

# Understanding and Investigating Sexual Harassment and Sexual Misconduct Claims

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# Case Study: Straight from the Headlines

## Part I

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- Two 11<sup>th</sup> grade girls share during an after school program that they are upset about a video that is being circulated of them on Snapchat. They report that during their math class, two boys pulled them out of their chairs, bent them over the table and dry humped them from behind while holding their hair as they tried to get away.
- How should the school respond?

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## Federal Law

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- Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any federally funded education program or activity.
- On September 22, 2017, the Office of Civil Rights at the US Department of Education (“OCR”) withdrew statements of policy and guidance previously issued on April 4, 2011, and April 29, 2014, both of which discussed how schools should handle claims of sexual violence.
- Today, Title IX requirements still apply, along with the [Q&A on Campus Sexual Misconduct](#) which OCR also issued on September 22, 2017, and [OCR’s Revised Sexual Harassment Guidance](#), issued in 2001.
- The US Department of Education has initiated rulemaking on schools’ Title IX responsibilities concerning complaints of sexual misconduct. Proposed regulations were issued in late November 2018, and the public comment period ended in late January 2019. More than 100,000 comments were received. The Department is now reviewing those comments and may revise the proposed regulations in response. This process may take a year or longer. (Spoiler alert: more details on final two slides...)

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## Must Haves: An Abridged Checklist

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- Written Sexual Harassment Policy
- Grievance Procedure
  - Provide for prompt and equitable resolution of complaints of discrimination
- Title IX Coordinator
- Notice of Nondiscrimination
  - Include name and contact info for individuals designed to coordinate compliance efforts

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## Sexual Harassment and Sexual Violence: Defined

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- Sexual harassment - unwelcome conduct of a sexual nature, such as unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.
- Sexual violence - physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent (e.g., due to the student's age or use of drugs or alcohol, or because an intellectual or other disability prevents the student from having the capacity to give consent). A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.
- Gender-based harassment - refers to unwelcome conduct based on an individual's actual or perceived sex, including harassment based on gender identity or nonconformity with sex stereotypes, and not necessarily involving conduct of a sexual nature.

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## Sexual Harassment: Legal Standard

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- Legally, must be sex-based conduct “so severe, pervasive and objectively offensive” that it “deprives the victims of access to” educational opportunities and benefits.
- Conduct should be evaluated from “the perspective of a reasonable person in the alleged victims’ position, considering all the circumstances.” Conduct should be evaluated “from both a subjective and objective perspective.”
- ***BIG PICTURE***: whether conduct is sexual harassment depends on a number of factors, including type of conduct, ages of involved students intent, relationship between the students. Do NOT rely on reporting student’s label.
- If it’s not sexual harassment, inquiry does not end there. It may be bullying, classmate conflict, inappropriate staff behavior, etc. Procedures may just change.

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## Sexual Harassment/Discrimination: Nuances of the Legal Standard

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- Sexual harassment/discrimination can occur between members of the same sex.
- Title IX’s sex discrimination prohibition may extend to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity; courts are currently grappling with how Title IX applies in these instances and the internal debate inside the US Department of Education continues.
- Schools should investigate and resolve allegations of sexual or gender-based harassment of lesbian, gay, bisexual, and transgender students using the same procedures and standards that it uses in all complaints involving sex-based harassment.

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## Sexual Harassment: Scope of Legal Requirements

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- Investigating complaints of sexual harassment and sexual violence alone may not be enough to satisfy Title IX requirements.
  - May take interim measures for both parties during investigations.
  - If investigation reveals that sexual violence or sexual harassment created a hostile environment, school must take prompt, effective steps to end the sexual violence/harassment, eliminate the hostile environment, prevent its recurrence, and remedy its effects.

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## Grievance Procedure: Essential Elements

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- Statement that procedures apply to complaints of discrimination and/or harassment on the basis of disability, race, national origin, color, sex and age by employees, other students and third parties.
- Explanation of how a complaint may be filed.
- Name and/or title, office address, email address and telephone number of individual(s) with whom complaints may be filed.
- Description of process for adequate, reliable and impartial investigation of complaints, including statement regarding who will investigate, assurance that both parties may enlist assistance of an advisor (who may be an attorney), the designation of an impartial decision maker, and whether there will be an opportunity to present witnesses and other evidence.
  - Both parties must be given the same meaningful access to information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.
  - If parties present witnesses/evidence, such opportunity must be made equally available to reporting student and responding person.
  - If no such opportunity to present witnesses/evidence, then both parties should be given opportunity to review written investigation report and provide written statements, written questions for decision-maker to consider.

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## Grievance Procedure: Essential Elements

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- Designated and reasonably prompt time frames for major stages of the complaint process.
- Provision for written notice of the outcome of the complaint.
- Designation of who will serve as decision-maker re: disciplinary sanctions if there is a finding of responsibility.
  - May be the same person who served as the decision-maker for liability purposes, or may be a different person.
- Helpful to note that the range of potential sanctions that may be imposed (if there is a finding of liability) is set forth in the school's code of conduct and/or discipline policy
- Opportunity for appeal, and, if so, by whom – may allow only responding party to appeal, or both parties.
  - Providing opportunity to appeal is not required, but may allow.
  - If so, must identify who the impartial appellate decision-maker will be and must include provision for written notice of the outcome of the appeal.

