

Title IX: Best Practices in Training and Compliance

Part I and Part II Training
Transgender Student Issues

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DISCLAIMER

Please consult with your School Board lawyer prior to addressing any specific fact pattern or situation

Purpose of Part I Training

- Today's presentation includes Title IX Training Parts I and II
- Part I Training, as required by recently adopted federal implementing Regulations (34 CFR § 106.45(b)(1)), is designed for Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal process on the following:
 - Definition of sexual harassment
 - Scope of the school division's education program or activity
 - How to conduct an investigation and grievance process - including hearings, appeals, and informal processes, as applicable
 - How to serve impartially (avoiding prejudgment of facts, conflicts of interest, and bias)

Purpose of Part II Training

- The Regulations at 34 CFR § 106.45(b)(1) require Part II Training:
 - Investigators must receive training on issues of relevance, investigative report that fairly summarizes relevant evidence
 - Decision-makers must receive training on any technology to be used at live hearing, relevance of questions and evidence

Case Update: *Doe v. Fairfax County School Board*, No. 19-2201 (4th Cir. 2021)

- Fourth Circuit reversed the district court’s judgment in favor of the School Board and agreed with Doe that “the district court by misconstruing what it means for a school to have actual notice or knowledge of alleged harassment in Title IX cases, that a new trial must be granted because no evidence in the record supports the jury’s verdict under the correct legal standard.” (Emphasis added).
- Background
 - male to female, student-on-student sexual harassment case brought under Title IX
 - Doe claimed that FCPS was deliberately indifferent to known sexual harassment which occurred on the bus during a band trip
 - FCPS officials stated that they thoroughly investigated and determined that it amounted to mutual sexual touching
 - Jury verdict in favor of FCPS because there wasn’t “actual knowledge” of sexual harassment

Doe v. Fairfax County School Board, cont'd

- Doe asserts new trial is necessary because clear weight of evidence required a judicial override of the jury's finding
- Doe asserts that key school personnel received information from multiple sources
- Rationale for reversal:
 - “a school’s receipt of a report that can objectively be taken to allege sexual harassment is sufficient to establish actual notice or knowledge under Title IX – regardless of whether school officials subjectively understood the report to allege sexual harassment or whether they believed the sexual harassment actually occurred.”
 - School Board through appropriate officials with authority to address complaints of sexual harassment and to institute corrective measures, including an Assistant Principal, received multiple reports alleging the sexual assault
 - Jury could find that Doe was deprived of equal access to educational opportunities or benefits
 - *Sexual violence would have a severe and traumatic impact on any high school student*
 - Jury could find that School Board’s response was clearly unreasonable and it acted with deliberate indifference
 - *Principal made inappropriate jokes about the incident – “how many inches under the blanket or on the ground”*
 - *Doe testified that security specialist’s behavior during meeting with student after band trip “menacing”*

Doe v. Fairfax County School Board, cont'd

- Persuasive findings:
 - A reasonable jury could conclude that the sexual violence Doe allegedly suffered was severe, offensive and harrowing
 - No evidence in the record supports the jury's finding that the School Board lacked actual notice or knowledge
 - To the contrary, the School Board had actual knowledge of the following:
 - *During a bus trip, Doe sat next to an older male student who repeatedly touched her breasts and genitals and penetrated her vagina with his fingers despite her efforts to physically block him and that he put her hand on his penis repeatedly*
 - *Doe told two friends who in turn relayed the information to two school administrators*
 - *Doe did not think the sexual activity was consensual*
 - *Doe's mother explicitly described the bus incident as "sexual assault" or "sexual harassment"*
 - *Doe's parents requested a number of accommodations to help Doe cope with the psychological and emotional trauma*

Title IX Training Part I



Title IX

- Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (Title IX):
 - “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”
 - School division may violate Title IX if it does not respond promptly to actual knowledge of sexual harassment in an education program or activity of the school division against a person in the United States in a manner that is not deliberately indifferent

Title IX – Types of Harassment

Schools have responsibilities under Title IX both for alleged sexual harassment by staff, and by other students:

- **Staff-student harassment**

- *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) established that school district could be liable for sexual harassment of student by teacher where school official with authority to institute corrective measure had notice of, but was deliberately indifferent to, misconduct

- **Student-student harassment**

- School divisions are not liable for one student harassing another but may be liable for failing to respond adequately. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)

Title IX – 3 Types of Harassment

1) QUID PRO QUO – employee conditions an educational benefit or decision on the student's submission to unwelcome sexual conduct

2) Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive, as determined by a reasonable person, that it denies a person equal access to an educational program or activity

Factors to consider when making a determination regarding whether conduct meets definition of 2)

- Degree to which the conduct affects students' education
- Type, frequency and duration of the conduct
- Identity and relationship between complainant and respondent
- Number of individuals involved (group harassment)
- Age and sex of complainant and respondent
- Size of school, location of incidents, and context
- Welcomeness (depends on age, relationship between complainant and respondent)

Title IX - Types of Harassment

“Sexual assault” as defined in 20 U.S.C. 1092 (f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30)

- One incident of sexual assault can trigger Title IX responsibilities
- “We believe that sexual assault inherently creates the kind of serious, sex-based impediment to equal access to education that Title IX is designed to prohibit, and decline to require ‘denial of equal access’ as a separate element of sexual assault”

34 C.F.R. PART 106

Title IX Regulations

Effective August 14, 2020



History of Sexual Harassment Enforcement

- 1975 - Department of Education promulgated rules to enact Title IX, sexual harassment not contemplated
- 1997 Guidance from DOE included sexual harassment under Title IX
- 1998 - SCOTUS rules an educational entity is liable for Title IX teacher-on-student harassment if it is “deliberately indifferent” to “actual notice” *Gebser v. Lago Vista*
- 1999 - SCOTUS rules peer-on-peer harassment is actionable under Title IX - *Davis v. Monroe County Board of Education*
- 2001 OCR revised 1997 guidance in light of *Gebser* and *Davis*, included “interim measures” to help victims
- 2011 and 2014 – sexual violence added to definition of sexual harassment, 2014 question and answer document based on multitude of questions regarding 2011 guidance
- 2017- OCR rescinded 2011 and 2014 guidance, provided 7pg. Q and A document

