

AASB BOARDMANSHIP SERIES

DEVELOPING EXCELLENT SCHOOL BOARD LEADERS THROUGH
QUALITY TRAINING, ADVOCACY AND SERVICES



Understanding Title IX and the New Sexual Harassment Regulations for School Boards

FIRST EDITION
2021



ALABAMA
ASSOCIATION OF
SCHOOL BOARDS

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Boardmanship
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Foreword

This edition of the AASB Boardmanship Series booklet, *Understanding Title IX and the New Sexual Harassment Regulations for School Boards*, was written following the substantial changes to the Title IX regulations that became effective in late 2020. This booklet will assist boards and superintendents in fulfilling their obligations under the law and also provide some practical tips to consider when dealing with sexual harassment issues.

We hope this edition of the AASB Boardmanship Series helps board members understand the basics of the Title IX sexual harassment regulations, but as always, this should only be used as a general reference tool. It is not intended to be a substitute for the local board attorney's advice.

TABLE OF CONTENTS

Introduction.....	5
Title IX and Areas of Discrimination Based on Sex and Gender	6
Discrimination in Admission and Treatment: An Overview of Title IX	6
Discrimination in Athletics: Title IX Compliance in Athletics.....	7
Area One – Athletic Participation and Accommodation of Interest: The Three Prong Test.....	8
Area Two: Athletic Financial Assistance.....	12
Area Three: Equivalence in other Athletic Benefits and Opportunities: “The Laundry List”	13
Title IX and Discrimination in Employment in Education Programs	18
Compensation.....	18
Employment Tests.....	19
Pre-employment Inquiries.....	19
Marital or Parental Status.....	19
Sex as a Bona-fide Occupational Qualification	19
Courts and the Transformation of Title IX	20
Title IX and Transgender Students	21
Sexual Harassment under Title IX.....	24
The Final Rule: An Overview of the Transformation of Title IX.....	24
The Final Rule: Policy and Notice Requirements	25
The Final Rule: The Title IX Coordinator.....	25
The Final Rule: The Definition of Sexual Harassment	26
The Final Rule: Identifying When a School SYSTEM Must Respond.....	27
The Final Rule: The Complainant and Respondent	27
The Final Rule: The School System’s Response	28
General Response.....	28
Supportive Measures.....	28

Conduct Outside the United States	29
Emergency Removal/Administrative Leave	29
Formal Complaint Process	30
The Final Rule: Recordkeeping.....	36
The Final Rule: Confidentiality and Retaliation	36
The Final Rule: Training.....	37
The Final Rule: New Recordkeeping Requirements.....	38
Conclusion: Impact of The Final Rule on K-12 schools.....	39
Appendix.....	41
Sexual Harassment Policy Checklist.....	42
Title IX Sexual Harassment Flow Chart	44
Title IX Grievance Procedure	44
Non-Discrimination Notice.....	50
Title IX Discrimination Intake Form	51
Title IX Discrimination Formal Complaint Form.....	54
Notice of Formal Complaint	57
Supportive Measures Letter	60
Title IX Discrimination Dismissal Form.....	62

INTRODUCTION

Title IX of the Education Amendments of 1972 (“Title IX”) prohibits sex discrimination in any federally-funded educational program. Although Title IX’s impact on athletics has gained the most public attention in past years, the scope of Title IX is very broad. The law applies to every single aspect of education, both on and off-campus, and includes but is not limited to academics, athletics, extracurricular activities and employment. While not specifically addressed in the law, Title IX has expanded to include sexual harassment as well. Title IX applies to both girls and boys, and the law also applies to the entire entity if the entity receives federal funds -- not just the specific programs or activities that are federally funded.

As part of its enforcement power, the U.S. Department of Education has adopted regulations to implement Title IX. The regulations apply to elementary and secondary schools as well as post-secondary institutions. Generally, the Title IX regulations require school systems to have a non-discrimination policy, a grievance process that provides for a prompt and equitable resolution of sex discrimination complaints, and a designated Title IX Coordinator. Until recently, neither Title IX nor its implementing regulations specifically addressed sexual harassment.

On May 6, 2020, the U.S. Department of Education Office for Civil Rights (OCR) released the long-awaited “Final Rule” amending the Title IX regulations.¹ The Final Rule went into effect in August 2020. For the first time in its nearly 50-year history, OCR’s Title IX regulations recognize that sexual harassment is unlawful sex discrimination. The Title IX regulations now define sexual harassment and establish detailed procedures for how school systems must respond to allegations of sexual harassment. Importantly, the OCR’s changes to the Title IX regulations are significant, but they are only focused on sexual harassment. OCR did not change the existing regulations on topics such as athletic participation, employment, and single-sex education.

The following paragraphs provide an overview of Title IX and gender-based discrimination. This publication also discusses key topics such as how Title IX applies in the context of employment and transgender students. Finally, this publication provides a more detailed look into OCR’s Final Rule regarding sexual harassment as it applies to K-12 schools. While significant challenges to evolving interpretations of Title IX itself, as well as provisions of the new Final Rule are expected, AASB believes this AASB Boardmanship booklet will provide answers to many of your gender-based discrimination questions and concerns.

TITLE IX AND AREAS OF DISCRIMINATION BASED ON SEX AND GENDER

DISCRIMINATION IN ADMISSION AND TREATMENT: AN OVERVIEW OF TITLE IX

Title IX is the portion of the Education Amendments of 1972 that prohibits gender discrimination in educational institutions that receive federal funds, either directly or indirectly. Title IX states that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.²

Although Title IX is not a lengthy statute, its scope is broad. Title IX was an outgrowth of the Civil Rights Act of 1964 (“Title VII”) which prohibits employers from discriminating against employees on the basis of sex, race, color, national origin and religion.³ Notably, Title IX protects *any* person who participates, or seeks to participate, in an educational program or activity of the school.⁴ In addition, Title IX is not just for public schools. Any entity that receives federal funds, whether public or private, must comply with Title IX.⁵

The Office of Civil Rights (“OCR”) enforces many of the federal laws that prohibit discrimination in education. Title IX is one of those federal laws. Thus, a person who believes he or she has been discriminated against under Title IX may file a complaint with OCR. OCR may then start an investigation. OCR may also launch its own Title IX investigation, known as a “compliance review”.⁶ Finally, OCR may issue written policy guidance through letters in order to assist school systems and others with compliance issues.⁷

OCR enforces Title IX through federal regulations. OCR specifies through the regulations that no person shall, on the basis of sex, be denied admission, excluded from participation, or denied the benefits of any academic, extracurricular, research, occupational training, or other educational program or activity operated by a local education agency (“LEA”) which receives federal funding. Specifically, the LEA shall not, on the basis of sex:

- Treat one person differently from another in determining whether he or she is eligible for aid, benefits, or services;
- Provide different aid, benefits, or services;
- Deny aid, benefits, or services;
- Subject a person to different rules of behavior, sanctions, or treatment;
- Apply rules concerning the student or applicant's residence, including eligibility for in-state fees and tuition;
- Aid or perpetuate discrimination by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees; or
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.⁸

The following are examples of sex-based discrimination in admission and treatment, e.g. comments and discrimination directed at a student because of his or her gender or stereotypes resulting from that person's gender:

- Not allowing any females to participate in math field day because "Girls are bad at math and they will bring our scores down;"
- Criticizing male students when they speak up in class because "I find that boys disrupt class when I let them talk;" or
- Making fun of a student's gender identity by asking a transgender student, "do you know how girls feel about makeup and wearing high heels now that you ARE one?"

DISCRIMINATION IN ATHLETICS: TITLE IX COMPLIANCE IN ATHLETICS

While the Title IX statute itself does not expressly refer to athletic programs, the regulations state that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any *athletics* offered by an LEA, and no LEA shall provide any such athletics separately on that basis.^{9 10}

In addition to OCR’s interpretation of Title IX regulations, Title IX’s impact on athletics has evolved through the years through a series of OCR policy interpretations.¹¹ According to OCR, while designed specifically for intercollegiate athletics, the same standards will often apply to school athletic programs at the elementary and secondary level.¹²

Title IX covers the following three areas of high school and college athletics:

- Area One: accommodating student interests and abilities;
- Area Two: athletic financial assistance, e.g. scholarships and other program funds; and
- Area Three: other program components, also known as the “laundry list.”¹³

As a general rule, Title IX applies to the overall athletic program of a school, not to specific teams,¹⁴ and Title IX does not require athletic programs for male and female students to be identical, but it does require equity. Rather, for all of the program components (except financial aid), the basic test of compliance is equivalence.¹⁵ That is, the benefits, opportunities and treatment of each sex must be equal or *equal in effect*.¹⁶ Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any difference is negligible.¹⁷ Importantly, OCR has further explained that an entity is not required to offer particular sports or the same sports for each sex, and an entity is not required to offer an equal number of sports for each sex. Rather, an entity must accommodate *to the same degree* the athletic interests and abilities of each sex.¹⁸

AREA ONE – ATHLETIC PARTICIPATION AND ACCOMMODATION OF INTEREST: THE THREE PRONG TEST

Before Title IX, most schools prioritized sports for male students, leaving opportunities for women limited. Title IX has helped focus attention on meeting the needs of women interested in athletics and helped schools to recognize their responsibility to make sure that both genders are provided equal athletic opportunities. In the athletics context, the first component of compliance with Title IX is effectively accommodating the athletics interests and abilities of athletes.¹⁹

Title IX compliance is assessed by examining a school's:

- (a) determination of the athletic interests and abilities of its students;
- (b) selection of the sports that are offered; and
- (c) level of competition, including opportunity for team competition.²⁰

This three-part (or prong) test can sometimes be confusing and does not provide each individual school system a bright-line test for compliance. Thus, instead of guessing and analyzing a school's programs from year to year, OCR refined and explained OCR's three-prong test to determine compliance.²¹ In summary, the three-prong test gives a school three different ways to comply with Area One of Title IX athletic compliance.²² A school only has to satisfy one of the prongs in order to comply with Area One.²³ In addition, a school can change which of the three prongs it meets from one year to the next, as long as it meets one of the tests. In other words, schools are providing "equivalency" in participation--equal athletic participation opportunities and accommodation of interest to their male and female students--if they meet any one of the three prongs. The three-prong test is intended to allow schools flexibility and control over their athletic programs when deciding how it will provide students with athletic opportunities.²⁴

The following requirements represent the three-prong test under Area One:

- Test One: Proportionality: Are participation opportunities for males and females provided in numbers *substantially proportionate* to their respective enrollments; or
- Test Two: Continued Program Expansion: Where members of one sex have been underrepresented, can the school show a *history and continuing practice* of program expansion which reflects the interests and abilities of the members of that sex; or
- Test Three: Full Accommodation of Underrepresented Sex: Where the members of one sex are underrepresented, and the institution cannot show a history and continuing practice of program expansion, can the school show that the interests and abilities of the underrepresented sex have been effectively accommodated by the *present program*?²⁵

PRONG ONE: PROPORTIONALITY

Under the first prong of the test, each sex's representation in athletics must be substantially proportionate to its representation in the student body. In other words, a school should provide athletic opportunities for female students that are substantially proportionate to the percentage of female enrollment at the school.²⁶ For example, if girls are 54% of the overall enrollment of students at a high school, 54% of a school's athletes should be girls. Fortunately, OCR gives schools flexibility in deciding how to provide proportionate athletic opportunities to students of both sexes, including by eliminating teams, placing caps on its rosters,²⁷ or "[e]xpanding ...athletic opportunities through new sports."²⁸

Importantly, in achieving the first prong, a school is only required to achieve "substantial proportionality," not strict proportionality,²⁹ because OCR and courts have recognized that strict proportionality is not a feasible standard.³⁰ However, neither the OCR regulations nor any court has set out a clear rule with a specified percentage. Instead, OCR clarified that athletic opportunities are "substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, *i.e.*, a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team."³¹ In light of the above, in determining substantial proportionality, schools should consider:

- Actual athletes, not unfilled slots;³²
- Exact proportionality is not required so there is no magic number;³³
- Substantial proportionality is determined on a case-by-case basis in light of the school's circumstances and the size of its program;³⁴ and
- As a general rule, there is substantial proportionality "if the number of additional participants...required for exact proportionality 'would be sufficient to sustain a viable team.'"³⁵

PRONG TWO: HISTORY AND PRACTICE

Another way a school can show its compliance in the area of participation and accommodation is by satisfying the second prong: a history and continuing practice of expanding sports for women. This prong applies only if students of one sex are underrepresented. Typically, women are the underrepresented sex in athletics.³⁶ Accordingly, even if a school is unable to show substantial proportionality (prong one) in its athletic programs, a school can still be considered in compliance if it

can show a history and continuing practice of expanding its sports offerings for women. The focus is on whether the school responded to developing interests and abilities of female students. The factors OCR considers in making this determination are a school's recent history and continuing practice of:

