



TITLE IX: The Final Rule

**Board of Education of
Coopersville Area Public Schools**

September 23, 2020

**By
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TITLE IX FINAL RULE: WHAT WE WILL COVER

- How did we get here?
- What did NOT change?
- What DID change?
- Title IX Policy and Grievance Procedure Requirements.
- Appellate Process – What do you need to know?



TITLE IX FINAL RULE

- Released on May 6, 2020
- Effective August 14, 2020
- Applies to ALL K-12 Schools
- Legal Challenges to Final Rule? Stay tuned . . .



WHAT IS TITLE IX OF THE EDUCATION AMENDMENTS OF 1972?

- No **person** in the United States shall, on the basis of sex, be excluded from participation, or 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'S PROTECTIONS

- **PROTECTS ALL STUDENTS**

- Elementary → High School
- Male + female + straight + gay + lesbian + bisexual + transgender + questioning students.
- Gender Identity claims
 - Failure to conform to stereotypical notions of "masculinity" or "femininity."
- "Same sex" discrimination/harassment claims must be handled with same procedures as opposite sex claims.



TITLE IX IS MORE THAN ATHLETICS

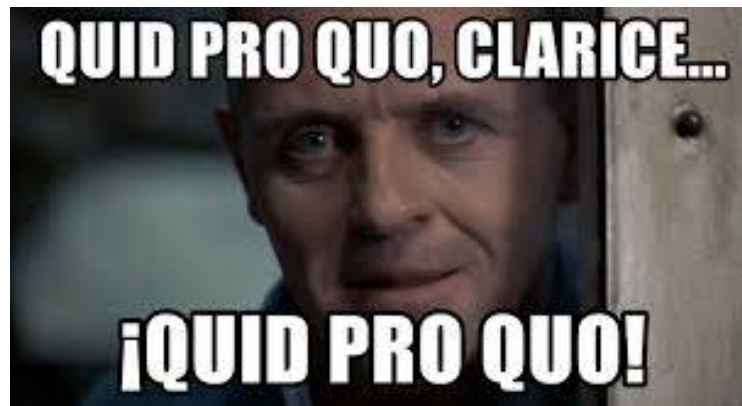
- **TITLE IX PROTECTS STUDENTS IN ALL:**

- Academics and Education
- Extracurricular and Athletic Programs
- Other programs of the school:
 - in a school's facilities;
 - on a school bus; and
 - at a class or training program sponsored by the school at another location, or **elsewhere** (*i.e.*, field trip) if the school sponsors the off-campus activity or event or has substantial control over the students at the event/activity.



DEFINITION OF SEXUAL HARASSMENT

- "*Quid Pro Quo*" harassment by a school employee.
- 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.
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as those terms are defined under other Federal laws called the Clery Act and the Violence Against Women Act.



SEXUAL HARASSMENT – WHAT CHANGED?

OLD DEFINITION (OCR Guidance)

- Unwelcome conduct
- Determined by a reasonable person
- To be severe, pervasive, **or** persistent, and to **interfere with or limit** a student's ability to participate in or benefit from school services, activities or opportunities

NEW DEFINITION (Final Rule)

- Unwelcome conduct
- Determined by a reasonable person
- To be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person's equal access to the recipient's education program or activity

WHEN DOES A SCHOOL HAVE NOTICE?

- Once a school has actual knowledge of sexual harassment or allegations of sexual harassment, the school has to respond and take action.
- A school has actual knowledge when the school has **notice** that a person may have been victimized by sexual harassment.
- Any person, whether the alleged victim or a parent, friend, or bystander, has the right to **report** sexual harassment to put the school on notice.
- And sometimes school personnel will personally **witness** sexual harassment.
- **Formal Complaint** filed.

ACTUAL KNOWLEDGE AND SCHOOL PERSONNEL

- The Title IX Coordinator(s) for the school district.
- Schools have to provide the contact information for the Title IX Coordinator(s).
 - CAPS: Dr. Tricia McPheron/Brent Hadden
- Other people within the school who have authority to institute corrective measures. This could vary from school to school, but always includes the Title IX Coordinator(s).
- In elementary and secondary schools, telling any school employee always puts the school on notice.



ACTUAL KNOWLEDGE – WHAT CHANGED?

OLD RULE (OCR Guidance)

- A school has a responsibility to respond promptly and effectively if a school **knows or should have known** about sexual harassment

NEW RULE (Final Rule)

- A school with **actual knowledge** of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent

NOTICE TO THE AAESA?

