

# The New Era of Title IX: What Every K-12 School Should Know

Brazosport Independent School District  
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# 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 subject to discrimination under any education program or activity receiving federal financial assistance.”



# How Title IX is Enforced

Two avenues for enforcement:

- **Administrative**
  - ❖ The U.S. Department of Education Office for Civil Rights (OCR) has jurisdiction over public school districts to investigate and review complaints under Title IX
  - ❖ Failure to comply may result in loss of federal funding
- **Litigation**
  - ❖ May result in money damages
  - ❖ Not required to file OCR complaint first

# Three Key Inquiries

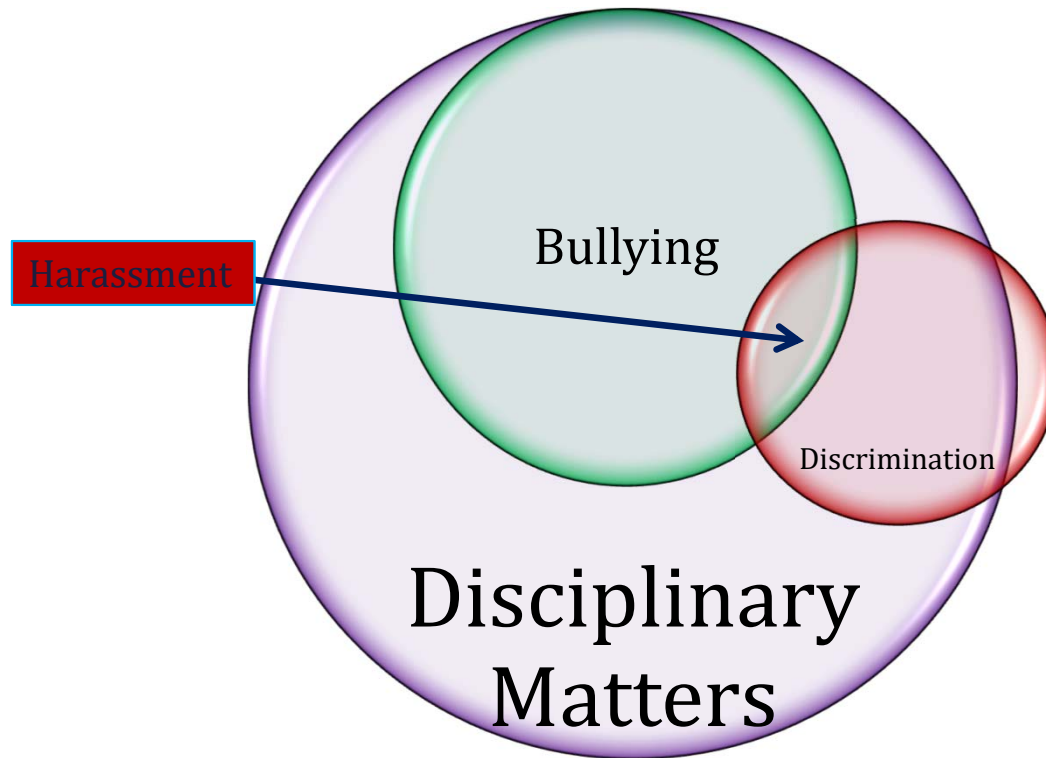
- What conduct is covered by Title IX?
- What triggers an institution's obligation to respond to an allegation of sexual harassment?
- What must that response entail?

# What Issues Fall Under Title IX

**“ . . . on the basis of sex . . . ”**

- Sex discrimination
- Gender-based discrimination
- Gender-based harassment
- Gender-based bullying
- Gender-based assault
- Sexual harassment
- Sexual assault
- Domestic violence
- Dating violence
- Stalking
- Retaliation

# Harassment v. Discrimination v. Bullying v. Discipline



## *Gebser v. Lago Vista Independent School District*

- High school teacher engaged in a secretive sexual relationship with a female student
- Although the **principal** was aware of prior alleged sexual comments by the teacher, the evidence indicated that **he was not aware** that the teacher had crossed the line into sexual misconduct
- Plaintiff sought to impose liability based on theories of either *respondeat superior* or constructive notice to the District

*Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)



*Gebser v.  
Lago Vista Independent School District*

- Institution may be held liable in damages if an **appropriate official**—an individual with authority to take corrective action—receives “**actual knowledge**” of sexual harassment by a school employee and responds with “**deliberate indifference**”
  - ❖ Rejected “constructive notice” and vicarious liability standards
  - ❖ Ensures that schools are liable in damages only for “an official decision...not to remedy the violation” and not “for it’s employees’ independent actions”



## The *Gebser* Actual Knowledge Standard for Liability

- A plaintiff must show the school district had “actual knowledge”
  - ❖ Constructive notice, or that a school district *should have known*, is not enough
  - ❖ *Respondeat superior*/vicarious liability is prohibited
- An appropriate school district official must possess such knowledge
  - ❖ Generally, this is a campus principal, Title IX Coordinator, superintendent, board member (or other higher level official)
  - ❖ The knowledge of the perpetrator is not enough

## *Davis v. Monroe County Board of Education*

- When can a school district be liable for peer-to-peer harassment?
- A fifth-grade student allegedly was subjected to prolonged sexual harassment by another student in the classroom
- The teacher and principal allegedly failed to intervene
- A school may be liable for its “**deliberate indifference** to **known** acts of **peer sexual harassment**”
- The harassment must be “so **severe, pervasive, and objectively offensive** that it effectively bars the victim’s access to an educational opportunity or benefit”

*Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999)

## *Davis v. Monroe County Board of Education*

- Liability is permitted only if the institution exercised “substantial control over both the harasser and the context in which the known harassment occurs”
- The school’s response must be “clearly unreasonable” This standard is more rigorous than a “mere reasonableness” standard.
- If the school does not engage in harassment directly, “it may not be liable for damages unless its deliberate indifference ‘subject[s]’ its students to harassment. That is, the deliberate indifference must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it.”

# Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students

New regulation defines sexual harassment, requires supportive measures for survivors, restores due process on campus

## New Campus Sexual-Harassment Rule Aims to Boost Rights for Accused

Trump administration's regulation allows for cross-examination and live hearings, and provides some new support for accusers

### AGLU sues Betsy DeVos over new campus sexual assault rules

The suit says Title IX changes will make it "more difficult for victims of sexual harassment or sexual assault to continue their educations."