- Adding female teams;
- Upgrading teams to varsity status;
- Affirmatively responding to requests for adding or upgrading teams; and
- Monitoring developing interests by conducting surveys, including implementation of a nondiscriminatory policy or procedure for requesting additional sports and the effective communication of the policy or procedure to students.³⁷

PRONG THREE: EFFECTIVE ACCOMMODATIONS

Finally, under the third prong of the test, a school may show compliance with Area One (accommodation of athletic interests) by demonstrating that its *present* programs are accommodating the athletic interest and abilities of its female students.³⁸ This prong does not require a school to provide a varsity team every time some female students are interested in a sport. It is also not about how many sports the school offers.³⁹ Instead, schools may satisfy this prong by asking:

- **Is there unmet interest in a particular sport?** For this factor, OCR will look for the following indicators, among others:
 - Requests by students that a particular sport be added;
 - Participation in particular sports;
 - Interviews with students, coaches, administrators and others regarding interest in particular sports; and
 - Results of student questionnaires regarding interests in particular sports.
- **Is there sufficient ability to sustain a team in the sport?** For this factor, OCR will examine:
 - Athletic experience and accomplishments of students interested in playing the sport; and
 - Opinions of the school's coaches, administrators, and

athletes regarding whether interested students can sustain a varsity team; and

- **Is there a reasonable expectation of competition for the team?** For this factor, OCR will look at available competitive opportunities in the geographic area where the school’s athletes primarily compete, including:
 - Competitive opportunities offered by other schools against which the school competes; and
 - Competitive opportunities offered by other schools in the school’s geographic area, including those offered by schools that are not current competitors.⁴⁰

OCR has stated that the interest, ability, *and* competition factors must exist before a school is required to add a team under prong three. Because of this, the lack of sufficient competition in the region often relieves the school from an obligation to add a team. If, however, a school’s answer to all three questions above is “yes,” OCR will likely find that a school is not effectively accommodating the interests and abilities of the underrepresented sex, and therefore is not in compliance with Title IX.⁴¹ Because the burden is on the school to determine whether there are unmet athletic interests within the female student body, if a school chooses prong three, the school should develop a tool to measure women’s athletic interests. Here are some options that a school might use:

- Use a written survey for the school’s female students to determine any areas of unmet athletic interest;
- Review non-school sports programs in the region, including intramural, club sports, physical education courses, community sports, and other area recreational sports to assess any unmet or growing areas of athletic interests for women.
- Review what other schools, systems, leagues and state associations in the school’s competition region are doing to meet the growth and trends in female athletic interests.

AREA TWO: ATHLETIC FINANCIAL ASSISTANCE

Area Two of Title IX compliance in athletics is reviewing athletic financial assistance. Because this area usually only applies to the post-secondary level and its athletic scholarships, it will only be addressed briefly here. If a college or

university provides athletic scholarships, it must provide reasonable opportunities for scholarships to members of each sex in proportion to the participation rate of each sex in intercollegiate athletics.⁴² The budgets for male and female sports do not have to be equal, and an institution does not have to provide the same number of scholarships for men and women.⁴³ Importantly, while unequal budgets for each sex will not automatically violate Title IX, the OCR may consider the failure to provide necessary funds for one sex in determining equality.⁴⁴ The key to allocating financial resources is the overall impact of expenditures. The total amount of assistance awarded to men and women must be *substantially proportionate* to their participation rates in athletic programs.⁴⁵ For example, if 47% of a university's athletes are male, the total amount of aid going to male athletes should be approximately 47% of the financial aid dollars the institution awards.⁴⁶

In addition, scholarship disparities may be justified by legitimate factors not related to sex. "For example, at some institutions the higher costs of tuition for out-of-state residents may cause an uneven distribution between scholarship aid to men's and women's programs."⁴⁷ Differences also may be explained by a school's own internal decision regarding program development. For example, a school beginning a new program may spread scholarships over a full generation (four years) of student athletes, thereby, awarding fewer scholarships during the first few years than would be necessary to create equality.⁴⁸

AREA THREE: EQUIVALENCE IN OTHER ATHLETIC BENEFITS AND OPPORTUNITIES: "THE LAUNDRY LIST"

The third area of compliance is determining whether equal opportunities in athletics are available for males and females. This is often called the "laundry list."⁴⁹ Again, OCR analyzes a school's program as a whole--not sport compared to sport.⁵⁰ In other words, when a complaint is filed claiming unequal treatment of male versus female athletes, OCR does not only evaluate the boys' basketball team as compared to the girls' basketball team. Rather, all male sports are compared to all female sports when determining equivalence. Whether a school's entire athletic program is equitable depends on multiple factors, including:

- Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes;
- The provision of equipment and supplies;
- Scheduling of games and practice time;

- Travel and per diem allowance;
- Coaching and academic tutoring;
- Assignment and compensation of coaches and tutors;
- Locker rooms, practice and competitive facilities;
- Medical and training facilities and services;
- Housing and dining facilities and services; and
- Publicity.⁵¹

For each of the above areas on the “laundry list,” OCR has clarified that schools must provide equivalent treatment, services and benefits.⁵² The overall equivalence standard allows schools to achieve their program goals by providing equal athletic opportunities. To determine equivalency in boys’ and girls’ athletic programs, each of the above factors is assessed by comparing the following:

- Availability;
- Quality;
- Kind of benefits;
- Kind of opportunities; and
- Kind of treatment.⁵³

Under this equivalency standard, *identical* benefits, opportunities or treatment are not required. For example, locker room facilities for a girls’ team do not have to be the same as for a boys’ team, as long as the effect of any differences in the overall athletic program are negligible. In addition, nondiscriminatory factors *can* account for differences in girls’ and boys’ programs. In other words, if a comparison of programs suggests they are not equivalent, the school may still be in compliance if the differences are the result of nondiscriminatory factors. Generally, these differences will be the result of unique aspects of a particular sport, such as the nature of equipment and maintenance of competition facilities.

To determine if differences are caused by gender discrimination, the OCR looks for a disparity between the boys’ and girls’ programs. Title IX requires that there should be no disparity. A “disparity” is defined as a difference, on the basis of sex,

in benefits or services, which has a *negative impact* on athletes of one sex when compared with benefits or services available to athletes of the other sex.⁵⁴ The OCR looks at a school's entire athletic program to determine whether there is a disparity and the significance of the disparity. If the disparities are greater for one sex than the other, and the difference results in lack of equal opportunity for one sex, then an overall finding of noncompliance may be made.⁵⁵

SPECIFIC AREAS OF COMPARISON

1. Equipment and Supplies. Equipment and supplies include but are not limited to uniforms, sport-specific equipment and supplies, instructional devices and conditioning and weight-training equipment. Uniforms include practice and game uniforms, shoes, and warm-up suits. Equipment includes bats, sticks, rackets and equipment for practice and competition. Conditioning and weight-training equipment includes weights, water bottles, sweat-bands, braces, etc. OCR also looks at:

- The quality of equipment and supplies;
- The amount of equipment and supplies;
- The suitability of equipment and supplies;
- The maintenance and replacement of the equipment and supplies; and
- The availability of equipment and supplies.⁵⁶

2. Locker Rooms, Practice and Competitive Facilities. This is one of the most common areas where differences are found between boys' and girls' programs. Here, the OCR will examine:

- The quality and availability of practice and competition facilities;
- The exclusivity of use of the facilities provided for practice and competitions;
- The quality of the locker rooms;
- The maintenance of practice and competition facilities; and
- The preparation of facilities for practice and competitive events.⁵⁷

3. Travel and Daily Allowance. OCR considers the following five factors:

- The method of transportation;
- The housing furnished during travel;
- The length of stay before and after competitive events;
- The per diem allowance provided to the teams; and
- The dining allowance and arrangements provided to the teams.⁵⁸

4. Scheduling of Games and Practice Times. In this area, OCR considers, among other factors:

- The number of competitive events offered per sport;
- The number and length of practices;
- The time of day competitive events are scheduled;
- The time of day practices are scheduled; and
- The number of pre-season and post-season competitive opportunities.⁵⁹

5. Coaching. This factor relates to years of experience, quality, compensation and assignment of coaches.⁶⁰ OCR's focus is whether female athletes have access to the same quality and expertise of coaching overall as male athletes.⁶¹ To determine compliance, OCR examines factors like:

- The availability of full-time coaches;
- The availability of part-time and assistant coaches;
- The rate of compensation (per sport, per season);
- The length of contracts;
- The conditions relating to contract renewal;
- Experience of coaches;
- The nature of coaching duties performed; and
- Working conditions.⁶²

6. Publicity. In determining compliance with this program component, OCR examines:

- The availability and quality of a school's advertisement of games and competitions;
- The ability to access other publicity resources for boys' and girls' programs; and
- The quantity and quality of publications and other promotional devices featuring boys' and girls' programs.⁶³

7. Medical and Training Facilities and Services. In determining compliance with this program component, OCR examines among other factors:

- Availability of medical personnel and assistance;
- Health, accident and injury insurance coverage;
- Availability and quality of weight and training facilities;
- Availability and quality of conditioning facilities; and
- Availability and qualifications of athletic trainers.⁶⁴

REVENUE AND BOOSTER CLUBS

Finally, OCR has made clear that schools cannot use an economic justification for discrimination. When a school accepts money from an outside source, e.g. fundraising, sponsors, booster clubs, private donations, the school can use the money in the manner specified by the outside source, but the school cannot use that direction as an excuse for discrimination. In addition, the ability or inability to generate revenue is not a legitimate reason for violating Title IX.⁶⁵ Regardless of the revenue source, an institution has a responsibility to ensure that boys' and girls' programs receive equivalent benefits.⁶⁶ This does not mean teams must share fundraising benefits. But the school remains responsible for making sure benefits, services, treatments and opportunities are equivalent, regardless of the revenue source.⁶⁷

Booster clubs are a frequent area of OCR review. Booster clubs sometimes provide benefits to the boys' teams that the girls' teams do not receive. For example, the football booster club, because of its size, is likely able to raise more funds than the volleyball booster club. If the fundraising activities of the football booster club

results in more funds being raised for the boys than the girls, a school has an obligation to at least *consider* whether that additional funding impacts the entirety of the boys' programs enough that the school needs to provide more funding for the girls' programs. If there is a disparity, the institution has three choices. It may:

- Increase the benefits for the girls;
- Decrease the benefits for the boys; or
- A combination of both.

This places an administrative burden on schools trying to monitor the distribution of all benefits to all teams, regardless of the source. For this reason, some schools choose to put all sports teams under one school-wide athletic booster club, where the club's board ensures that equal benefits and services are provided to all teams—both male and female. Here are other tips that may address the disparity caused by boosters and other benefactors:

- Advise the benefactor of Title IX and ask that the gift to be used in a nondiscriminatory fashion that benefits both genders.
- Create a policy where all outside donations are deposited into a unified athletic fund for all teams instead of being given directly to a specific team.
- Accept the gift and publicize a challenge or matching gift to the community.

TITLE IX AND DISCRIMINATION IN EMPLOYMENT IN EDUCATION PROGRAMS

In addition to protecting students, Title IX also protects individuals from sex discrimination in employment.⁶⁸ That protection covers employment, recruitment, consideration, advertising, hiring, upgrading, tenure, firing, rates of pay, fringe benefits, leave for pregnancy and childbirth and participation in employer-sponsored activities.⁶⁹ The following summarizes key areas school boards should be aware of.

COMPENSATION

Under Title IX, a school system cannot establish policies that result in unequal compensation to employees on the basis of sex in jobs that require equal skill, effort and responsibility, and that are performed under similar conditions.⁷⁰ In

addition, the school system may not discriminate based on sex with regard to fringe benefits such as medical, hospital, accident, life insurance or retirement benefits, services, policies, or plans, and leave.⁷¹

EMPLOYMENT TESTS

An employment test that screens out applicants on the basis of sex may not be used, unless the test is shown to validly predict successful performance in the position, and alternative tests are unavailable.⁷²

PRE-EMPLOYMENT INQUIRIES

The Title IX regulations make a distinction between questions about marital status and questions about gender. Questions about marital status are prohibited. This includes asking on an application whether an applicant is a “Miss or Mrs.” An employer may make a pre-employment inquiry about gender when the inquiry is made equally for both sexes and is not used for discriminatory purposes. For example, it is permissible for an employer to ask the sex of applicants to develop “applicant flow data” to monitor equal employment opportunity.⁷³

MARITAL OR PARENTAL STATUS

Under Title IX, an employer also may not discriminate or establish practices based on the current or potential marital or parental status of employees or applicants. The employer also may not differentiate on the basis of sex by asking whether a person is the head of a household or the primary wage earner in a family.