Title IX Recent Developments

- November 16, 2018 Notice of Proposed Rulemaking
<https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf>
- 124,000 + comments received
- May 19, 2020 final rule published - USDOE guidance document is over 2000 pages; previous Title IX regulations did not refer to sexual harassment
- Seventeen states (including Virginia) filed suit challenging the final rule and requesting a stay of its effective date pending judicial review - stay DENIED on August 12, 2020
 - “Although Plaintiffs have raised serious arguments about certain aspects of the Rule, they have not established a likelihood of success on their claims, nor have they established that they are likely to suffer irreparable harm”

Title IX Regulations – Training Requirements

- 34 CFR § 106.45(b)(1)
 - Training for Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal process on the following (Part I):
 - Definition of sexual harassment
 - Scope of the school division's education program or activity
 - How to conduct an investigation and grievance process - including hearings, appeals, and informal processes, as applicable
 - How to serve impartially (avoiding prejudgment of facts, conflicts of interest, and bias)
 - In addition (Part II):
 - Investigators must receive training on issues of relevance, investigative report that fairly summarizes relevant evidence
 - Decision-makers must receive training on any technology to be used at live hearing, relevance of questions and evidence

Title IX Regulations

- Defining Sexual Harassment - 34 CFR § 106.30(a) – Conduct on the basis of sex that meets one or more of the following:
 - Quid pro quo harassment;
 - Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive, as determined by a reasonable person, that it denies a person equal access; or
 - Sexual assault (as defined in the Clery Act regulations)
- What Triggers School’s Obligation to Respond
 - Actual knowledge
 - Reporting to a Title IX Coordinator will always give schools actual knowledge
 - In K-12, reporting sexual harassment to any employee at that school gives the school actual knowledge
 - Any individual may report, not just individual allegedly subjected to misconduct
 - Conduct within school division’s own program or activity - includes any location, event, or circumstance over which the school division exhibits substantial control over both the alleged harasser and the context in which the harassment occurred
 - Perpetrated against a person “in the United States” (new provision)

Title IX Regulations

- General Response 34 C.F.R. § 106.44
 - Regulations require school divisions to appoint a Title IX Coordinator - specifically named on website, contact information, annual training, records of that training
 - *authorized to coordinate school division's compliance efforts*
 - *doesn't have to be full-time only job, but individual needs to have sufficient authority and time to carry out role*
 - Liability when school knows of sexual harassment allegations and responds in a way that is "deliberately indifferent," defined as "clearly unreasonable in light of the known circumstances"
 - Must "respond meaningfully to every report" – but must activate grievance process only when a **formal complaint** is filed
 - **If school follows grievance procedures – safe harbor against finding of deliberate indifference**
 - Must investigate formal complaints
 - Must treat complainants and respondents equitably

Title IX Regulations – Receipt of Report

- How a School Must Respond
 - Reports trigger obligation for Title IX Coordinator to meet with and offer the complainant supportive measures (available to complainants and respondents)
 - **Definition: non-disciplinary, non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed 34 CFR § 106.30 (a)**
 - counseling, course modifications, schedule changes, monitoring, supervision, extensions of deadlines, security
 - removing a respondent completely from an activity would likely be considered punitive
 - Explain formal complaint process
 - K-12 schools need to protect younger students and may require the Title IX Coordinator to file a formal complaint even when a young complainant does not want to file
- Emergency removal/administrative leave of respondent permitted under certain circumstances
 - Must conduct an individualized safety and risk analysis and determine that emergency removal is necessary in order to protect a student or other individual from an immediate threat to physical health or safety
 - School division must provide respondent with notice and an opportunity to challenge the decision immediately after the removal
 - Example: Accusation of sexual harassment leads to respondent's threats of physical self-harm

Title IX Regulations – Grievance Process

Formal Complaint

- Basic Requirements 34 CFR § 106.45(b)(1)
 - Treat complainants and respondents equitably
 - Objective evaluation of all relevant evidence
 - Presumption of innocence for respondent
 - Burden of proof on the school, preponderance of evidence vs. clear and convincing
 - Reasonably prompt time frames
 - Description of possible disciplinary outcomes and remedies following a determination of responsibility
- Notice of allegations 34 CFR § 106.45(b)(2)
 - Written notice to all parties of grievance process and allegations at issue
 - STATEMENT that respondent is presumed “not responsible” until final decision
 - Notice of right to advisor (who may be an attorney) and to inspect and review evidence
 - Notice of any code of conduct provision regarding false statements

Title IX – Grievance Process

- Dismissal 34 CFR § 106.45(b)(3)
 - *Mandatory* if investigation reveals alleged conduct did not occur in school division’s program or activity OR against a person in U.S.
 - *Mandatory* if alleged conduct would not constitute sexual harassment prohibited by Title IX even if proved
 - *Permissive* if complainant provides Title IX Coordinator in writing a request to withdraw complaint, if respondent is no longer employed by the recipient or enrolled in its education program; or if specific circumstances prevent the school division from gathering enough evidence to reach a decision
- Investigation 34 CFR § 106.45(b)(5)
 - Equal opportunity to present witnesses, evidence, **inspect and review evidence (10-day review period)**
 - *Cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a doctor, psychiatrist, psychologist, and made in connection with treatment to the party unless there is written consent from the parent to do so
 - No gag order
 - Advisors (can be a lawyer) permitted for complainant or respondent in any meeting, any restrictions imposed by school division as to advisors must be applied equally to both parties
 - Written notice of interviews

Title IX – Grievance Process

- Investigative Report
 - *Must fairly summarize relevant evidence*
 - *At least 10 days before determination of responsibility - send it to each party and the party's advisor for their review and response*
- Hearings for K-12 - optional, but prior to determination, the parties must be allowed to submit written questions to challenge each other's credibility and decision-maker must allow for limited follow-up
 - Questions and evidence about the complainant's prior sexual behavior are not relevant, unless offered to prove that someone other than the respondent committed alleged conduct; or if it concerns specific incidents related to respondent to prove consent
 - Decision-Maker must explain to the party proposing the questions any decision to exclude a question as not relevant

