TITLE IX TRAINING

ALLEGHENY VALLEY SCHOOL DISTRICT

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Title IX

"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.

Sexual Harassment is a form of Sex Discrimination.

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What does "on the Basis of Sex" mean?

- Title IX's prohibition of discrimination "on the basis of sex" encompasses sex in the biological sense, gender, and gender stereotypes. Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989).
- It also applies to discrimination against homosexual and transgender students.
  - In Bostock v. Clayton County, 140 S. Ct. 1731 (2020), the Supreme Court held that discrimination against a person for being transgender is discrimination "on the basis of sex." As the Supreme Court noted, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." In August 2020, the Fourth Circuit held that "we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him "on the basis of sex."
  - Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 284 (W.D. Pa. 2017) (court issued a preliminary injunction against the school district and in favor of the students, holding they are likely to succeed on the claim that forcing them to use restrooms which either are single-user or those corresponding with their biological sex violates their right to Equal Protection under the law as guaranteed by the Fourteenth Amendment.
  - A.H. by Handling v. Minersville Area Sch. Dist., 2019 WL 4875331 (M.D. Pa. 2019) (partially granted an elementary school student's (A.H.) motion for summary judgment on a claim that Minersville Elementary School prohibited A.H. from using girls' restrooms at school, and at school sponsored events, in violation of Title IX's prohibitions against sex discrimination and the Equal Protection Clause of the U.S. Constitution.)

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Prevalence (Middle School)

- 43 percent of middle school students experienced verbal sexual harassment the previous year
- 21 percent of middle school students reported having been pinched, touched, or grabbed in a sexual way
- 14 percent reported having been the target of sexual rumors
- 9 percent had been victimized with sexually explicit graffiti in school locker rooms or bathrooms.

Regulations, p. 30076

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Prevalence (High School)

- 51 percent of high school girls and 26 percent of high school boys experienced adolescent peer-on-peer sexual assault victimization.
- One in four young women experiences sexual assault before the age of 18.
- 10 percent of children were targets of educator sexual misconduct by the time they graduated from high school.
- 48 percent of U.S. students are subject to sexual harassment or assault at school before they graduate high school (56 percent of girls and 40 percent of boys).
- 36 percent of girls, 24 percent of boys, and 30 percent of all students in grades seven through 12 experienced sexual harassment online.

Regulations, pp. 30075-76

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Prevalence (LGBTQ Persons)

- 57 percent of LGBTQ students were sexually harassed at school during the past year.
- 38 percent of LGBTQ girls had been kissed or touched without their consent.
- 86 percent of high school transgender individuals had experienced a form of sexual violence due to their gender identity

Regulations, pp. 30077-78.

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New Regulations

- On May 6, 2020, the United States Department of Education issued its long-awaited Final Regulations (the "Regulations") that focus on Title IX protections for victims of sexual misconduct.
- **These apply to Students and Employees**.
- General Rule:

  A School District with **Actual Knowledge** of **Sexual Harassment** in an **Education Program or Activity** of the School District against a person **in the United States**, must respond promptly in a manner that is **not deliberately indifferent**.

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The District's Role

"Conflicting" Responsibilities?

- The District is obligated to identify and address sexual harassment and discrimination that occurs in its education program or activity.
- The Regulations require that the District remain impartial and do not permit the District to take an adversarial posture with respect to either party.
- Ultimately, however, the District itself must take action in response to the determination regarding responsibility that directly affects both parties.

Rule

- It is the District's burden to impartially gather evidence and present it so that the decision-maker can determine whether the District (not either party) has shown that the weight of the evidence reaches or falls short of the standard of evidence selected by the recipient for making determinations.
- The District should not advocate as to whether the burden has been met.

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Terminology

- "Complainant" - the individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- "Respondent" - the individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- "Formal Complaint" - a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
- "Supportive Measures" - individualized services reasonably available that are nonpunitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment

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School District Liability

Gebser v. Lago Vista Independent School District

- where a school has actual knowledge of an employee sexually harassing a student but responds with deliberate indifference to such knowledge, the school itself has engaged in discrimination, subjecting the school to money damages in a private lawsuit under Title IX.

Davis v. Monroe County Board of Education

- where sexual harassment is committed by a peer rather than an employee, the same standards of actual knowledge and deliberate indifference apply.

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REPORT SEXUAL HARASSMENT

If you:

1) witness what may be sexual harassment; or
2) receive a report of what may be sexual harassment

YOU MUST REPORT IT

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I. Actual Knowledge and Reporting

A School District with **Actual Knowledge** of **Sexual Harassment** in an **Education Program or Activity** of the School District against a person **in the United States**, must respond promptly in a manner that is **not Deliberately Indifferent**.

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When Does the District Have "Actual Knowledge"?

Actual Knowledge:

Notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, **or to any employee of an elementary or secondary school**.

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Types of Notice

- May receive Notice through:
  - an oral report of sexual harassment by a complainant or anyone else,
  - a written report,
  - through personal observation,
  - through a newspaper article,
  - through an anonymous report, or
  - through various other means.

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Who Can Make a Report?