Title IX requires employers to treat pregnancy and related conditions the same as other temporary disabilities. This includes the granting of leave, payment of disability income, accrual of seniority, and the provision of other benefits and services. For example, a pregnant woman must be given the same benefits and rights provided a man who temporarily leaves work due to a broken arm.⁷⁴

SEX AS A BONA-FIDE OCCUPATIONAL QUALIFICATION

Employers may engage in action otherwise prohibited by Title IX if sex is shown to be a bona-fide occupational qualification for a job. For example, employers may consider an applicant’s sex when hiring for a position in a locker room or toilet facility used only by one sex. An employer cannot, however, claim a bona-fide occupational qualification exists based on stereotyped characterizations of one sex or the other.⁷⁵

COURTS AND THE TRANSFORMATION OF TITLE IX

In addition to OCR's interpretation of Title IX through the years, federal circuit courts have provided schools guidance as well. The United States Supreme Court has issued a number of rulings interpreting Title IX. In *Cannon v. University of Chicago*,⁷⁶ the Supreme Court held that Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination. In *Franklin v. Gwinnett County Public Schools*,⁷⁷ the Supreme Court held that private parties may seek monetary damages for intentional violations of Title IX after a school board was deliberately indifferent to a teacher-on-student sexual harassment.⁷⁸ In *Gebser v. Lago Vista Independent School District*, the Supreme Court held that a school must have "actual notice" of the discrimination and fail to act appropriately before it can be held liable under Title IX.⁷⁹ Finally, in *Davis v. Monroe County Board of Education*, the Supreme Court held that students who are harassed by other students may sue the school district for monetary damages. Importantly, the *Gebser* and *Davis* courts determined that although Title IX makes no explicit reference to sexual harassment or abuse, such conduct can sometimes constitute sex discrimination. In addition, *Gebser* and *Davis* established that Title IX requires a school to investigate or otherwise respond to sex discrimination. Because the *Davis* and *Gebser* courts ultimately influenced OCR's Final Rule regarding Title IX and sexual harassment, the following paragraphs summarize these two important decisions in more detail.

In *Gebser v. Lago Vista Independent School District*, a middle school student was sexually molested by a teacher on two occasions. The student did not report the relationship to school officials at the time, but parents of other students complained to the principal about the teacher's suggestive comments in class. The teacher apologized. The complaints were not reported to the superintendent. Several months later, a police officer discovered the teacher and the student engaging in sexual intercourse and arrested the teacher. The school district terminated the teacher and the state revoked his teaching license. The student and her mother sued the school district and the teacher. The student argued that the school district should have known about the teacher's misconduct and done something to stop it. Ultimately, the Supreme Court decided that a school district could be liable for monetary damages under Title IX when an employee with authority to take corrective action has actual notice of sexual harassment but responds with deliberate indifference, meaning its response was "clearly unreasonable under the known circumstances." In ruling in favor of the school district, the Court determined that to establish liability in a private right of action, the party must show that a school official who had authority to stop the discrimination had actual

knowledge of the misconduct and displayed deliberate indifference to the harassment.⁸⁰

Not long after *Gebser*, in *Davis*, it was alleged that a fifth-grade boy taunted and touched a girl numerous times over a five-month period and that three teachers and the principal failed to help her. The boy was charged and pleaded guilty to sexual battery. The girl sued the school district, the superintendent, and the principal, alleging violation of Title IX. Regarding student-on-student sexual harassment, the U.S. Supreme Court applied the *Gebser* standard and held that the school district could properly be held liable because a school official had actual knowledge of the harassment and was deliberately indifferent to it. In order to prevail when a student is sexually harassed by another student, however, a student would have to prove:

- Gender-oriented conduct that is severe, pervasive and objectively offensive;
- The alleged harassment has denied the student an equal opportunity or benefit to an education;
- The school district had actual knowledge of the alleged harassment;
- The school district was deliberately indifferent to the harassment; and
- Damages as a result of the harassment. In other words, mere teasing or name-calling, even if based on a student's sex, would not rise to the level of sexual harassment under Title IX.⁸¹

TITLE IX AND TRANSGENDER STUDENTS

In addition to their interpretations regarding Title IX liability, the OCR and federal courts have also had to determine whether “gender” under Title IX includes discrimination on the basis of sexual orientation and/or gender identity. As noted earlier, Title IX provides: “[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁸² Although Title IX has long been understood to include discrimination based on failure to conform to sex-based stereotypes, neither Title IX nor its regulations mentioned discrimination on the basis of a student's sexual orientation or gender identity.

In 2015, however, the OCR clarified this issue when it issued an opinion letter and stated: “When a school elects to separate or treat students differently on the basis

of sex a school generally must treat transgender students consistent with their gender identity.”⁸³ The 2015 opinion letter from OCR cited to its *Questions and Answers on Title IX and Single–Sex Elementary and Secondary Classes and Extracurricular Activities*, which said, “All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes.”⁸⁴ Shortly thereafter in May 2016, OCR in conjunction with the Department of Justice, issued a Dear Colleague Letter taking the same position.⁸⁵ When the Trump administration took office in 2017, the OCR withdrew its guidance on transgender students.⁸⁶ Post-2017, a transgender student, or a student who felt he or she was being discriminated against because of sexual orientation, was protected by laws such as the U.S. Constitution, certain factual scenarios under Title IX, and state laws and local school board policies which explicitly protected them. OCR, however, did not specifically identify these groups of students as being a protected class of individuals that were entitled to specific protection under Title IX. Most recently, in June 2021, the Biden Administration reversed the Trump administration and issued new guidance making clear that transgender students are protected by Title IX.

Additionally, in June 2020, the U.S. Supreme Court held that discrimination on the basis of an individual’s status as homosexual or transgender constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964.⁸⁷ Thus, under *Bostock*, employers, including school systems, are now specifically prohibited from discriminating against an employee because of their sexual orientation or transgender status. While the Court’s decision was within the context of the employer/employee relationship under Title VII, the *Bostock* decision set the stage for addressing whether the same standard should apply to students under Title IX.

School systems did not have to wait long for federal courts to begin interpreting *Bostock’s* application to Title IX. Less than two months later, the 11th Circuit, which rules on federal cases in Alabama, Georgia and Florida, issued a decision in a case involving a Florida high school student who sued his school district for its bathroom policy. The transgender boy was not allowed to use the boys’ bathroom even though he identified as male. The 11th Circuit followed *Bostock* and held that Title IX protects transgender students from discrimination based on their gender identity. *Adams by & through Kasper v. School Board of St. Johns County*.⁸⁸ While the school district argued that Title IX’s bar on sex discrimination is different from

Title VII's workplace discrimination provisions, because "schools are a wildly different environment than the workplace" and education "is the province of local governmental officials," the 11th Circuit was not persuaded, finding that "Congress saw fit to outlaw sex discrimination in federally funded schools, just as it did in covered workplaces...[w]ith *Bostock's* guidance, we conclude that Title IX prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex."⁸⁹

The 11th Circuit's decision in *Adams*⁹⁰ marks one of the first federal circuit courts to issue such a ruling regarding Title IX and transgender students.⁹¹ The decision will impact how Alabama school systems implement bathroom policies and treatment of transgender students. It will also likely subject Alabama school systems to more scrutiny, as well as more lawsuits related to discrimination against transgender students beyond the bathroom issue. School systems should expect renewed challenges from transgender students and employees who can now rely on *Bostock* and *Adams* for support. In light of the scrutiny that Alabama schools may face and the quickly developing case law, AASB encourages you to consult your legal counsel to determine whether a school must accommodate transgender students and/or employees' access to restrooms and locker rooms of the sex with which they identify. In order to minimize exposure, AASB suggests you and your legal counsel consider the following:

- Consider whether gender identity and expression should be included in your Title IX, nondiscrimination and conduct policies. Determine whether such policies should expressly prohibit discrimination on the basis of transgender status or sexual orientation.
- Review all documents, forms, records and online information to ensure that gender-inclusive language and options are used and that the approach is consistent across schools and departments.
- Consider whether to include a policy that would allow a transgender student or employee to use bathroom and locker room facilities aligned with their gender identity. At a minimum, consider making a sufficient number of single-user facilities available to all students and employees who want additional privacy, regardless of gender identity. Consider converting open urinals to private urinals for additional privacy, regardless of gender identity. Such restrooms should use clear gender-neutral labeling and be clearly designated on campus maps. In light of *Adams*, you should not have a policy or practice that requires

the single-user bathroom be used by transgender individuals; rather, make them available for anyone to use.

- Consider a particular method by which students and employees can seek accommodation based on gender identity. Such accommodations could include restroom access, preferred names and pronouns, and changes to school records to align with an individual’s gender identity. If possible, your policies and procedures should designate the person who will receive such requests so that person can be trained in this sensitive area.
- Provide training for school employees on issues relating to gender identity and sexual orientation. Similarly, regular outreach and awareness initiatives can be used to enhance acceptance of gender diversity within the school community.
- Finally, remind your stakeholders that protection of rights is not a “majority rules” issue. Even if most people in your community object to protecting transgender students, the school has a legal obligation to do so. Consider assembling a committee of stakeholders to discuss ongoing efforts and to support your school in fostering an environment of inclusivity.

SEXUAL HARASSMENT UNDER TITLE IX

THE FINAL RULE: AN OVERVIEW OF THE TRANSFORMATION OF TITLE IX

Sexual harassment was not originally addressed by Title IX and its regulations. As discussed previously, *Gebser* and *Davis* set the framework for sexual harassment claims under Title IX along with OCR’s interpretations.

Under the Obama administration, OCR issued multiple Title IX Dear Colleague letters sparking a growing debate about how to address sexual violence and harassment of victims while protecting the due process and First Amendment rights of the accused. During this time, OCR was criticized for attempting to rule by letter rather than publishing formal rulemaking under the Administrative Procedure Act.

In 2017, the Trump Administration proposed new Title IX rules. The proposed rules were designed to address sexual harassment and to address due process

concerns raised by advocates for accused students in higher education. For the most part, the proposed regulations treated colleges and K-12 schools the same. OCR received almost 125,000 comments from the public regarding the proposed rules. In May 2020, OCR released its final Title IX regulations (“the Final Rule”). The Final Rule, which went into effect on August 14, 2020, now defines sexual harassment and also highlights new due process requirements. Below is a more in-depth look into the Final Rule.

THE FINAL RULE: POLICY AND NOTICE REQUIREMENTS

While most of the prior regulation has simply been moved to new 34 C.F.R. §106.8, K-12 school systems and their attorneys should carefully review their existing notices and publications to ensure compliance. Generally, the Final Rule requires a school system to provide notice of its nondiscrimination policy and grievance procedures to the following groups: applicants for admission and employment, students, parents or legal guardians, unions or professional organizations holding agreements with the system. That notice must include how to report sexual harassment and how the school system will respond.⁹² In addition, the Final Rule requires notice to the same groups of the Title IX coordinator’s name or title, email address, office address, and telephone number.⁹³ The prior regulations only required notice of the Title IX coordinator’s name, office address, and telephone number.

The notice of nondiscrimination must state that the recipient does not discriminate on the basis of sex and that it is required by Title IX not to discriminate in such a manner. The notice must also state that the requirement not to discriminate also applies to employment. Next, the notice must state that questions about Title IX may be referred to the designated Title IX Coordinator, to the Assistant Secretary, or both. Finally, a school system must publish the notice of nondiscrimination described above, and the Title IX coordinator’s contact information, on its website, and in any handbook provided to the groups listed above, e.g. employee handbook and student code of conduct.⁹⁴ A sample notice is provided in the Appendix.

THE FINAL RULE: THE TITLE IX COORDINATOR

The Title IX regulations have always required school systems to designate an employee to coordinate the system’s efforts to implement the law. The Final Rule goes further. The Final Rule now requires the employee to be known as the “Title IX Coordinator.”⁹⁵ Practically speaking, AASB recognizes that many Alabama school systems do not have a full-time Title IX Coordinator. Rather, some school systems assign Title IX responsibilities, with other assigned duties, to a designated administrator like the Human Resources Director or the Curriculum Director. In

light of the Final Rule, AASB recommends that school systems consider whether a new position should be created and/or update the existing job title to include “Title IX Coordinator”, e.g. Director of Human Resources and Title IX. In addition, school systems should review the Title IX Coordinator’s job duties to ensure they have sufficient time to carry out this role.