Title IX – Grievance Process

- Decision-maker's Written Determination 34 CFR § 106.45(b)(7)
 - Must be made by someone other than Title IX Coordinator or investigator and must:
 - *identify allegations potentially constituting sexual harassment;*
 - *describe all procedural steps taken;*
 - *include findings of facts and conclusions about the application of code of conduct to the facts;*
 - *include a statement of, and a rationale for, the decision reached on each allegation;*
 - *identify whether remedies will be provided to complainant;*
 - *identify any disciplinary sanctions imposed on the respondent; and*
 - *include procedures and permissible bases for appeals*

Title IX – Grievance Process

- Appeals - 34 CFR § 106.45(b)(8)
 - Available to both parties after determination of responsibility or dismissal of formal complaint and based on the following
 - *procedural irregularity;*
 - *new evidence that could affect the outcome and that wasn't available at the time of dismissal or determination of responsibility; or*
 - *conflict of interest or bias by Title IX Coordinator, investigator, decision-maker*

Title IX Regulations

- Informal resolution 34 CFR § 106.45(b)(9)
 - Cannot be required
 - May facilitate mediation or other informal process
 - May not be offered in employee-student harassment context
- Documentation 34 CFR § 106.45(b)(10)
 - For 7 years schools must create and maintain records documenting every Title IX sexual harassment investigation and determination of responsibility including:
 - Disciplinary sanctions imposed, if any;
 - Any informal resolution or appeal;
 - All materials used to train their Title IX Coordinators, investigators and decision-makers, and any person who facilitates an informal resolution process (parties may request copies); and
 - Basis for conclusion that its response was not deliberately indifferent
 - School must keep records regarding response to every report – including documentation of supportive measures offered and implemented for complainant

Title IX – Regulations

- Other miscellaneous requirements and clarifications
 - Notice of policy, grievance procedures, and Title IX Coordinator’s name or title, email address, office address, and telephone number published on website and sent to:
 - *applicants for admission and employment*
 - *students’ parents or legal guardians*
 - *unions or professional organizations holding agreements with the school division (34 CFR § 106.8)*
 - Must also publish notice of nondiscrimination policy and Title IX Coordinator’s contact information in handbooks to students/employees
 - Timelines must be reasonably prompt
 - No damages assessed by DOE
 - Nothing requires restriction of 1st Amendment, Due Process rights
 - Severability provisions
 - Prohibition on retaliation (34 CFR § 106.71)

Title IX Regulations – Office for Civil Rights Frequently Asked Questions – September 4, 2020

- Final Rule Effective: August 14, 2020, will not be enforced retroactively*
- Districts have a duty under Title IX to address sexual harassment if the alleged victim shows “signs of enduring unequal educational access”
 - skipping a class
 - decline in GPA
 - difficulty concentrating
- An individual may file a formal Title IX complaint as long as she is participating or attempting to participate in the district’s programs or activities (alumni groups included), specifically “a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is ‘attempting to participate’ in the recipient’s education program or activity”
- The Title IX Rule does not adopt the Federal Rules of Evidence, uses “relevance” as the sole admissibility criterion
 - Not relevant: treatment records, information protected by legally recognized privilege, certain prior sexual behavior
 - Ordinary meaning of the word should be applied

Doe v. Rensselaer Polytechnic Institute, 2020 U.S. Dist. LEXIS 191676, (N.D. NY. October 16, 2020)

- Case involved early 2020 conduct, but complaint process straddled the August 2014, 2020 effective date, with an appeal hearing scheduled for after that date
- Accused student demanded that school use its new Title IX policies and procedures for the rest of the investigation and disciplinary hearing, claiming that using the old policy when it could use the 2020 policy was sex discrimination against him
- Student and counsel particularly interested in the eight new rights that the regulations would have afforded him
- Court acknowledged OCR's preamble and blog post regarding enforcement of rules retroactively, but ultimately agreed with the student that RPI "could have easily implemented the 2020 policy for hearing
- Court agreed with Student that OCR's blog post isn't entitled to deference and "need not be the last word on the matter"
- School could still have elected to use the 2020 policy, regardless of OCR post regarding enforcement

California Lawsuit Filed – March 2021

- The Women’s Student Union at Berkeley High School sued US DOE in federal district court on March 8, 2021
- Focuses on four changes to Title IX regulations
 - Definition of sexual harassment requires severe and pervasive conduct
 - Location of harassment on school grounds or at a school activity
 - Actual knowledge
 - Required to respond in a manner that is not clearly unreasonable under the circumstances
- Lawsuit alleges that these changes mean school districts do not need to take sexual harassment as seriously as before
- Attorney hopes litigation will be speedier than review ordered by President Biden and that court will set regulations aside until review is completed

U.S. DOE's OCR announced a comprehensive review of the Title IX regulations – April 6, 2021

- President Biden issued an Executive Order on March 8, 2021 - *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*
- As a result, OCR issued a letter on April 6, 2021 to students, educators, and other stakeholders, outlining plans to solicit the public's input on the regulations
- Could lead to possible revisions through a notice of proposed rulemaking
- Guidance expected from US DOE on implementation of current regulations

Questions and Answers for K-12 Public Schools in the Current COVID-19 Environment (OCR Sept. 28, 2020)

- 4 of 13 questions related to Title IX
- Yes, school divisions must continue to accept and investigate reports and complaints of sexual harassment even in a distance learning only environment
- A school division may need additional time to complete the grievance process and the situation related to COVID-19 may in some circumstances qualify as “good cause” for a delay, so long as all parties are notified promptly
- If a school division’s methods/process changes due to COVID-19 related interruption, it must promptly notify students/employees and display changes in process prominently on the school division website

VSBA Model Policy– Prohibition of Harassment and Retaliation

- Comports with Title IX Regulations
 - Applicable definitions
 - Reporting guidelines (confidentiality, prompt reporting, false statements and retaliation prohibited)
 - Reporting processes (including informal complaints)
 - Grievance procedures (reporting, initial response, supportive measures, formal complaints, notice requirements, informal resolution, investigation, determination regarding responsibility, written determination, appeal/review, discipline, records retention)
 - Annual notification and training requirements

Administrative Response and Investigations

Administrative Response to Sexual Harassment or Assault

- All employees must be able to recognize sexual violence and harassment of students by other students or school employees
- All employees must be able to recognize “grooming behaviors” by other employees or other third parties (volunteers, coaches, etc.)
- All employees must know to report suspected harassment or grooming behaviors to Title IX Coordinator
- Failure to do so can contribute to liability of the Division under Title IX and individual liability of the employee under other laws