Anyone.

- a school employee may perpetrate sexual harassment against a student and then pressure the complainant to stay silent.

- if the complainant tells a parent, or a friend, or a trusted adult in the complainant's life, that third party has the right to report sexual harassment, obligating the school to promptly respond

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All District Employees

- Title IX Coordinator
- teachers
- principals
- paraeducators
- school counselors
- coaches
- school bus drivers
- “all other employees”

Regulations, p. 30116

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District Employees Must Report

- A student in an elementary or secondary school may report sexual harassment to any employee.

- If an employee of an elementary or secondary school personally observes sexual harassment, then the elementary or secondary school recipient must respond to and address the sexual harassment in accordance with these final regulations

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Why "Any Employee"?

Students in elementary and secondary schools do not need to report allegations of sexual harassment to a specific employee such as a Title IX Coordinator to trigger a recipient's obligation to respond to such allegations.

The Regulations provide:

> "it is unreasonable to expect young children to seek out specific employees for the purpose of disclosing Title IX sexual harassment."

Regulations, p. 30116.

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Hypo: Duty to Report

Guidance Counselor witnesses Student A touch Student B inappropriately but is not sure if the conduct meets the definition of sexual harassment.

Should Guidance report the incident?

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If in Doubt, Report

Yes. The Regulations provide:

> if an elementary or secondary school employee witnesses conduct but does not know ‘‘on the spot’’ whether the conduct meets the §106.30 definition of sexual harassment, the person victimized by the conduct is a ‘‘complainant’’ entitled to the school’s prompt response if the conduct ‘‘could’’ constitute sexual harassment.

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If in Doubt, Report

- Policy 247 (Hazing)
  - Students, parents/guardians**,** coaches, sponsors, volunteers, and district employees shall be alert to incidents of hazing and shall report such conduct to the building principal.

- Policy 249 (Anti-Bullying)
  - The District expects employees to maintain an educational environment free of bullying and cyber-bullying and those who observe or become aware of an act of bullying to immediately intervene and report the bullying to the school administration for further investigation.

- Policy 806 (Child Abuse)
  - School employees, independent contractors, and volunteers shall make a report of suspected child abuse if they have reasonable cause to suspect that a child is the victim of child abuse . . . .

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Why is it Important to Report Immediately?

When an Employee has Notice:

- The District must promptly offer supportive measures to a complainant under §106.44(a)
- Title IX Coordinator specifically must contact the complainant.
- the Department will hold the District accountable for not meeting the District's response obligations under the Regulations

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Why is it Important to Report Immediately?

If the District complies with the Regulations, it will be able to stop any alleged harassment and demonstrate that it was not deliberately indifferent in responding to a report of sexual harassment.

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How to Report – Student Complainants

- A school employee who suspects or is notified that a student has been subject to conduct that constitutes a violation of this policy shall immediately report the incident to the building principal, as well as properly making any mandatory police or child protective services reports required by law.

- If the building principal is the subject of a complaint, the student, third party or a reporting employee shall report the incident directly to the Title IX Coordinator.

- The complainant or the individual making the report may use the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form attached to the policy for purposes of reporting an incident or incidents in writing; however, verbal reports of an incident or incidents shall be accepted, documented and the procedures of this policy and the relevant attachments followed.

Policy 103

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How to Report – Employee Complainants

- The Board encourages employees and third parties who believe they or others have been subject to Title IX sexual harassment, other discrimination or retaliation to promptly report such incidents to the building principal or building administrator. A person who is not an intended victim or target of discrimination but is adversely affected by the offensive conduct may file a report of discrimination.

- If the building principal or building administrator is the subject of a complaint, the complainant or the individual making the report shall direct the report of the incident to the Title IX Coordinator.

- The complainant or the individual making the report may use the Discrimination/Sexual Harassment/Retaliation Report Form attached to this policy for purposes of reporting an incident or incidents in writing; however, verbal reports of an incident or incidents shall be accepted, documented and the procedures of this policy and the relevant attachments followed.

Policy 104

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Title IX Coordinator

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by e-mail, at any time, including non-business hours, to the Title IX Coordinator:

Dr. Hamsini Rajgopal
Allegheny Valley School District
Director of Finance & Business Operations
300 Pearl Avenue
Cheswick, PA. 15024
hrajgopal@avsd.k12.pa.us
724-274-5300

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Hypo: Duty to Report

Student A reports to Teacher that she has been sexually assaulted by Student B in the Boys' Bathroom, but begs Teacher A not to tell anyone?

What must the Teacher do?

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Any employee who fails to promptly report an incident of sexual harassment of which they are aware, will be subject to disciplinary action, up to and including termination.

Examples of failure to report include, but are not limited to:

- Promising someone that you will not report what they tell you about sexual harassment.
- Deciding not to call to report sexual harassment immediately.

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Retaliation Prohibited

The Board prohibits retaliation by the district or any other person against any person for:

1. Reporting or making a formal complaint of any form of discrimination or retaliation, including Title IX sexual harassment.

2. Testifying, assisting, participating or refusing to participate in a related investigation, process or other proceeding or hearing.

