

# TITLE IX REGULATIONS

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# TITLE IX

## 20 U.S.C. 1681 (A) (2006)

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“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...”

# REGULATION HIGHLIGHTS

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**A school district shall not, on the basis of sex:**

- Treat one person differently from another in determining whether such person ...[receives any] aid, benefit, or service;
- Provide different aid, benefits, or services or ... in a different manner;
- Deny any person any such aid, benefit, or service;
- Subject any person to separate or different rules of behavior, sanctions, or other treatment;
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 CFR 106.31(b)

# REQUIREMENTS UNDER REGULATIONS

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1. Have a Title IX Officer/Coordinator (Director of Student Services, Karen Bess)
2. Notify all students and employees of the name, office address and telephone number of the Title IX Officer/Coordinator.
3. Adopt and public grievance policies/procedures for handling Title IX Complaints (In process)

# TWO PRIMARY TYPES OF TITLE IX COMPLAINTS

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1. Athletics
2. Sexual Harassment

Emerging third category:

- Transgender discrimination
  - This could be in the form of denying a transgender boy access to the boys' restroom. Or
  - Denying a transgender girl the opportunity to compete with the girls in sports. Or
  - Gender-based harassment

# SEXUAL HARASSMENT UNDER TITLE IX FROM THE COURTS

- 1992 Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992)
  - Sexual harassment constitutes sex discrimination under title IX
  - Title IX not only provides equitable remedies to require fair treatment, it also provides for damages awards (i.e., District can be sued for money)
- 1998 Gesber v. Lago Vista Independent School Dist., 524 U.S. 274 (1998)
  - A school is not liable for monetary damages for teacher-student sexual harassment unless a school district official who “at a minimum has authority to institute corrective measures on the district’s behalf” has **actual notice** of, and is **deliberately indifferent** to, the teacher’s misconduct.
- 1999 Davis v. Monroe County Board of Education 536 U.S. 629 (1999)
  - A school board may be held liable in cases of **student-on-student harassment**, but only where the district is **deliberately indifferent to sexual harassment**, of which the district has **actual knowledge**, and that harassment is so **severe**, **pervasive**, and **objectively offensive** that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

# GUIDANCE FROM OCR

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- From 2001-2017, OCR issued dozens of guidance documents regarding sexual harassment and Title IX, heavily focused on the rights of the victim and the obligation of schools to take prompt and effective steps reasonably calculated to end any harassment and prevent harassment from occurring again.
- Schools were required to engage in prompt, thorough, and impartial investigation while providing interim supportive measure to the victim, informing the victim of the progress of the investigation, and informing the victim of the outcome of the investigation.

# CHANGES TO THE REGULATIONS

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- Responding to complaints that the Department of Education's guidance did not adequately protect the rights of those accused of sexual harassment or sexual violence, in 2017, the U.S. Department of Education Secretary Betsy DeVos rescinded the Obama-era guidelines which encouraged colleges and universities to more aggressively investigate campus sexual assaults.
- In October, 2018, DOE proposed new regulations for the first time since 1997.
- The regulations were open to public comment, and the DOE received over 124,000 responses.
- The regulations were published May 6, 2020, and made effective August 14, 2020.

# NEW REGULATIONS

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- In May 2020, the following sections were added to the Title IX Regulations:
  - §106.44 Recipient's response to sexual harassment.
  - §106.45 Grievance process for formal complaints of sexual harassment.
- These sections create a robust process for handling sexual harassment complaints
- Most of the process will be handled by the Title IX Coordinator, and designated Title IX Investigators and Decision-makers.
- It's helpful for everyone to know and understand the process.
- Especially because ALL employees are deemed agents of the school and if ANY employee has knowledge of conduct that may be considered sexual harassment, the school itself is deemed to have that knowledge. (More on this on next slide...)