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## Grievance Procedure: Essential Elements

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- Assurance that school will take steps to prevent, remedy or otherwise correct harassment and/or discrimination, if necessary.
- Assurance that the school will not retaliate against an individual who files a complaint or participates in a complaint investigation.
- Confidentiality provision (provide as much as possible; there will be instances when can't provide total confidentiality and that's okay – to the extent possible).
- Publish in school handbooks, make available as separate document, have copies available on campus, and otherwise make available for interested parties.

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## Title IX Coordinator: Who Is Yours?

- Employee(s) designated to coordinate school's efforts to comply with Title IX – may designate more than one employee but should have a lead coordinator.
  - Title IX coordinator must be visible to the school community – identified in notice of nondiscrimination and other prominent places.
- Title IX Coordinator must be adequately trained or have necessary expertise to effectively serve in this role.
  - Training should occur regularly (all staff should receive some level of training).
  - OCR resources – Letter to Title IX Coordinators and Title IX Resource Guide.
  - Collaborate with other Title IX Coordinators.
- Title IX Coordinator should be provided sufficient time to perform the roles and responsibilities.

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## Title IX Coordinator: Independence, Authority and Responsibilities

- Title IX Coordinator should be independent to avoid any potential conflicts of interest and report directly to school leadership.
  - Designating a disciplinary board member, general counsel, dean of students, superintendent, principal or athletics director as the Title IX coordinator could pose a conflict of interest.
- Title IX Coordinator must have appropriate authority and support necessary to carry out duties.
  - Must be notified regarding all reports and complaints raising Title IX issues.
  - Responsible for coordinating responses to all complaints – could include monitoring outcomes, identifying and addressing any patterns and assessing effects on the campus climate.
  - Must be knowledgeable about all relevant policies and should be involved in drafting and revising such policies.
  - Should assist in developing a method to survey the school climate and coordinate the collection and analysis of information from that survey.
  - Should monitor students' participation in athletics and across academic fields to identify programs with potential disproportionality based on sex and ensure that sex discrimination is not causing such disproportionality or otherwise negatively affecting a student's access to equal educational opportunities. Should monitor administration of school discipline to ensure no disproportionality as well.

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## Case Study: Straight from the Headlines Part II

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- Two 11<sup>th</sup> grade girls share during an after school program that they are upset about a video that is being circulated of them on Snapchat. They report that during their math class, two boys pulled them out of their chairs, bent them over the table and dry humped them from behind while holding their hair as they tried to get away.
- How would you investigate this?
  - Who do you talk to?
  - What other information do you gather?
  - Do you take any immediate action while the investigation is happening?
  - How do you document the investigation and outcome?

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## Investigations - Timeline

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- OCR requires a “good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.”
  - Previously-imposed 60-day timeline (included in the 2011 guidance and 2014 guidance) is gone.
  - Under the current OCR standard, there is no fixed timeframe under which a school must complete a Title IX investigation.
  - BUT, still in effect is the 2001 guidance that calls for “prompt” investigation and “designated and reasonably prompt timeframes for the major stages of the complaint process.”

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## Investigations - Interim Measures

- Interim measures are individualizes services offered (as appropriate) to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.
  - Interim measures include counseling, extensions of time or other course-related adjustments, modifications of class schedules, campus escort services, restrictions on contact between the parties, leaves of absences, increased security and monitoring of certain areas of campus and other similar accommodations.
- Should determine what may be needed by both parties without hard and fast rules about what to offer.
  - Nothing is automatic or required – there are no fixed rules.
  - Interim measures may change over time; interim measures should be necessary and effective based on parties’ evolving needs.
- Interim measures should avoid depriving any student of his or her education.
  - But if school needs to preserve access to education for the complaining student, then interim measure may impose disparate burden on the responding person.

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## Investigations - Procedures

- The school, not either party, carries the burden to gather evidence to determine whether sexual misconduct may have occurred.
- The investigation must be “adequate, reliable and impartial” and must include the opportunity for both parties to present evidence.
- Any investigatory model may be used.
- The school’s “trained investigator” analyzes and **documents evidence** and must take into account the circumstances of each case.
  - The trained investigator may be the Title IX coordinator, an outside person, or someone designated by the Title IX coordinator.
  - Title IX coordinator oversees the investigation – deep-dive or monitoring more broadly; specific role is governed by the school’s grievance policy.
- Once an official investigation begins, the school must provide written notice to the person who is being investigated.
  - Sufficient details of the allegations, including the identities of the parties, the conduct at issue, and the date and location of the alleged incident must be provided in the written notice.
  - Sufficient time to prepare a response must be given to the person being investigated before an interview is administered.
  - Responding person may have an advisor assist in advance of and during the interview; the advisor may be an attorney.
- A gag order imposed on one or both parties is likely to result in a finding of an inequitable investigation.

