that constitutes retaliation or unlawful tortious conduct.

# CONFIDENTIALITY

- **Without a complainant** (i.e., a person alleged to be the victim of sexual harassment) at some point being identified during an investigation, a District may find itself unable to meet the District's burden to gather evidence sufficient to reach a determination regarding responsibility. For example, without knowing a complainant's identity a District may not be able to gather evidence necessary to establish elements of conduct defined as "sexual harassment" under § 106.30, such as whether alleged conduct was unwelcome, or without the consent of the victim.

In such a situation, the final regulations provide for **discretionary dismissal of the formal complaint**, or allegations therein. § 106.45(b)(3)(ii). A District's decision (made via the Title IX Coordinator) to initiate a grievance process over the wishes of a complainant, or where the complainant does not wish to participate, or where the complainant's identity is unknown, is evaluated under the deliberate indifference standard set forth in § 106.44(a).



## DELIBERATE INDIFFERENCE (SEE SLIDE 26 AS WELL)

Under the deliberate indifference standard, upon receiving a report of sexual harassment, at a minimum, a District has an obligation to provide supportive measures.

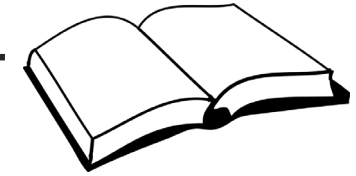
The rules require that, after receiving any report of sexual harassment, the District's Title IX Coordinator must promptly:

- Contact the complainant to discuss the availability of supportive measures;
- Let the complainant know that supportive measures are available regardless of whether a formal complaint is filed;
- Consider the complainant's wishes regarding supportive measures; and
- Explain to the complainant the process for filing a formal complaint.

The rules define “supportive measures” as non-disciplinary, non-punitive individualized services that are reasonably available and provided without fee or charge to the complainant or respondent. Supportive measures are intended to ensure equal access to an education program or activity, protect safety, or deter sexual harassment. Supportive measures may include:

- Counseling;
- Extending deadlines;
- Modifying class schedules;
- Placing mutual restrictions on contact between the parties;
- Providing campus escort services;

# CONFIDENTIALITY AND DEDUCING INVOLVEMENT



As noted above, where a formal complaint **has not been filed** by a complainant or signed by a Title IX Coordinator, the final regulations do not require a District to disclose a complainant's identity to a respondent (unless needed in order to provide a particular supportive measure, such as a mutual no-contact order where a respondent would need to know the identity of the person with whom the respondent's communication is restricted).

The final regulations also expressly prohibit retaliation and Districts must respond to complaints of retaliation in order to protect complainants whose identity has been disclosed as a result of a formal complaint (or, as also discussed herein, where providing supportive measures to the complainant necessitates the respondent knowing the complainant's identity).

Thus, in situations where a complainant **fears** that disclosure to the respondent of the complainant's identity (or the fact that the complainant has filed a formal complaint) poses a risk of retaliation against the complainant, the Title IX Coordinator must **discuss** available supportive measures and consider the complainant's wishes regarding supportive measures designed to protect the complainant's safety and deter sexual harassment.

# CONFIDENTIALITY



- Under § 106.30 defining “supportive measures” (think safety plan, in building no contact) Districts must keep confidential the provision of supportive measures to a complainant or respondent to the extent that maintaining confidentiality does not impair the ability of the District to provide the supportive measures.
- Thus, unless a particular supportive measure affects the respondent in a way that requires the respondent to know the identity of the complainant (for example, a mutual no-contact order), the Title IX Coordinator need not, and should not, disclose the complainant’s identity to the respondent during the process of selecting and implementing supportive measures for the complainant.

**NOTICE TO PARTIES  
(HIB SHARES A SIMILAR REQUIREMENT)**

A **formal complaint** alleging sexual harassment triggers a grievance process, and in the interest of fairness that process must commence with both parties receiving written notice of the pertinent details of the incident under investigation.

The federal rules have removed proposed § 106.44(b)(2) from these final rules, which provision would have required a Title IX Coordinator to file a **formal complaint** upon receiving **multiple reports** against the same respondent.

## NOTICE TO PARTIES

At the beginning of an investigation, a school must provide both parties with a written explanation of the allegations with “sufficient details known at the time and with sufficient time to prepare a response before any initial interview.” If the nature of the allegations changes over the course of the investigation, that, too, must be communicated in writing to both parties in a supplemental notice.

## NOTICE TO PARTIES

Two new requirements for the written notice to parents/guardians:

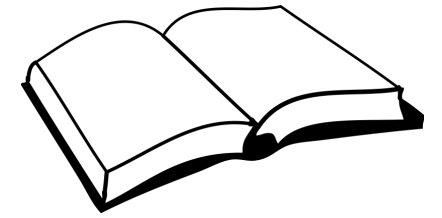
1. It must include a statement “that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process”; and
2. It must include a statement informing the parties of any provision of the institution’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.



