

A New Era in Title IX Enforcement

Title IX Sexual Harassment Complaint Procedures



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Introduction – “Who Are You and Why Are We Here?”

Presenter:

- Darren Gibson: Co-Chair of Littler’s Higher Ed Group

Purpose of today’s presentation:

- Training on new Title IX Sexual Harassment Complaint Procedures
- Comply with training mandates in new Title IX regulations

See 34 CFR § 106.45(b)(1)(iii).

AGENDA

- ✓ **Key Changes Required by New Title IX Regulations**
 - ❑ Title IX Sexual Harassment Complaint Procedures
 - ❑ Appeals and Other Provisions
 - ❑ Intersection with Other Policies and Legal Obligations

Title IX of the Education Amendments of 1972

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, *et seq.*

Title IX Enforcement

- All educational institutions, both public and private, that receive federal funds are subject to Title IX.
- Failure to comply risks federal funds.
- Department of Education's Office for Civil Rights (OCR) enforces Title IX by:
 - *Investigating complaints and entering agreed resolutions; and*
 - *Compliance reviews and technical assistance.*
- Additional enforcement through private lawsuits.

Scope of Title IX: “Education Program or Activity”

- Any location, event, or circumstance over which the recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs.
- Includes all education programs or activities, whether occurring on or off-campus, and any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).

Heightened Standard for “Sexual Harassment” (i.e. Title IX Sexual Harassment under policy)

- 1) Any instance of quid pro quo harassment by a recipient’s employee;
- 2) Any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; or
- 3) Any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

Additional Key Provisions of Amended Regulations

- Formal Complaint, Actual Knowledge, and Deliberate Indifference
- Supportive Measures (even if no Formal Complaint filed)
- Uniform evidentiary standard and grievance process for students, staff, and faculty
- Mandatory dismissal where allegations do not rise to heightened standard of sexual harassment
- Investigation, notice, parties' rights during investigation, and equitable treatment
- Rights of parties to inspect and review evidence

Additional Key Provisions of Amended Regulations

– *Continued*

- Independent Decision-Maker(s)
- Mandatory appeal process provided
- Retaliation included within Title IX policy and can result in violation
- Informal resolution – discretionary
- Record keeping

Let's Start with Key Definitions



Key Definitions – 34 CFR § 106.30

- ***Complainant.*** An individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- ***Respondent.*** An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- ***Formal Complaint.*** Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. As used in this definition, a “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

AGENDA

- Key Changes Required by New Title IX Regulations
- ✓ **Title IX Sexual Harassment Complaint Procedures**
- Appeals and Other Provisions
- Intersection with Other Policies and Legal Obligations

Title IX Sexual Harassment Complaint Procedures

Legal Disclaimer

This training is meant to summarize the Title IX Sexual Harassment Complaint Procedures and related materials.

- This training should not be a substitute for reading the Title IX Sexual Harassment Complaint Procedures.
- The text of this training does not quote the full language of the Title IX Sexual Harassment Complaint Procedures, and the language of the policy governs.
- For a complete understanding of the Title IX Sexual Harassment Complaint Procedures, please refer to the policies and supporting materials.



Purpose of Title IX Sexual Harassment Complaint Procedures

AR 4119.12/4219.12/4319.12 and AR 5145.71

- Clearly define what is Title IX Sexual Harassment.
- Provide students and employees with notice of their rights and mechanisms for reporting alleged Title IX Sexual Harassment.
- Describe centralized investigation and adjudication procedures for prompt and equitable resolution of complaints alleging Title IX Sexual Harassment.
- Provide students and employees with the range of disciplinary actions and remedies applicable to violations of the Policy.

Scope of the Title IX Sexual Harassment

- The Policy applies to all personnel and students.
- The Policy applies to allegations of Title IX Sexual Harassment by or against all personnel and students and may include an unaffiliated third party (e.g., guests, invitees) as a Complainant or Respondent.
- This Policy does not apply to allegations of sexual misconduct that may occur in any location that is outside the borders of the United States of America, or to alleged incidents that occur outside the scope of an Education Program or Activity, even if personnel or students are involved as a Complainant or Respondent.