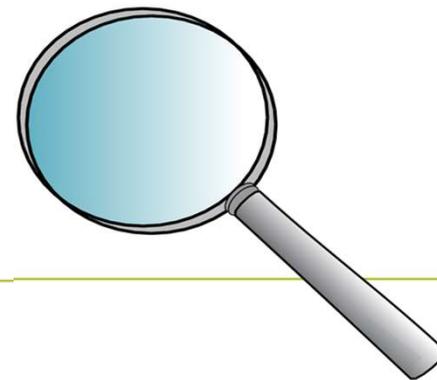
General Response and Investigations

General response: Whether or not the student files a formal complaint or asks the school to take action, if the school knows of an incident of sexual misconduct, school must respond appropriately (prompt response in a manner that is not deliberately indifferent)

Failure to timely or thoroughly investigate in accordance with policy may amount to deliberate indifference

To assemble facts to describe:

- What happened
- Why it happened



The Best Investigations Are:

- Prompt (meeting school division policy/regulation requirements)
- Thorough (and documented)
- Objective

Step 1 - Intake

- Title IX Coordinator must meet promptly with the complainant and the parents and document the same
 - discuss availability of supportive measures with or without the filing of a formal complaint; explain process
 - If formal complaint is filed, consider whether informal resolution might be appropriate
- Determine the rules and law that apply; consult counsel if necessary
- Map out the investigation
 - Who will investigate?
 - What will be investigated?
 - Who will be interviewed and in what order?
 - Outline a calendar of events to begin without delay
- Give notice to both parties
- Consider whether and what supportive measures are required for the responding party during investigation

Step 2 – Designate an Investigator(s)

- Free of actual or reasonably perceived conflicts of interest and biases for or against any party
- Maintains confidentiality
- Analyzes and documents available evidence to support reliable decisions
- Objectively evaluates
- Synthesizes available evidence



Step 3 – Gather Information

Complainant

- Interview them like a journalist and LISTEN and DOCUMENT!
- Chronological order
- Obtain the names, addresses, contact info of anyone with knowledge
- Ask about any proposed resolution

Step 3 – Gather Information

Supportive Measures

Different for each case –

- Placement of students in different classes
- Provide complainant with escort or different transportation services
- Counseling
- Academic, emotional, and social support
- Written agreement with respondent to avoid complainant
- Extension of deadlines
- Safety plan
- Offending employee placed on administrative leave
- Emergency removal

Step 3 – Gather Information

Respondent

- Give a detailed description of what has been alleged to allow full response
- Inform the responding party that no conclusions have been made
- Inform the responding party that any attempt to influence or coerce or intimidate the reporting party will be grounds for immediate discipline
- Consider the need for a recorded or written statement

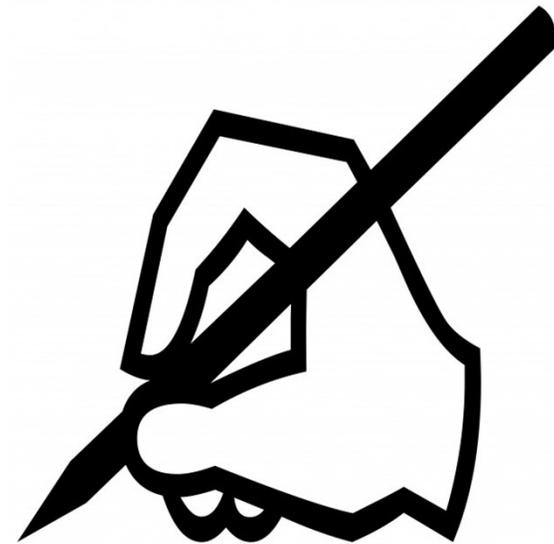
Step 3 – Gather Information

Witnesses

- Interview third-party witnesses with open, not leading, questions
- Provide some background to give witnesses the opportunity to address the issues – but preserve confidentiality if possible
- Remind all witnesses of confidentiality and the prohibition of retaliation
- Compare all stories for consistency and inconsistency

Step 4 – Record Your Findings – Investigative Report

- Leave out insignificant details
- Highlight misconduct with specific description of the events, not generalized conclusions
- Do not editorialize – but may make credibility determinations, which can't be based on party's status as complainant, respondent or witness
- Make use of evidentiary attachments, such as photos, e-mails, texts, screen shots, videos, handwritten documents, etc.
- Summarize both inculpatory and exculpatory evidence
- Account for unique and complex circumstances
- Provide to parties and they have 10 days to provide a written response



Step 5 – Report Results to Decision-Maker

Decision-maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness and explain to the party proposing a question any decision to exclude a question as not relevant

Limited follow-up questions



Step 6 - Decision-Maker's Written Determination of Responsibility

- Makes decision regarding determination of responsibility, cannot be the investigator OR the Title IX Coordinator
 - Commentary addresses consideration of consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, lack of credibility
- Must include:
 - identification of allegations
 - description of procedural steps taken from the receipt of formal complaint through determination
 - findings of fact supporting the determination
 - conclusions regarding application of code of conduct to facts
 - statement of and rationale for the result as to each allegation, including disciplinary sanctions
 - details regarding appeal procedures
- Is it more likely than not that the respondent engaged in the alleged misconduct?
- Decision is final when provided to both parties simultaneously and time for appeal expires

Step 7- Appeal Decision-Maker

- Not the same person as initial decision-maker, investigator, or the Title IX Coordinator
- Decides appeal on following bases:
 - procedural irregularity that affected outcome of matter;
 - new evidence not reasonably available at the time the determination regarding responsibility or dismissal was made; or
 - Title IX Coordinator, investigator, decision-maker bias
- Provides notification in writing to both parties:
 - when appeal filed; and
 - of decision, describing result and rationale for result

Serving Impartially – Decision-makers

- Regulations' preamble states that being impartial = free from bias
 - Whether bias exists requires examination of facts and school divisions should apply an objective, commonsense approach to evaluating whether a particular person is biased
- Consider perceived conflict of interest vs. actual conflict of interest toward complainants or respondents generally or an individual complainant or respondent
 - Past advocacy for victim or respondent's rights
 - Prior adjudication involving complainant or respondent
- Avoid:
 - Reliance on sex stereotypes (complainant always female, respondent always male)
 - Pre-judgement of facts

Conduct Off-School Grounds

- Regulations do not impose a geographic test or draw a distinction between on-campus and off-campus misconduct
- Required to investigate if the sexual harassment occurred within the scope of an educational program or school-sponsored activity

Remedies for Student-on-Student Harassment

- Disciplinary sanctions against respondent
- Strict behavioral and “no contact” contract
- Separate classes, schedules, transportation, or programs
- Administrative transfer of complainant (voluntary) or respondent (voluntary or involuntary) to another school
- Targeted training for certain groups (i.e. band, athletic team)

Title IX Part II Training

For Investigators and Decision-Makers



Relevance

- Investigators must receive training on (1) **relevance** and (2) writing reports that fairly summarize **relevant evidence**
- So what is relevance?
 - Generally, “relevant” evidence is that evidence tending to prove or disprove an alleged fact.
 - Stated differently, it is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

What is Relevant Evidence?