## REASONABLE PERSON STANDARD

**Example 2:** On numerous occasions over a period of several months, a fifth-grade student inappropriately touches another fifth-grade student and makes overtly sexual comments and gestures to that student. The conduct is unwelcome and results in the victim's grades falling because he or she is unable to concentrate on studying. This behavior constitutes sexual harassment.

# SUPPORTIVE MEASURES – TITLE IX COORDINATOR



The Title IX Coordinator, with or without a formal complaint, must promptly contact the complainant to discuss:

1. The availability of supportive measures, considering the complainant's wishes with respect to supportive measures,
2. Informing the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explaining to the complainant the process for filing a formal complaint;
3. In response to a formal complaint, following a grievance process that complies with the Final Rule **before** the imposition of any disciplinary sanctions or other actions against a respondent (other than those undertaken to offer interim supportive measures to the complainant);
4. Not restricting rights otherwise protected under the U.S. Constitution, including, to the extent applicable, the First Amendment, Fifth Amendment, and Fourteenth Amendment.

## INFORMAL RESOLUTIONS



- A school may not **require** the parties to participate in informal resolution and may not offer informal resolution unless a formal complaint is filed.

At any time prior to agreeing to a resolution, any party has the right to withdraw from informal resolution and resume the grievance process with respect to the formal complaint.

- Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.
- **Think athletics and activities**

# INVESTIGATION

- Provide both parties an equal opportunity to inspect and review any **evidence** obtained as part of the investigation that is directly related to the allegations raised in a **formal complaint**.
  - This includes the evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.
  - Prior to completion of the investigative report, the District must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
- Create an **investigative report** that fairly summarizes **relevant** evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

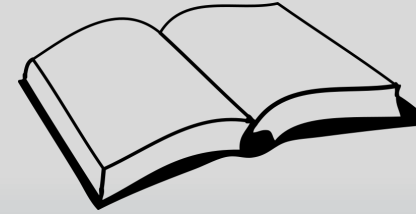
# INVESTIGATION

After the school has sent the **investigative report** to the parties and before reaching a determination regarding responsibility, the **decision-maker(s)** must afford each party the opportunity to (1) submit written, **relevant** questions that a party wants asked of any party or witness, (2) provide each party with the answers, and (3) allow for additional, limited follow-up questions from each party.

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

- Use of electronic platforms that prevent the downloading of the materials is permitted. Nondisclosure agreements are permitted to prevent the circulation of the evidence subject to inspection and review.

# INVESTIGATIONS



- The Department disagrees that the written submission of questions procedure in this provision exposes students to hostile proceedings, unnecessarily limits the discretion of local school officials, or obligates school districts to expend resources in an unwarranted manner. While due process of law is a flexible concept, at a minimum it requires notice and a meaningful opportunity to be heard, and the Department has determined that with respect to sexual harassment allegations under Title IX, both parties deserve procedural protections that translate those due process principles into meaningful rights for parties and increase the likelihood of reliable outcomes. This provision prescribes written submission of questions prior to adjudication, a procedure that benefits the truth-seeking purpose of the process even when the rights of a young student are exercised by a parent or legal guardian.

# INVESTIGATION



1. The parties must have an equal opportunity to present witnesses, including both fact and expert witnesses and other witnesses.
2. Institutions cannot restrict the parties' ability to discuss the allegations or gather and present evidence.
3. The parties must be allowed to have an advisor of their choosing present at any meeting or grievance proceeding. Institutions are still permitted, however, to establish restrictions regarding the extent to which the advisor may participate in the proceedings, so long as the restrictions apply equally to both parties.
4. Importantly, the final regulations make clear that the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the institution, not on either party.

I.

# APPEALS



- A school must offer both parties an appeal from a determination regarding responsibility and from a school's dismissal of a formal complaint or any allegations therein on the following bases:
  - (i) procedural irregularity that affected the outcome of the matter;
  - (ii) new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome of the matter; and/or
  - (iii) the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter. A school may offer an appeal equally to both parties on additional bases as well.





# STUDENT DISCIPLINE

- The Title IX federal rules will also impact how a school district may administer discipline to a student who has allegedly engaged in sexually harassing behavior.
- Specifically, the Title IX federal rules prohibit a school or school district from imposing any disciplinary sanctions, or other actions that are not supportive measures, against a student until the district has followed the Title IX complaint process and determined the student was responsible for the sexual harassment. Supportive measures must be non-disciplinary and may include, for example, counseling, modifications of class schedules, mutual restrictions on contact between parties, and increased security and monitoring of certain areas at school.