3. Acting in opposition to practices the person reasonably believes to be discriminatory.

The district, its employees and others are prohibited from intimidating, threatening, coercing, or discriminating against anyone for actions described above. Individuals are encouraged to contact the Title IX Coordinator immediately if retaliation is believed to have occurred.

Policy 103/104

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Retaliation

Retaliation means:

> intimidation, threats, coercion, or discrimination against a victim or other person because they report conduct that may constitute discrimination or harassment, including Title IX sexual harassment, in accordance with Board policy and procedures, participate in an investigation or other process addressing discrimination or Title IX sexual harassment, or act in opposition to discriminatory practices.

A complaint of retaliation shall be handled in the same manner as a complaint of discrimination (i.e., Discrimination procedures).

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Retaliation

The Regulations provides the following examples of **Retaliation**:

- Bringing code of conduct charges against an individual that do not involve sex discrimination/harassment, but arise out of the same circumstances, for the purpose of interfering with Title IX rights.
- The District disclosing the identity of the Complainant, Respondent or Witness outside of the Title IX Grievance Process or otherwise required by law. (i.e., the District has a confidentiality requirement)
  - NOTE: The regulations prohibit the District from issuing a gag order to the participants in Title IX Sexual Harassment proceedings

The Regulations provide that the following is **Not Retaliation**:

- Exercising First Amendment rights;
- Charging an individual for making a false statement in bad faith (i.e., lying) during the grievance process

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II. Deliberate Indifference

A School District with **Actual Knowledge** of **Sexual Harassment** in an **Education Program or Activity** of the School District against a person **in the United States**, must respond promptly in a manner that is **not Deliberately Indifferent**.

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Deliberate Indifference

- A District acts with deliberate indifference only when it responds to sexual harassment in a manner that is ‘‘clearly unreasonable in light of the known circumstances’’
- For a District with actual knowledge to respond in a clearly unreasonable manner constitutes the District committing intentional discrimination.

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Deliberate Indifference

To avoid being deliberately indifferent, the District's response:

- **must be prompt**;
- must consist of offering supportive measures to a complainant;
- must ensure that the Title IX Coordinator contacts each complainant (i.e., person who is alleged to be the victim of sexual harassment) to discuss supportive measures, consider the complainant's wishes regarding supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint;
- must follow a grievance process that complies with the Regulations before imposing disciplinary sanctions

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Deliberate Indifference

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

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III. Sexual Harassment

A School District with **Actual Knowledge** of **Sexual Harassment** in an **Education Program or Activity** of the School District against a person **in the United States**, must respond promptly in a manner that is **not Deliberately Indifferent**.

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Sexual Harassment

Under the Regulations, there are three categories of **Sexual Harassment**:

1. *Quid Pro Quo*;
2. Hostile Environment; and/or
3. Crimes (Sexual assault, dating violence, domestic violence, or stalking).

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1) Quid Pro Quo Sexual Harassment

Elements:

- **District employee***;
- Conditioning a District benefit, aid or service;
- On participation in an unwelcome sexual act.

*Note: Student on Student and Student on Employee conduct cannot be Title IX *quid pro quo* sexual harassment.

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Hypo: *Quid Pro Quo*

- A high school drama teacher tells a student that if she engages in sexual activity with the teacher, she will be given the lead part in a school play. The student agrees to participate in the sexual act but without desiring to do so.

- Is this *Quid Pro Quo* Sexual Harassment?

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Hypo: *Quid Pro Quo*

- Student A is struggling in class and asks Student B for tutoring help. Student B agrees to help on the condition that Student A engages in sexual activity with student B. The student agrees to participate in the sexual act but without desiring to do so.

- Is this *Quid Pro Quo* Sexual Harassment?

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Quid Pro Quo - Hypothetical

- A male teacher touches a female student's thigh in class. This makes the student uncomfortable, but the teacher does not expressly state that the female student must submit to this if she wants a good grade in his class.

- Is this *Quid Pro Quo* sexual harassment?

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Quid Pro Quo - Hypothetical

- The Department interprets the *quid pro quo* harassment broadly to encompass situations where the *quid pro quo* nature of the incident is implied from the circumstances.

- It does not need to be severe or pervasive. A prohibited *quid pro quo* bargain may occur explicitly or implicitly.

- Determining whether unwelcome sexual conduct is proposed, suggested, or directed at a complainant, by a recipient's employee, as part of the employee ''conditioning'' an educational benefit on participation in the unwelcome conduct, does not require the employee to expressly tell the complainant that such a bargain is being proposed, and the age and position of the complainant is relevant to this determination.

Regulations, pp. 30147, n. 643.

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2) Hostile Environment Sexual Harassment

Elements:

- 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 school's education program or activity.

NOTE: Test includes both objective and subjective elements and was taken from the Supreme Court's decision in Davis v. Monroe County Board of Education

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a) Unwelcome Conduct

The unwelcomeness of the conduct is subjective (i.e., whether the complainant viewed the conduct as unwelcome).