THE FINAL RULE: THE DEFINITION OF SEXUAL HARASSMENT

The Final Rule now defines sexual harassment as conduct on the basis of sex that satisfies one or more of the following:

1. An employee conditioning an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct (otherwise known as *quid pro quo* sexual harassment);
2. Unwelcome conduct which is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school system’s education program; or
3. Sexual assault, dating violence, domestic violence or stalking as defined by federal law.⁹⁶

The new definition of sexual harassment adopts the higher standard from the *Davis* case.⁹⁷ This means that some cases which may have violated Title IX under the old standard will not violate Title IX under the new standard. Of course, offensive conduct may still be considered misconduct and subject the offender to discipline outside of Title IX. Now, conduct only falls under Title IX if it is so severe, pervasive, and objectively offensive that it denies the person equal access.

For K-12 purposes, the Final Rule defines an *education program or activity* as including “any location, event, or circumstance over which the [school system] exhibits substantial control over both the alleged harasser and the context in which the harassment occurred.”⁹⁸ School officials will need to keep in mind that sexual harassment could encompass harassment made in alternate mediums, such as text messaging or social media if the harassment occurs in that medium while a student is at school or during a school-sponsored event or activity.⁹⁹

THE FINAL RULE: IDENTIFYING WHEN A SCHOOL SYSTEM MUST RESPOND

The Final Rule states that any person can report sex discrimination, including sexual harassment, regardless of whether the person is the victim of the reported conduct. That report can be made in person, by mail, by phone or by email using the Title IX Coordinator's contact information, or by any other means that results in the Title IX Coordinator receiving the person's report. The report may be made to the Title IX Coordinator at any time, including during non-business hours.¹⁰⁰

OCR will only hold a school system responsible for conduct if it has actual knowledge of the sexual harassment.¹⁰¹ For K-12 schools, the Final Rule defines "actual knowledge" as notice of sexual harassment or allegations of sexual harassment to *any employee*.¹⁰² OCR acknowledges that this approach is far broader than prior guidance."¹⁰³ OCR chose to expand the employees who would trigger an official response for several reasons, including consistency with mandatory child abuse reporting laws and the risk that an adult who targets young children may pressure them to stay silent. OCR found that it is "unreasonable to expect young children to seek out specific employees" to report sexual harassment.¹⁰⁴

Once a system has actual knowledge of sexual harassment, it must respond "promptly in a manner that is not deliberately indifferent."¹⁰⁵ Under the Final Rule, a system is only deliberately indifferent if its response to sexual harassment is "unreasonable in light of known circumstances." OCR and court decisions will likely help school systems interpret what constitutes "actual knowledge" and "deliberate indifference." Until such time, systems should ensure that all employees are properly trained on recognizing sexual harassment under the new definitions, and that all employees know who the Title IX Coordinator is and what the process is for reporting sexual harassment.

THE FINAL RULE: THE COMPLAINANT AND RESPONDENT

The Final Rule provides several new definitions related to reporting sexual harassment. A "complainant" is a person who is alleged to be the victim of conduct that could be sexual harassment.¹⁰⁶ A complainant may file a "formal complaint" with the Title IX coordinator by mail, email, or other method made available by the school system. Importantly, 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 system with which the formal complaint is filed.

In addition, the Title IX Coordinator may also sign a complaint but doing so does not make the Title IX coordinator a party in the grievance process. Only a complainant and the Title IX Coordinator may file a formal complaint.¹⁰⁷

A “respondent” is a person who has been reported to be the perpetrator of sexual harassment.¹⁰⁸ The respondent can be a fellow student or a school system employee.

THE FINAL RULE: THE SCHOOL SYSTEM’S RESPONSE

As mentioned above, the Final Rule requires that a school system respond in a manner that is not deliberately indifferent. To meet that requirement, the Final Rules discuss the general requirements for responding to actual knowledge of sexual harassment separately from the required procedure for responding to a *formal complaint* of sexual harassment, defined as a document filed by a complainant or signed by the Title IX Coordinator.¹⁰⁹ Put another way, under the new Rules, a school system’s response is now two-fold: (1) a system’s general response to actual knowledge of sexual harassment, (which could include an informal verbal or written report of sexual harassment by any individual), and (2) a system’s response to a formal complaint.¹¹⁰

GENERAL RESPONSE

The Final Rule requires a school system respond promptly, in a manner that is not deliberately indifferent to actual knowledge of sexual harassment. This provision adopts the *Gebser/Davis* standard, as does the Final Rule’s definition, stating that a recipient is *deliberately indifferent* if its response is clearly unreasonable in light of known circumstances.¹¹¹

SUPPORTIVE MEASURES

A school system’s response must treat complainants and respondents equitably by offering supportive measures to a complainant and by following a grievance process before imposing any disciplinary consequences or sanctions on a respondent.¹¹² “Supportive measures” are non-disciplinary, non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed.¹¹³ Examples of supportive measures include counseling, course modifications, schedule changes, and increased monitoring or supervision. Supportive measures should be designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party. In other words, a supportive measure that completely removes a respondent from an activity would likely be considered punitive.¹¹⁴

The Final Rule makes clear that supportive measures are required and are not necessarily interim in nature. They apply even if no formal complaint has been filed. They also apply equally to the respondent as well as the complainant. In addition, the Final Rule requires the Title IX Coordinator to promptly contact the complainant (the alleged victim) to discuss potential supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint and explain the process for filing a formal complaint.¹¹⁵ The Title IX Coordinator's prompt response and offer of supportive measures is required regardless of whether a formal complaint is filed. Be sure to document those measures.

CONDUCT OUTSIDE THE UNITED STATES

Finally, under previous OCR guidance and practice, conduct that occurred outside of the United States, off-campus, or online could be fair game for review by OCR - even if the offender was not a student, parent or employee. In essence, if the conduct had sufficient impact on a student's education, a school system could be required to respond. The Final Rule changes that guidance. Now, in order to be covered by Title IX, conduct must occur "in" a school's education program or activity and the conduct must be perpetrated in the United States.

EMERGENCY REMOVAL/ADMINISTRATIVE LEAVE

Despite the time consuming and formal process required by the Final Rule once a formal complaint is filed, an emergency removal may be in order in addition to supportive measures. The regulations do not prohibit immediate removal of a respondent from the school on an emergency basis, provided that the system conducts an individualized safety and risk analysis. The system must also determine that emergency removal is necessary to protect a student or others from an immediate threat to physical health or safety. The system must provide the respondent with notice and an opportunity to challenge the decision immediately after the removal.¹¹⁶ OCR has suggested that the term "physical" was added before "health and safety" to clarify that emergency removal would not be an appropriate action to address emotional or mental health needs, which should instead be addressed by supportive measures. In providing an example of a situation that might justify emergency removal, OCR states that "if a respondent reacts to being accused of sexual harassment by threatening physical self-harm, an immediate threat to the respondent's physical safety may 'arise from' the allegations of sexual harassment and could justify an emergency removal."¹¹⁷

School systems should also note that emergency removal does not modify any rights under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.¹¹⁸ Emergency removal of a student in a Title IX proceeding could potentially become a change of placement under IDEA or Section 504.¹¹⁹ While it is unknown how the emergency removal provisions will work with the IDEA and Section 504 provisions, as a practical matter, it is clear that the Final Rule will require school systems to coordinate their compliance efforts with special education staffers before a student is removed from their current educational setting.

FORMAL COMPLAINT PROCESS

As indicated above, the Final Rule creates an extensive new procedures for processing complaints. In fact, the Final Rule creates two tracks: (1) one when a system has actual knowledge of sexual misconduct and (2) one when a formal complaint has been filed. Under the Final Rule, once a formal complaint is filed, systems are allowed wide latitude to use informal processes such as mediation to address the complaint unless the complaint alleges employee-on-student sexual harassment. As previously mentioned, the Final Rule no longer allows just anyone to file a complaint. Now, only the victim (complainant) or the Title IX Coordinator are allowed to file a formal complaint. Once a formal complaint is filed, the Final Rule requires systems to follow a number of specific steps to investigate and resolve the complaint. Below is a summary of the major procedural steps in the rule, which are aimed at increasing fairness to the parties.

BASIC ELEMENTS

In response to a formal complaint of sexual harassment, school systems must follow a grievance procedure that must do the following:

- **Treat parties equitably** by following a grievance process before imposing any discipline, or other actions that are not supportive measures. Also, provide remedies to a complainant once the respondent has been found responsible. The remedies may ultimately include the supportive measures, but they can also punish the respondent.
- **Require an objective evaluation of the evidence**, whether it refutes or supports the complaint. Also, resist the urge to assess credibility based on a party's status as complainant, respondent, or witness.
- **Ensure that there is no conflict of interest** by the Title IX coordinator, investigator, decisionmaker, or other authority against the parties. Train the authorities on the definition of sexual harassment;

how to conduct an investigation and grievance process, including hearings, appeals, and informal processes; and how to serve impartially. Investigators must be trained on how to prepare an investigation report, and decisionmakers must receive training on any technology to be used at a live hearing and issues of evidence and questioning, including when questions about a complainant's prior sexual history or disposition are not relevant. Training must promote impartial investigations and resolution of formal complaints and must not be based on sex stereotypes.

- **Foster the presumption** that the respondent is not responsible for the alleged conduct until a determination has been made at the end of the grievance process.
- **Include reasonably prompt time frames** to complete the grievance process, including a process for temporary delays when necessary (e.g., law enforcement involvement, absence of a party, witness, or advisor, translation or accommodation needs) with written notice to both parties explaining the reason for the delay.
- **Respect the privilege** by not allowing or using evidence or questions that seek legally privileged information, unless the privilege is waived.
- **Describe the potential supportive measures** available to complainants and respondents.
- **Describe the possible disciplinary actions** and remedies that are possible if the respondent is found responsible.
- **State the standard the decisionmaker used**, whether a preponderance of evidence or clear and convincing, to determine responsibility. School systems must use the same standard for all formal complaints, including complaints against employees.
- **Provide for appeals**, including the procedures and permissible reasons a respondent or a complainant may use.¹²⁰

WRITTEN NOTICE

Once a formal complaint is received, the system must provide written notice to all known parties in enough time to give the respondent time to prepare a response before an initial interview. Written notice must include:

- Notice of the grievance process, including any informal resolution process;
- Notice of the allegations, including sufficient detail (e.g., names of

known parties, the conduct alleged to be sexual harassment, and the date and location of the conduct, if known) to allow the respondent to prepare a response;

- A statement that the respondent is presumed not responsible for the conduct and that responsibility will be determined at the end of the grievance process;
- Notice of the parties' right to have an advisor (who may be, but is not required to be, an attorney) and to inspect and review evidence; and
- Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process.¹²¹

If the system decides to investigate allegations about the respondent or complainant that were not included in the original complaint, written notice of the additional allegations must also be provided in writing to the known parties.

DISMISSAL

The Final Rule sets out reasons for dismissal of a formal complaint. This section was designed to let complainants trigger an investigation, while recognizing that OCR allows school systems to handle misconduct that does not violate Title IX.¹²² The following reasons are outlined in the Final Rule as reasons for dismissal of a formal complaint:

- The complaint must be dismissed: (1) if the allegations would not constitute sexual harassment as defined even if proved, (2) if the conduct did not occur in the school system's program or activity, and/or (3) if the alleged conduct did not occur in the United States; or
- The complaint may be dismissed if: (1) the complainant notifies the Title IX coordinator at any time that he or she wishes to withdraw the complaint or an allegation; (2) if the respondent's enrollment or employment ends; or (3) if specific circumstances prevent the system from gathering evidence sufficient to reach a determination.