### Georgetown Students, Administration Raise Concerns About Title IX Changes

May 12, 2020 by [Jaime Moore-Carrillo](#) and [Moira Ritter](#) — [Leave a Comment](#)

*Published on Friday, May 15, 2020 by Common Dreams*

## DeVos Sued Over New Title IX Rules That Make It 'Easier for Schools to Sweep Sexual Violence Under the Rug'

### **THE HILL** Biden says he'll reverse DeVos rule bolstering protections for those accused of campus sexual assault

BY JONATHAN EASLEY - 05/06/20 09:07 PM EDT

2101 COMMENTS

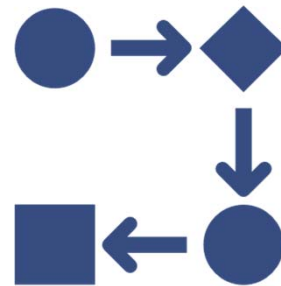
# Overview of New (Soon to be Old?) Regulations

- Effective August 14, 2020
- Defines sexual harassment and scope of Title IX protections
- Adopts deliberate indifference to actual knowledge of sexual harassment standard
- Adds that knowledge of any school district employee can trigger a duty to respond
- Discusses formal/informal complaints



# Overview of New Regulations

- Discusses the procedures schools must have to respond to reports
  - ❖ Supportive measures
  - ❖ Process for emergency removal, if applicable
- Discusses procedures schools must have for due process
  - ❖ Investigation
  - ❖ Grievance process
  - ❖ Appeals process



# Overview of New Regulations

- Further defines role of Title IX Coordinator
- Provides role for investigator, decisionmaker, facilitator, and person reviewing any appeal
- Identifies policies school districts must implement
- Discusses written notices schools must provide
- Provides training schools must provide to personnel involved in the Title IX complaint process
- Includes specific anti-retaliation provisions with a complaint process for any retaliation

# The Rationale for the Grievance Process

- The new Title IX regulations require schools to investigate and adjudicate formal complaints of sexual harassment using a grievance process that incorporates **due process principles**, treats all parties fairly, and reaches reliable responsibility determinations.
- Schools must follow a grievance process that complies with Title IX regulations **before** the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent.



## Many District Staff Members Will Be Involved



Title IX Coordinator



Investigator



Decision-maker



Appeal Officer



Informal Resolution Facilitator



Hearing Advisors (if live hearings are utilized)



# How to Serve Impartially

- The new Title IX regulations require that any individual involved in the Title IX process -- Title IX Coordinator, investigator, decisionmaker, appellate decisionmaker, or informal resolution facilitator -- not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.



# Impartiality

- All Title IX personnel must avoid:
  - Prejudgment of the facts
  - Conflict of interest
  - Bias



# Avoiding Prejudgment

## Definition of prejudgment

- “To judge before hearing or before full and sufficient examination”
- “[A]n opinion about a situation of a person that is formed before knowing or considering all of the facts.” – Cambridge Dictionary

## Synonyms – Merriam-Webster

- Preconception
- Assumption
- Presumption/presupposition
- Speculation



# Avoiding Prejudgment

- **Examples:**
- An investigator, after interviewing only the complainant, concludes that the respondent must have engaged in the alleged misconduct.
- A juror in a criminal trial, after hearing only opening statements, makes up his mind that the defendant is guilty.



# Avoiding Prejudgment

## Ways to Avoid Prejudgment:

- **Remember:** anyone can be a Complainant, and anyone can be a Respondent (don't pre-judge)
- Full and fair consideration of the allegations
- Full and fair investigation of the allegations and the evidence
- Full and fair consideration of the facts and the evidence
- Maintain the presumption that the Respondent is not responsible



# Avoiding Prejudgment

## Things Not To Do:

- Assume or infer the existence of facts or the outcome
- “Connect the dots”
- Speculate
- Rely on personal experience or beliefs
- Weigh credibility  
(Title IX Coordinator and investigators)



# Conflicts of Interest

## Definition of conflict of interest

- “A situation in which the concerns or aims of two different parties are **incompatible**.”
- A conflict of interest arises when what is in a person’s best interest is not in the best interest of another person or organization to which that individual owes loyalty.”

<https://ethicsunwrapped.utexas.edu/glossary/conflict-of-interest>





# Conflicts of Interest

## Examples of conflict of interest

- A male manager dates or is in a relationship with a female employee who reports to the manager
- An attorney enters into a business venture with a current client
- When a person must answer to two different individuals or groups at odds with one another



# Conflicts of Interest

## Identifying relationships that raise a conflict of interest

- Family
  - Within the first degree of consanguinity or affinity
  - Parent, child and spouse
- Workplace
  - Manager-employee
- Personal
  - Significant other
  - Friend



# Conflicts of Interest

## Criteria for assessing and detecting conflicts of interest

- What is the scope of the relationship?
- What are the competing interests?
- Can I act with total objectivity with regard to the competing interests?

*\*\*\*Also applies to the appearance of potential conflicts of interest\*\*\**



# Conflicts of Interest

## How to remedy conflicts of interest

- Disclosure
  - To supervisor
- Recusal
  - Evaluate necessity
  - Err on side of caution to avoid even the appearance of impropriety
- Mitigation



# Bias

## Definition of bias

- “[A]n inclination of temperament or outlook, especially: a personal and sometimes unreasonable judgment.”
- “[T]o give a settled and often prejudiced outlook to...his background biases him against foreigners.”

*Merriam-Webster*

**Synonyms** – nonobjectivity, one-sidedness, partiality, partisanship, prejudice



# Bias

- Under the commentary regarding the Title IX regulations, this includes bias against an individual's:
  - Sex
  - Race
  - Ethnicity
  - Sexual orientation
  - Gender identity
  - Disability
  - Immigration status
  - Financial ability
  - Other characteristic



# Bias v. Prejudgment

- **Bias**
  - Favoring one side over another – picking a side based on a reason that is not supported by evidence or logic
  - Occurs when an individual displays **partiality** or prejudice against someone, something, or some idea
- **Prejudgment**
  - When an individual **assumes** a fact or takes for granted a fact without supporting evidence



# Bias

- Recognize bias
- Ensure bias does not affect review or consideration of facts or evidence
  - For or against Complainants, generally
  - For or against Respondents, generally
  - For or against a particular Complainant
  - For or against a particular Respondent
- Leave any of your own biases out of the investigation before you begin
- The Investigator must remain neutral



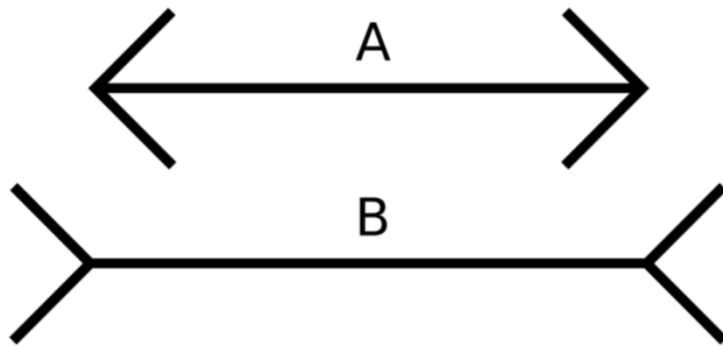


# Bias – a Thought Experiment

- The symphony wants to hire musicians
- Listen to musician applicants behind a screen—a “blind audition”
- Judges went as far as to ask applicants to take off shoes so the judges can’t get hints about whether they are listening to a man or woman
- Goldin, Claudia and Cecilia Rouse. "Orchestrating Impartiality: The Impact of " Blind" Auditions on Female Musicians." *The American Economic Review* 90.4 (2000): 715-741.