Alternative Processes Still Available

- Other misconduct procedures continue to be available to students and employees for matters that are not required to be addressed by Title IX.
 - Employees: “All other sexual harassment complaints shall be investigated and responded to pursuant to AR 4030 - Nondiscrimination in Employment.”
 - Students: “All other sexual harassment complaints shall be investigated and responded to pursuant to AR 1312.3 - Uniform Complaint Procedures.”
- “[Mandatory dismissal of a Formal Complaint] does not preclude action under another provision of the recipient’s code of conduct.” 34 CFR § 106.45(b)(3).

Definition of Sexual Harassment Under the Policy

The complaint procedures described in this administrative regulation shall be used to address any complaint governed by Title IX of the Education Amendments of 1972 alleging that a student was subjected to one or more of the following forms of sexual harassment:

1. A district employee conditioning the provision of a district aid, benefit, or service on the student'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 student equal access to the district's education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking as defined in 20 U.S.C. § 1092 or 34 U.S.C. § 12291.

Where to Report Title IX Misconduct?

**SEXUAL HARASSMENT
COMPLAINT**

Complainant Information	Given Name	Middle Name	City	Home
	Home Phone Number	Alternate Phone Number		Date of filing

Where and How to Report Title IX Sexual Harassment

- A formal complaint, with the complainant's physical or digital signature, may be filed with the Title IX Coordinator in person, by mail, by email, or by any other method authorized by the district.
- A report of sexual harassment shall be submitted directly to or forwarded to the district's Title IX Coordinator using the contact information listed in AR 4119.11/4219.11/4319.11 - Sexual Harassment and in in AR 5145.7 - Sexual Harassment.
- Upon receiving report, Title IX Coordinator shall inform the complainant of the process for filing a formal complaint.

Title IX Sexual Harassment Complaint Procedures, AR 4119.12 & 5145.71

False Information & Retaliation

- There is a prohibition against knowingly making false statements or knowingly submitting false information during the complaint process.
- No retaliation against any individual, including intimidation, threats, coercion, or discrimination, to interfere with rights provided by Title IX, or because individual participated in Title IX Complaint Procedures.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute retaliation.



Duty of Confidentiality – Who is Covered?

The confidentiality provisions protect:

- Reporting Party;
- Complainant;
- Individual who was reported to be perpetrator;
- Respondent; and
- Witness.



34 CFR § 106.71(a)

Supportive Measures



Supportive Measures

Supportive Measures offered to **parties**:

- may be offered 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 Education Program or Activity; and
- maintained as confidential to the extent that maintaining such confidentiality would not impair the ability to provide the supportive measures.

Title IX Coordinator shall consider the complainant's wishes with respect to supportive measures.

Scope of Available Supportive Measures

Supportive Measures can include:

- Counseling;
- Course-related adjustments;
- Modifications of work and class schedules and locations
- Mutual restrictions on contact between the parties;
- Leave of absence;
- Increased security; and
- Monitoring of certain areas of campus.