- The Preamble addresses this definition as follows:
 - “The requirement for recipients to summarize and evaluate relevant evidence, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to § 106.45, appropriately directs recipients ***to focus investigations and adjudications on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant).***” 85 F.R. 30294

So What is Relevant Evidence?

- Do recipients have latitude to define relevance on their own?
 - Again, the Q&A Document offers guidance:
 - “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.” Q&A #8.
 - “Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance. For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. A recipient may adopt rules of order or decorum to forbid badgering a witness and may fairly deem repetition of the same question to be irrelevant.” Q&A #8.

Rules of Evidence

- Importantly, the regulations specifically do NOT apply formal rules of evidence:
 - “The Department desires to prescribe a grievance process adapted for an educational environment rather than a courtroom, and declines to impose a comprehensive, detailed set of evidentiary rules for resolution of contested allegations of sexual harassment under Title IX.” Comments to the Regulations, 85 FR 30337
 - “A recipient’s grievance process must . . .Require an objective evaluation of all relevant evidence – including both ***inculpatory and exculpatory evidence*** – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.” 34 C.F.R. 106.45(b)(1)(ii)

More on Rules of Evidence and Relevance

- OCR’s September 4, 2020 “Questions and Answers Regarding the Department’s Final Title IX Rule:
 - “The Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX. . . . [T]he Rule uses ‘relevance’ as the sole admissibility criterion.” Q&A #7.
 - “The Title IX Rule also deems certain evidence and information to be not relevant or otherwise precludes the recipient from using it:
 - *(i) a party’s treatment (medical, psychological and similar) records, without the party’s prior written consent [§ 106.45(b)(5)(i)];*
 - *(ii) information protected by a legally recognized privilege [§ 106.45(b)(1)(x)]; and*
 - *(iii) questions or evidence about a complainant’s prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)].*

Legally Privileged Information

- A recipient, when *investigating* a formal complaint:
 - “Cannot access, consider, disclose or otherwise use a party’s records that are maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance under this section. § 106.45(b)(5)(i).
- Other recognized privileges:
 - Attorney-client communications
 - Spousal testimony in criminal matters
 - Fifth Amendment (right against self-incrimination)
 - Confessions to a clergy member

More on Relevance

- The Preamble to the new Rule provides further explanation:
 - “These final regulations require objective evaluation of relevant evidence and contain several provisions specifying types of evidence deemed irrelevant or excluded from consideration in a grievance process; a recipient may not adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45. For example, a recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the Federal Rules of Evidence, the Federal Rules of Evidence constitute a complex, comprehensive set of evidentiary rules and exceptions designed to be applied by judges and lawyers, while Title IX grievance processes are not court trials and are expected to be overseen by layperson officials of a school, college or university rather than by a judge or a lawyer.” (As cited in Q&A #7)

More on Relevance

- Continuing, the Preamble states:
 - “Similarly, a recipient may not adopt rules excluding certain types of relevant evidence (e.g., lie detector test results or rape kits) where the type of evidence is not either deemed ‘not relevant’ (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege). However, the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.” As cited in Q&A #7.

Weight and Credibility

- The guidance documents recognize a difference between the ***admission*** of relevant evidence, and the ***weight, credibility, or persuasiveness*** of particular evidence:
 - “The § 106.45 process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.” Q&A #8, citing the Preamble.
 - “A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party’s prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents.” Q&A #8, citing the Preamble.

Gathering the Evidence

- Recall that the grievance process must provide that the parties have an equal opportunity to inspect, review, and respond to evidence directly related to the allegations (§ 106.45(b)(5)(vi)) and an equal opportunity to review and respond to the recipient’s investigative report. (§ 106.45(b)(5)(vii))
 - This process “allows each party the opportunity to provide input and make arguments about the relevance of evidence and how a decision-maker should weigh the evidence.” Q&A #13.
 - The decision-maker must (i) afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions for each party, and (ii) explain to the party proposing the questions any decision to exclude a question as not relevant. § 106.45(b)(6)(ii)
- The Preamble asserts that the Rule “. . . balances the recipient’s obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties’ equal right to participate in furthering each party’s own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence.” (As cited in Q&A #13)

Determining the Facts

- For each fact in dispute, weigh the evidence and argument submitted by the parties – including making credibility determinations – and make a determination: a “finding of fact.”
- These findings will inform the overall determination of responsibility.
- The Preamble states that the decision-maker should be looking at consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility. 85 FR 30315 and 30330
 - Consider all witness statements; detail and consistency in stories; corroboration; changes in complainant’s behavior after alleged incident, and potential sources/causes of such changes
 - Timing of complaint MAY inform decision in several aspects: consider whether filed promptly; however, a delay may reflect hesitation that claim may not be believed or a fear of retaliation

Avoiding Bias in Decision-Making

- The Preamble includes significant discussion addressing concerns by commenters regarding potential bias and unfairness in the grievance process.
 - Examples include: decision-maker's financial and reputational interests encourage protecting the institution; inappropriately combining administrative and adjudicative roles; Title IX Coordinator may supervise decision-maker; past role as advocate for victim's or respondent's rights.
 - Also includes concerns about marginalized groups: racial minorities, LGBTQ community, disabled persons.
- The Rule now provides that a recipient's grievance process must:
 - "Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **not have a conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent."
 - Further, "A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on . . . **how to serve impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interests, and bias."
 - § 106.45(b)(iii)

Preventing Biased Decisions

- Bias may be created by differences in cultural backgrounds; age; race; religion; life experiences; trauma.
 - Decision-makers must remain impartial, avoiding sympathy or a personal perspective on the claim.
 - Avoid sex stereo-types (e.g., women have regret and/or lie about sexual assault; men are sexual aggressors).
- Decision-makers may nonetheless draw reasonable inferences from the evidence.
- The Preamble encourages recipients to apply an objective (reasonable person), common sense approach to evaluate whether a particular person is biased.