# Bias



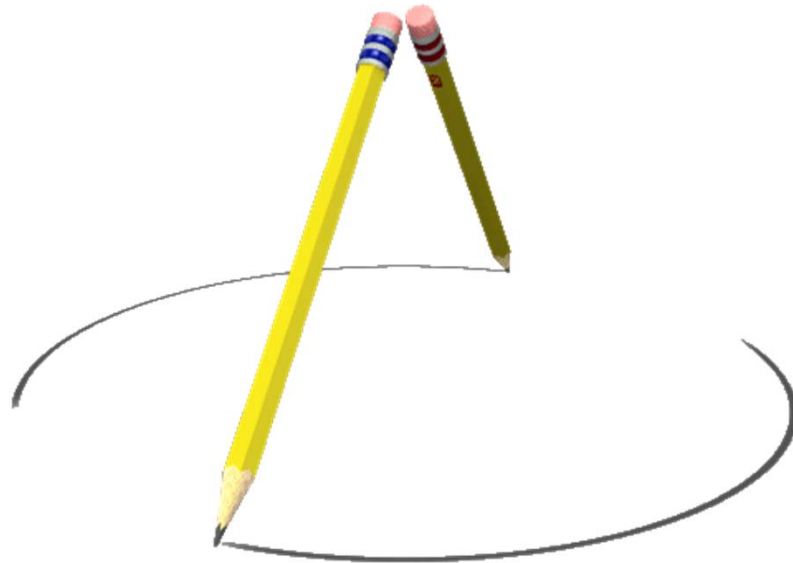
# Ensuring the Investigation is Impartial

- Conduct self-reflection and be honest with yourself
- In instances where you do not believe you can remain impartial, disclose this and allow someone else to conduct the investigation or engage in this role, in the particular case



# The Initiation Stage

*(primary actor: the Title IX Coordinator)*



# The Title IX Coordinator

- The school district must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under Title IX, and this employee must be referred to as the “Title IX Coordinator.”
- Contact information from the Title IX Coordinator must be listed on the website and in any handbooks or catalogs
- Must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent specifically

# The Title IX Coordinator

- The school district must provide the name or title, office address, electronic-mail address, and telephone number of the Title IX Coordinator to the following:
  - applicants for admission and employment
  - students, parents or legal guardians of elementary and secondary school students
  - employees, and
  - all unions or professional organizations holding collective bargaining or professional agreements with the recipient  
*(hereinafter “persons entitled to notification”).*

# The Title IX Coordinator

- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- Such a report may be made **at any time** (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

## Important Terms in the Title IX Grievance Process

- **Complainant:** The alleged victim of the conduct that could constitute sexual harassment
  - The Complainant is always the victim, even if the report was made by a parent/guardian, third party, or signed by the Title IX Coordinator
- **Respondent:** The individual reported to be the perpetrator of the conduct that could constitute sexual harassment
  - Required to call the accused the “Respondent”
- **Formal Complaint:** Written and signed document containing the allegations of sexual harassment





# Sexual Harassment Defined

## 1) Quid Pro Quo

- ❖ A **school employee** conditioning an educational benefit or service on an individual's participation in unwelcome sexual conduct

## 2) Hostile environment

- ❖ Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's educational program or activity

## 3) **Sexual assault, dating violence, domestic violence, or stalking** as defined under the Clery Act and the Violence Against Women Act

# Sexual Harassment: Hostile Environment

Several factors are considered:

- the degree to which the conduct affected the student's education
- the type, frequency, and duration of the conduct
- the relationship between the victim and the participant
- the number of individuals involved
- the age and sex of the participants
- size of school, location of incidents, and context
- other incidents of sex-based harassment

## Sexual Harassment: Hostile Environment

- Must be based on sex
- Must be severe and pervasive and objectively offensive
  - ❖ Severe – nature of the harassment
  - ❖ Pervasive – frequency of the harassment and length of time over which it has occurred
  - ❖ Objectively offensive – reasonable person standard
- Must deprive of educational opportunities
- An isolated incident, if severe, can be sufficient

## Sexual Violence Defined Under Federal Law

- Sexual assault
  - Defined in Clery Act
- Dating violence
- Domestic violence
- Stalking
  - Defined in Violence Against Women Act (VAWA”)



## “Sexual assault” under the Clery Act:

- “An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation” 20 U.S.C. § 1092(f)(6)(A)(v)
- Includes:
  - Rape
  - Fondling
  - Statutory Rape
- **Does not require an element of physical force**, but turns on lack of consent of the victim



## “Dating violence” under VAWA:

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim
- The existence of a relationship is determined based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship

34 U.S.C. § 12291(10)



# “Domestic violence” under VAWA

- A felony or misdemeanor crime of violence committed by:
  - A current or former spouse or intimate partner of the complainant,
  - A person with whom the complainant shares a child in common,
  - A person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner,
  - A person similarly situated to a spouse of the complainant under the domestic or family violence laws of the jurisdiction receiving grant monies, or
  - Any person against a complainant who is protected from that other person’s acts under the domestic or family violence laws of the jurisdiction

34 U.S.C. § 12291(8)



## “Stalking” under VAWA

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for his or her safety or the safety of others or;
- Suffer substantial emotional distress

34 U.S.C. § 12291(30)





## “... on the basis of sex”



- “Sex” is not defined
- Department stated “sexual harassment . . . does not depend on whether the definition of ‘sex’ involves solely the person’s biological characteristics . . . or whether a person’s ‘sex’ is defined to include a person’s gender identity. . . Anyone may experience sexual harassment, irrespective of gender identity or sexual orientation”

## Severe, Pervasive, and Objectively Offensive

*Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156 (5<sup>th</sup> Cir. 2011)

- Sanches alleged that J.H. started harassing her because she was dating J.H.'s former boyfriend, C.P.
- J.H. allegedly called Sanches a “ho” and said she “would beat her ass if it weren’t for cheerleading.” J.H. also started a rumor that Sanches “had a hickey on her boob.”
- J.H. “cornered” Sanches in the hallway during a passing period, “told [her] that she [J.H.] was having sex with [C.P.],” and “physically touched her by wiping the tears from [Sanches’s] eyes.”
- J.H. slapped C.P.’s buttock as she walked by Sanches and C.P. and stated that “your ass is so cute and you and [Sanches] are so cute!”