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Unwelcome Conduct

- **Verbal Conduct**
  - Flirting/Sexual Advances, Boasting of Sexual Prowess
  - Intimate Questions about Sex Life, Harassing voicemails and texts
  - Whistling, cat-calls, sexual inuendo
- **Physical Conduct**
  - Hugging/Kissing
  - Touching hair, body or clothing
  - Giving Neck or Shoulder Massage
  - Cornering
- **Other Conduct**
  - Written messages (texts, notes)
  - Visual images (drawings, photographs)
  - Gestures

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Hypothetical – Unwelcome Conduct

- A middle school student makes offensive sexual jokes to another student, but the student does not object to the jokes or speak out against them.
  - Is the joke unwelcome?

- A female high school student willingly kisses a male student on one occasion. When the male student subsequently attempts to kiss her again, she objects, but he kisses her anyway.
  - Is the second kiss unwelcome?

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b) Severe, Pervasive, and Objectively Offensive

The elements of severity, pervasiveness, objective offensiveness, and resulting denial of equal access are determined under an objective, reasonable person standard.

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i) Severe

- The severity of an incident depends largely on the nature and scope of the conduct as alleged, although you can also look at its impact.
  - Physical conduct of a sexual nature often qualifies as severe
  - Treatment that is humiliating, threatening, or violent heightens the severity of the incident.
  - Comments, jokes, online postings, photographs, etc. are less likely to be sufficiently severe to create a hostile environment.
  - Typically, conduct that is mean, hateful, rude, or insulting is less likely to be severe and does not result in a policy violation

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i) Severe

- evaluation of whether harassment is ‘‘severe’’ appropriately takes into account the circumstances facing a particular complainant, such as the complainant’s age, disability status, sex, and other characteristics.

- a complainant need only describe what occurred and the recipient must then consider whether the described occurrence was severe from the perspective of a reasonable person in the complainant’s position.

Regulations, p. 30165.

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ii) Pervasive

- Pervasiveness hinges on how widespread, openly-practiced, prevalent, and/or distributed the conduct is.

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Hypo: Severe and Pervasive

A group of students conspire to humiliate Student A (an ex-girlfriend of one of the students) by disseminating naked photographs of Student A via social media to the school community.

- Is this conduct sufficiently severe and pervasive?

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Yes. The Regulations provide:

> Disseminating ‘‘revenge porn,’’ or conspiring to sexually harass people or other unwelcome conduct that harms and humiliates a person on the basis of sex may meet the elements of the Davis standard including pervasiveness, particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement.

Regulations, p. 30166.

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Hypo: Severe and Pervasive

Student A whistles at Student B and comments on her appearance as she passes him in the hallway. This upsets Student B and makes her feel uncomfortable.

Is this conduct sufficiently severe and pervasive?

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- Title IX is not a federal civility statute. It is not enough to show that a student has been teased, called offensive names, or taunted, because liability attaches only to sexual harassment that is severe and pervasive.
- Microaggressions, cat-calling, and hostile, crude, or ‘‘creepy’’ behaviors that can make students feel unwelcome, unsafe, disrespected, insulted, and discouraged from participating in a community or in programs or activities.
- However, it must rise to a level of severity, pervasiveness, and objective offensiveness such that it denies equal access to education to create a Hostile Environment
- Accordingly, isolated microaggressions generally will not create a Hostile Environment, but could form part of a course of conduct reaching severity, pervasiveness, and objective offensiveness.
- In addition, allegations not meeting the definition of sexual harassment does not preclude a recipient from acting on the allegations through non-Title IX codes of conduct.

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iii) Objectively Offensive

Whether harassing conduct is ‘‘objectively offensive’’ must be evaluated under a reasonable person standard, as a reasonable person in the complainant’s position.

- the objective nature of the inquiry simply means that evaluation is made by a reasonable person considering whether, standing in the shoes of the complainant, the conduct would be offensive.

Regulations, p. 30167.

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Hypo: Objectively Offensive

A female elementary student is subjected to consistent sexual comments from a male middle school student for an extended period of time. The District concludes that "boys will be boys" and that the comments would not be deemed offensive to a middle school student.

Is this the appropriate analysis?

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No. The Regulations provide:

The reasonable person standard appropriately takes into account whether a reasonable person, in the position of the particular complainant, would find the conduct offensive . . . . It would be inappropriate for a Title IX Coordinator to evaluate conduct for objective offensiveness by shrugging off unwelcome conduct as simply ‘‘boys being boys’’ or make similar assumptions based on bias or prejudice.

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c) Effectively Denies Equal Access

- Applies any situation where the sexual harassment ‘‘so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.’’

- Does not require that a complainant dropped out of school, failed a class, had a panic attack, or otherwise reached a ‘‘breaking point’’ in order to report and receive a recipient’s supportive response to sexual harassment.

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Hypo: Denial of Equal Access

A high school wrestler is subject to sexual harassment. In response, he quits the team but carries on with other school activities.

Has he been denied equal access to educational opportunities?

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Yes, this is likely a denial of “equal access”.