If a Title IX Coordinator dismisses a complaint because it is not a violation of Title IX, other actions may be taken pursuant to local law or school system policy. Finally, if a system dismisses a complaint, written notice must be provided to both parties simultaneously, including the reasons for mandatory or discretionary dismissal.¹²³

CONSOLIDATION

The Final Rule allows formal complaints to be consolidated if they are against more than one respondent, by more than one complainant against one or more respondents, or by one party against another party, where the allegations arise out of the same facts or circumstances.¹²⁴

INVESTIGATION

After a formal complaint has been filed and notice has been provided to the parties, the school system may begin investigating the formal complaint. The Title IX Coordinator should appoint an investigator and notify the parties of his or her name. Under the Final Rule, when investigating a formal complaint and throughout the grievance process, the system and investigator must:

- Ensure that the system, not the parties, has burden of proof and of collection of evidence, except that certain treatment records cannot be obtained without voluntary, written consent from the party or parent;
- Provide an equal opportunity for the parties to present witnesses and evidence;
- Allow either party the ability to discuss the allegations or gather and present evidence;
- Allow the parties to have others present during interviews or other proceedings, including an advisor who may or may not be an attorney;
- Provide written notice to a party who is invited or expected to attend any investigative interview, hearing, or other meeting with enough time to allow the party to prepare to participate. The notice should contain the date, time, participants, purpose and location of the event;
- Provide both parties and their advisors, if any, an equal opportunity to review all evidence that is directly related to the allegations in the formal complaint. This includes evidence that the system does not intend to use and any exculpatory or inculpatory evidence from any source. Such evidence must be provided before the final investigation report is completed. It should also be provided in enough time to give the parties at least 10 days to prepare a written response, which the investigator must consider prior to completing the final report; and
- Prepare a written investigation report that fairly summarizes the relevant evidence and provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility.¹²⁵

HEARINGS

Following the investigation, and upon completion of the written investigation report by the investigator, the school system may provide a hearing in order to make a determination regarding the sexual harassment.¹²⁶ The Final Rule, however, does not **require** K-12 schools to provide live hearings. According to OCR's commentary, systems "could determine that their educational community is best served by holding live hearings for high school students, for students above a certain age, or not at all."¹²⁷

With or without a hearing, after the investigative report is completed, the system must provide each party the chance to submit written, relevant questions that he or she wants asked of another party or witness, provide each party with the answers, and provide for limited follow-up questions. The Final Rule sets out how to handle questions about a complainant's prior sexual behavior.¹²⁸ Because of the procedural requirements and nature of live hearings, AASB recommends that you consult your counsel in determining whether a live hearing process is appropriate for your school system.

DETERMINATION OF RESPONSIBILITY

After the investigator completes the final investigation report, and the parties are given an opportunity to review the report and submit questions, the investigator then provides the report to the decisionmaker. The decisionmaker, who cannot be the investigator or the Title IX coordinator, must then apply the school system's standard of evidence and issue a written determination of responsibility that:

- Identifies the allegations that potentially constitute sexual harassment;
- Describes the system's procedural steps taken from the receipt of the complaint to the determination;
- Includes findings of fact supporting the determination;
- Includes conclusions regarding application of the code of conduct to the facts;
- Includes a statement of, and a rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions, and whether remedies to restore or preserve equal access to the school program or activity will be provided to the complainant; and
- Includes procedures and allowable reasons for appeals.¹²⁹

APPEALS

Under the formal complaint process, school systems must offer both parties the right to appeal the decision, whether that decision has found the respondent responsible or the complaint has been dismissed. The appeal may be based on any of the following reasons: (1) a procedural irregularity that affected the outcome; (2) new evidence that was not reasonably available at the time of the decision and could affect the outcome; or (3) a conflict of interest on the part of the Title IX coordinator, investigator or decisionmaker that affected the outcome. In addition to these reasons, a system's grievance procedure may also give both parties an equal right to appeal for other reasons.¹³⁰

For all appeals, however, the system must ensure that written notice is provided to both parties of the appeal and both parties must be provided an equal opportunity to submit a written statement in support of, or challenging, the determination. The appeal process must result in a written decision that must be provided to both parties simultaneously.¹³¹

In addition, systems must make sure that the decisionmaker for an appeal: (1) is not the Title IX coordinator, investigator or initial decisionmaker; (2) does not have a conflict of interest or bias against the parties; and (3) receives appropriate training.¹³² Importantly, in the K-12 context, sometimes boards of education decide grievance appeals under local policies and procedures. AASB recommends that boards and their attorneys, discuss whether it is ideal for a board to serve in this capacity, given the unique training requirements and prohibition on conflicts of interest.

INFORMAL RESOLUTION

After the formal complaint has been filed, the Title IX Coordinator must offer the option of informal resolution in the written notice to the parties.¹³³ Importantly, the Final Rule prohibits a school system from offering an informal resolution process unless a formal complaint is filed. The intent is to ensure that the "default" procedure following a report of sexual harassment includes an investigation.¹³⁴ At any point during the formal complaint process, however, a system may offer an informal process that does not require a full investigation as long as the system: (1) provides both parties written notice of their rights; and (2) obtains the parties' written, voluntary consent. This is allowed unless the complaint involves an employee harassing a student.¹³⁵ OCR declined to adopt a definition of "informal resolution process," explaining that informal resolution "may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation or restorative justice."¹³⁶

THE FINAL RULE: RECORDKEEPING

Under the Final Rule, school systems must keep records related to sexual harassment reports for a minimum of seven years, including investigation records, disciplinary sanctions, remedies, appeals and records of any action taken, including supportive measures. Records should document that the system's response was not deliberately indifferent and that measures were taken to restore or preserve equal access to the education program or activity.¹³⁷ If a system does not offer supportive measures in response to a report, the records should document why the response was reasonable under the circumstances.

In addition to retaining any training materials used for Title IX coordinators, investigators, decisionmakers and any other designees, systems must also post the training material on their websites, or otherwise make the materials available to the public if the system does not have a website.¹³⁸

THE FINAL RULE: CONFIDENTIALITY AND RETALIATION

The Final Rule discusses confidentiality in a couple of areas. For example, a school system must keep confidential the identity of any person who has made a report or complaint of sex discrimination, including: (1) any person who has made a report or filed a formal complaint of sexual harassment, (2) any complainant, (3) any person who has been reported to be the perpetrator of sex discrimination, (4) any respondent, and (5) any witness, except:

- a) as may be permitted by FERPA; or
- b) as required by law; or
- c) to carry out the purposes of the Title IX regulations, including conducting any investigation, hearing, or judicial proceeding.¹³⁹

In addition, the school system must keep confidential any supportive measures provided to the complainant or respondent, unless doing so prevents the system from providing the supportive measures.¹⁴⁰

A school system cannot access, consider, disclose or otherwise use a party's records that are kept by a physician, psychiatrist, psychologist or other recognized professional in connection with treatment, unless the system obtains that party's voluntary, written consent to do so. If a party is not an "eligible student" as defined under FERPA (e.g., the party is a minor), then the school system must obtain the voluntary, written consent of a parent or authorized guardian.¹⁴¹

Finally, the Final Rule prohibits retaliation by a school system or any other person for the purpose of interfering with Title IX rights or because the person has participated or refused to participate in any manner in a proceeding under Title IX regulations.¹⁴² The retaliation provision is purposefully broad in scope.¹⁴³ It protects any person who has made a report or complaint of sex discrimination or harassment, any complainant, any person who has been reported to be the perpetrator of sex discrimination, any respondent, any witness and any other person who participates or refuses to participate in an investigation, proceeding or hearing. Although a wide variety of conduct may constitute retaliation, including acts of intimidation, threats, coercion and discrimination, the exercise of rights protected under the First Amendment does not constitute retaliation under the Final Rule.¹⁴⁴

Charging a person with a code of conduct violation based on knowingly making a false statement in bad faith is not retaliation. However, a simple finding of responsibility alone is not enough to find that a false statement was made. In other words, the deciding factor for whether an additional code of conduct charge is retaliatory is whether the charge is designed to interfere with any right or privilege secured by Title IX.¹⁴⁵

Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination that school systems are required to adopt.¹⁴⁶ The system should respond to a complaint of retaliation to the best of its ability.¹⁴⁷ If the person accused of retaliation is a student or employee, the system may pursue discipline. If the person accused is a third party, a system can take precautionary measures such as issuing a no-trespass order against the third party.

THE FINAL RULE: TRAINING

Under the Final Rule, all employees who are likely to receive information about sexual harassment should be trained on a regular basis regarding how to identify and report sexual harassment.¹⁴⁸ In addition, the Final Rule requires school systems to ensure that Title IX Coordinators, investigators, decisionmakers and other appropriate individuals receive training covering the following:

- The updated definition of Title IX sexual harassment;
- The scope of the school system's education programs and activities;

- How to conduct an investigation and grievance process, including the hearing or formal complaint process, appeals and informal resolution; and
- How to serve impartially, and without judgment, conflicts of interest and bias.¹⁴⁹

Because the Final Rules provide that “actual knowledge” is knowledge by any K-12 school system employee, systems should consider whether it will require all employees to participate in a general, awareness-level training module regarding sexual harassment and the system’s Title IX obligations. In addition, AASB recommends that boards decide whether decisionmakers should also receive training on issues of evidence since they should be able to determine issues of relevance and to be able to explain any decision to exclude certain questions or certain evidence. Investigators may also need training in order to create the investigative report and fairly summarize relevant evidence.

Finally, while the rules allow the form and length of training to the discretion of the system, any materials used to train individuals must avoid sex stereotypes and promote impartial investigations and adjudications of formal complaints. All materials must be made publicly available on the entity’s website, or if there is no website, materials must be made available upon request for inspection. Training materials must be maintained for seven years.¹⁵⁰

THE FINAL RULE: NEW RECORDKEEPING REQUIREMENTS

The Final Rule establishes many new recordkeeping requirements. These requirements state that school systems must maintain the following records for a period of seven years:

- a) In connection with a school system response to any report or formal complaint of sexual harassment, the system must create and maintain a record of any actions, including any supportive measures, that it takes in response to the report or complaint. In each instance:
 - i. The system must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the education program or activity;
 - ii. If a system does not provide a complainant with supportive measures, then the system must document the reasons why such a

response was not clearly unreasonable in light of the known circumstances; and

- iii. The documentation of certain explanations or measures does not limit the system in the future from providing additional explanations or detailing additional measures taken.
- b) In connection with each formal complaint of sexual harassment that is filed, a school system must maintain a record of:
- i. Each sexual harassment investigation including:
 - 1) any determination regarding responsibility;
 - 2) any disciplinary sanctions imposed on the respondent;
 - 3) any remedies provided to the complainant designed to restore or preserve equal access to the school's education program or activity; and
 - 4) any audio or video recording or transcript from any hearing held as part of the grievance process. (Note: School systems generally will not hold live hearings under their grievance processes and, as a result, will likely not generate such recordings/transcripts.)
 - ii. Any appeal and the result of an appeal; and
 - iii. Any informal resolution and the result therefrom.
- c) All materials used to train Title IX Coordinators, investigators, decisionmakers and any other appropriate person. A school system must make these training materials publicly available on its website, or if there is no website, the school system must make these materials available upon request for inspection by members of the public.¹⁵¹

CONCLUSION: IMPACT OF THE FINAL RULE ON K-12 SCHOOLS

AASB acknowledges that the Final Rule changes the standard for liability under Title IX, and that the Final Rule likely imposes significant challenges for our members. Keeping up with the Final Rule's extensive training, recordkeeping and documentation requirements will require additional staff time. Also, harmonizing the formal complaint procedures with existing laws, policies and student codes of conduct may also be difficult. For example, under the Final Rule, school systems

are required to turn away and dismiss certain complaints about sexual misconduct if the conduct is outside the new Title IX definition of sexual harassment. Systems, however, can still address, and may be *required* to address, the same conduct if it violates other provisions of the student code of conduct or another applicable federal or state law. One such law that may require a system to still address a student's complaint is the Jamari Terrell Williams Bullying and Prevention Act passed in Alabama in 2018.¹⁵² Like the Final Rule, the Jamari Terrell Williams Bullying and Prevention Act also has very strict requirements and processes that school officials are required to follow. Thus, school systems must now make sure employees receive knowledge and training on all applicable laws, policies and procedures and their overlap in order to avoid costly litigation and OCR scrutiny.

Next, in the employment context, the Final Rule now clearly applies sexual harassment to employees. It is still unknown, however, whether OCR will attempt to enforce Title IX in the employment context, or whether OCR will defer to the Equal Employment Opportunity Commission ("EEOC"), which is charged with enforcing discrimination and harassment under Title VII. Or rather, will the EEOC and the OCR work together? Until school systems are provided further clarification from one or both of the agencies, systems must now blindly navigate how to address sexual harassment through the lens of both Title IX and Title VII. Despite the lack of clarity regarding compliance with Title IX, however, because the Final Rule went into effect in August, school systems must act now to come into compliance.

Finally, AASB notes that the Biden Administration has indicated an intent to revise certain provisions. However, until such time as that happens, school systems are expected to comply with the new Title IX regulations. Thus, until school systems receive further clarification from OCR or the Department of Education, school systems should focus on training employees and updating policies and procedures. The Appendix shares resources and sample letters to provide some guidance as you navigate the Final Rule. Given all these complexities and the changing environment, AASB encourages school system officials and board members to consult with their school board attorney, especially when allegations of sexual harassment arise.