Weighing the Evidence

- Do not make a decision until all evidence has been received and reviewed. Do not “pre-judge” the facts. § 106.45(b)(1)(iii)
- Consider only relevant evidence and make findings of fact and determinations based only on the evidence received in its totality.
- Determine what evidence is worthy of belief and its importance along with necessary and reasonable inferences.
 - Rely on direct evidence whenever possible.
- Make witness credibility determinations (motives, bias, probability, consistency, etc.) and ascribe the testimony the weight you believe it deserves.
 - But remember you are confirming FACTS.
- These do require judgments, but the judgments must be impartial.
- Do not consider potential consequences or outcomes at fact-finding stage.

Determination of Responsibility/Non-Responsibility

- Findings of fact will then be assessed by applying the recipient's identified standard of proof (e.g., preponderance of the evidence or clear and convincing) to the elements of the alleged offense (e.g., sexual assault, harassment, etc.)
 - Preponderance of the evidence: a fact is more likely than not to be true.
 - Clear and convincing: a fact is highly probable to be true.
 - 85 FR 30373, fn 1409
- Recall that recipient **MUST** begin with a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

§ 106.45(b)(iv)

Written Determination

- Remember: Decision-maker cannot be the same person as the Title IX Coordinator or the investigator.
- Must issue a written decision regarding responsibility.
- Applying standard of evidence identified by recipient's policy

Written Determination

- The Written Determination Must Include:
 - Identification of the allegations potentially constituting sexual harassment;
 - Description of the procedural steps taken;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the recipient's code of conduct to the facts;
 - A statement of, and rationale for, the result as to each allegation, including
 - *(i) a determination regarding responsibility,*
 - *(ii) any disciplinary sanctions the recipient imposes on the respondent, and*
 - *(iii) whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and*
 - The recipient's procedures and permissible bases for the complainant and respondent to appeal.
 - § 106.45(b)(7)(ii)(A)-(F)

Written Determination and Appeals

- The recipient must provide the written determination to the parties simultaneously.
 - The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely. § 106.45(b)(7)(iii)
- The recipient must offer both parties an appeal from the determination on the following bases:
 - Procedural irregularity that affected the outcome;
 - New evidence not reasonably available at the time the determination was made that could affect the outcome; or
 - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
 - § 106.45(b)(8)(i)(A)-(C)

Live Hearings

- Live hearings are NOT required for elementary and secondary school Title IX grievance proceedings.
 - IF your division intends to conduct live hearings, additional training is required, specifically for the use of technology in such proceedings.
 - This presentation presumes the recipient is NOT conducting live hearings.

Transgender Student Issues

Recent Developments



Grimm v. Gloucester County Public Schools

Gavin Grimm long since graduated from Virginia School Division

- While there, school board adopted policy giving option of using single stall bathroom or bathroom associated with his gender assigned at birth
- Declined to change his educational records to reflect gender identity

Fourth Circuit Court of Appeals – panel

- Twice now has held that transgender students may use the bathroom of the gender with which they identify
- Given that Virginia issued Grimm a revised birth certificate, School Division must revise his educational records to reflect the gender with which Grimm identifies

United States Supreme Court

- School Division's Appeal denied this summer

Grimm v. Gloucester County School Board

4th Circuit Opinion – August 2020

4th Circuit panel held (2-1) that Gloucester School Board violated Grimm’s rights under the Fourteenth Amendment, Equal Protection Clause and **Title IX** because the Board adopted a policy barring the student who is a female-to-male transgender individual from using the boys’ restroom at school based on his gender identity

- Dissent (Niemeyer): While the law prohibits discrimination on the basis of sex in the provision of educational benefits, it allows schools to provide ‘separate living facilities for the different sexes,’ 20 U.S.C. §1686, including ‘toilet, locker room, and shower facilities,’ 34 C.F.R. §106.33

Because “the Board’s policy as applied to Grimm is not **substantially related** to the important objective of protecting student privacy, we affirm summary judgment to Grimm”

- Regarding GCSB’s reliance on the bodily privacy interest to justify its restroom policy, the majority pointed out that GCSB “ignores the reality of how a transgender child uses the bathroom: ‘by entering a stall and closing the door.’”
- “**Grimm used the boys’ restrooms for seven weeks without incident.** When the community became aware that he was doing so, privacy in the boys’ restrooms actually increased, because the Board installed privacy strips and screens between the urinals” (Privacy argument also rejected in 3rd and 9th Circuits)

Refusal to update records: “harmed Grimm because when he applies to four-year universities, he will be asked for a transcript with a sex marker that is incorrect and does not match his other documentation;” and (2) “this discrimination is unlawful because it treats him worse than other similarly situated students whose records reflect their correct sex”

New Federal Guidance Regarding Transgender Students

USDOE's June 2021 "Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*"

- USDOE "interprets Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender identity"

USDOE's June 23, 2021 "Dear Educator Letter"

- Points recipients to various federal Title IX resources, including highlighting the rights of LGBTQI+ students
- "OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that received Federal financial assistance from the Department"

New Federal Guidance Regarding Transgender Students

Fact Sheet (attached to Dear Educator Letter)

- “Confronting Anti-LGBTQI+ Harassment in Schools”
 - *Includes examples of the kinds of incidents OCR can investigate*
- “What if a Student Experiences Discrimination in School?”

Virginia Code § 22.1-23, “Treatment of transgender students; policies”

A. The Department of Education shall develop and make available to each school board **model policies** concerning the treatment of transgender students in public elementary and secondary schools that address common issues regarding transgender students in accordance with **evidence-based best practices** and include information, guidance, procedures, and standards relating to:

1. Compliance with applicable nondiscrimination laws;
2. Maintenance of a **safe and supportive learning environment** free from discrimination and harassment for all students;
3. Prevention of and response to **bullying and harassment**;
4. Maintenance of **student records**;
5. Identification of students;
6. Protection of **student privacy** and the confidentiality of sensitive information;
7. Enforcement of **sex-based dress codes**; and
8. Student participation in **sex-specific school activities** and events and **use of school facilities**. Activities and events do not include athletics.