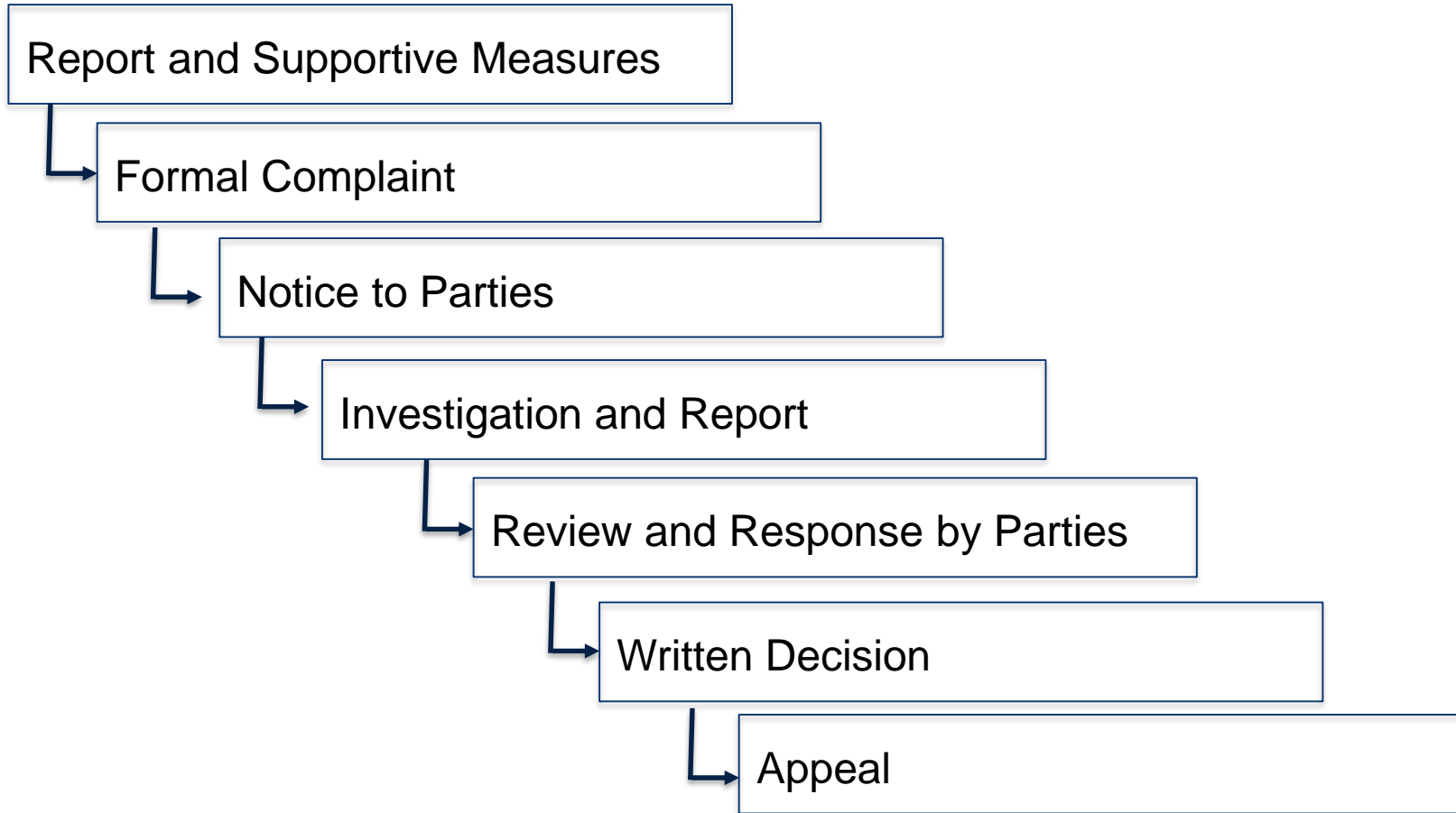
Title IX Sexual Harassment Complaint Procedures, AR 4119.12 & 5145.71

Administrative Leave and Emergency Removal

- For students, must conduct individualized safety and risk analysis to determine if individual poses immediate threat.
- If so, may remove Respondent to protect safety of community.
- Must provide notice and immediate opportunity to challenge the removal.
- Employee may be placed on administrative leave during pendency of formal complaint process.



Title IX Sexual Harassment Complaint Procedures



Roles and Responsibilities

- **Title IX Coordinator** monitors compliance with Title IX Policy, including training, education, prevention efforts, communication with stakeholders, and oversight of investigation and adjudication procedures for all reported policy violations.
- **Investigator** will conduct an inquiry into allegations and create an investigative report that fairly summarizes relevant Evidence
- **Decision-Maker** will determine relevance of questions asked by Advisors and make a written determination regarding responsibility and may impose sanctions.
- **Appeal Officer** will make a final determination on appeals.

Title IX Sexual Harassment Complaint Procedures, AR 4119.12 & 5145.71

Informal Resolution Process

- Title IX Coordinator may offer the Complainant and Respondent an informal resolution process.
- Parties participate in an unofficial mediation process with the Title IX Coordinator acting as mediator.
- Both parties must agree to this alternate process, and, in doing so, the parties waive their right to investigation and adjudication.
 - *Agreement to proceed with alternative resolution must be in writing, per the regulations.*

Title IX Sexual Harassment Complaint Procedures, AR 4119.12 & 5145.71

Title IX Sexual Harassment Complaint Procedures – Formal Complaint

- Formal Complaint required to initiate Complaint Procedures.
- Upon receiving report (or if Actual Knowledge of the alleged Title IX Sexual Harassment), Title IX Coordinator will promptly contact Complainant to:
 - (1) discuss the availability of Supportive Measures, which are available with or without Formal Complaint, and
 - (2) explain the process of filing a Formal Complaint.
- At time of filing Formal Complaint, Complainant must be participating in or attempting to participate in Education Program or Activity.

