



## What is Deliberate Indifference?

### Best Practices for Responding to Sexual Harassment in Your District

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Under Title IX, the law that prohibits sex discrimination in federally funded institutions, a district or school can be held liable for sexual harassment claims if its response to alleged sexual harassment is deliberately indifferent. The fallout could include court cases, rising litigation costs, and a tarnished reputation.

This resource is designed for K-12 Title IX staff, as well as campus and district administrators who may receive reports of sexual harassment. To help protect your organization, we will:

- Define deliberate indifference per the current Title IX regulations
- Discuss your organization's duties
- Explore best practices for appropriately responding to sexual harassment complaints
- Reduce your risk of liability

#### Title IX and deliberate indifference

Amendments to the Title IX regulations, which became effective August 14, 2020, use two Supreme Court ("Court") cases: *Gebser v. Lago Vista ISD*, 524 U.S. 274 (1998) and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), as a framework for defining deliberate indifference. In these cases, deliberate indifference occurs when a school has **actual knowledge** of sexual abuse or allegations of sexual abuse, and its response is clearly unreasonable considering the known circumstances.

So, what is actual knowledge?

Actual knowledge for K-12 schools means a school is put on notice of sexual harassment when someone makes a report to the Title IX Coordinator or to any employee, even if the report is not a formal complaint.

Some important things to know about the Court's deliberate indifference standard include:

- For the school to be held liable, an employee who has decision-making authority, such as a principal, superintendent, director, or another official must display indifference.



- Deliberate indifference could include, but not be limited to, ignoring complaints or reports about abuse, minimally responding without follow-up investigation, and not taking reasonable steps to stop the abuse and ensure students' safety.

### Department of Education requirements

Although the Department of Education (Department) has adopted the Court's deliberate indifference standard, the rules mandate schools and districts to fulfill specific obligations that are not required under the Court's standard. Specifically, the regulations, particularly section 106.44 (a), require the response to:

- Be prompt (Your school or district should follow its policies concerning reasonable timelines for responding),
- Offer supportive measures to a complainant, who is the alleged victim of sexual harassment,
- Ensure that the Title IX Coordinator contacts the complainant to discuss supportive measures and considers the complainant's wishes regarding supportive measures,
- Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and to
- Explain the process for filing a formal complaint.

Additionally, your district or school must respond to both the complainant and the respondent, who is the alleged perpetrator, with **equitable treatment**. This means that supportive measures must be offered to the complainant and due process through grievance procedures must be afforded to both parties.

### Your organization's duty to respond

The following questions consider the *Gebser/Davis* framework that the Title IX regulations have adopted regarding a school's duty to respond. When a formal complaint is filed or a report is received by a school or district, there is always a duty to respond. To learn more, see the response to, "[How should our district respond to a sexual harassment complaint?](#)" in our InsideRM Q&A article on the Title IX regulations.

Your organization should analyze three questions and comply with your policies and procedures to help your district or school respond appropriately, and not with deliberate indifference, to sexual harassment.



- Is there actual knowledge of the sexual misconduct?
- Is the alleged harassment so **severe, pervasive, and objectively offensive** that it can be said to deprive the victim of access to the educational opportunities or benefits provided by our school?
- Is our organization's response clearly reasonable concerning the known circumstances?

Now, explore each question and learn how they guide you in responding appropriately to sexual harassment allegations.

Is there actual knowledge of the sexual misconduct?

The regulations no longer use the responsible employee rubric as the Department had done before. Previously, if an allegation of sexual harassment was reported to a responsible employee, such as a principal or superintendent, then this employee had the duty to report or take action. It also meant that the school was put on notice about the abuse.

Now, for elementary and secondary schools, the regulations mandate that notice of sexual harassment to **any employee**, along with notice to the Title IX Coordinator or any official with authority, requires the school or district to respond. Higher education institutions receive actual knowledge when the Title IX Coordinator or a school official with authority to take corrective action is notified about the allegations.