Signs of enduring unequal educational access due to severe, pervasive, and objectively offensive sexual harassment may include:

- skipping class to avoid a harasser,
- a decline in a student’s grade point average, or
- having difficulty concentrating in class.

Regulations, p. 30170

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d) Intent

- The Hostile Environment standard does not require ‘‘intent’’.

- Sexual harassment cannot be excused by trying to blame the victim or rationalize the perpetrator’s behavior

Regulations, p. 30167

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3) Crimes - Sexual Assault

Sexual Assault means a sexual offense under state or federal law that is classified as a **forcible** or **nonforcible sex offense** under the uniform crime reporting system of the Federal Bureau of Investigation.

- Forcible Sex Offenses: Forcible Rape, Forcible Sodomy, Sexual Assault with an Object, Forcible Fondling.
- Nonforcible Sex Offenses: Incest, Statutory Rape.

"Forcible" generally means without consent.

NOTE: Act 110 of 2020 (Section 1318.1 of the School Code) requires that a District: 1) expel; 2) transfer to an alternative education program; or 3) reassign to another school any student that is convicted (or adjudicated delinquent) of committing sexual assault against another District student attending the same school. **The Title IX Coordinator must be provided notice of any conviction or adjudication**.

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3) Crimes - Dating Violence

Dating violence means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship is determined by the following factors:

1. Length of relationship.
2. Type of relationship.
3. Frequency of interaction between the persons involved in the relationship.

- Note: Relevant to District if it occurs during a District Educational Program or Activity (*e.g.*, Prom).

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3) Crimes - Domestic Violence

Domestic violence includes felony or misdemeanor crimes of violence committed:

1. by a current or former **spouse** or intimate partner of the victim;
2. by a person with whom the victim shares a child in common;
3. by a person who is **cohabitating** with or has cohabitated with the victim as a spouse or intimate partner;
4. by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving federal funding; or
5. by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

- **NOTE:** Unlikely to arise in any District Program or Activity

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3) Crimes - Stalking

Stalking means to engage in a course of conduct directed at a specific person that would cause a reasonable person to either:

1. Fear for their safety or the safety of others; or
2. Suffer substantial emotional distress.

Definitions:

- "Course of conduct" - A pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct. The term includes lewd, lascivious, threatening or obscene words, language, drawings, caricatures or actions, either in person or anonymously. 18 Pa.C.S. 2709.1.
- "Emotional distress" - A temporary or permanent state of mental anguish. 18 Pa.C.S. 2709.1.

Example:

- Sending nine bizarre emails over the course of a month that causes the victim to feel "great concern and alarm" meets the elements for stalking. Com. v. D'Collanfield, 805 A.2d 1244, 1249 (Pa. Super. 2002)

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Hypothetical

- Student A commits "dating violence" against Student B at the Homecoming Dance, but the particular facts of that situation demonstrate that the conduct, somehow, is not sufficiently "severe, pervasive and objectionably offensive" as to create a Hostile Environment.

- Does a single act of dating violence constitute Title IX Sexual Harassment if it does not create a Hostile Environment?

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Answer

Yes. The Preamble to the Regulations clarify that:

> *the Department's inclusion of sexual assault, dating violence, domestic violence, and stalking in the § 106.30 definition of sexual harassment, without requiring those sex offenses to meet the Davis elements of severity, pervasiveness, and objective offensiveness, appropriately guards against, for instance, some sexual assaults or incidents of dating violence or domestic violence being covered under Title IX while other sexual assaults or incidents of dating violence or domestic violence are deemed not to be ''pervasive'' enough to meet the Davis standard.*

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IV. In an Education Program or Activity Against a Person in the United States

A School District with **Actual Knowledge** of **Sexual Harassment** in an **Education Program or Activity** of the School District against a person **in the United States**, must respond promptly in a manner that is **not Deliberately Indifferent**.

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District's Education Program or Activity

- The Regulations define this term as:

  locations, events, or circumstances over which the District exercised substantial control over both the Respondent and the context in which the Sexual Harassment occurs.

- 2001 Guidance states that Title IX protects students in connection with:

  all of the academic, educational, extracurricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

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Hypothetical

Student A shares nude pictures of Student B via social media with over the weekend. The pictures are seen by many students and are recirculated among more students. Student B is humiliated and is emotionally unable to return to school, causing her to withdraw and enroll in a charter school.

- Is this Sexual Harassment?

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Discussion

- Did this occur in the District's Education Program or Activity?
- Would punishment violate Student A's First Amendment rights?

Mahanoy Area Sch. Dist. v. B. L. by and through Levy, 141 S. Ct. 2038 (2021).

- B.L., a high school cheerleader, posted a "Snap" featuring a photo of her and a friend holding up their middle fingers with the text, "f[***] school f[***] softball f[***] cheer f[***] everything" superimposed on the image.
- one of the cheerleading squad's coaches informed B.L. that she was being dismissed from the squad. The coach produced a printout of the Snap and told B.L. that the Snap was "disrespectful" to the coaches, the school and the other cheerleaders.
- Holding: while public school districts may have a special interest in regulating some off-campus student speech, the reasons offered by the District in this case were not sufficient to overcome B.L.'s interest in free expression.