# GENERAL CHANGES TO THE REGULATIONS

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- Definition of sexual harassment has changed—it is reserved for only very serious sexual conduct
- Respondent will get written notice before first investigative interview
- Parties will be able to have a parent and/or attorney at every interview (an “advisor”)
- Gag orders are prohibited
- The person who investigates the allegation and the person who makes the final decision must be different people
- Both parties have extensive opportunity to respond to evidence presented against them
- Appeal must be offered
- Specific steps for addressing sexual harassment complaints must be followed

# CHANGES TO DISTRICT POLICY AND PROCEDURE

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## THEN

- Sexual harassment was included in general Non-Discrimination Policy
- All sexual conduct, however minor, was treated as sexual harassment
- School administrators handled all allegations and investigations of sexual conduct/harassment under Non-Discrimination Policy, Bullying Policy, and general misconduct policy

## NOW

- There will now be a new and separate Sexual Harassment Policy
- There is a difference sexual misconduct and sexual harassment, the term sexual harassment being reserved only for conduct that meets the new definition under the regs
- Sexual misconduct can be handled by school in accordance with other student conduct policies

# THE PLAYERS

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You'll need:

- Title IX Coordinator (Designated District Coordinator)
- Investigator(s)
- Decision Maker(s)
- Informal Resolution Facilitator
- Appellate person

NOTE: Your Title IX Coordinator MAY also be an investigator, but you cannot have your investigator or the Title IX Coordinator be the decision-maker. The Informal Resolution Facilitator could also take on any of the other roles. The person reviewing appeals should also be independent.

# TRAIN YOUR PLAYERS

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The regulations require the following training:

- For Title IX Coordinator, the Investigator(s), the Decision-Maker(s) and any person who facilitates an informal resolution process:
  - Training on the definition of sexual harassment
  - The scope of the LEA's education program or activity
  - How to conduct an investigation and grievance process
  - How to serve impartially, including avoiding prejudgment of the facts, conflicts of interest, and bias
- For Decision-Maker(s) only:
  - Training on issues of relevance of questions and evidence
- For Investigator(s) only:
  - Training on issues of relevance to create an investigative report that fairly summarizes relevant evidence
- All training must:
  - NOT rely on sex stereotypes and
  - Promote impartial investigations and adjudications of complaints of sexual harassment

# TRAIN YOUR **STAFF** TO REPORT

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- Previously, a school was not deemed to have “actual knowledge” of sexual harassment unless someone with authority to take disciplinary action knew.
- Now, the new regulations impute actual knowledge to an LEA when **ANY EMPLOYEE** knows.
- Make sure your employees know:
  - What to report
  - When to report it (immediately!)
  - And to whom they report
- You may train your staff on the new definition of sexual harassment, OR you may just tell your staff if you know of or even suspect any conduct that is sexual in nature occurring at our schools, report it!
- Make it part of your mandatory annual staff training

# EXAMPLES

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- You are in your classroom when you hear Johnny tell Jimmy how he was pretty stoked because he “nailed” Jenny in the bathroom. Jimmy asks, “Was she all into it?” And Johnny replies, “Whatever. I know she wanted it.”
- A colleague tells you that another colleague has been making sexual comments to her that make her extremely uncomfortable. She begged you not to say anything to anyone because she’s afraid of what the colleague will do and she feels like she may be making it a bigger deal than it is.
- A high school student attends a party at a friend’s house over the weekend. At the party, the student is sexually assaulted by another person who attended the party. The student reports the sexual assault to the local police department and to her voice coach, who is a part time Prep Specialist at the elementary in the area.