Actual knowledge does not include what the employee *should have known*. Instead, and per the regulations, notice occurs when any elementary or secondary school employee, Title IX Coordinator, or official with authority witnesses or hears about sexual harassment or allegations. Also, if these people receive a written or verbal sexual harassment complaint, then they are considered notified.

Was the harassment so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the school?

This question should be analyzed on a case-by-case basis. Students respond to sexual harassment differently; therefore, how harassment affects their educational opportunities could vary. So, consider each case and each student separately.

Harassment can be considered severe, pervasive, and objectively offensive if it negatively impacts the student's educational experience. The court in [Davis](#) states:

Whether gender-oriented conduct is harassment depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the harasser's and victim's ages and the number of persons involved. Courts must also bear in mind that school children may regularly interact in ways that would be unacceptable among adults...



However, keep in mind that the regulations do not apply the *severe, pervasive, and objectively offensive standard* to criminal sex offenses such as sexual assault, dating violence, domestic violence, and stalking because it is assumed that such actions undoubtedly deprive the victims of access to educational or employment opportunities and benefits.

The [Office for Civil Rights](#) offers these examples of how harassment could negatively impact students:

- Decline in grades
- Lowered academic achievement and aspirations
- Increased anxiety
- Loss of self-esteem and confidence
- Depression and post-traumatic stress
- General deterioration in physical health
- Self-harm and suicidal thinking
- Feelings of alienation in the school environment, such as fear of other children
- Absenteeism from school

Keep in mind that the impact of sexual harassment on students may extend beyond these examples. Therefore, you should promptly respond to and analyze each allegation to determine how such action(s) affect the student victim and their education.

Is our organization's response clearly reasonable concerning the known circumstances?

While it's important to respond promptly, the school must consider whether its planned response is reasonable based on the circumstances. As always, refer to your school's or district's policies for guidance, including FFH (LOCAL), which may discuss addressing harassment, offering supportive measures, and implementing the grievance process if a formal complaint has been filed.



If sexual harassment allegations are based on rumors or someone “having a feeling” that something inappropriate is going on, it is worth reporting to the Title IX Coordinator and investigating. Sometimes, indirect reports or information can be indicators of inappropriate conduct. Furthermore, anyone who **suspects** child abuse must immediately make a report to law enforcement **or** child protective services (CPS). However, if the person suspected of abusing the child is responsible for the child’s care, custody, or welfare, then the report **must** be made to CPS. Your school cannot require you to report suspected abuse to a school administrator before reporting to law enforcement or CPS. The law also protects against retaliation if the report is made in good faith.

Principals and superintendents must also comply with their reporting obligation to law enforcement or CPS if they suspect child abuse. In addition to mandatory child abuse reporting, principals and superintendents have other reporting requirements. If the person reporting is the principal, he or she would need to report to the superintendent. If the reporting person is the superintendent, he or she would need to report to the State Board for Educator Certification (SBEC).

### [Best practices for responding to reports of sexual harassment](#)

Now that you understand what actual knowledge entails, the need to analyze the alleged sexual harassment’s impact on the victim, and the importance of your organization not responding with deliberate indifference, consider the following suggestions on the dos and don’ts for responding to sexual harassment.

#### Don’ts

Districts and schools should avoid responses from a school or district that may be clearly unreasonable in light of known circumstances, which might include, but are not limited to:

- Ignoring complaints from employees and parents and not properly investigating allegations concerning sexual harassment
- District employees failing to report sexual harassment and relying on the Title IX Coordinator, principal, supervisor, or another person to make such report
- Delegating the duty to report child abuse
- Making excuses for an employee’s or student’s inappropriate behavior
- Failing to document complaints
- Conducting brief and undocumented meetings with the accused perpetrator about the inappropriate behavior, without follow-up investigations