B. **Each school board shall adopt policies** that are consistent with but may be more comprehensive than the model policies developed by the Department of Education pursuant to subsection A.

“Model Policies for the Treatment of Transgender Students in Virginia’s Public Schools” – VDOE 2020

Definitions

- Cisgender; Transgender; Gender-expansive/gender-diverse/gender-fluid/gender-nonbinary/agender/gender queer; Gender Expression; Gender Identity; Gender Nonconforming; Gender Transition; LGBTQ+; and Sex Assignment

Related Laws

- First Amendment; Equal Protection Clause; Title VII; Title IX; FERPA; HIPAA; Virginia Values Act; Virginia’s Anti-Bullying legislation; Virginia Identification Documents legislation; Virginia’s prohibition against conversion therapy

Guiding Principle to Support Transgender Students

- Key guiding principle: “All children have a right to learn, free from discrimination and harassment.”
- “School divisions are encouraged to develop comprehensive policies, regulations, guidance and implementation plans to minimize social stigmatization for such students and maximize opportunities for social integration so that all students have an equal opportunity to attend school, be engaged, and achieve academic success.”

VDOE Model Policies – Cont’d

School Board Policies

- Must be consistent with VDOE’s models, but may be more comprehensive
- Must be adopted “no later than the 2021-2022 school year”

Contemplate multiple policies in different categories rather than a single policy

- Existing policies may need to be expanded or clarified to be more gender-inclusive or to emphasize specific protections for transgender, nonbinary, and gender-expansive students

Bullying, Harassment, and Discrimination

VDOE cites statistics evidencing transgender students experience rejection, criticism and bullying that affect emotional health and academic achievement

- 84% feel unsafe at school
- Those who experience victimization
 - *Have significantly lower GPAs*
 - *Are more likely to miss school*
 - *Are less likely to plan on continuing their education*
- LGBTQ+ youth report higher rates of depression, anxiety, alcohol and drug use, and lower self-esteem
 - *73% experienced verbal threats*
 - *77% report feeling depressed over the past week*
 - *95% report trouble sleeping at night*

Bullying, Harassment, and Discrimination

School Boards should ensure compliance with all state and federal laws regarding harassment, intimidation and bullying

- Acts of verbal harassment may include the intentional or persistent use of names and pronouns not consistent with their identity
- May also include disclosure of the student's transgender status without their consent

“Local school boards should expand their policies prohibiting discrimination, harassment, and bullying to emphasize that discrimination or harassment against a student, by either school staff or other students, on the basis of gender identity is prohibited under federal and state law. Nondiscrimination policy and related complaint procedures should be readily accessible to students and parents/guardians.”

Student Privacy/Confidentiality

School divisions encouraged to communicate openly, albeit confidentially, with student/family regarding transgender status

- Determine student's needs
- Address any privacy concerns
- Protecting privacy is critical to ensuring student is treated consistent with gender identity

School staff should discuss with student how they prefer information about their status be shared

- May be known, may not
- The school should support the student's need for privacy and NOT disclose a student's gender identity to other students or parents
- Should be shared internally only among school personnel with a legitimate educational interest or need to know

Student Privacy/Confidentiality

Student's transgender status, legal name, or sex assigned at birth may be considered confidential medical information and protected Personally Identifiable Information – disclosure MAY violate FERPA and HIPAA.

- Absent a legal authorization, such information should not be shared with any third parties

“Additionally, privacy and confidentiality are critical for transgender students who do not have supportive families. . .

- “School divisions will need to consider the health and safety of the student in situations where students may not want their parents to know about their transgender status, and schools should address this on a case-by-case basis. If a student is not ready or able to share with their family about their transgender status, this should be respected. . . .school staff should work with students to help them share the information with their family when they are ready to do so.”

Student Identification

School divisions should accept a student's assertion of their gender identity without requiring any particular substantiating evidence, including diagnosis, treatment, or legal documents.

- A student is considered transgender if, at school, the student consistently asserts a gender identity different from the sex assigned at birth
- It should involve more than a casual declaration of gender identity, does not require any substantiating evidence nor any required minimum duration of expressed gender identity

If student asserts a name/pronoun affirming gender identity, school staff should abide by student's wishes as to how to address the student

- School may need to direct school staff to do so
- An employee's intentional and persistent refusal is considered discriminatory
 - See [West Point case](#)

Student Identification

In the situation when parents/guardians of a minor student do not agree with the student's request to adopt a new name and pronouns, school divisions will need to

- Determine whether to respect the student's request
- Abide by the parents' wishes to continue using the student's legal name and sex assigned at birth, or
- Develop an alternative that respects both

“School staff should be prepared to support the safety and welfare of transgender students when their families are not affirming” and should

- Provide information and referral to resources to support the student in coping with the lack of support at home
- Provide information to families about transgender issues
- Seek opportunities to foster a better relationship between the student and family
- Provide close follow-ups to both

School Records

School divisions should develop solutions to support a transgender students' wishes for privacy

- Consider maintaining student's legal name and sex assigned at birth in the student information system that requires additional privilege to access
- Same system can then separately include the *asserted name and gender* identity as additional information that is used to the greatest extent possible to populate school-related documents available to other users
 - *Where legal name/sex assigned at birth are required (e.g., standardized testing or student data reporting to VDOE), staff should adopt practices to avoid inadvertent disclosures*
 - *Schools should eliminate gender markers from forms, documents and records when feasible*
 - *For purposes of data collection, VDOE has expanded gender choices to include nonbinary as a third option of the student or parent wishes to use that option*

School Records

Changing name or gender on school records

- The extent to which records are modified will depend on the type of record and the substantiation of the change

When former students make the request

- They may want to make sure records are consistent with what they are submitting on job and college applications
- “School divisions could consider respecting a former student’s request to amend records retroactively and may consider processing those requests in the same way other student record amendment requests are processed.”
- “If a former student obtains a court order changing their name or amend other legal documents such as their birth certificate, state- or federal-issued identifications, or passports, school divisions, when requested, should amend the student’s record, including issuing a high school diploma or transcript, to reflect the student’s current name and gender.”