# DEVELOP A POLICY—IN PROCESS!

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- Your policy will include the following components:
  - A clear statement prohibiting sexual harassment at school and at school-related
  - Definitions
  - General provisions
  - Grievance procedures
  - Training requirements

# NEW DEFINITION OF SEXUAL HARASSMENT

(\*THE HEADINGS BELOW ARE MY WORDS, NOT THE REGS')

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## Quid Pro Quo

- When an employee conditions some benefit in exchange for unwelcome sexual conduct

## Hostile Environment

- Conduct that is so **severe, pervasive, **AND objectively offensive** that**
- It denies equal access to educational program

## Violence Against Woman Act Big 4

- Sexual assault
- Dating violence
- Domestic violence
- Stalking

# QUID PRO QUO

- Principal promises bad evaluation if teacher doesn't give him massage
- Teacher offers student higher grade if student kisses her
- Coach implies athlete will start if she lets him sit close and rub her legs
- **\*MUST BE BY AN EMPLOYEE WITH SOME SUPERVISORY OR OTHER AUTHORITY OVER COMPLAINANT\***



# HOSTILE ENVIRONMENT

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- Severe = reasonable person considers it severe
  - Most physical contact will be considered severe
  - Non-physical contact associated by threats of violence
- Pervasive = pattern or widespread dissemination
- Objectively Offensive = reasonable person is offended
  - “I know it when I see it”



# VIOLENCE AGAINST WOMEN ACT BIG 4

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- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

# SEXUAL ASSAULT DEFINED

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- A sex offense is any sexual act directed against another person, without the consent of the victim...and includes rape, fondling, incest and statutory rape.
- Fondling means the touching of the private body parts of another person for ***the purpose of sexual gratification***, without the consent of the victim

# SEXUAL ASSAULT IN SCHOOLS

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- Butt slaps (“Ass Grab Game”)
- Playing doctor?
- Crowded hallway?
- Squirrel tapping (grabbing or touching male genitalia over the pants in a joking manner)?



# PURPOSE OF SEXUAL GRATIFICATION?

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## Factors In Determining Intent:

- Age and maturity of students?
- Disability?
- Experience or understanding?
- Control or coercion?
- Attitude of both students?
- Concealment?
- Where did it happen?
- How long did it last?

# DATING VIOLENCE

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“violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship”

**\*For the purposes of this definition dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Importantly, sexual harassment under the dating violence prong does not have to be sexual in nature.**

# DOMESTIC VIOLENCE

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- **A felony or misdemeanor crime of violence committed by**
  - a current or former spouse or intimate partner of the victim;
  - by a person with whom the victim shares a child in common;
  - by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
  - by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
  - 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 in which the crime of violence occurred.

# STALKING

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“engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for the person’s safety or the safety of others; or suffer substantial emotional distress”

- Course of conduct means: two or more acts (on district property or during school sponsored activities), including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
- Substantial emotional distress: Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



# FOLLOW GRIEVANCE PROCEDURES

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The new rule includes specific procedural steps that must be taken during a sexual harassment investigation.



# STEP 1: KNOW YOUR TITLE IX COORDINATORS (DESIGNATED DISTRICT OFFICIAL/COORDINATOR)

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- Employees: Director of Human Resources
- Students: Director of Student Services
- Athletics: Director of Secondary Education

# STEP 2: ACTUAL KNOWLEDGE

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1. Formal Complaint filed OR
  - Student or employee files a Formal Complaint with the Title IX Coordinator or principal, who then forwards it to Title IX Coordinator
2. WSD employee becomes aware of conduct that could amount to Sexual Harassment through direct report or observation.
  - NOTE: **ANY** employee who becomes aware of conduct that **COULD** amount to Sexual Harassment—either through observation or a personal report—is **REQUIRED** to report to immediate supervisor who then reports to you.
  - This also means when a student or parents reports to you that something of a sexual nature happened at school



# STEP 3: INITIAL SCREENING

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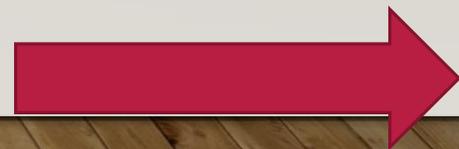
- Building Principal conducts screening interview with student (if student)
  - What happened?\*
  - Where did it happen?
  - Has Respondent done this before? When and where?
  - Are you in a dating relationship with the Respondent?
  - Have you reported to police or CJC?
  - Do you intend to? We may have to if you don't.
- \*This is NOT an investigative interview. Do not take a written statement. This is just to determine which process we follow.
- **IMPORTANT:** In consultation with your SRO, determine whether to involve law enforcement