## Severe, Pervasive, and Objectively Offensive

*Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156 (5<sup>th</sup> Cir. 2011)

“Reduced to its essentials, this is nothing more than a dispute fueled by a disgruntled cheerleader mom, over whether her daughter should have made the squad. It’s a petty squabble, masquerading as a civil rights matter.”



## Severe, Pervasive, and Objectively Offensive

*Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156 (5<sup>th</sup> Cir. 2011)

- Sanches’s mother complained to the school about J.H.
- Meanwhile, J.H.’s parents complained about Sanches and her mother harassing J.H. They alleged that the administration was unfairly “allow[ing] one parent to drive an entire program...” The school attempted to investigate all the complaints.
- In rejecting the student’s Title IX claim, the court wrote: “Dating and relationships are an inescapable part of high school, as is the resulting stress. It is a trying time for young people who experience a wide range of emotions and often lack the skills to control them. J.H. was acting like a typical high-school whose ex-boyfriend began dating a younger cheerleader.”

## Severe, Pervasive, and Objectively Offensive

*Carmichael v. Galbraith*, 574 F. App'x 286 (5<sup>th</sup> Cir., June 19, 2014)

- The plaintiffs' 13-year-old son killed himself after allegedly being bullied by his fellow students.
- “Jon was accosted by a group of boys in the locker room—oftentimes having his underwear removed—while Defendant Watts observed.” Members of the football team allegedly “stripped [Jon] nude and tied him up” and “placed [Jon] into a trash can” while calling him “fag,” “queer,” and “homo.” One student “videotaped the attack and uploaded it to YouTube.”
- The harassment was, according to the complaint, “based on gender or gender-based stereotypes.”
- The court wrote that the “removal of a person’s underwear without their consent on numerous occasions plausibly constitutes pervasive harassment of a sexual character.”

# What Triggers A Need to Respond?

A school must respond **promptly** when it has:



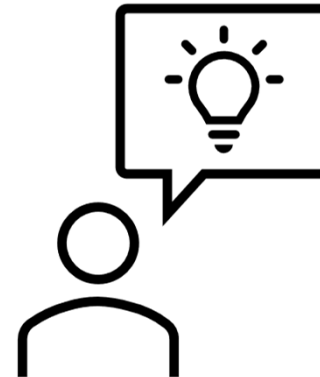
- ✓ actual knowledge
- ✓ of sexual harassment
- ✓ that occurred within the school's educational program or activity
- ✓ against a person in the United States

# Actual Knowledge

Actual knowledge means notice of *sexual harassment* or *allegations of sexual harassment* by **any employee** of an elementary and secondary school

- The new regulation changes the prior “knows or should have known standard” to actual knowledge.

This standard is not met when the only official of the recipient with actual knowledge is the respondent (employee)



# Substantial Control

- The sexual harassment must occur **within the school's program or activity** (on or off campus)
  - ❖ This “includes locations, events, or circumstances over which the recipient exercised **substantial control over both the respondent and the context** in which the sexual harassment occurs.”
- The harassment must have been perpetrated against a person **in the United States**



# Educational Programs and Activities

“...under any education program or activity...”

- Institution must have **substantial control** over the **respondent and context** of the harassment
- Context:
  - ❖ Off-campus conduct not categorically excluded; fact specific and case-by-case basis
  - ❖ Did the school promote or sponsor the event?

# Educational Programs and Activities

“...under any education program or activity...”

- Did the school promote or sponsor the event?
- Examples
  - ❖ Instructional programs
  - ❖ Athletic programs
  - ❖ Student organizations



# Educational Programs and Activities

“...under any education program or activity...”

- Basic instruction
- Guidance, counseling, and evaluation services
- Cocurricular and extracurricular activities
- Health services
- Student transportation
- Food services
- Social work services



# Educational Programs and Activities

“...under any education program or activity...”

## More Examples

- Field trips and off-campus, school-sponsored activities
- Early College High Schools
- Career and technical programs
- Early (pre-kindergarten) learning
- Athletics
- Special education
- Visual and performing arts



# School District's Response



- Must respond in a manner that is **not “deliberately indifferent”**
  - ❖ The school cannot act in a manner that is clearly unreasonable in light of the known circumstances
  - ❖ The response must be **prompt**, even if the student delayed in bringing forth his or her complaint

# School District's Response

- Once the school knows about the sexual harassment, the Title IX Coordinator must contact the complainant (victim) to provide information regarding:
  - ❖ Supportive measures
  - ❖ Right to file a complaint
  - ❖ How to file a formal complaint
- A Title IX Coordinator must engage in such outreach even if no formal complaint has been filed by anyone

## Supportive Measures

- During the grievance process, the school must ensure supportive measures are offered to both the Complainant **and** the Respondent
  - ❑ Free, individualized services designed to restore or preserve an individual's equal access to education, to protect the individual's safety, or deter further sexual harassment
  - ❑ **Cannot be punitive or disciplinary**
- The measures should not unreasonably burden another person
- The measures should be kept confidential
- Title IX Coordinator is responsible for implementing the supportive measures

# Supportive Measures

- Examples:
  - ❖ counseling,
  - ❖ extensions of deadlines or other course-related adjustments,
  - ❖ modifications of work or class schedules,
  - ❖ campus escort services,
  - ❖ mutual restrictions on contact between the parties,
  - ❖ leaves of absence, and
  - ❖ increased security and monitoring of certain areas of the campus.





# Supportive Measures

The courts have held that schools have a duty to evaluate whether their efforts to stop ongoing harassment are ineffective, and potentially increase the severity of the measures they have put in place or take new measures to avoid new liability.

*Patterson v. Hudson Area Schs.*, 551 F.3d 438, 444 (6th Cir. 2009).

*Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir. 2000).



## Emergency Removal / Administrative Leave

- Emergency removal of student
  - ❖ Must conduct an individualized safety and risk assessment
  - ❖ Student is an imminent threat to the physical health or safety of another student or individual arising from the allegations of sexual harassment
  - ❖ Provide notice and immediate opportunity to challenge the decision
- Administrative leave for employees during investigation is permitted
  - ❖ Follow state law, Board policy, and normal district procedures

## IDEA & Section 504 Implications

- Removal of a student would be a change of placement
- MDR requirements and procedural safeguards will be triggered
- Some supportive measures, such as provision of counseling or changes to class schedules, will also implicate placements and services under IDEA and Section 504
- **Bottom line**: ARD/Section 504 Committees will need to be involved from the beginning and the Title IX staff will need to be trained on identifying and address SPED/504 implications

# Formal Complaints

- May be made by a complainant (or parent, or legal guardian) or signed by the Title IX Coordinator
  - ❖ Complainant's wishes as to whether to file a formal complaint should be respected unless the Title IX Coordinator determines that initiating an investigation against the complainant's wishes is not clearly unreasonable
- Complainant must be participating in or attempting to participate in the school's education program or activity
- School must have policy regarding how to file a formal complaint and must publish how to file the formal complaint on the district's website

# Response to Formal Complaints

- Upon receipt of a formal complaint and prior to any interviews, school must provide the parties written notice of:
  - ❖ The school's grievance process;
  - ❖ The allegations of sexual harassment;
  - ❖ The presumption of innocence;
  - ❖ The right to inspect and review evidence;
  - ❖ The right to have an advisor during the process; and
  - ❖ Any provision in the school's code of conduct that prohibits knowingly making false statements or submitting false information during the grievance process.