- Superintendent
- Principal
- Assistant Principal
- Title IX Coordinator

- Teacher?
- Counselor?
- BOE Member?
- Food Service/Custodial?



NEW POLICY AND PROCEDURE REQUIREMENTS



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WRITTEN GRIEVANCE PROCEDURES

- Schools must have a written grievance procedure for dealing with sexual harassment which must abide by the new regulations.
- The grievance procedures themselves can't discriminate on the basis of sex, and any additional provisions that a school adds must apply equally to complainants and respondents.
- Written grievance procedures need to include 10 specific items.
- Adopt as an Administrative Regulation/Procedure rather than as part of BOE Policy to allow for changes without BOE approval. (CAPS Policy 2266/AG: Title IX Grievance Procedure).

REQUIREMENT 1: TREAT PARTIES EQUITABLY

- The school's grievance process must treat complainants and respondents equitably by providing remedies to a complainant if a respondent is found responsible, and by following the prescribed grievance process imposing discipline on a respondent.
- The remedies for a complainant have to be designed to restore or preserve equal access to the school's education program or activity.
- Unlike supportive measures in place with or without a grievance process pending, a complainant's remedies CAN be punitive or disciplinary against the respondent.

REQUIREMENT 2: OBJECTIVE EVALUATION OF EVIDENCE

- The school's grievance process must ensure an objective evaluation of all relevant evidence – including inculpatory and exculpatory evidence.
- Credibility determinations can't be made on the basis of a person's status as a complainant, respondent, or witness.



REQUIREMENT 3: TRAINING; NO CONFLICTS OF INTEREST

- The individuals involved in the Title IX process: the Title IX Coordinator(s), investigators, decision-makers, appeal, and facilitators of informal, voluntary resolution efforts – must not have any bias or conflict of interest.
- These individuals must also be trained. The materials used to train Title IX personnel can't rely on sex stereotypes, must promote impartial investigations and adjudications, and must be posted on each school's website (and if a school does not maintain a website, make them available for public inspection upon request).
- Investigator cannot be decision-maker. Decision-maker cannot be investigator or Title IX Coordinator. Appellate person/body cannot be anyone involved previously or Title IX Coordinator.

REQUIREMENT 4: PRESUMPTION OF INNOCENCE

- Under the school's grievance procedures, the respondent must be presumed not responsible, so that any finding of responsibility only comes at the conclusion of a grievance process.



REQUIREMENT 5: REASONABLY PROMPT TIMEFRAMES

- **The grievance process must include reasonably prompt timeframes for resolving formal complaints of sexual harassment.**
 - CAPS: 30-60 days.
- **Temporary delays are permitted only for good cause. Good cause can include law enforcement activities, the absence of a party or witness, the absence of a party's advisor of choice, or the need to provide language assistance or accommodation of disabilities.**



REQUIREMENT 6: DESCRIPTION OF RANGE OF OUTCOMES

- The grievance process must describe or list the range of possible remedies and disciplinary sanctions that could occur following a determination of responsibility.



RANGE OF OUTCOMES?