- Only reporting sexual harassment after a series of complaints and after the situation has escalated
- A principal not informing the superintendent about employee sexual misconduct
- A superintendent not reporting sexual misconduct to the SBEC
- Discouraging employees from reporting sexual harassment, and even threatening or implying that they will lose their job for reporting inappropriate conduct
- Not offering supportive measures to the complainant or not implementing a grievance process when a formal complaint has been filed, as required under the regulations

#### Dos

Some ways to properly address reports of sexual harassment include:

- Consistently reviewing and complying with your policies and the Title IX regulations for guidance on responding to every report.
- Offering supportive measures in a timely manner and allowing the victim to choose which, if any, are best for him or her. Some supportive measures may include, but are not limited to:
  - Counseling
  - Extensions of deadlines or other course-related adjustments
  - Modifications of work or class schedules
  - Campus chaperones
  - Mutual restrictions on contact between the parties
  - Changes in work or housing locations
  - Leaves of absence
  - Increased security and monitoring of certain areas of the campus
- Being mindful of whether the implementation of supportive measures is perceived by the victim as isolation or punishment and providing other alternatives preferred by the victim
- Documenting that supportive measures were offered, even if the victim declines the offer





- Implementing the [grievance process](#) if a formal complaint of sexual harassment is filed. Your district may have established forms for responding to reports and complaints of sexual harassment. However, if not, TASB provides sample administrative procedures and a [sample formal complaint form](#) (login required) regarding the Title IX complaint process located in [TASB Policy Service's Regulations Resource Manual](#) (login required).
- Ensuring your organization consistently complies with all reporting requirements, including making reports to law enforcement, [child protective services](#), and [SBEC](#).
- Properly evaluating every response by the deliberate indifference standard per your policies and Title IX regulations. Asking the question, "Knowing the circumstances, did our organization respond to this matter in a clearly reasonable manner?"
- Documenting all steps of your response to a report or formal complaint including, but not limited to, outcomes, appeals, accepted and declined supportive measures, as well as gathered evidence (physical or electronic).
- Creating documentation of the sexual harassment allegations, including who, what, where, and when. Ensuring that you record dates and times, along with names and sworn statements of all the parties interviewed.
- Retaining all records pertaining to sexual harassment reports and investigations for seven years.

#### Educate and train staff and students

Informed stakeholders are key to helping your district or school properly respond to sexual harassment. Train your staff and students to understand what sexual harassment means, recognize inappropriate behavior, and report their concerns. Some best practices include:

- Encouraging administrators and staff to understand your policies and their responsibilities, including the:
  - Definition of sexual harassment
  - Instructions for reporting sexual harassment. Remind them that following proper reporting procedures helps your school or district avoid the pitfalls of failing to respond appropriately.
  - Confidentiality policies
  - Contact information for individuals who can further assist students seeking help
- Keeping employees fully informed on policies concerning their conduct on and off campus, including social media engagement



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- Keeping your Title IX coordinators and personnel trained on their responsibilities to ensure they are properly assisting your district with its Title IX compliance
- Training employees to identify inappropriate behavior between employees and students. Examples include spending too much time together; making inappropriate comments; touching inappropriately; communicating electronically one-on-one with students; giving students rides home; isolating themselves with students; communicating jokes and gestures that only the employee and student can understand; and engaging in other subtle and overt inappropriate conduct.
- Helping students learn to identify inappropriate employee-to-student and student-to-student interactions
- Creating engaging methods for teaching students their rights under Title IX, including how to report sexual harassment anonymously

#### Expert advice from the Fund

Fund members with [School Liability coverage](#) have access to expert advice, training, and resources on liability risks such as inappropriate relationships, cyberbullying, and discrimination. For more information on liability risks, please contact TASB Legal Liability Risk Consultant Charli Searcy at [charli.searcy@tasb.org](mailto:charli.searcy@tasb.org). If you need legal advice or have questions about your policies, we encourage you to contact [TASB Legal Services](#) at 800.580.5345, as well as [TASB Policy Service](#).

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