Title IX Sexual Harassment Complaint Procedures, AR 4119.12 & 5145.71

Title IX Sexual Harassment Complaint Procedures – Formal Complaint

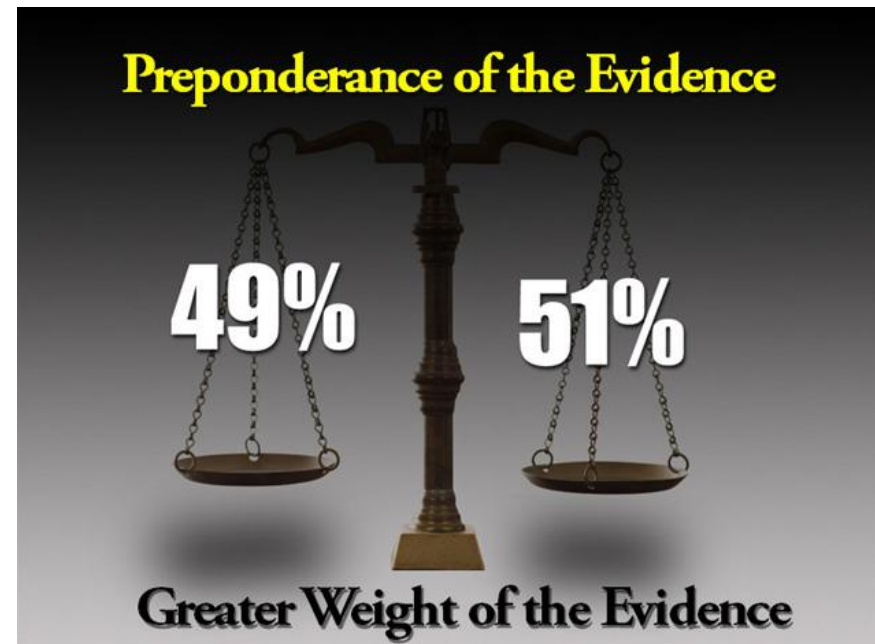
- Formal Complaint may be signed by the Title IX Coordinator.
- Complainant's wishes will be respected, unless the Title IX Coordinator determines that a safety threat exists.
- Title IX Coordinator may file a formal complaint in other situations as permitted under the Title IX regulations.

Title IX Sexual Harassment Complaint Procedures, AR 4119.12 & 5145.71

Title IX Sexual Harassment Complaint Procedures – Presumption of Non-Responsibility and Standard of Evidence

- The standard of evidence is a preponderance of the evidence.
- Presumption that Respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the formal complaint process.

*Title IX Sexual Harassment Complaint
Procedures, AR 4119.12 & 5145.71*



Initial Review of a Formal Complaint— Mandatory Dismissal

Title IX Coordinator must dismiss a Formal Complaint if:

- the allegation does not describe conduct that would constitute Title IX Sexual Harassment;
- the Title IX Sexual Harassment did not occur in an Education Program or Activity; or
- the Title IX Sexual Harassment did not occur against a person in the United States.

But such a dismissal does not preclude action under other policies or code of conduct.

*Title IX Sexual Harassment Complaint
Procedures, AR 4119.12 & 5145.71*



Initial Review of a Formal Complaint— Optional Dismissal

Title IX Coordinator may dismiss Formal Complaint if:

- Complainant notifies Title IX Coordinator in writing that they wish to withdraw Formal Complaint;
- Respondent is no longer enrolled in or employed by the district; or
- circumstances exist that prevent gathering sufficient evidence to reach a determination.

*Title IX Sexual Harassment Complaint
Procedures, AR 4119.12 & 5145.71*



Written Notice and Appeal of Dismissal Decision

- If the Title IX Coordinator dismisses a Formal Complaint or any allegations therein, the district must provide written notice of dismissal and reasons simultaneously to all parties.
- Any party can appeal the dismissal.

Title IX Sexual Harassment Complaint Procedures, AR 4119.12 & 5145.71

Right to Consolidate Formal Complaints

The district may consolidate Formal Complaints:

- against more than one Respondent,
- by more than one Complainant against one or more Respondents, or
- by one party against the other party, where the allegations of Title IX Sexual Harassment arise out of the same facts or circumstances.