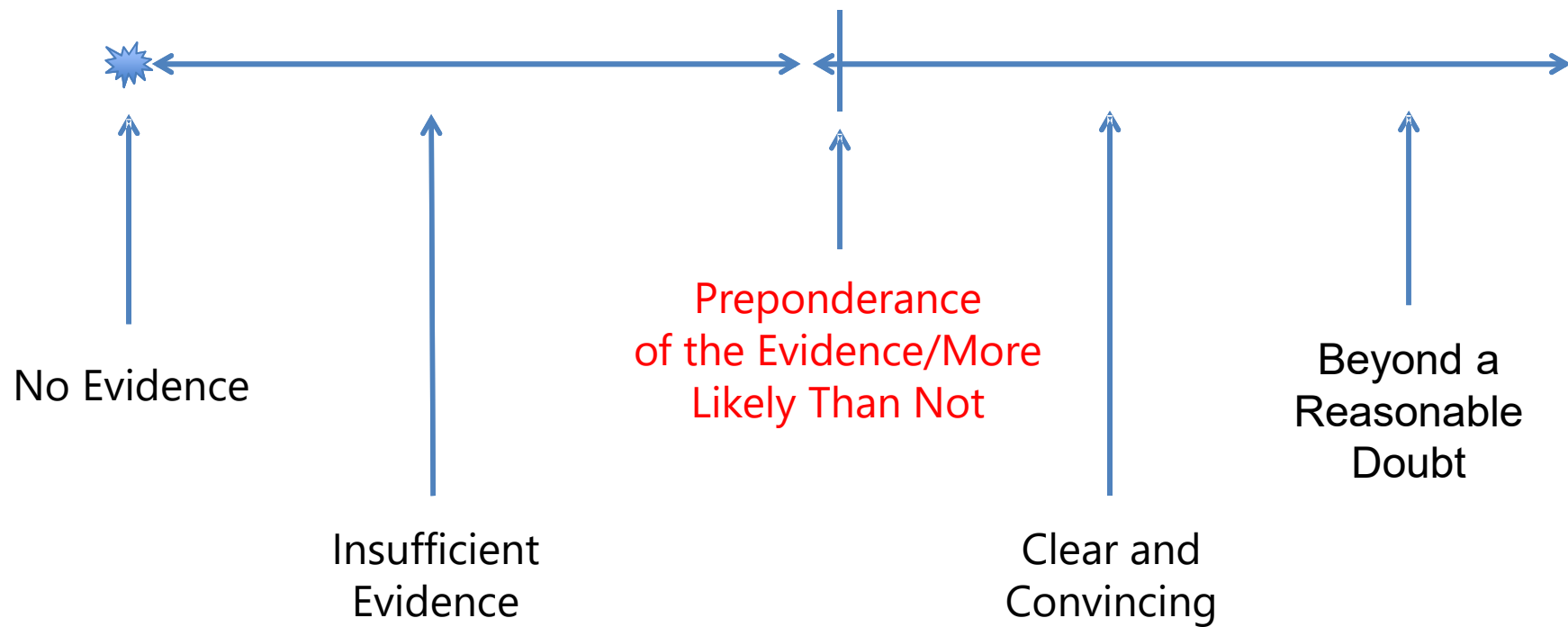
- **Possible disciplinary sanctions:**
 - Suspension up to and including permanent expulsion
 - Discipline up to and including termination
- **Possible remedies:**
 - AKA: Remedial Measures/Supportive Measures
 - No Contact Order (for both parties)
 - Change in classroom, lunchroom, bus, locker assignment
 - Restorative Justice, if applicable

REQUIREMENT 7: STANDARD OF EVIDENCE

- The grievance process must state which standard of evidence the school will use to reach a determination regarding responsibility, to be used for all sexual harassment proceedings.
- Schools can choose between the preponderance of the evidence standard and the clear and convincing evidence standard.
- Whichever standard the school chooses, it has to use that standard for all formal complaints of sexual harassment, whether the respondent is a student, or employee, including a faculty member.
- All sexual harassment proceedings must have the same standard of evidence.

EVIDENCE THRESHOLDS

EVIDENTIARY STANDARDS



REQUIREMENT 8: RIGHT TO APPEAL

- The grievance procedures have to contain the right to appeal the result of a grievance process, and information about how to invoke the right to appeal.
- Schools must offer an appeal to every party on certain bases, and schools also have the option to expand the bases on which an appeal may be taken, as long as they apply those bases equally to both parties.



APPEALS – WHAT CHANGED?

OLD REQUIREMENTS (OCR Guidance)

- Not required
- Must be provided equally to both parties, if provided
- No limitation on basis for appeals, if provided
- No requirement that the decisionmaker on appeal be different from investigators/ decision-makers in other phases of the process

NEW REQUIREMENTS (Final Rule)

- Must offer to both parties for dismissals and final determinations in the following circumstances:
 - Procedural irregularity
 - New evidence not reasonably available
 - Conflict of interest against Title IX Coordinator, investigator, decision-maker
- Can offer for other reasons on equal terms
- Different decision-maker (CAPS: BOE)

REQUIREMENT 9: DESCRIPTION OF RANGE OF SUPPORTIVE MEASURES

- The school's grievance process must describe the range of supportive measures available to complainants and respondents.



WHAT ARE SUPPORTIVE MEASURES?

- Supportive measures are free, individualized services designed to restore or preserve equal access to education, protect safety or deter sexual harassment.
- There doesn't need to be a formal complaint for an alleged victim to receive supportive measures.
- Supportive measures support a student, and they aren't punitive or disciplinary with respect to another student.
- Supportive measures don't unreasonably burden any other person.
- The **Title IX Coordinator** is responsible for implementing and monitoring supportive measures.
- Still the implication to "err" on the side of the victim as school always has to consider the alleged victim's wishes when it comes to requests for supportive measures.