## Informal Resolution

- An alternative to the formal grievance procedure that schools *may* offer, but are not required to offer.
- Schools may not offer the parties informal resolution options, such as mediation or restorative justice, unless a formal Title IX complaint is filed.
- Informal resolution is never permitted in employee-student sexual harassment cases.
- Schools cannot require parties to attempt informal resolution and cannot require waiver of a formal adjudication.

# Informal Resolution Facilitator

- Schools that choose to use an informal resolution process should identify an informal resolution facilitator to oversee the process.
- Need not be a school district employee; can be an outside mediator or arbitrator.
- Informal resolution facilitator must be trained on:
  - ❖ The definition of sexual harassment;
  - ❖ The scope of the school's education program/activities;
  - ❖ How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes;
  - ❖ How to serve impartially.

## Informal Resolution Process

- Informal resolution steps are allowed at any time during the formal complaint process if:
  - ❖ The school provides the parties written notice of the allegations and their rights.
  - ❖ Both parties give voluntary, informed, written consent.
  - ❖ Parties have the right to withdraw from the informal process at any time and proceed with the formal grievance process.



# Dismissal of Formal Complaints

- The regulations set out **mandatory** and **discretionary** reasons for dismissal of formal complaints.
- Goal: complainants must be empowered with the authority to start an investigation, but OCR cannot require schools to adjudicate misconduct not covered by Title IX or control how such non-Title IX misconduct is handled.

34 C.F.R. § 106.45(b)(3)

# Formal Complaints: Dismissal

- **Mandatory Dismissal**
  - ❖ Complaint does not describe conduct that would constitute sexual harassment, as defined, even if proven
  - ❖ The sexual harassment did not occur in the school's education program or activity
  - ❖ The sexual harassment did not occur against a person in the United States

# Formal Complaints: Dismissal

- **Permissive/Discretionary Dismissal**
  - ❖ Complainant notifies Title IX Coordinator in writing that he/she wishes to withdraw the formal complaint or some allegations in the complaint
  - ❖ The respondent is no longer enrolled or employed
  - ❖ Circumstances exist that prevent the school from gathering sufficient evidence to reach a determination about the allegations

## Formal Complaints: Dismissal

- If the school dismisses the complaint or allegations in the complaint, it must promptly send written notice of the dismissal **and** the reason for the dismissal to all parties
- Any party can appeal the dismissal decision

## Formal Complaints: Dismissal

- Even if you dismiss a complaint because it doesn't meet the requirements for **Title IX**, you should consider whether it violates something else, like **the Student Code of Conduct**.



# Consolidation of Formal Complaints

- The school district may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.
- Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular “party,” “complainant,” or “respondent” include the plural, as applicable.

# Title IX Complaint Process



# The Investigation Stage

*(primary actor: the Investigator(s))*





# The Investigators

- Recommend Title IX coordinators not serve as Investigators
- Training for **all** Title IX personnel
  - Definition of sexual harassment
  - Scope of the school's education program or activity
  - Conducting an investigation
  - The grievance process, hearings, appeals, and informal resolution processes
  - Serving impartially

# The Investigators

- Required investigator-specific training
  - Relevance
  - Applying Rape Shield protections
- Recommended investigator-specific training
  - Types of Evidence
  - Standard of Evidence
  - How to gather evidence
  - Conducting interviews
  - Evaluating the evidence
  - Drafting the investigative report
  - Other legal considerations

## Overview of the Investigative Process

- The school district must investigate all Formal Complaints
- Treat the Complainant and Respondent equitably
- The school district must provide **equal opportunity** to the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence

## Overview of the Investigative Process

- The Respondent is **presumed not responsible** at the outset of the investigation
- The Investigators must remain impartial and be free of conflicts of interest or bias
- Consistent investigation process for student-on-student and employee-on-student sexual harassment

## Overview of the Investigative Process

- A school cannot restrict the parties' ability to discuss the allegations or gather evidence (i.e. no "gag orders")
- But confidentiality should be maintained to the greatest extent possible



## Right to an Advisor

- The Complainant and Respondent must be given the opportunity to select an advisor of their choice
- The advisor may be present for any meeting or interview during the investigative process
- The school district may establish restrictions regarding the extent to which the advisor may participate in the proceedings if the restrictions are equally applied to both parties
- Advisor may inspect and review the evidence

# Standard of Evidence

- School districts must decide whether they want to use a “preponderance of the evidence” or “clear and convincing evidence” standard
  - ❑ A **preponderance of the evidence** standard of evidence is understood to mean concluding that a fact is more likely than not to be true. At least 51% of the evidence favors the Complainant.
  - ❑ A **clear and convincing evidence** standard of evidence is understood to mean concluding that a fact is highly probable to be true.



Must use the same standard of evidence for **all** complaints against students and employees

# Investigation Time Frames

- Investigation is conducted within reasonably prompt time frames
  - Some exceptions due to law enforcement investigations, party or witness absence, or providing language or disability accommodations
- Considerations in developing time frames
  - Written notice required for any interviews or meetings
  - Provide party with sufficient time to prepare for interviews
  - Scope of investigations
  - Required time for parties to submit written responses to the evidence



## Gathering Evidence

- The burden to gather evidence is on the school—not the parties
- **Equal opportunity** for the parties to present inculpatory and exculpatory evidence



## Gathering Evidence

- After receipt of the Formal Complaint, an investigator should:
  - Immediately identify and preserve likely sources of evidence
  - Preserve evidence—locate and take control of the evidence
- The school district—or the investigator—has the burden of gathering evidence

# Relevant evidence

Evidence is relevant if

(a) it has any tendency to make a fact more or less probable than it would be without the evidence, and;

(b) the fact is of consequence in determining the action.