Districts must still comply with Chapter 392-400 WAC, Washington's student discipline rules, when administering discipline to a student who has engaged in sexual harassment. The Title IX rules' limitation on schools imposing disciplinary sanctions against a student does not preclude a school from removing the student from the school district's education program or activity on an **emergency basis**, provided that the district undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the student with notice and an opportunity to challenge the decision immediately following the removal.

- In situations where a school district determines it is necessary to emergency expel a student accused of sexual harassment, the district must comply with Washington's student discipline rules for emergency expulsions.

K-12 AS OPPOSED TO HIGHER ED

Hearings not required at K-12

**REGULATION 3205**  
**SEXUAL HARASSMENT OF STUDENTS**  
**PROHIBITED**

**REGULATION 5013**  
**SEXUAL HARASSMENT OF**  
**PERSONNEL, VOLUNTEERS AND**  
**VISITORS**  
**PROHIBITED**

## SEXUAL HARASSMENT VERBAL ACTIONS



Addressing a person with a term of affection



Making sexual innuendoes



Turning work discussions to sexual topics



Telling sexual jokes or stories



Asking questions of a sexual nature



Asking personal comments about a person's clothing, body, or looks



Making kissing sounds, howling, smacking lips

**SEXUAL  
HARASSMENT  
NON-VERBAL  
ACTIONS**



Looking a person up and down (elevator eyes)



Staring at someone



Blocking a person's path; restricting, hindering the other person's movements



Displaying sexually suggestive visuals, artifacts, items



Displaying sexual and/or derogatory comments about men/women on coffee mugs, hats, clothing, etc.



Making facial expressions, such as winking, or throwing kisses



Making sexual gestures with hands and/or body movements



**IMPACT -  
MOTIVE  
DOESN'T  
MATTER**

- It is the perception of the receiving individual, not that of the acting individual, that weighs most heavily in deciding if harassment has occurred.
- Even though sexual harassment may not have been the motive, if the receiving individual finds the behavior uncomfortable, embarrassing, or threatening, there is a problem and interventions are needed.

# FLIRTING VS SEXUAL HARASSMENT

## Flirting

### Actions are

- Mutual
- Flattering
- A compliment
- Uplifting
- Desired
- Motivated by caring
- Legal

### Causes

- Higher self-esteem

## Sexual Harassment

### Actions are

- One sided
- Humiliating
- A criticism
- Attacking
- Undesired
- Motivated by power
- Illegal

### Causes

- Lower self-esteem

# FLIRTING VS SEXUAL HARASSMENT

## Flirting

### Receivers feel

- Happy
- Flattered
- In control
- Attractive
- Important

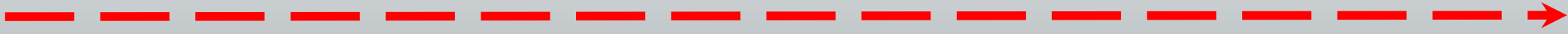
## Sexual Harassment

### Victims feel

- Angry
- Sad
- Powerless
- Ugly
- Unimportant



# THE SPECTRUM OF UNWANTED SEXUAL AND GENDER-DIRECTED BEHAVIOR PATTERNS



<u>Verbal</u>	<u>Written</u>	<u>Touching</u>	<u>Power</u>	<u>Threats</u>	<u>Force</u>
<ul style="list-style-type: none"> <li>❑ Dirty Joke</li> <li>❑ Intimate?</li> <li>❑ Whistling</li> <li>❑ Comment on Physical Appearance</li> <li>❑ Sexual Rumors</li> <li>❑ Suggestive Comments</li> <li>❑ Ogling</li> <li>❑ Elevator Eyes</li> <li>❑ Xbox Live</li> </ul>	<ul style="list-style-type: none"> <li>❑ Love Letters</li> <li>❑ Suggestive Notes</li> <li>❑ Suggestive Graphics</li> <li>❑ Texting</li> <li>❑ Sexting</li> <li>❑ Email</li> <li>❑ Cyber</li> </ul>	<ul style="list-style-type: none"> <li>❑ Violating Space</li> <li>❑ Patting</li> <li>❑ Pinching</li> <li>❑ Caressing</li> </ul>	<ul style="list-style-type: none"> <li>❑ Sexual Favors</li> <li>❑ Favoritism</li> <li>❑ Hazing Rituals</li> <li>❑ Blocking Movement</li> </ul>	<ul style="list-style-type: none"> <li>❑ Demands</li> <li>❑ Quid Pro Quo</li> </ul>	<ul style="list-style-type: none"> <li>❑ Attempted Rape</li> <li>❑ Rape</li> <li>❑ Pantsing</li> <li>❑ Stripping</li> <li>❑ Groping</li> <li>❑ Kissing</li> </ul>