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Guidance:

The Court indicated that discipline for off-campus speech may be permissible in cases of:

1. serious or severe bullying or harassment targeting particular individuals;
2. threats aimed at teachers or other students;
3. the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and
4. breaches of school security devices, including material maintained within school computers

As stated in Justice Alito's concurring option:

> "If today's decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory."

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District's Education Program or Activity

Policy 218 (Discipline):

This policy shall also apply to student conduct that occurs off school property and would violate the Student Behavior Code if:

1. There is a nexus between the proximity or timing of the conduct in relation to the student's attendance at school or school-sponsored activities.
2. The student is a member of an extracurricular activity and has been notified that particular off-campus conduct could result in exclusion from such activities.
3. Student expression or conduct materially and substantially disrupts the operations of the school, or the administration reasonably anticipates that the expression or conduct is likely to materially and substantially disrupt the operations of the school.
4. The conduct has a direct nexus to attendance at school or a school-sponsored activity, such as an agreement made on school property to complete a transaction outside of school that would violate the Student Behavior Code.
5. The conduct involves the theft or vandalism of school property.

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Hypo: Foreign Travel

Student A sexually assaults Student B while on a class trip to Toronto. The assault occurs in Canada. Student B files a formal complaint with the District alleging Title IX Sexual Harassment.

- Is this conduct governed by the new Title IX Regulations?

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Answer

No. Whether it's part of the Education Program or Activity probably depends on the facts of the case and the District's involvement in the trip.

However, the Regulations confirm that conduct that occurs against a person who outside of the United States is not covered by Title IX.

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Does this Mean the Offender Cannot Be Punished?

No. While the conduct is not covered by Title IX, it can still be punished. In the Preamble to the Regulations, the Department clarified that:

> *nothing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment occurring outside the recipient's education program or activity, or occurring against a person who is not located in the United States.*

NOTE: Any convicted student may also be subject to removal under Act 110 of 2020 (Section 1318.1 of the SC).

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V. Investigation and Grievance Process

A. Responding to Reports of Discrimination

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Responding to Reports

Districts must respond "promptly" and not in a "deliberately indifferent" manner when it has "actual knowledge" of "sexual harassment" in its "education program or activity" against a person in the United States.

- "Actual Knowledge" – notice, including a formal complaint, of Sexual Harassment (including allegations) to the Title IX Coordinator **or any employee of the District**.
- "Deliberately Indifferent" – *i.e.*, "clearly unreasonable in light of the known circumstances."

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Submitting Reports

- **Policy**: An individual who believes they have been subjected to discrimination (including Sexual Harassment) is encouraged to immediately report the incident to the building principal, building administrator or Title IX Coordinator using the Report Form or by making a general report verbally or in writing to the building principal, building administrator or the Title IX Coordinator.
- Such a report may be made at any time (including during non-business hours) by using the telephone number or email address, or by mail to the office address, listed for the **Title IX Coordinator.**
- Complainants are not required to use the Report Form.

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Common Steps

The Title IX Coordinator/Compliance Officer shall:

- offer Supportive Measures to the Complainant;
- review reports and complaints, and may gather additional information from the individual submitting the report and other parties identified in the report using the Report Form.
- promptly contact the complainant regarding the report to gather additional information as necessary, and to discuss the availability of supportive measures.
- consider the complainant's wishes with respect to supportive measures.
- explain the process for filing a Formal Complaint of Sexual Harassment to the Complainant.

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Common Steps

Title IX Coordinator shall assess whether the report:

- Involves other Board policies or the Code of Student Conduct.
- Indicates, based on an individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of an individual.
- Involves a student identified as a student with a disability under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act.

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Common Steps

- The Title IX Coordinator shall contact the parents/guardians of the parties and provide them with information regarding the report and Title IX sexual harassment procedures and grievance process for formal complaints.
  - Section 106.6(g) of the Regulations were included to acknowledge the legal rights of parents and guardians to act on behalf of individuals with respect to exercise of rights under Title IX, including but not limited to filing a formal complaint of sexual harassment
  - If a Student is 18 years old, records related to discipline are educational records and, under FERPA, access to the education records of a student who is or has been in attendance at a school shall be granted to the parent of a student who is a minor or who remains a dependent for tax purposes. 34 C.F.R. §§ 99.10, .3, .31(a)(8).
- Best Practices: Thoroughly document all steps taken in the process.

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Supportive Measures

- **What are they?**
  - Nondisciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and before or after the filing of a Formal Complaint or where no Formal Complaint has been filed.
  - Designed to restore or preserve equal access to the District's Education Program or Activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the District's educational environment, or deter Sexual Harassment.

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Supportive Measures

- **Supportive Measures**
  - Examples: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work, leaves of absence, increased security and monitoring of certain areas of the campus.
  - Confidentiality: District shall maintain as confidential any Supportive Measures provided to the Complainant or Respondent, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the Supportive Measures.
  - The Title IX Coordinator is responsible for coordinating the effective implementation of Supportive Measures.