FED. R. EVID. 401



# Gathering Evidence

- “Inculpatory evidence”
  - Favorable to the Complainant
  - Evidence that shows or tends to show an individual’s involvement in the alleged sexual harassment that can establish responsibility
- “Exculpatory evidence”
  - Favorable to the Respondent
  - Evidence that exonerates or tends to show the Respondent is not responsible for the alleged sexual harassment incident

## Gathering the Evidence



- No information protected by legal privilege may be used during an investigation unless waived in writing by the person holding the privilege
  - Attorney-Client, Physician/ Psychotherapist-Patient, etc.
  - No questions may be asked about these matters unless privilege is waived

# Attorney-Client Privilege

- “The assertor of the lawyer-client privilege must prove: (1) that he made a *confidential* communication; (2) to a lawyer or his subordinate; (3) for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding.” *United States v. Robinson*, 121 F.3d 971, 974 (5th Cir. 1997).
- The attorney-client privilege generally protects communications **between** only the attorney and the client (and sometimes their representatives)
- The attorney-client privilege protects only communications made in **confidence** for the purpose of obtaining legal advice from the attorney.
- The attorney-client privilege protects communications from discovery only if the communications were made for the purpose of securing **legal advice**

# Physician/Psychotherapist-Patient

- Under **federal law**, a person has a limited privilege to refuse to disclose, and to prevent another from disclosing, confidential communications made to a psychotherapist for the purposes of diagnosis or treatment of a mental or emotional condition, including drug addiction. *Jaffee v. Redmond*, 518 US 1, 15 (1996)
  - A psychotherapist is a person authorized to engage in the diagnosis or treatment of a mental or emotional condition, including drug addiction.
  - The privilege may extend to unlicensed counselors.
  - The privilege is limited to confidential communications made in the course of diagnosis or treatment.

## Physician/Psychotherapist-Patient

- Under **state law**, a person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between a physician and the patient that relates to or was made in connection with any professional services that physician rendered the patient, and a record of the patient's identity, diagnosis, evaluation, or treatment created or maintain by the physician. TEX. R. EVID. 509(c).





# Interviews

- School must provide parties **written notice** of the date, time, location, participants, and purpose of all investigative interviews or other meetings **with sufficient time to prepare**

**No more surprise interviews!**



- Must provide parties with equal opportunity to present evidence and identify fact and expert witnesses

## Interviews – Rape Shield Protections

- Questions and evidence related to a Complainant's prior sexual history or sexual behavior are **not relevant** and may not be asked/sought
- Exceptions in two narrow circumstances:
  1. The evidence is offered to prove someone other than the respondent committed the alleged sexual harassment
  2. The evidence relates to the sexual behavior between the complainant and respondent and is offered to prove consent
- Except in these two narrow circumstances, do not seek evidence or ask a complainant questions about their prior sexual history or sexual behavior

# Interviews

DO	DON'T
Take all allegations and statements seriously	Make credibility determinations based on sex-stereotyping or status in the investigation
Make the employee feel at ease	Create a hostile or unwelcoming environment
Be neutral, objective, and open-minded	Have an agenda
Let the interviewee tell his or her story	Conduct an interrogation
Listen <u>actively</u>	Be a passive interviewer
Be thorough – make sure to elicit all relevant facts	Shy away from asking tough questions
Test the credibility of the statements made during the interview	Conduct the interview without reference to any documentation
Seek information regarding potential justifications/excuses	Rush to judgment
Ask probing questions	Be argumentative or accusatory
Ask all necessary follow-up questions	Do all the talking
Ask for any supporting documentation and/or corroborating witnesses	Be unprepared

## Other Legal Considerations

- Student Fifth Amendment Rights–Right Against Self-Incrimination

- “Administrators, teachers, and other professional personnel may question a student regarding the student’s own conduct or the conduct of other students. In the context of school discipline, students have no claim to the right not to incriminate themselves.”

TASB Policy FNF (Local)

- At the same time, “No student shall be required... to submit to a survey, analysis, or evaluation that reveals information concerning the following topics without the prior consent of the student or parent:
  - Sex behavior and attitudes
  - Illegal, anti-social, self-incriminating, and demeaning behavior.”

TASB Policy FL (Legal)

# Other Legal Considerations

- Employee Fifth Amendment Rights–Right Against Self-Incrimination
  - ❑ A school district, when demanding answers to work-related questions, cannot compel employees to give up their right against self-incrimination.
  - ❑ A school district may dismiss someone for refusing to answer work-related questions *so long as the employee is **not** required to waive immunity from prosecution based on his or her answers to the questions.*
- The *Garrity* Warning
  - ❑ Incriminating information obtained from a **compelled examination** cannot be used in a subsequent criminal proceeding
  - ❑ *Garrity* rule applies in investigatory situations where the employee is **compelled** to answer questions about workplace wrongdoing, under threat of termination AND gives up right against self-incrimination
  - ❑ The rule applies to all public employees

# Investigation – Practical Tips

- Develop an investigation plan. What needs to be investigated? What is the scope?
- Interview the complainant and the respondent.
  - Develop outlines in advance based on available information.
  - Identify relevant documents (e.g., club or class roster).
  - Conduct follow-up interviews as may be appropriate during the investigation.

# Investigation – Practical Tips

- Take excellent notes. Use quotation marks to indicate direct quotes. Obtain a written statement from witnesses when possible.
- Avoid developing an email/texting relationship with the reporting party, respondent, or witnesses. Emails should be ministerial (*e.g.*, to schedule a meeting).
- Promptly pull and *save* surveillance video if relevant. Obtain and save copies of electronic evidence as promptly as possible (*e.g.*, text messages, Facebook postings). Take photographs when needed. Do not photograph a victim's injuries without consent.

# Investigation – Practical Tips

- The reporting party and the respondent are entitled to fairness, respect, sensitivity.
- Both may experience stress throughout the process.
- Conduct the interviews in a comfortable environment.
- Allow the student to bring an advisor.
- Demonstrate empathy and patience.





## Investigation – Practical Tips

- Ask open-ended questions, followed by appropriate clarifying questions.
- Ask at the end of the interview: “Is there anything else about this situation that I should know?”
- Invite the individual to contact you with additional information.

# Investigation – Practical Tips

- Interview individuals who are likely to have material information. Document efforts to contact witnesses. Interview witnesses one at a time.
- Inform each person interviewed about the policy against retaliation.
- When interviewing third-party witnesses, share the least amount of information possible, and ask non-leading questions.
  - Ex.: “We have a complaint about the lab environment. What can you tell me about the environment in the lab?”

# Investigation – Practical Tips

- Ask questions to understand relationships and bias. E.g., “How do you know the reporting party?”
- Withhold judgment until the facts are in. Don’t offer opinions about facts that are shared.
- Don’t ask the complainant and the respondent to contact witnesses themselves...
  - ... but do obtain contact information.

## Evaluating the Evidence

- Investigators must objectively evaluate all the evidence
  - ❑ No conflict of interest or bias
  - ❑ Investigation cannot itself discriminate against the Complainant or Respondent on the basis of sex
  - ❑ Respondent maintains the **presumption of not responsible** during the investigation
    - Only at the conclusion of the entire grievance process can a finding of responsibility be made

## Evaluating the Evidence

- Investigators must objectively evaluate all the evidence
  - ❑ Credibility determinations cannot be made based on the status as a Complainant, Respondent, or witness
    - Credibility determinations are not made by the investigator—the decision-maker will decide credibility
    - Investigator can include a summary of contradicting evidence and statements for the decision maker

# Types of Evidence

- Investigators should understand the types of evidence they are evaluating:
  - Direct Evidence
  - Circumstantial Evidence
  - Statistical Evidence
  - Hearsay
  - Rumor or Innuendo

# Direct Evidence

- Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

BLACK'S LAW DICTIONARY 675 (10<sup>th</sup> ed. 2014)

# Circumstantial Evidence

- Evidence based inference and not on personal knowledge or observation...all evidence that is not given by eyewitness testimony.