SUPPORTIVE MEASURES

- **Examples:**

- No Contact Orders (both ways)
- Counseling
- Extensions of deadlines for assignments/tests
- Changes in classroom/lunchroom/bus assignments
- Increased Monitoring and Supervision
- Assigning a "safe" person



REQUIREMENT 10: PRIVILEGES

- The school's grievance process must explain that no information protected by a legal privilege, such as the attorney-client privilege or the doctor-patient privilege, can be used during an investigation unless the person holding that privilege has waived it.
- Neither a party nor the school is allowed to seek, permit questions about, or allow the introduction of evidence that is protected by a recognized privilege.
- Individuals can always opt to waive their own privileges, if they want, but they don't have to.

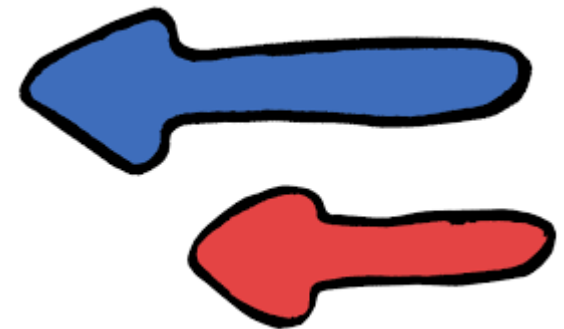
APPEAL PROCEDURES



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APPEALS

- A school has to offer both parties an opportunity to appeal.
- Appeals can be taken from **two** different steps in the process.
 - After a dismissal before the grievance process, whether mandatory or discretionary.
 - At the end of the grievance process.



MANDATORY DISMISSALS

- **A school must dismiss a complaint:**
 - that does not describe conduct that meets the definition of sexual harassment;
 - that alleges sexual harassment that did not occur in the school's education program or activity;
 - that alleges sexual harassment that did not occur in the United States at all.
- **Schools can still address these complaints under their code of conduct, even if the misconduct is not sexual harassment under Title IX.**

DISCRETIONARY DISMISSALS

- **A school may dismiss a complaint:**
 - if the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or some of its allegations;
 - if the respondent is no longer enrolled or employed by the school; or
 - if specific circumstances prevent the school from gathering evidence sufficient to reach a determination about the allegations.

DISMISSAL PROCEDURES

- Whenever a school dismisses a formal complaint, or any allegations in it, the school has to promptly send written notice of the dismissal and the reasons to the parties.
- Both parties have the right to appeal a school's dismissal decisions.



APPEALS: AFTER THE FINAL DECISION

- The school must send the written determination to the parties simultaneously, along **with information about how to appeal** the determination.
- A school has discretion to set **deadlines for when an appeal must be filed**, bearing in mind the obligation to conclude the entire grievance process and bring resolution to the situation for both parties, within a reasonably prompt timeframe.



GROUNDS FOR APPEAL: AFTER FINAL DECISION

1. A procedural irregularity affected the outcome of the matter.
2. New evidence has been discovered that was not reasonably available at the time of the determination on responsibility or dismissal.
3. A conflict of interest on the part of a Title IX Coordinator, an investigator who compiled evidence, or a decision-maker, and the conflict of interest affected the outcome.
4. Schools can offer additional grounds for appeals, if they want to, so long as the grounds apply on an equal basis to the parties.
 - CAPS did NOT offer additional grounds.

APPELLATE PROCESSES

- The recipient has to notify the parties in writing and implement appeal procedures equally.
- Both parties must have equal opportunity to submit a written statement supporting or challenging the outcome. (CAPS = 5 calendar days)
- The person or body who decides the appeal cannot be the same person who reached the determination regarding responsibility, or the same person as the investigator or Title IX Coordinator. (CAPS = BOE)
- After considering the parties' written statements, the decision-maker on appeal has to issue a written decision and send it to the parties simultaneously. (CAPS = 10 calendar days)
- The school's determination about whether the respondent is responsible for the sexual harassment allegations becomes **final** after appeal.

APPELLATE PROCESSES

- No requirement for a hearing or meeting, but can offer one.
- If offered, closed session under the OMA, Section 8(h).
- Board President should issue appeal decision on behalf of BOE.
- Board can appoint “committee” to review appeal, in lieu of entire BOE.
- Board should review all relevant documents, and follow-up with investigator/decision-maker and parties if any questions arise.
- Engage with legal, if appropriate.

QUESTIONS?



PLEASE NOTE

This presentation does not constitute legal advice nor create an attorney client relationship.

It contains general recommendations and information and should not be relied upon for any specific purpose without consultation with legal counsel and in the context of specific facts and circumstances.

THANK YOU!



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