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## Investigations - Confidentiality

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- What about confidentiality/FERPA?
  - Request for legal confidentiality?
    - Cannot really give.
    - Once the school knows, it has to investigate ...
  - Request for anonymity?
    - 2001 OCR guidance speaks to investigating anonymous complaints.
      - School's ability to respond may be limited.
      - If complaining student still wants to proceed anonymously, school must take "reasonable, non-punitive steps" to address complaint without disclosing the identity of the complaining student.
      - BUT, if there may be a continuing safety threat, the school may not be able to honor the complaining student's request for anonymity.

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## Investigations – Interplay with Law Enforcement

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- A school cannot rely on a criminal investigation to resolve a complaint.
- Moreover, a school should not wait for the conclusion of a law enforcement investigation or criminal proceeding to begin its own Title IX investigation.
- BUT, it should be noted that more the flexible timeframe for a school to complete its investigation may provide the opportunity for more interplay between a criminal investigation and an internal investigation.

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## Case Study: Straight from the Headlines Part III

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- **Facts That Came To Light During Investigation**
  - Other students say the girls were playing along and laughing
  - Video shows the girls laughing – but the girls say that wasn't the entire interaction
  - One of the girls reports that one of the male students has made sexually inappropriate comments to her in the past
  - The boys say this was a game that the students play
  - Police investigated and did not press charges against the boys after interviewing students involved and witnesses
  
- **What's the outcome?**

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## Investigations - Findings

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- Can either use a “preponderance of the evidence” (lower) standard OR a “clear and convincing evidence” (higher) standard.
  - Must be consistent with the standard used for other investigations of alleged misconduct.
- Must prepare a written report summarizing the relevant evidence gathered, both exculpatory and inculpatory.
- No hearing is required (but may be provided).
- Person who determines liability and appropriate disciplinary action need not be the investigator; should be set forth in grievance procedure.
  - Who is the decision-maker at your school?
- Disciplinary action should be proportionate to misconduct.
  - What is the range of potential sanctions at your school?
  - Who imposes sanctions at your school, after a finding of responsibility?

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## Investigations - Findings

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- If initial analysis of information leads trained investigator to conclude that alleged conduct does not rise to the the level of sexual misconduct, the trained investigator must still gather facts and document conclusions.
- BUT, the investigation report does not need to be as detailed.
- What serves as an adequate investigation in this context depends on the facts.
- Investigation report still must document allegations, findings and reasons for taking, or not taking, action.

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## Investigations – Notice of Decision

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- K-12 schools must inform the involved parties about the final determination concurrently.
- Specifically, parties must be notified:
  - Whether any remedies are being offered to the reporting students;
    - What remedies have been used at your school?
  - Whether any sanctions “that directly relate to the reporting student” will be imposed on the responding person; and,
    - What sanctions that directly relate to the reporting student have been used at your school?
  - What other steps the school will take to eliminate a hostile environment, should such an environment have been found to exist.
    - What steps may be taken to eliminate a hostile environment?
- No appeal is required, but if one is allowed under school policy, the appeal can be limited to the responding person or can be provided for both the reporting student and responding person.

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## Investigations – Informal Resolution

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- OCR now allows informal resolution of Title IX complaints that have been opened for investigation.
  - Notably, this is now permitted under the 2017 Q&A, although it was prohibited in the 2001 OCR guidance.
- Informal resolution may be used if:
  - All allegations and options for formal resolution are disclosed; and,
  - All parties voluntarily agree to participate.
- School determines if informal resolution is appropriate.
  - If so, school facilitates the informal resolution, which may include mediation, to assist the parties in reaching a voluntary resolution.

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## The New Proposed Regulations: An Overview of What May Be Ahead

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- **Defines sexual harassment** as:
  - Quid pro quo harassment (school employee conditioning educational benefit or service upon a person's participation in unwelcome sexual conduct)
  - Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it effectively denies a person equal access to the school's education program or activity; **or**,
  - Sexual assault.
- A school must respond when the school has **actual knowledge** of the sexual harassment that occurred **within the school's own education program or activity** against a **person in the U.S.**
- A school is liable under Title IX when it is **deliberately indifferent** to known sexual harassment, meaning its response is clearly unreasonable in light of known circumstances.
- A school **must investigate** every formal complaint and **must respond meaningfully** to every known report of sexual harassment.
- Significant emphasis on providing **supportive measures** designed to preserve or restore access to the school's education program or activity, with or without a formal complaint.
- If there is a finding of responsibility, school should design remedies to **restore or preserve access** to the school's education program or activity.

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# The New Proposed Regulations: An Overview of What May Be Ahead

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- To achieve fairness and reliable outcomes, the proposed regulation would require due process protections, including:
  - A **presumption of innocence** throughout the grievance process, with the burden of proof on the school;
  - A prohibition of the single-investigator model, thereby **requiring a decision-maker separate from the Title IX Coordinator or trained investigator**;
  - **Either** the clear and convincing evidence or preponderance of the evidence standard, subject to limitations;
  - Written **notice of allegations** and an **equal opportunity to review the evidence**;
  - Title IX Coordinators, investigators, and decision-makers **free from bias or conflicts of interest**; and,
  - **Equal opportunity for parties to appeal**, where schools offer appeals.

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Questions? Please contact us.

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