BLACK'S LAW DICTIONARY 674 (10<sup>th</sup> ed. 2014)



# Hearsay Evidence

- Hearsay means a statement (oral or written) that the declarant does not make while testifying at the current trial or hearing, and that a party offers in evidence to prove the truth of the matter asserted in the statement.

FED. R. EVID. 801(c)

# Reviewing the Evidence

- Must provide the parties and advisors an opportunity to inspect and review the evidence
  - Evidence that is directly related to the allegations raised in the Formal Complaint
  - Statements, notes of interviews, and other types of evidence the school plans to use before reaching a determination *and* evidence the school doesn't think it will use
  - Provide the evidence in electronic or hard copy format
- The parties must be given at least **10 days** to review all the evidence and submit written responses about the evidence to the investigator

# Considering the Parties' Comments

- The Investigator must consider the parties' response(s) to the evidence:
  - Did either party identify new witnesses who may need to be interviewed, or new evidence that will need to be collected and considered?
  - Did either party raise relevancy concerns about the current evidence?
  - Did either party point out inconsistencies in the evidence?

# Finalizing the Investigation Report

- Investigator must share the final Investigative Report with both parties and their advisors
- Both parties must be given at least **10 days** to review and submit a written response regarding the investigation report to the decisionmaker before any final determination of responsibility



# Investigation Time Frame Example

Week	Su	M	Tu	W	Th	F	Sa
1		Formal Complaint Submitted		Notice to Parties	Determine Scope of Investigation		
2		Gathering Evidence and Interviews					
3		Gathering Evidence and Interviews					
4		Provide Evidence to Parties					
5						Written Response Deadline	
6		Receive and consider written responses to the evidence.		Issue Investigative Report			

# Investigative Process Checklist

- Identify investigators
- Determine appropriate investigation time frames in accordance with Title IX Final Rule requirements
- Draft templates to parties and witnesses to maintain consistency
  - Formal Complaint/Initiation of Investigation templates
  - Notice of Evidence
  - Interview/meeting notices
  - Examining evidence and details on how to provide written responses to the evidence
  - Investigative Report and time to respond
  - Other notices/report templates deemed necessary
- Revise school district policies and regulations

# The Determination Stage

*(primary actor: the Decisionmaker)*



# Key Questions

- **The Decisionmaker**
  - ❖ Who can serve as the decisionmaker?
  - ❖ What training must the decisionmaker receive?
- **The Written Decision**
  - ❖ What standard applies?
  - ❖ Required components of the decision
- **Informal Resolution**



# Key Questions

- **The Appeal Process**
  - ❖ Who can appeal
  - ❖ What are grounds for appeal
  - ❖ What must the process entail
- **Implementing the Decision**

# Determination Process

- Decisionmaker may not be the Title IX Coordinator or the investigator
- Decisionmaker (and anyone designated to facilitate an informal resolution process) must be free from conflicts of interest or bias:
  - ❖ against complainants and respondents generally; or,
  - ❖ against the particular complainant or respondent

# Hearings v. Written Questions

- Live hearings, with cross-examination, *are not required* at the K-12 level.
- Instead, schools must establish a written question/ answer process.



# Optional Live Hearing Process

If the optional live hearing process is used:

- If necessary, school must provide (and pay for) an advisor to parties free of charge.
- Each party's advisor must be able to cross-examine the other party and any witnesses, to challenge credibility, and ask follow-up questions.
- Only relevant cross-examination is permitted. The decisionmaker makes relevance decisions before questions are answered.
- The decisionmaker must disregard statements of parties and witnesses who do not submit to cross-examination.

# Hearing on Written Questions

- After completion of the investigation report, and after the report is provided to both parties.
- Each party must have the opportunity to submit written, **relevant** questions for any other party or witness.
- Process must provide opportunity for additional, **limited** follow-up questions from each party.

# Revisiting Rape Shield Protection for Complainants

- Limitation on questioning and evidence regarding the complainant's sexual predisposition or prior sexual behavior.
- Questions or evidence about complainant's prior sexual behavior are irrelevant, unless:
  - ❖ offered to prove someone else committed the alleged misconduct; or,
  - ❖ concern specific incidents in complainant's prior sexual history with the respondent and are offered to prove consent.

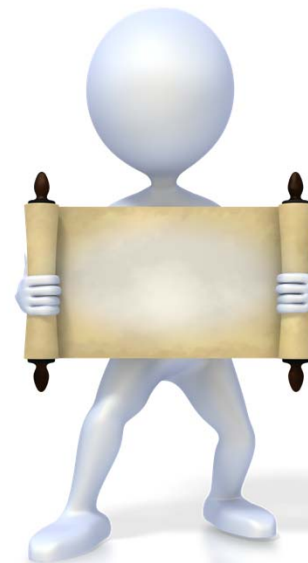
# Determination Process

- Decision must be objective and unbiased
- Objective evaluation of relevant evidence and conclusion about whether the respondent is responsible for alleged sexual harassment
- Must exercise independent judgment
- Must be free of conflict of interest or bias for or against the complainant or respondent.



# Determination of Responsibility

- Must apply the school's established standard of evidence (preponderance of the evidence or clear and convincing evidence).
- Decisionmaker must issue a written determination of responsibility.





# Reminder Regarding Dismissal

- Depending on the outcome of the investigation and the grievance process, it may be necessary to revisit dismissal of a Title IX formal complaint.
- Decisionmaker should consider whether grounds for dismissal were revealed.
  - ❖ Example: Conduct was not sexual harassment
  - ❖ Conduct not during school program/activity
  - ❖ Request to withdraw
- Decisionmaker should consider whether grounds for dismissal were revealed.

# Written Decision Requirements

- Identify the allegations at issue that potentially constitute sexual harassment.
- Include specific policy provision that the conduct allegedly violates
- Describe the school's procedural steps to date, from receipt of the complaint to the determination.
- Include findings of fact supporting the determination.
- Include conclusions regarding application of the school's code of conduct to the facts.

# Written Decision Requirements

- Decision must include a statement of, and rationale for, the result as to each allegation.
  - ❖ Determination regarding responsibility.
  - ❖ Any disciplinary sanctions imposed on the respondent.
  - ❖ Whether remedies designed to restore or preserve equal access to educational program will be provided by the school to the complainant.
- Must explain appeal process and permissible grounds for each party to appeal.
- Must provide the written determination to the parties simultaneously.