34 CFR § 106.45(b)(4)



Mandatory Notices to Parties

- The district must provide initial written notice to both parties on receipt of a Formal Complaint.
- Supplemental notice required if additional allegations later included in scope of investigation.
- Sufficient notice must be given to all parties of hearings, interviews, or meetings. Sufficient notice is defined as a minimum of three calendar days.

*Title IX Sexual Harassment Complaint
Procedures, AR 4119.12 & 5145.71*



Initial Notices to Parties

Initial notice to the parties must include:

- ✓ the identities of the parties involved (if known),
- ✓ a description of the alleged Title IX Sexual Harassment, date and location of the alleged incident(s) (if known),
- ✓ the Policy provisions alleged to have been violated, and information about the complaint process set forth herein,
- ✓ the right of parties to have an advisor of their choice,
- ✓ the right to inspect and review evidence, and
- ✓ that knowingly making false statements or submitting false information may be subject to additional disciplinary action up to and including dismissal or separation.

Title IX Sexual Harassment Complaint Procedures, AR 4119.12 & 5145.71

Investigation Process – Gathering Evidence

- Parties must be given an equal opportunity to identify witnesses and submit evidence.
- District cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- Investigation shall consider all relevant evidence – both inculpatory and exculpatory – and credibility determinations may not be based on person’s status as a complainant, respondent, or witness.

*Title IX Sexual Harassment Complaint
Procedures, AR 4119.12 & 5145.71*



Complaint Process Requirements – Role of Advisors

- Complainant and Respondent may, but are not required to, have an Advisor of their choosing present during Investigation and any meetings related to the Investigation of a report of Title IX Sexual Harassment.
- The district may establish restrictions regarding the extent to which the advisor may participate in the proceedings as long as the restrictions apply equally to both parties.

*Title IX Sexual Harassment Complaint
Procedures, AR 4119.12 & 5145.71*



Inspection and Review of Relevant Evidence

- Prior to issuing Investigative Report, parties must have opportunity to review and inspect evidence directly related to allegations.
- The district must provide parties at least 10 days to submit a written response to the evidence.
- Evidence may be redacted as necessary to comply with applicable state or federal confidentiality laws (e.g., HIPAA, FERPA).

*Title IX Sexual Harassment Complaint
Procedures, AR 4119.12 & 5145.71*



Investigative Report

- Investigator will prepare a report that fairly summarizes the relevant evidence.
- Report sent to parties and advisors at least 10 days prior to the determination of responsibility or alternative resolution.
- Afford each party the opportunity to submit written, relevant questions that the party wants asked of any party or witness, provide each party with answers, and allow for limited follow-up questions from each party.

*Title IX Sexual Harassment Complaint
Procedures, AR 4119.12 & 5145.71*



Complaint Process Requirements – Protection of Privileged Information

- Information protected under a legally recognized privilege may not be used during any part of Complaint Process *unless* person holding such privilege has waived the privilege and obtained that party's voluntary, written consent to do so.
- For example, documents made or maintained by a physician, psychiatrist, psychologist, or other professional regarding treatment to the party.

34 CFR § 106.45(b)(1)(x)

Relevance – What is Relevant?

According to Federal Rule of Evidence 401, evidence is relevant if:

- a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- b) the fact is of consequence in determining the action.

RELEVANCE = PROBATIVE + MATERIAL

Specific Information Deemed Not Relevant

Information that will be deemed not relevant includes:

- Information protected by a legal recognized privilege;
- Evidence about Complainant's sexual predisposition or prior sexual behavior
 - Unless offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
 - If evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is offered to prove consent.
- Any party's medical, psychological, and similar records (unless the party has given voluntary written consent).

Written Determination Required Components

The Decision-Maker will issue a written determination that includes:

- 1) identification of the allegations;
- 2) description of the procedural steps in Complaint Process;
- 3) findings of fact supporting the determination;
- 4) conclusions regarding application of the district's Code of Conduct to facts;
- 5) a determination and rationale regarding responsibility for each allegation;
- 6) any disciplinary sanctions or other remedies; and
- 7) information concerning parties' ability to appeal.

Potential Sanctions and Remedies—Sexual Assault & Battery

Respondents found to have engaged in Sexual Assault will be removed from the district:

- Employees will be terminated.
- Students will be suspended and expelled.

Title IX Sexual Harassment Complaint Procedures, AR 4119.12 & 5145.71

Potential Sanctions and Remedies—Any other Title IX Sexual Harassment

Possible sanctions or remedies on Respondent includes:

Students

- Suspension and/or expulsion for grades 4-12;
- Transfer from class or school;
- Parent/guardian conference;
- Education on impact of conduct on others;
- Positive behavior support; and
- Referral to student success team and denial of extracurricular participation.