# INITIAL SCREENING, CONT.

BUILDING PRINCIPAL, IN CONSULTATION WITH SUPERVISOR, DETERMINES IF A REPORT SHOULD BE MADE TO THE TITLE IX COORDINATOR

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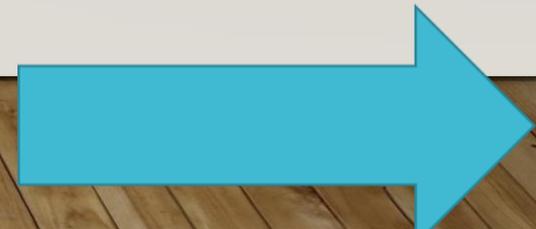
1. Does the allegation involve an employee offering a benefit in exchange for a sexual favor?  
If yes→Call Lyle. If no→Go to next question.
2. Does the allegation involve conduct that is severe?  
If yes→Go on. If no→Go to question 6
3. Does the allegation involve conduct that is pervasive?  
If yes→Go on. If no→Go to question 6
4. Does the allegation involve conduct that is objectively severe?  
If yes→Go on. If no→ Go to question 6
5. Is the complaint being denied access to educational benefits as a result of the conduct?  
If yes→Call Karen/Lyle/Richard. If no→Go on to next question.
6. Is the alleged conduct sexual assault?  
If yes→Call Karen/Lyle/Richard. If no→Go on to next question.
7. Is the alleged conduct dating violence?  
If yes→Call Karen/Lyle/Richard. If no→ Go on to next question.
8. Is the alleged conduct stalking?  
If yes→Call Kar Karen/Lyle/Richard en. If no→Go on to next question.
9. Is the alleged conduct domestic violence?  
If yes→Call Karen/Lyle/Richard. If no→HANDLE CONDUCT UNDER STUDENT MISCONDUCT POLICY. DO NOT IGNORE!!!



# STEP 4: TITLE IX COORDINATOR WILL:

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- Confirm conduct meets the definitional elements of Sexual Harassment on its face
- Review for jurisdictional authority—
  - at school or school program/activity or en route to school program/activity where District exercised substantial control over Respondent and the context in which the Harassment occurred.
  - off-campus conduct that has a clear nexus to school and which impacts a Complainant's ability to access and continue in his/her educational program
  - in the U.S.
  - Complainant must be enrolled or employed (or seeking enrollment or employment)
- If no jurisdiction, dismiss.
  - Written Notice of Dismissal
  - School will handle case under general student misconduct or other policy
- If jurisdiction, meet with the Complainant and Building Principal (if desired) to explain process and offer formal complaint and
  - In order to investigate a formal complaint must be filed
  - Title IX Coordinator can file formal complaint if Complainant does not (but this would be rare)
- Offer Supportive Measures\* to Complainant and
- Assign an investigator and
- Determine whether Emergency Removal\* is warranted



# STEP 5. MAKE SURE TO OFFER SUPPORTIVE MEASURES

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- counseling,
- extensions of deadlines or other course-related adjustments,
- modifications of work or class schedules,
- altering work arrangements for employees or student-employees,
- school safety plan,
- mutual restrictions on contact between the parties,
- changes in work locations,
- leaves of absence,
- increased security and monitoring of certain areas of the school, and
- other similar measures

**NOTE:** Respondent should also be offered Supportive Measures once the investigation begins.

# \*EMERGENCY REMOVAL

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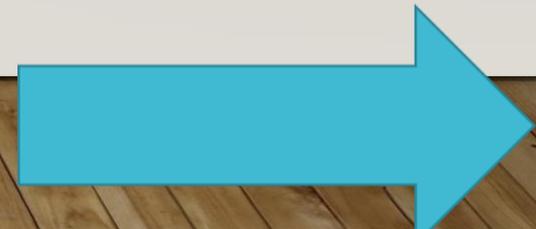
- **Emergency Removal** is appropriate when it is determined, based on an individualized safety and risk analysis that an immediate threat to the physical health or safety of any student justifies removal.
- These determinations will be made by the Title IX Coordinator in consultation with the Building Principal and possibly WSD Mental Health Specialist Supervisor on a case-by-case basis.
- The basis for removal must be documented.