APPENDIX

SEXUAL HARASSMENT POLICY CHECKLIST

This is a basic checklist for school systems to consult when developing and implementing their Title IX policies, annual notices and staff trainings. This list is not exhaustive, but it provides a general overview of the key steps school systems should be taking as the new school year begins.

□ **Develop a Title IX Sexual Harassment Policy.**

School systems must have a policy that contains the school's grievance process for resolving complaints of sexual harassment under Title IX. This should be a separate policy, distinct from the general nondiscrimination and harassment policies. General policies should be reviewed and revised, if necessary, to clarify the role of the Title IX Sexual Harassment Policy.

□ **Designate a Title IX Coordinator and other Title IX personnel.**

The new regulations require school systems to name at least one Title IX Coordinator and give that person authority to ensure the system's compliance with Title IX. Notably, the position must be called "Title IX Coordinator" and his or her contact information must be included within the Title IX policy and annual notice of nondiscrimination.

There are other people who play key roles throughout the grievance process. For example, an investigator (who may or may not be the same person as the Title IX Coordinator), a decisionmaker (this person cannot be the Title IX Coordinator or investigator) and an appeals decisionmaker. While these individuals need not be named in the policy, consider who may serve in each role since this may impact who may be named Title IX Coordinator and who may need training.

□ **Notify Employees, Students, Parents and Applicants.**

School systems must notify employees, students, parents and applicants for employment and admission of the following:

- The name or title and contact information of the Title IX Coordinator(s);
- That the school system does not discriminate on the basis of sex in its education programs or activities, including in admission and employment, and that the school system is required by Title IX and its regulations not to discriminate in such a manner; and
- The school system's Title IX grievance procedures, including how to report or file a complaint.

Annual notices of nondiscrimination and other statements of nondiscrimination in policies, websites, handbooks and other system publications should be reviewed and revised as appropriate.

□ **Train Title IX personnel and all school staff on their new responsibilities.**

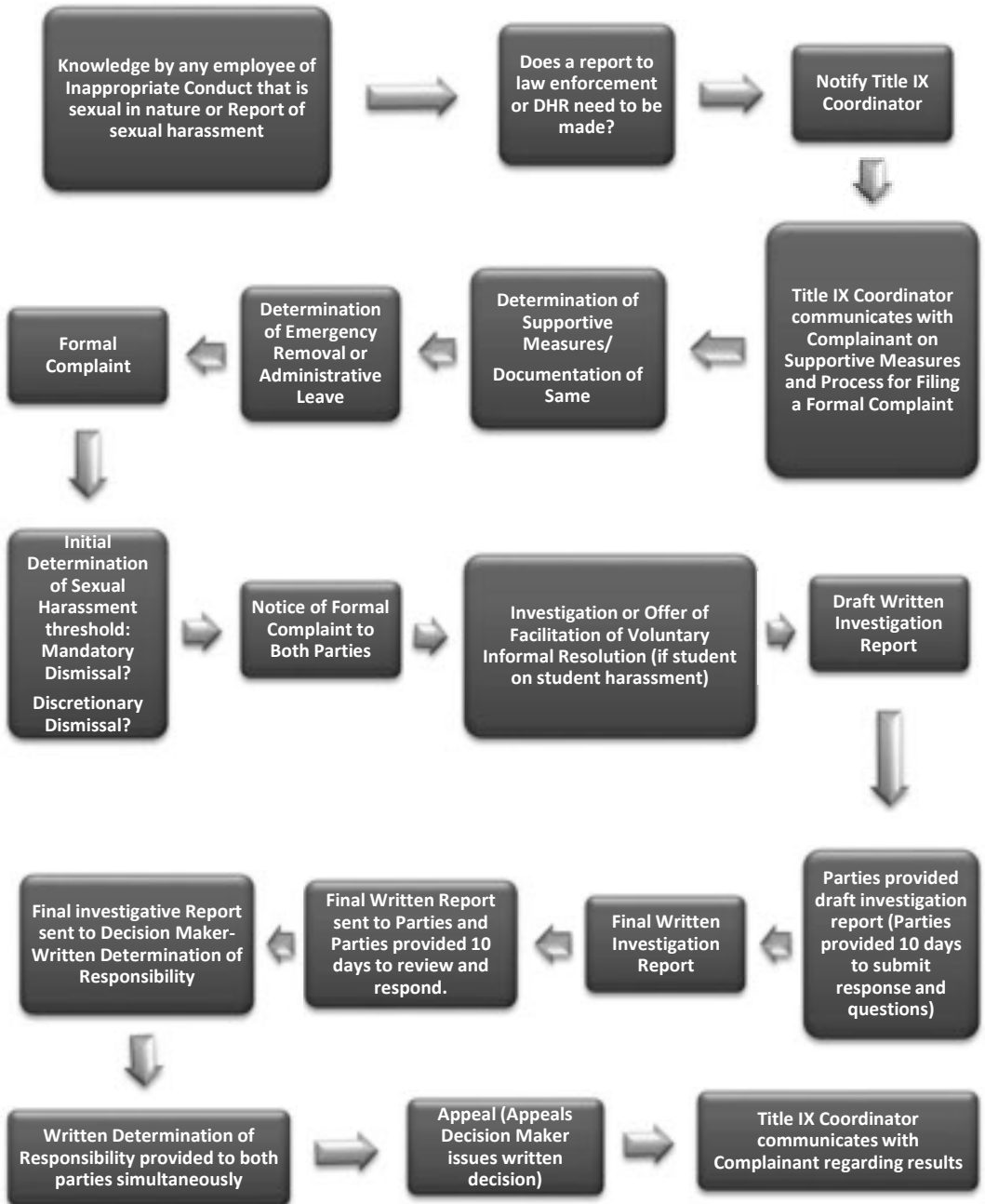
The new regulations require all Title IX personnel (Title IX Coordinators and anyone with responsibilities during the process) to receive Title IX training. The training needs to cover specific definitions contained within the policy, how to conduct an investigation and complete the grievance process and how to serve impartially.

Training is not required for non-Title IX staff, but any school employee that receives notice of sexual harassment allegations triggers the school system's obligation to respond under Title IX. Therefore, we recommend that all school staff receive at least some training on the definition of sexual harassment and what to do if they learn of allegations of sexual harassment.

□ **Publish Title IX materials.**

The final rule requires all Title IX policies to be published on the system's website and in applicable handbooks. Additionally, any Title IX training materials used should also be published on the system's website for the public to access.

TITLE IX SEXUAL HARASSMENT FLOW CHART



A student can file an OCR Complaint at any time during this process.

TITLE IX GRIEVANCE PROCEDURE

Sexual harassment affects a student's ability to learn and an employee's ability to work. Providing an educational and workplace environment free from sexual harassment is an important system goal. The System does not discriminate on the basis of sex in any of its education programs or activities, and it complies with Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations (34 C.F.R. Part 106) concerning everyone in the System's education programs and activities, including applicants for employment, students, parents/guardians, employees and third parties.

Title IX Sexual Harassment

Prohibited sexual harassment as defined in Title IX is prohibited. Any person, including a System employee or agent, or student, engages in Title IX Sexual Harassment whenever that person engages in conduct on the basis of an individual's sex that satisfies one or more of the following:

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

Examples of sexual harassment include, but are not limited to, touching, crude jokes or pictures, discussions of sexual experiences, teasing related to sexual characteristics, spreading rumors related to a person's alleged sexual activities, rape, sexual battery, sexual abuse and sexual coercion.

Definitions from 34 C.F.R. §106.30

1. Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
2. Education program or activity includes locations, events or circumstances where the System has substantial control over both the Respondent and the context in which alleged sexual harassment occurs.
3. Formal Title IX Sexual Harassment Complaint means a document filed by a Complainant or signed by the Title IX Coordinator alleging sexual

harassment against a Respondent and requesting that the System investigate the allegation.

4. Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
5. Supportive measures mean non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent before or after the filing of a Formal Title IX Sexual Harassment Complaint or where no Formal Title IX Sexual Harassment Complaint has been filed.

Title IX Sexual Harassment Prevention and Response

The Superintendent or designee will ensure that the System prevents and responds to allegations of Title IX Sexual Harassment as follows:

1. Ensures that the System incorporates age-appropriate awareness and prevention programs;
2. Incorporates education and training for school staff as recommended by the Superintendent, Title IX Coordinator, Building Principal or other appropriate administrator; and
3. Notifies applicants for employment, students, parents/guardians and employees of this policy and contact information for the Title IX Coordinator by, at a minimum, prominently displaying them on the System's website, if any, and in any handbook made available to such persons.

Making a Report

A person who wishes to make a report under this Title IX Sexual Harassment grievance procedure may make a report to the Title IX Coordinator, Building Principal or any employee with whom the person is comfortable speaking. A person who wishes to make a report may choose to report to a person of the same gender. School employees shall respond to incidents of sexual harassment by promptly making or forwarding the report to the Title IX Coordinator. An employee who fails to promptly make or forward a report may be disciplined, up to and including discharge. The Superintendent shall insert into this policy and keep current the name, office address, email address and telephone number of the Title IX Coordinator.

Processing and Reviewing a Report or Complaint

Upon receipt of a report, the Title IX Coordinator and/or designee will 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 Title IX Sexual Harassment Complaint, and (4) explain to the Complainant the process for filing a Formal Title IX Sexual Harassment Complaint.

Further, the Title IX Coordinator will analyze the report to identify and determine whether there is another or an additional appropriate method(s) for processing and reviewing it. For any report received, the Title IX Coordinator shall review appropriate Board policies to determine if the allegations in the report require further action.

Reports of alleged sexual harassment will be confidential to the greatest extent practicable, subject to the System's duty to investigate and maintain an educational program or activity that is productive, respectful and free of sexual harassment.

Formal Title IX Sexual Harassment Complaint Grievance Process

When a Formal Title IX Sexual Harassment Complaint is filed, the Title IX Coordinator will investigate it or appoint a qualified person to undertake the investigation. The Superintendent or designee shall implement procedures to ensure that all Formal Title IX Sexual Harassment Complaints are processed and reviewed according to a Title IX grievance process that fully complies with 34 C.F.R. §106.45.23 The System's grievance process shall, at a minimum:

1. Treat Complainants and Respondents equitably by providing remedies to a Complainant where the Respondent is determined to be responsible for sexual harassment, and by following a grievance process that complies with 34 C.F.R. §106.45 before the imposition of any disciplinary sanctions or other actions against a Respondent.
2. Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a Complainant, Respondent or witness.
3. Require that any individual designated by the System as a Title IX Coordinator, investigator, decisionmaker or any person designated by the System to facilitate an informal resolution process:
 - a. Not have a conflict of interest or bias for or against complainants or respondents generally or an individual Complainant or Respondent.

b. Receive training on the definition of sexual harassment, the scope of the System's education program or activity, how to conduct an investigation and grievance process (including hearings, appeals and informal resolution processes, as applicable), and how to serve impartially.

4. Require that any individual designated by the System as an investigator receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

5. Require that any individual designated by the System as a decision-maker receive training on issues of relevance of questions and evidence, including when questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant.

6. 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.

7. Include reasonably prompt timeframes for conclusion of the grievance process.

8. Describe the range of possible disciplinary sanctions and remedies the System may implement following any determination of responsibility.

9. Base all decisions upon the preponderance of evidence standard.

10. Include the procedures and permissible bases for the Complainant and Respondent to appeal.

11. Describe the range of supportive measures available to Complainants and Respondents.

12. 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.

Enforcement

Any System employee who is determined, at the conclusion of the grievance process, to have engaged in sexual harassment will be subject to disciplinary action up to and including discharge. Any third party who is determined, at the conclusion

of the grievance process, to have engaged in sexual harassment will be addressed in accordance with the authority of the Board in the context of the relationship of the third party to the System, e.g., vendor, parent, invitee, etc. Any System student who is determined, at the conclusion of the grievance process, to have engaged in sexual harassment will be subject to disciplinary action, including, but not limited to, suspension and expulsion consistent with student behavior policies. Any person making a knowingly false accusation regarding sexual harassment will likewise be subject to disciplinary action.

This policy does not increase or diminish the ability of the System or the parties to exercise any other rights under existing law.

Retaliation Prohibited

The System prohibits any form of retaliation against anyone who, in good faith, has made a report or complaint, assisted, or participated or refused to participate in any manner in a proceeding under this policy. Any person should report claims of retaliation using the appropriate Board Policy.