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Divergence

- Discrimination: If the Complainant elects to not file a Formal Complaint, but the conduct constitutes discrimination or retaliation, then the procedures set forth on in your existing PSBA Policy 103 or 104 must be followed (PSBA Attachment 2).

- Sexual Harassment: If the Complainant elects to file a Formal Compliant, the new Grievance Process for Formal Complaints set forth in the new Regulations must be followed (PSBA Attachment 3) .

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Divergence

- **Discrimination** means to treat individuals differently, or to harass or victimize based on a protected classification including race, color, age, creed, religion, sex, gender, sexual orientation, genetic information, ancestry, national origin, marital status, pregnancy, or handicap/disability.
- All Title IX Sexual Harassment is Discrimination, but not all Discrimination is Title IX Sexual Harassment
- **Sex Discrimination/Harassment** that does not meet the definition of Title IX Sexual Harassment would follow the Discrimination procedures.
- Claims of **Retaliation** during the Title IX Sexual Harassment would follow the Discrimination procedures.

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V. Investigation and Grievance Process

B. Discrimination Complaint Procedures

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Discrimination Procedures

1. Initial Communications/Supports
   - Implement protective/supportive measures
   - Inform Complainant of his/her rights and the process for investigating the complaint
   - If Complainant is under the age of 18, attempt to obtain consent from parents for Complainant to participate
2. Informal Remedies
   - May be offered upon receipt of a report
   - Resolution must be signed by the parties and delivered to the Title IX Officer

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Discrimination Procedures

3. Investigation
   - Investigator selected by Title IX Coordinator (can be the Title IX Coordinator).
   - Duty to "conduct an adequate, reliable and impartial investigation" event is alleged victim refuses to participate.
   - Complainant and Respondent may provide witnesses and evidence.
   - Participants shall be directed to keep the matter confidential.
   - Obligation to investigate remains even if there are parallel criminal investigations.
   - Investigator shall submit a report to the Title IX Coordinator within a certain number of days of the initial report.

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Discrimination Procedures

4. District Action
   - If the Investigation find that there has been a violation, District "shall take prompt, corrective action designed to ensure that such conduct ceases and that no retaliation occurs."
   - Disciplinary actions shall be consistent with the Code of Student Conduct, Board policies and administrative regulations, district procedures, applicable collective bargaining agreements, and state and federal laws and regulations.

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Discrimination Procedures

5. Appeals
   - Either party has the right to appeal within 15 days of receiving notice of the outcome of the investigation.
   - Appeals shall be submitted to Title IX Coordinator or Superintendent if Title IX Coordinator conducted the investigation.
   - Response to the appeal shall be issued within 20 days.

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V. Title IX Investigation and Grievance Process

C. The Title IX Sexual Harassment Formal Complaint Grievance Process

1. General Requirements

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General Requirements

The District's Title IX Grievance Process must:

1. Treat Complainants and Respondents equitably;
2. Prohibit the imposition of any disciplinary sanctions (other than Supportive Measures) prior to completion of the process;
3. Provide remedies designed to restore or preserve equal access to the District's Education Program or Activity;
4. Require an objective evaluation of all relevant evidence and credibility determinations (avoid credibility determinations based on a party's status as a complainant, respondent or witness);
5. Require that Title IX Personnel not have a **conflict of interest or bias** for or against Complainants or Respondents generally or an individual Complainant or Respondent;

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General Requirements

6. Include a presumption that the Respondent is not responsible for the alleged conduct until a determination regarding responsibility is made;
7. Provide reasonably prompt time frames for conclusion of the grievance process;
8. Set forth the range of possible disciplinary sanctions and remedies;
9. State the standard of evidence to be used to determine responsibility;
10. must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege;
11. Set forth the procedures and permissible bases for to appeal; and
12. Describe the range of Supportive Measures.

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Timeframes

- Established timeframes set forth in the procedures may be adjusted to allow for a temporary delay or a limited extension of time for good cause.

- Good cause includes:
  - The absence of a party, a party's advisor or a witness;
  - Concurrent law enforcement activity; and/or
  - Need for language assistance or accommodation of disabilities

- Notice setting forth basis for an extension should be sent to parties and kept in the file.

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C. The Title IX Sexual Harassment Formal Complaint Grievance Process.

2. Informal Resolution

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Informal Resolution

- **Step 2 – Informal Resolution**
  - **Not Available** where Formal Complaint alleges that an **Employee Harassed a Student**;
  - Only available where a **Formal Complaint has been filed**;
  - Can take many forms, including mediation, facilitated discussion, restorative practices, acknowledgement and apologies;
  - Must be Voluntary;
  - Can be initiated at any time before there is a written determination

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Informal Resolution

Written Notice – The Offer of Informal Resolution must disclose:

- The allegations;
- The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a Formal Complaint arising from the same allegation;
- That, at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process;
- The consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

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Informal Resolution

Additional Requirements

- If the matter is resolved to the satisfaction of the parties, the district employee facilitating the informal resolution process shall document the nature of the complaint and the proposed resolution of the matter, have both parties sign the documentation and receive a copy, and forward it to the Title IX Coordinator.
- The Title IX Coordinator shall contact the complainant to determine if the resolution was effective and to monitor the agreed upon remedies
- The Title IX Coordinator shall document the informal resolution process, responses from all parties, and include an explanation of why the district's response was not deliberately indifferent to the reported complaint of sexual harassment.