# STEP 6: INVESTIGATOR(S) WILL:

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- Send Notice of Complaint to Complainant and to Respondent, which includes:
  - Complainant's specific allegations, a description of the alleged misconduct, and a range of dates during which the misconduct is alleged to have occurred
  - Statement that Respondent is presumed NOT to be responsible until findings otherwise
  - Notice that an interview will be held within 2-3 days of the notification, including date, time, and location of the meeting, the purpose of the meeting, the participants expected at the meeting, and that an advisor or attorney is allowed, and that the parties may bring any documents, evidence, or other information they would like the Investigator to consider.\*
  - Information regarding the overall process.
  - A provision that a preponderance of the evidence standard will be applied
  - Directives for the Respondent not to retaliate
  - Information about the Informal Resolution Process

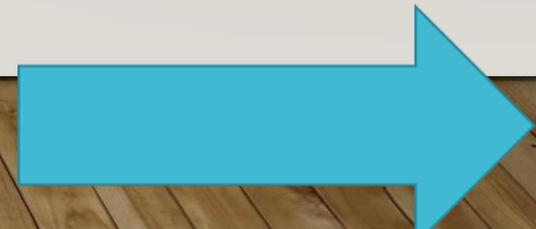
\*Any time an investigator meets with either party, the parties must receive written notice of the meeting 2-3 days in advance with the information listed above



# INVESTIGATOR(S) WILL, CONT.

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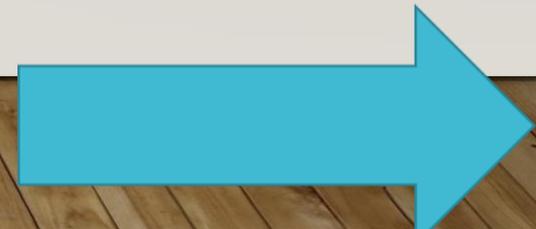
- Meets with Complainant and ask for any documents or witnesses.
- Meets with Respondent and ask for any documents or witnesses.
- Collects all available evidence not submitted by parties (security camera, police reports, etc.)
- Meets with witnesses.
- Follows up with Complainant and/or Respondent if necessary.
- Compiles a summary of evidence in Draft Investigative Report, which includes a summary of all evidence and findings of fact (ie, "I find it is more likely than note that X,Y, and/or Z occurred.")
- Send Draft Investigative Report to both parties and allows 10 days for both parties to respond to report.
- Considers responses by both parties, but need not adopt the responses.
- Prepare Final Investigative Report.
- Submit Final Investigative Report to both parties, and to Decision-Maker Team.



# STEP 7: DECISION-MAKER TEAM WILL:

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- Notify both parties that they have 10 days to submit cross-examination questions in writing to the Decision-Making Team.
- Upon review for relevance, forward cross-examination questions to each party and allow opportunity to respond.
- Review responses
- Write Final Written Determination
  - Identification of allegations
  - Steps taken from formal complaint through investigation
  - Findings of fact
  - Conclusions of law
  - Statement of rationale for the result as to each allegation
  - Appeal rights



# STEP 8: APPEAL

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- An appeal must be made in writing to the Title IX Coordinator within 5 days of the Final Decision being issued.
- Title IX Coordinator forwards appeals to Superintendent.
- If the Superintendent allows the appeal, both parties submit written statements supporting or challenging the outcome.
- Superintendent will issue written decision affirming, repealing, or remanding the decision-makers' decision.