Any person who retaliates against others for reporting or complaining of violations of this policy or for participating in any manner under this policy will be subject to disciplinary action, up to and including discharge, with regard to employees, or suspension and expulsion, with regard to students.

NON-DISCRIMINATION NOTICE

_____ School System prohibits discrimination on the basis of race, color, national origin, gender, sexual orientation, gender identity, genetic information, pregnancy, religion, marital status, disability, age, veteran status, or any other legally protected classification in its educational programs, activities, admissions, access, treatment, or employment practices and provides equal access to scouting groups and other designated youth groups. The system is committed to providing equal access and equal opportunity in its programs, services and employment including its policies, complaint processes, program accessibility, system facility use, accommodations, and other Equal Employment Opportunity matters. The following person has been designated to handle inquiries and complaints regarding unlawful discrimination, harassment, and retaliation:

[Name of Employee]

[Title of Employee – Title must include “Title IX Coordinator”]

[Contact Information, including street address, phone number and email address]

Title IX of the Education Amendments of 1972 (Title IX) provides that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. §1681(a).

The System’s Title IX Policy defines sexual harassment and outlines the policies and procedures that the System follows in identifying, investigating, and responding to allegations of sexual harassment. The following person has been designated to handle inquiries and complaints regarding unlawful discrimination, harassment, and retaliation:

[Name of Employee]

[Title of Employee – Title must include “Title IX Coordinator”]

[Contact Information, including street address, phone number and email address]

TITLE IX DISCRIMINATION INTAKE FORM

Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) is a federal law that prohibits discrimination based on the sex of students in educational institutions that receive federal financial assistance. This form is to be completed by an individual reporting sexual harassment or an individual in the Title IX Coordinator's office when a student, parent, or system employee reports possible sexual harassment to the Title IX Coordinator's office. (This form is not for "Formal Complaints.")

REPORTER INFORMATION:

Case Number: _____

Reporter Name: _____

Email: _____

Phone Number: _____

If Student, School or Campus Name: _____ Grade: _____

If Employee, Office or Department Name: _____ Location: _____

Job Title: _____

Type of Prohibited Conduct:

Discrimination based on: (Check all that apply)

- Sexual Harassment Sexual Assault Gender Based Harassment
 Dating Violence Stalking Retaliation Cyber Bullying Other

(CONTINUE TO NEXT PAGE)

Date or Dates Incident Occurred: _____

ALLEGED VICTIM'S INFORMATION:

Name: _____

If Student, School or Campus Name: _____ Grade: _____

If Employee, Office or Department Name: _____ Location: _____

Job Title: _____

Extra-Curricular Activities: _____

Describe the prohibited conduct:

(ATTACH ADDITIONAL SHEETS, IF NECESSARY)

Were there any witnesses to this matter? (Please circle) Yes No

If yes, please list those who witnessed the incident(s) or have knowledge of the incident. Please attach additional names if needed.

Name: _____ School/Department: _____

Phone Number: _____ Email: _____

Name: _____ School/Department: _____

Phone Number: _____ Email: _____

Name: _____ School/Department: _____

Phone Number: _____ Email: _____

Did the reporter discuss the incident with any witnesses previously identified?

(Please circle) Yes No

Name: _____ School/Department: _____

Phone Number: _____ Email: _____

Please identify any administrators, system employees, or law enforcement agency to whom a report has been made:

Name: _____ School/Department: _____

Date of Report: _____ Method of Report (phone, email, etc.): _____

Phone Number: _____ Email: _____

Results or Actions Taken in Response: _____

Report taken by:
Title IX Coordinator/designee: _____ Date: _____

TITLE IX DISCRIMINATION FORMAL COMPLAINT FORM

Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) is a federal law that prohibits discrimination based on the sex of students in educational institutions that receive federal financial assistance. **When this formal complaint form has been completed and signed by a Complainant or the Title IX Coordinator, the alleged sexual harassment will be investigated by _____.** A copy of this completed form, as well as information about the (Insert School System's) Title IX grievance process will be provided to the Complainant and Respondent.

Complainant: An individual who is alleged to be the victim of sexual harassment.
Respondent: An individual who is alleged to be the perpetrator of sexual harassment.

COMPLAINANT PERSONAL INFORMATION (Please Print):

Name _____ Email: _____

Home Address _____

City _____ State _____ Zip code _____

Phone Numbers: (Cell) _____ Work _____

If Student, School or Campus Name: _____ Grade: _____

If Employee, Office or Department Name: _____

Job Title: _____

(CONTINUE TO NEXT PAGE)

Type of Complaint:

Discrimination based on: (Check all that apply)

- Sexual Harassment
- Sexual Assault
- Gender Based Harassment
- Dating Violence
- Stalking
- Retaliation
- Cyber Bullying
- Other

Date(s) Incident Occurred: _____

RESPONDENT INFORMATION: Please list the individual(s) alleged to have engaged in sexual harassment/prohibited conduct:

Name: _____

School/Department: _____

Name: _____

School/Department: _____

Name: _____

School/Department: _____

Name: _____

School/Department: _____

Name: _____

School/Department: _____

Name: _____

School/Department: _____

Name: _____

School/Department: _____

NOTICE OF FORMAL COMPLAINT

***THIS NOTICE MUST BE SENT SIMULTANEOUSLY TO THE COMPLAINANT AND RESPONDENT AND BEFORE INVESTIGATION OF THE FORMAL COMPLAINT BEGINS, INCLUDING STUDENT INTERVIEWS OCCUR. NOTICE MUST INCLUDE:**

- Allegations of sexual harassment, known at the time, with sufficient detail to prepare before any initial interview;
- Identities of the parties involved;
- Date, location of alleged incident(s);
- Statement that Respondent is presumed not responsible and that a determination will not be made until the conclusion of the grievance process;
- Statement that the parties have the right to an advisor of their choosing, who can be a parent/guardian or another individual who may, but is not required to be, an attorney and who may inspect and review evidence; and
- Statement that the Code of Conduct prohibits knowingly making false statements.
- An offer of informal resolution.

[Date]

**[(Adult Student)Complainant/Parent/Guardian]
[Address]**

Re: Notice to Parties of Title IX Formal Complaint of Sexual Harassment

Dear **Mr./Ms.** _____:

This letter is to notify you of the filing of a Formal Complaint of sexual harassment involving your student. The details of the allegations, including but not limited to the date and location of the alleged incident, are included on the enclosed Formal Complaint form. Sexual harassment is prohibited by and defined in Board Policy _____ (insert relevant Board Policies). The formal complaint process for handling this complaint can be found _____ (insert location of procedures where sexual harassment formal complaint procedures can be found. Example, the Student Code of Conduct). The policies and procedures are also enclosed for your reference.

The (insert school system)'s Title IX sexual harassment formal complaint process includes an opportunity to participate in an informal resolution process at any time prior to a determination regarding responsibility. Informal resolution is a voluntary process. Please contact my office if you would like to discuss the informal resolution process and options. During the formal complaint process, the filer of the complaint is called the Complainant, and the accused is called the Respondent. The first step in the formal complaint process is an investigation. I have appointed _____ [name], _____[title] to serve as investigator, and he/she will be in contact with you.

The System's goal is for you/your child to feel safe and comfortable on campus during this process. In light of the filing of the Formal Complaint, while this matter is being investigated, the System is implementing the following supportive measures for your child. Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge to students, when a report of alleged sexual harassment is made.

Supportive Measures: [Select only those that apply and provide details. Delete the options below that will not be implemented.]

- Counseling of students regarding appropriate behavior expectations
- Review of system and code of conduct expectations with students by administrator
- Change of class schedule/lunch schedule/locker location
- Campus/class escort
- Increased school monitoring of [location] for [time period e.g., next 9 weeks]
- School counseling
- Stay away agreement/No contact directives
- Limitation on extracurricular activities
- Training
- Other: _____

Please be aware that, by law, the Respondent is presumed not responsible for the alleged conduct and a determination regarding responsibility is made only at the conclusion of the formal complaint process by a decisionmaker other than the investigator. I have appointed _____ [name], _____ [title] as the decisionmaker in this complaint.

You are allowed an advisor, of your choosing, to assist you in this process. This advisor can be a parent or guardian, or any other adult whom you wish to help you through the process or represent your student. This person may be an attorney but does not have to be. If you would prefer, you may proceed without an advisor. You and your advisor are also entitled to inspect and review all evidence obtained as part of the investigation. that is directly related to the allegations raised in the Formal Complaint, including the evidence upon which the System 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 you can meaningfully respond to the evidence prior to conclusion of the investigation.

Please also be aware that provision (Insert number of specific title) of the System's Code of Conduct prohibits knowingly making false statements or knowingly submitting false information during the formal complaint process.

If you have any questions regarding this information, please let me know. Thank you for your cooperation during this formal complaint process to ensure that our students experience an education environment free from discrimination on the basis of sex.

Sincerely,

[Name],

Title IX Coordinator/designee

Enclosures: Title IX Policy
 Title IX Sexual Harassment Policy and Procedures
 Formal Complaint Form

SUPPORTIVE MEASURES LETTER

***THIS LETTER MAY BE SENT TO ADULT STUDENTS OR PARENTS OF MINOR STUDENTS AFTER INITIAL VERBAL CONTACT BY SCHOOL OFFICIALS ABOUT A REPORT OF ALLEGED SEXUAL HARASSMENT INVOLVING THEIR CHILD WHEN NO FORMAL COMPLAINT IS FILED.**

[Date]

[(Adult/Student) Complainant/Parent/Guardian]

[Address]

Re: Title IX Complaint – Response to Sexual Harassment Report
Supportive Measures

Dear **Mr./Ms.** _____:

This letter is to confirm receipt of a report of alleged sexual harassment involving your child. It is our understanding that, at this time, you do not wish to file a Formal Complaint and pursue this matter further. If you change your mind, please contact my office immediately. Even though you have not filed a Formal Complaint, the System is implementing the following supportive measures for your child, because school board policy ____ (insert Board policy number) prohibits discrimination on the basis of sex, including sexual harassment and other prohibited conduct, against students in all of its educational programs. Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge to students, when a report of alleged sexual harassment is made.

Supportive Measures: **[Select only those that apply and provide details. Delete the options below that will not be implemented.]**

- Counseling of students regarding appropriate behavior expectations
- Review of system and code of conduct expectations with students by administrator
- Change of class schedule/lunch schedule/locker location
- Campus/class escort
- Increased school monitoring of [location] for [time period e.g., next 9 weeks]

- School counseling
- Stay away agreement/No contact directives
- Limitation on extracurricular activities
- Training
- Other: _____

The System’s goal is for you/your child to feel safe and comfortable on campus. If you have questions about the System’s Title IX sexual harassment formal complaint process or any of the above supportive measures, please contact the Title IX Coordinator’s Office at **(XXX) XXX-XXXX or [email]**.

Sincerely,

[Name]

Title IX Coordinator/designee

TITLE IX DISCRIMINATION DISMISSAL FORM

***(ONCE SIGNED, A COPY OF THIS DISMISSAL FORM WILL BE PLACED IN THE FILE FOR THIS COMPLAINT AND SENT TO ALL PARTIES INVOLVED.)**

COMPLAINT INFORMATION (Please Print):

Case Number: _____

Complainant's Name: _____

Email: _____

Complainant School/Department: _____

Respondent's Name: _____

Email: _____

Respondent School/Office Location: _____

Dismissal Basis: (Check all that apply)

- Does not constitute sexual harassment
- Did not occur in system program or activity
- Did not occur in the U.S.
- Dismissal requested by Complainant
- Respondent no longer enrolled in system
- Circumstances prevent the system from gathering evidence sufficient to reach a determination

Detailed Reasoning for Dismissal: Describe the reasoning behind the dismissal of this complaint.

(ATTACH ADDITIONAL SHEETS, IF NECESSARY)

Name _____

Date _____

Title IX Coordinator/designee

¹ 34 C.F.R. Part 106.

² Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. § 1681.

³ 42 U.S.C. § 2000e *et seq.*

⁴ 34 C.F.R. §106.21(c).

⁵ 20 U.S.C. § 1681(d).

⁶ See U.S. Dep’t of Educ. Office for Civil Rights, *Case Processing Manual*, Article IV (Feb. 2015).

⁷ See OCR Reading Room, <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/readingroom.html> (last accessed Dec. 5, 2020).

⁸ 34 C.F.R. §106.31(a) and (b). *See, also*, “Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities,” U.S. Department of Education, Office for Civil Rights (December 1, 2014). *See*, <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

⁹ 34 C.F.R. §106.41(a)

¹⁰ The regulations do not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact. The federal regulations do not prohibit the grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex. 34 C.F.R. §106.34(a).