See [Grimm v. Gloucester County School Board](#)

Dress Code

Dress codes, including hairstyles, should encompass broad guidelines that are not gender-specific and free of gender stereotypes

- Transgender students have the right to dress in a manner consistent with their gender identity or expression
- Any student has the right to expression free from gender expectations – as long as the attire complies with the school’s dress code

Virginia Code §22.1-279.6 permits any school board to include in its code of student conduct a dress or grooming code

- A recent amendment explicitly states that any dress or grooming code shall “maintain gender neutrality by subjecting any student to the same set of rules and standards regardless of gender; . . . not have a disparate impact on students of a particular gender.”

Gender-specific attire for school activities and events?

- Physical education uniforms, school ceremony attire, sex-segregated graduation gowns, musical uniforms

Access to Activities

School divisions should make efforts to reduce or eliminate gender-based practices to the extent possible

- Review any gender-based policies, rules, and practices to determine whether they serve a legitimate educational goal or non-discriminatory purpose
- Any single-gender activity or program should not be premised on generalizations or stereotypes about different talents, capacities, or preferences of any gender

When schools provide sex-segregated activities (e.g., PE classes) students should be allowed to participate in a manner consistent with their gender identity

- Includes acknowledgements, dances, assemblies, after-school programs, extracurricular activities, intramurals, non-competitive sports leagues, and field trips
- “For overnight trips, the school should not force the student into single-occupancy accommodations that are not required for other students; however, such alternative accommodations should be made available to any student requesting them.”
- School division should “seek to address privacy interests in situations involving individuals undressing or showering”

HB 145 and SB 161 exclude athletics for purposes of developing school board policies; VHSL has provided policies regarding participating in gender-specific sports team by transgender students

Access to Facilities

Students should be allowed to use the facility that corresponds to their consistently asserted gender identity

- “Taking into account existing school facilities, administrators should take steps to designate gender-inclusive or single-user restrooms commensurate with the size of the school”
- Should be accessible without special keys or codes
- For locker room facilities without private changing areas, school divisions should make reasonable accommodations for requests for increased privacy
 - *If requested, schools should offer alternative arrangements such as a separate changing schedule, use of a nearby private area, access to a staff member’s office, not requiring students to dress in uniform for physical education, or offering alternatives to in-person physical education*
 - *Should be non-stigmatizing and minimize lost instructional time*
 - *Accommodations should be handled so as to protect the student’s privacy relating to transgender status*
- Staff should not confront students about their gender identity upon entry into the restroom
 - *New facilities should be designed to include single-user, gender-inclusive restrooms and changing areas*
 - *Va. Code §22.1-6.1 requires school boards to make menstrual supplies available at all times and at no cost in all schools, and in bathrooms of middle and high schools; supplies should be made available in all bathrooms to be gender-inclusive*

Professional Development and Training

School divisions should incorporate regular education about transgender students into staff development

- Periodic professional development minimally to school mental health professionals
 - *School-based counselors*
 - *Psychologists*
 - *Social workers*
- School divisions should provide training to ALL school staff, including support staff who may work/interact with students

Professional Development

Goal is to ensure staff understand the rights of all students to a safe learning environment and school board's expectations regarding treatment of transgender students

- Key LGBTQ+ terminology and use of unbiased language
- Challenges and barriers frequently faced by LGBTQ+ students
- Federal/state laws and local policies/regulations relating to student rights (e.g., prohibitions on harassment and bullying, rights to privacy, etc.)
- Practices to create a safe, inclusive environment for all students
- Knowledge of LGBTQ+ affirming resources for students and families
- Strategies to engage parents and other stakeholders in inclusive school community that affirms LGBTQ+ students

Other Considerations

Local school boards have an opportunity to lead discussions on issues of gender identity

- “Should help to reconcile sometimes deeply conflicting community views”
- May need to review agreements and processes with community partners for any activities taking place on school grounds to ensure consistency of practices (e.g., JROTC or community youth sports leagues)
 - *“While the conversation is not easy, local school boards and staff will need to provide clear guidance on the implementation of these policies and reduce their exposure to legal liability.”*

Local school boards should consider developing detailed guidelines and processes for the implementation of these policies

- Student records/privacy issues; consider developing templates/forms
- Recommends designating a point of contact or team of knowledgeable and affirming staff members
- LGBTQ+-inclusive curricula
 - *Note: rights of parents under Virginia law to review Family Life Education curriculum and to excuse their child from some/all of FLE instruction*

School divisions should promote activities and LGBTQ+-affirming resources for students and families

- Clubs such as Gay-Straight Alliances
- Student training: such as peer-led education groups, educational materials on student rights, and training on self-advocacy skills
- “Other affirming activities include the promotion of visible supports for LGBTQ+ youth such as the use of flags and stickers . . .”

Family Foundation, Founding Freedoms Law Center v. VDOE and Atif Qarni (Filed March 30, 2021)

Appeal of VDOE Model Policies – Assignments of Error

- VDOE failed to respond to comments regarding parental rights based on
 - *The Due Process Clause of the Federal Constitution*
 - *Virginia Code § 1-240.1 (“A parent has a fundamental right to make decisions concerning the upbringing, education and care of the parent’s child.”)*
- VDOE failed to respond to comments that the Model Policies violate
 - *The free speech rights of students and teachers*
 - *The free exercise of religion rights of students and teachers*
 - *The equal protection rights for non-transgender students*
 - *The due process rights of students and teachers because the terms used are vague, and the policies violate the right to privacy*
 - *Various federal laws (e.g, Title IX and FERPA)*

Family Foundation, Founding Freedoms Law Center v. VDOE and Atif Qarni

- VDOE violated the authorizing law (Virginia Code § 22.1-23.3) by
 - *Exceeding its scope*
 - *Failing to provide a safe and supporting learning environment free from discrimination for ALL students*
 - *Failing to consider evidence other than that supporting its apparent pre-ordained conclusion*

Relief requested

- Set aside effective date of Model Policies and remand to VDOE to address all assignments of error
- Retain jurisdiction to determine whether VDOE has subsequently adopted Model Policies that comport with § 22.1-23.3

Questions?

Thank You for your time!



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