# INFORMAL RESOLUTION PROCESS

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- At any time BEFORE a final decision is reached, the parties may enter an informal resolution process.
- Allegations of a student Complainant against an employee Respondent DO NOT have the option of going through the Informal Resolution Process.
- The Informal Resolution Process Facilitator will work with the parties to resolve the allegations.
- We're still working on how that will look, exactly.

# PRACTICE CASE I

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- A high school student attends a party at a friend's house over the weekend.
- At the party, the student is sexually assaulted by another person who attended the party.
- The student reports the sexual assault to the local police department and to her voice coach, who is a part time Prep Specialist at the elementary in the area.
- Because she knew the police were involved, the Prep Specialist does not report to her principal.

# CASE I ANALYSIS

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- Is the District responsible for knowing about the alleged assault?
- Does the District have Title IX jurisdiction over the sexual assault?
- Some other policy?
- What are the Admin's next steps

# PRACTICE CASE 2

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- A Sophomore girl reports to coach that several girls on the volleyball team have been picking on her in the locker room, in the commons after practice, and on bus rides to away games including:
  - “snapping her bra,”
  - calling her sexually charged names like “whore and slut”
  - And posting unflattering pictures of her bending over on social media

## CASE 2 ANALYSIS

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- Does the District have Title IX jurisdiction over the sexual assault?
- Some other policy?
- What are the Admin's next steps?

# PRACTICE CASE 3

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- A male drill coach has been rumored to be holding “pool parties” at his house for some members of his drill team over the summer.
- A student tells him she can’t come over anymore because she feels uncomfortable “with the way he looks at her.”
- The student reports to an Admin that the Drill Instructor told her that if she mentioned the pool parties to anyone, she’d not get a spot on the upcoming team.

## CASE 3 ANALYSIS

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- Does the District have Title IX jurisdiction over the sexual assault?
- Some other policy?
- What are the Admin's next steps?

# PRACTICE CASE 4

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- 9<sup>th</sup> grade girl broke up with her boyfriend in October.
- The ex-boyfriend, also a 9<sup>th</sup> grader, has been exchanging sexually explicit photos of the girl with his friends for months.
- On at least two occasions, the boy follows the girl between classes and has been reported by another witness touching or attempting to touch the girl's breasts from behind as she hurried away.
- Boy has also left threatening voicemails on girl's phone about what he'll do to her if they don't get back together
- The girl's attendance and grades have been falling for some months now.
- Her dad is on the phone and is irate having just learned of the boy's alleged involvement.

# CASE 4 ANALYSIS

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- Does the District have Title IX jurisdiction over the sexual assault?
- Some other policy?
- What are the Admin's next steps?

# PRACTICE CASE 5

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- You get a call from a mom who says her daughter has been sexually harassed in English class. That's all she knows.
- When you call the daughter down to ask her what's going on, she denies anything is happening.
- She seems quieter than usual and it seems to you that she is hiding something, but she insists "everything's cool" and wants to go back to class.

# CASE 5 ANALYSIS

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- Does the District have Title IX jurisdiction over the sexual assault?
- Some other policy?
- What are the Admin's next steps?

# SEXUAL HARASSMENT V. SEXUAL MISCONDUCT

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- While the definition of Sexual Harassment is now much more narrow than it used to be, that does not mean school can or should ignore all sexual conduct that does not qualify as Sexual Harassment under the new regulations.
- Your job is to report EVERYTHING, and if it is sexual harassment, you may be asked to address the misconduct under your student code of conduct policy.

# MAJOR TAKE-AWAY FOR ADMINISTRATORS

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- If you learn of conduct involving some sexual component, **STOP!!!**



- Discuss with supervisor and/or Title IX Coordinator **BEFORE** investigating or interviewing kids and **BEFORE** disciplining/removing kids

# TAKE-AWAYS, CONT.

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- Most conduct will NOT be sexual harassment. BUT don't assume that it isn't.
- We have to go through the process of determining whether it is or isn't each and every time.
- Ensure supportive measures are being offered.
- Take a breather—these all may go away in a couple years. 😊