¹¹ *See* Federal Register, Vol.44, No. 239 (Dec. 11, 1979).

¹² *See Requirements Under Title IX of the Education Amendments of 1972*, U.S. Dep’t of Educ., Office for Civil Rights, <https://www2.ed.gov/about/offices/list/ocr/docs/interath.html>.

¹³ 44 Fed. Reg. 71413.

¹⁴ *See Arnot v. Ramo*, No. 92-0551, (D.N.M. July 19, 1992) (bench decision), appeal dismissed, No. 92-2151 (10th Cir. Nov. 3, 1992) (original action dismissed March 9, 1993) (upholding the University of New Mexico’s elimination of its women’s gymnastics team and declaring that a program-wide, rather than sport-specific analysis was required under Title IX). Title IX also applies to intramural sports, physical education courses and other school-sponsored athletic programs.

¹⁵ *See* 34 C.F.R. §106.41(c)(2)-(10).

¹⁶ *See* OCR Policy Interpretation, 44 Fed. Reg. 71415.

¹⁷ *Id.*

¹⁸ OCR Policy Interpretation states, “neither the statute nor the regulations calls for identical programs for male and female athletes. Absent such a requirement, the

Department cannot base noncompliance upon a failure to provide arbitrarily identical programs, either in whole or in part.” (44 Fed. Reg. 71422.)

¹⁹ See note *supra* 15.

²⁰ 44 Fed. Reg. 71418.

²¹ *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (“The 1996 Clarification Letter”) (January 16, 1996), available at <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two>.

²² See *McCormick ex rel. McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 300 (2nd Cir. 2004) (applying three-part test to high school districts); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272–75 (6th Cir. 1994) (same).

²³ See “The 1996 Clarification”, *supra* note 25.

²⁴ See *Dear Colleague Letter: Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Complaint* (“The 2003 Further Clarification”) (July 11, 2003), available at <https://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.pdf>.

²⁵ OCR Policy Interpretation, 44 Fed. Reg. 71417

²⁶ See *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 94 (2nd Cir. 2012).

²⁷ “The 1996 Clarification,” *supra* note 25.

²⁸ *Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance, Office of Civil Rights*, (Sept. 17 2008), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html>

²⁹ See *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 856 (9th Cir. 2014); *Equity In Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91, 110 (4th Cir. 2011).

³⁰ *Id.*

³¹ See “The 1996 Clarification,” *supra* note 25.

³² See *Ollier*, 768 F.3d at 856.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ 44 Fed. Reg. 71418.

³⁷ See 44 Fed. Reg. 71413, 71418 (laying out the three prongs for meeting the effective accommodation test for Title IX compliance).

³⁸ See 44 Fed. Reg. 71413, 71418 (laying out the three prongs for meeting the effective accommodation test for Title IX compliance). See also *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 579-85 (W.D. Pa.), *aff’d*, 7 F.3d 332 (3rd Cir. 1993).

³⁹ *Id.*

⁴⁰ See The 1996 Clarification, *supra* note 25, *citing to* 44 Fed. Reg. at 71417.

⁴¹ *Id.*

⁴² See *supra* note 15, *citing to* 44 Fed. Reg. 71413.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 71418, 71483.

⁵¹ *Id.* at 71417.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See* 44 Fed. Reg. 71418; 71483

⁵⁵ *See Id.*.

⁵⁶ *Id.* at 71417.

⁵⁷ *Id.*

⁵⁸ *Id.* at 71416.

⁵⁹ *Id.*

⁶⁰ *Id.* at 71417.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See Cohen v. Brown Univ.*, 879 F. Supp. 185, 208 n.47 (D.R.I. 1995).

⁶⁶ *See OCR Letter to Gilyard* (Feb. 7, 1995), accessible at <https://www2.ed.gov/about/offices/list/ocr/letters/jurupa.html>.

⁶⁷ *Id.*

⁶⁸ 34 C.F.R. §106.8 *et seq.*

⁶⁹ 34 C.F.R. §106.51(a)(1).

⁷⁰ 34 C.F.R. §106.54.

⁷¹ 34 C.F.R. §106.56

⁷² 34 C.F.R. §106.52

⁷³ 34 C.F.R. §106.60

⁷⁴ 34 C.F.R. §106.21(c)(1)-(4); §106.57.

⁷⁵ 34 C.F.R. §106.61.

⁷⁶ 441 U.S. 677, 690-693 99 S.Ct. 1946 (1979).

⁷⁷ 503 U.S. 60 112 S.Ct. 1028 (1992).

⁷⁸ *Id.*

⁷⁹ 524 U.S. 274 (1998).

⁸⁰ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *see also Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992) (recognizing potential under Title IX for a school district to be liable for monetary damages based on a teacher's sexual harassment of a student).

⁸¹ *See Davis*, 526 Us. At 652 (stating it is not enough to show that a student has been teased or called offensive names); *see also Sanchez v. Carrollton-Farmers*

Branch Indep. Sch. Dist., 647 F.3d 156, 165-67 (5th Cir. 2011)(holding derogatory gossip and name-calling were insufficient for Title IX claims, even if based on sex).

⁸² 20 U.S.C. § 1681(a).

⁸³ *Letter to Emily Prince*, Office for Civil Rights at the Department of Education (January 7, 2015)

⁸⁴ See Office of Civil Rights, Dept. of Educ., Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (2014) available at <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

⁸⁵ “Dear Colleague Letter on Transgender Students,” Office of Civil Rights Division of the Department of Justice and the Department of Education (May 13, 2016).

⁸⁶ “Dear Colleague Letter,” Office of Civil Rights (Feb. 22, 2017), accessible at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁸⁷ See *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1741 (2020) (“[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

⁸⁸ *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020)

⁸⁹ *Id.*

⁹⁰ The 11th Circuit later vacated its decision and issued a new opinion. The Court ruled in favor of the student, but only on equal protection grounds. *Adams v. School Board of St. Johns County, Fla.*, --F.4th--, 2021 WL 944396 (11th Cir. Jul. 14, 2021).

⁹¹ The Fourth Circuit also ruled in *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), as amended (Aug. 28, 2020) that a school board could not exclude a transgender student from a boys’ bathroom without referencing his “biological gender,” and thus, the student’s sex was a “but for” cause for the schools’ actions. Accordingly, the school board’s bathroom policy excluded the transgender student from the boys’ restroom on the basis of sex in violation of Title IX.

⁹² 34 C.F.R. §106.8(b).

⁹³ 34 C.F.R. §106.8(a).

⁹⁴ 34 C.F.R. §106.8(b)(1)-(2).

⁹⁵ 34 C.F.R. §106.8(a).

⁹⁶ 34 C.F.R. §106.30(a).

⁹⁷ *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).

⁹⁸ 34 C.F.R. §106.44(a).

⁹⁹ U.S. Dep’t of Educ., OCR, Title IX Regulations Addressing Sexual Harassment (Unofficial Copy), (May 6, 2020), [ed.gov/about/offices/list/ocr/docs/titleix-regs-](http://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-)

unofficial.pdf (p. 441-442).

¹⁰⁰ 34 C.F.R. §106.8(a).

¹⁰¹ *Id.*

¹⁰² 34 C.F.R. §106.30(a).

¹⁰³ U.S. Dep't of Educ., OCR, Title IX Regulations Addressing Sexual Harassment (Unofficial Copy), (May 6, 2020), [ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf](https://www.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf) (p. 334).

¹⁰⁴ U.S. Dep't of Educ., OCR, Title IX Regulations Addressing Sexual Harassment (Unofficial Copy), (May 6, 2020), [ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf](https://www.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf) (p. 332-333.)

¹⁰⁵ *Id.*

¹⁰⁶ 34 C.F.R. §106.30(a).

¹⁰⁷ U.S. Dep't of Educ., OCR, Title IX Regulations Addressing Sexual Harassment (Unofficial Copy), (May 6, 2020), [ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf](https://www.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf) (p. 353-354).

¹⁰⁸ 34 C.F.R. §106.30(a).

¹⁰⁹ 34 C.F.R. §106.30(a).

¹¹⁰ 34 C.F.R. §106.44.

¹¹¹ 34 C.F.R. §106.44(a).

¹¹² *Id.*

¹¹³ 34 C.F.R. §106.30(a).

¹¹⁴ U.S. Dep't of Educ. OCR, Title IX Regulations Addressing Sexual Harassment (Unofficial Copy), (May 6, 2020), [ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf](https://www.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf) (p. 565-566).

¹¹⁵ 34 C.F.R. §§106.30(a), .44(a).

¹¹⁶ 34 C.F.R. §106.44(c).

¹¹⁷ U.S. Dep't of Educ. OCR, Title IX Regulations Addressing Sexual Harassment (Unofficial Copy), (May 6, 2020), [ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf](https://www.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf) (p. 729).

¹¹⁸ *See* Dep't of Educ. OCR, Title IX Regulations Addressing Sexual Harassment (Unofficial Copy), (May 6, 2020), [ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf](https://www.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf) (p. 741 & p. 1714-1738 Directed Question 5: Individuals with Disabilities.)

¹¹⁹ In addition, under 34 C.F.R. §106.44(d), the Final Rule allows a school system to place an employee-respondent on administrative leave during the pendency of a grievance process. Schools should still ensure all provisions of the Student's First Act are complied with in placing an employee on administrative leave and/or unpaid leave.

¹²⁰ 34 C.F.R. §106.45(b)(1).

¹²¹ 34 C.F.R. §106.45(b)(2).

¹²² U.S. Dep't of Educ. OCR, Title IX Regulations Addressing Sexual Harassment (Unofficial Copy), (May 6, 2020), [ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf](https://www.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf)

unofficial.pdf (p. 962).

¹²³ 34 C.F.R. §106.45(b).

¹²⁴ 34 C.F.R. §106.45(b)(4)

¹²⁵ 34 C.F.R. §106.45(b)(5)

¹²⁶ 34 C.F.R. §106.45(b)(6)

¹²⁷ U.S. Dep’t of Educ. OCR, Title IX Regulations Addressing Sexual Harassment (Unofficial Copy), (May 6, 2020), ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf (p. 1230).

¹²⁸ 34 C.F.R. §106.45(b)(6)(ii).

¹²⁹ See U.S. Dep’t of Educ. OCR, Title IX Regulations Addressing Sexual Harassment (Unofficial Copy), (May 6, 2020),

ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf (p. 1230, fn. 1395)

(“A recipient’s discretion in this regard is limited by the introductory sentence in §106.45(b) that any rules adopted by a recipient must apply equally to both parties. Thus, a recipient’s grievance process could not, for example, state that a hearing will be held only if a respondent requests it, or only if a complainant agrees to it, but could state that a hearing will be held only if both parties request it or consent to it.”) (*italics in original*).

¹³⁰ 34 C.F.R. §106.45(b)(8)

¹³¹ *Id.*

¹³² 34 C.F.R. §106.45(b)(1)(iii).

¹³³ 34 C.F.R. §106.45(b)(9).

¹³⁴ U.S. Dep’t of Educ. OCR, *Title IX Regulations Addressing Sexual Harassment (Unofficial Copy)*, (May 6, 2020), ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf (p. 1367).

¹³⁵ 34 C.F.R. §106.45(b)(9).

¹³⁶ U.S. Dep’t of Educ. OCR, Title IX Regulations Addressing Sexual Harassment (Unofficial Copy), (May 6, 2020), ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf (p. 1370).

¹³⁷ 34 C.F.R. §106.45(b)(10).

¹³⁸ *Id.*

¹³⁹ 34 C.F.R. §106.71, 106.30(a).

¹⁴⁰ 34 C.F.R. §106.30(a).

¹⁴¹ 34 C.F.R. §106.45(b)(5)(i).

¹⁴² 34 C.F.R. §106.71.

¹⁴³ See Joint Guidance on Federal Title IX Regulations: Analysis of Section 106.71: Retaliation, New York (June 16, 2020), accessible at <https://system.suny.edu/media/suny/content-assets/documents/sci/tix2020/Retaliation.pdf>.

¹⁴⁴ 34 C.F.R. §106.71(b)(1).

¹⁴⁵ 34 C.F.R. §106.71.

¹⁴⁶ 34 C.F.R. §106.8(c)

¹⁴⁷ 85 Fed. Reg. at 30536.

¹⁴⁸ 34 C.F.R. §106.45(b)(1)(iii) and 106.45(b)(10).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ 34 C.F.R. §106.45(b)(10).

¹⁵² *Ala. Code* §16-28B-1, *et seq.*

Notes

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