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C. The Title IX Sexual Harassment Formal Complaint Grievance Process.

3. Investigation

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Notice

The District must investigate the allegations in any formal complaint and send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint.

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Investigation - Requirements

The District shall:

1. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the District and not on the parties.
2. Provide an equal opportunity for the parties to present witnesses and evidence;
3. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
4. Provide the parties with the same opportunities to have others present during any grievance proceeding (including an attorney);

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Investigation - Requirements

5. Provide timely written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings to a party who is expected to participate;
6. Provide an equal opportunity for the parties to inspect and review any evidence obtained as part of the investigation;
7. Send this evidence to the parties at least 10 days prior to completion of the Investigative Report;
8. Allow and consider written responses from the parties;
9. Create an Investigative Report;
10. Send the Investigative Report to the parties and the Decision-Maker at least 10 days prior to the determination of responsibility.

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C. The Title IX Sexual Harassment Formal Complaint Grievance Process.

4. Dismissal of Complaints

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Dismissal of Formal Complaints

Mandatory Dismissal: The District **shall** dismiss the Formal Complaint with regard to that conduct for purposes of Sexual Harassment if the conduct alleged in the Formal Complaint:

- does not constitute Sexual Harassment even if proved;
- did not occur in the District's Education Program or Activity; or
- did not occur against a person in the United States,

When: After the filing of a Formal Complaint

Who: Title IX Coordinator

Such a dismissal does not preclude action under another provision of the District's code of conduct

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Dismissal of Formal Complaints

Discretionary Dismissal: The District **may** dismiss the Formal Complaint or any allegations therein, if at any time prior to the issuance of the written determination:

- A Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the Formal Complaint or any allegations therein;
- The Respondent is no longer enrolled or employed by the District; or
- Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein.

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Dismissal of Formal Complaints

- Written notification shall:
  - Be promptly issued to the parties simultaneously of any allegations found not to qualify or that are dismissed in compliance with Title IX.
  - State whether the allegations will continue to be addressed pursuant to the Code of Student Conduct and other Board policies.
  - State that the dismissal may be appealed pursuant to the appeal procedures.

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C. The Title IX Sexual Harassment Formal Complaint Grievance Process

5. Determination

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Title IX Sexual Harassment – Determination

- Decision Maker - must issue a Written Determination regarding responsibility by applying the "preponderance of the evidence" standard:

  "the greater weight of the evidence, *i.e.*, to tip a scale slightly is the criteria or requirement for preponderance of the evidence."

- In considering evidence, credibility determinations are not based on an individual's status as a complainant, respondent or witness.

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Determination

- The Written Determination cannot be finalized until at least 10 days have passed from the release of the Investigative Report to Complainant and Respondent.
- After the Investigative Report is shared, the Decision-Maker(s) must afford each party the opportunity to submit written, relevant questions and limited follow up-questions.
  - Generally, questions and evidence about the complainant's sexual predisposition or prior sexual behavior is not relevant, unless offered to prove that someone other than the respondent is responsible or to prove consent.
- Decision-Maker must explain a decision to exclude a question for not being relevant.

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Determination

The written Determination shall be provided to the parties simultaneously and must include:

1. Identification of the allegations;
2. Descriptions of the procedural steps taken by the District (notification, interviews, site visits, methods used to gather other evidence);
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the District's code of conduct;
5. For each allegation:
   - a determination regarding responsibility;
   - any disciplinary sanctions the District imposes on the respondent; and
   - a statement as whether remedies designed to restore or preserve equal access to the District's education program or activity will be provided by the District to the complainant. (NOTE: Actual Remedies should not be identified)
6. Appeal procedures.

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C. The Title IX Sexual Harassment Formal Complaint Grievance Process

6. Appeals

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Appeals

Both parties have the right to appeal:

1. a determination of responsibility; and
2. the dismissal of a Title IX formal complaint or any allegation in the Title IX formal complaint

Three Permitted Reasons for an Appeal:

1. A procedural irregularity;
2. New evidence that that could affect the outcome was not reasonably available at the time the decision to dismiss or determination of responsibility was made; and/or
3. Conflict of Interest or bias of the Title IX Coordinator, investigator(s), or decision-maker(s).

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Appeals

- The designated appeal authority (Appeal Decision-Maker) cannot be the same person as the Decision-Maker that reached the determination, the Investigator, or the Title IX Coordinator. The Appeal Decision-Maker can be a District employee.

- Appeal Decision-Maker shall:
  - Provide Written Notice of Appeal to the Parties;
  - Provide a Reasonable Opportunity for the Parties to submit a Position Statement;
  - Issue a Written Decision and provide it to both Parties simultaneously.

- The Appeal Decision-Maker can consider new evidence or remand to the Decision-Maker.

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Thank you for attending!

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