Personnel

- Appropriate disciplinary action, up to and including dismissal, in accordance with applicable law and collective bargaining agreement.

Timeframe for the Complaint Process

The district will strive to complete investigations in 45 days.

- May be extended “for good cause” and
- Parties must be given notice and justification for the extension.
- Good cause includes:
 - *Absence of party, advisor or witness*
 - *Concurrent law enforcement activity*
 - *Need for language assistance or accommodation*
 - *Overall complexity and volume of evidence*

*Title IX Sexual Harassment Complaint
Procedures, AR 4119.12 & 5145.71*



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- ❑ Key Changes Required by New Title IX Regulations
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- ✓ **Appeals and Other Provisions**
- ❑ Intersection with Other Policies and Legal Obligations

Appeal Officer

- The Appeal Officer will make a final determination regarding responsibility if either the Complainant or Respondent appeal the written determination.
- The written decision of the Appeal Officer is final and may not be appealed.
- Either party has the right to file a complaint with the U.S. Department of Education's Civil Rights Office.

Filing an Appeal and Response

- A party must file a written appeal within ten (10) days of written determination or dismissal.
- Written appeal must set forth the grounds for the appeal.
- Appeals are not intended for use as a substitute adjudication process, and Complainant and Respondent may not pursue appeals based on mere disagreement with findings or sanctions.
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, outcome.

Title IX Sexual Harassment Complaint Procedures, AR 4119.12 & 5145.71

Grounds of Appeal & Written Decision

The parties may appeal a determination or a dismissal based on:

- A procedural irregularity that affected the outcome;
- New evidence not previously available; or
- A conflict of interest or bias of the Title IX Coordinator, Investigator, or Decision-Maker.

Except where newly discovered evidence is the basis for the appeal, appeals are limited to a review of the Evidence and written documentation from investigation and determination.

The Appeal Officer must issue a written decision within 20 calendar days to both parties simultaneous.

Title IX Sexual Harassment Complaint Procedures, AR 4119.12 & 5145.71

Recordkeeping Obligation

- The district must maintain the following information for a period of 7 years:
 - *Reported cases and Title IX investigations*
 - *Determinations of responsibility*
 - *Audio or audiovisual recording and transcript*
 - *Disciplinary sanctions and remedies*
 - *Any appeal, informal resolutions, and responses*
 - *All training materials*



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Title IX Versus Title VII/State Law – Different Definition of Sexual Harassment

The district is subject to Title VII and Title IX.

- Title VII defines sexual harassment as “severe or pervasive,” whereas Title IX defines as “severe, pervasive, and objectively unreasonable.”
- Title VII “knew or should have known” versus “actual knowledge” required for Title IX.
- Title VII vicarious liability for acts of supervisors, without exception when the supervisor is the one engaging in the harassment. Not so with Title IX.

Title IX Versus Title VII/State Law – Applicable Policies

1. Title IX – Title IX Sexual Harassment Complaint Procedures (AR 4119.12 & 5145.71)
2. Title VII – Sexual Misconduct and Other Prohibited Conduct (AR & BP 4119.11 & AR & BP 5145.7)
 - Misconduct that does not rise to level of “severe, pervasive, and objectively unreasonable” under Title IX or are outside scope of Title IX.
3. Title VII – Discrimination, Harassment and Retaliation (AR 4030 & 5145.3)
 - Other types of prohibited discrimination and retaliation.

Obligation to Address Less Severe Sexual Harassment

- If alleged sexual harassment meets Title IX definition, must proceed under Title IX Policy (AR 4119.12 & 5145.71).
 - Title IX Policy is the default policy when allegations rise to Title IX Sexual Harassment.
- If alleged misconduct does not fall within definition of Title IX Sexual Harassment, must assess whether the misconduct meets the definition of either (i) prohibited conduct under policies against sexual harassment (AR & BP 4119.11 & AR & BP 5145.7) or (ii) other discrimination, harassment, and retaliation (AR 4030 & 5145.3).
- If so, proceed under applicable policy.

Title IX Sexual Harassment Complaint Procedures, AR 4119.12 & 5145.71

A New Era in Title IX Enforcement

Questions?