# Remedies

- The Title IX Coordinator is responsible for effective implementation of any remedies.
- Remedies must be designed to **restore or preserve equal access** to the school's educational program or activity.
- Need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent.
- If a student respondent is found responsible for sexual assault, discipline could include suspension, DAEP placement, or expulsion.

# Appeals

- Schools must create a process for appealing (1) a determination regarding responsibility and/or (2) the school's dismissal of a formal complaint.
- Each party must be provided notice of the appellate process and the opportunity to appeal.
- Grounds for appeal:
  - ❖ Mandatory
    - Procedural irregularities that affected the outcome
    - New evidence
    - Conflict of interest
  - ❖ School may choose to offer appeals on additional bases.
  - ❖ Both parties must have equal appeal rights.

# Appeals

- Decision-maker on appeal cannot be the same decision-maker from the initial determination, the investigator, or the Title IX Coordinator
- Process:
  - ❖ Both parties provided notice of the appeal and given opportunity to submit written statements
  - ❖ Decision-maker issues a written decision including the result and rationale

## Timeline of Investigation and Determination

Monday	Tuesday	Wednesday	Thursday	Friday
March 1  <b>Formal Complaint Filed</b>	2	3  <b>District provides notice of the allegations of sexual harassment</b> <i>... with sufficient time to prepare a response before any initial interview</i>  <i>advisor of their choice – presumably we have to give them time to find an advisor of their choice?</i>	4	5
8	9	10  <b>Interviews</b>	11  <b>Interviews</b>	12
15  <b>Provide evidence subject to inspection and review</b> -- give parties <i>have at least 10 days to submit a written response</i>	16	17	18	19

**Legend:**

**Green days** are statutory mandatory days

**Yellow days** are "permissive" days, and might be reduced (but not likely)

## Timeline of Investigation and Determination

March 22	23	24	25	26
29	30	31	April 1	2
Receive and consider written comments from parties as to evidence		Issue Investigative Report to both parties – give 10 days for their review and written response		
5	6	7	8	9
<i>decision-maker(s) must 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 from each party</i>				
12	13	14	15	16
		Receive and consider written response from parties as to investigation report		Issue Determination

**Legend:**

Green days are statutory mandatory days

Yellow days are “permissive” days, and might be reduced (but not likely)



# What did this investigation presume?

- TIXC could analyze complaint, assemble team, and issue initial notice of interview in two (2) days
- Parties are given five (5) days to find an advisor (attorney?) and prepare for interviews
- Investigator is able to conduct interviews over two (2) days, synthesize information and evidence, and provide parties access to evidence in 1-2 days
- Investigator is able to receive comments about evidence, synthesize them into report, and issue investigation report in two (2) days
- Right of parties to submit written, relevant questions that a party wants decisionmaker to ask any other party or witness, review answers, and ask additional, limited follow-up questions does not extend the mandatory 10-day period between investigation report and determination (hint: it probably will)
- Decisionmaker is able receive comments about investigation report, as well as first and (limited)second round of written cross examination answers, synthesize that information, and issue written determination report in two (2) days

# Training Materials

Schools must ensure that all training materials are accessible on their websites



# Retaliation

- New regulations contain an anti-retaliation provision
- Charges of code of conduct violations that arise out of the same facts or circumstances as a report of sex discrimination or sexual harassment **for the purpose of interfering with any right under Title IX** constitutes retaliation
- Charges for making a materially false statement is not retaliation if charge is **not** based solely on outcome of the grievance process
- Complaint process for retaliation



# Recordkeeping



Must retain records for **seven** years.

Records must include:

- ❖ Final determination;
- ❖ Any audio/visual records or transcripts;
- ❖ Supportive measures taken or reason for no supportive measures;
- ❖ Sanctions imposed;
- ❖ Remedies provided;
- ❖ Appeal and result;
- ❖ Informal resolution and result;
- ❖ All training materials; and
- ❖ The basis for the school's conclusion that any response to an allegation of sexual assault was not deliberately indifferent and that it took measures to restore/preserve equal access.

# Homework

- ☑ Develop a plan to implement the new regulations
- ☑ Identify Title IX team: Coordinator, investigator(s), decision-maker(s), and facilitators
- ☑ Title IX Coordinator:
  - Must have the title “Title IX Coordinator”
  - Prepare documentation and processes to provide the Title IX Coordinator’s name or title, office address, email address, and telephone number to:
    - ☐ Applicants for admission and employment
    - ☐ Students, parents or legal guardians
    - ☐ Employees
    - ☐ All professional organizations holding professional agreements with the district
  - Prominently display the contact information for the Title IX Coordinator on the district’s website



# Homework

- Title IX Coordinator will:
  - Receive reports
  - Advise complainant of availability of supportive measures
  - Explain to the complainant the process for filing a formal complaint
  - Potentially sign the formal complaint
  - Implement supportive measures
  
- Determine whether Title IX Coordinator will also be an investigator or if the school will keep the roles separate



# Homework

## Training

- Title IX Coordinator, investigator(s), decision-maker(s), decision-maker(s) for appeals, facilitators
- Training for all other employees regarding need to report sexual harassment
- Must post all training materials on website
- Ensure training meets all requirements of the new regulations and does not engage in sex stereotyping



# Homework

## Policy Development



- TASB is developing model policies
- Develop timelines for your investigation/grievance process and appeals
- Determine whether the school will opt to adopt the hearing process
- Determine the standard of proof the school will use for all complaints of sexual harassment (clear and convincing evidence vs. preponderance of the evidence)
- Determine if school will provide additional bases for appeal of decision regarding responsibility
- Determine if the school will have a more expansive definition of sexual harassment
- Determine what process (if any) will be used by the school to address harassment that does not fall within the definition of sexual harassment in the Title IX regulations
- Determine process for complaints of retaliation



## Revising Relevant Policies and Procedures

- Board policies will likely need substantial revisions to comply with Title IX Final Rule regulations
- Suggestion: delegate development and implementation of detailed procedures to Superintendents in school district regulations

## What Can't and Can be in Policies?

- **Can't tell Complainant and Respondent:**
  - That they **must** consent to an interview and/or submit to a written statement
  - To refrain from discussing the case, facts, suspicions, or allegations with anyone other than the assigned investigator and his or her legal representative
  - To refrain from contacting witnesses
- **Can tell Complainant and Respondent**
  - That we encourage them to cooperate and provide all relevant and factual information
  - To provide truthful statements

# What Can't and Can be in Policies?

- **Can't tell Witnesses:**

- That they can't discuss the case, facts, suspicions, or allegations with the complainant or respondent
- To refrain from contacting the complainant or respondent
- That they must direct inquiries from respondents or their representative regarding the allegations to the assigned investigator

- **Can tell Witnesses:**

- That they don't have to discuss the case, facts, suspicions, or allegations with the complainant or respondent
- To provide truthful statements

# Homework

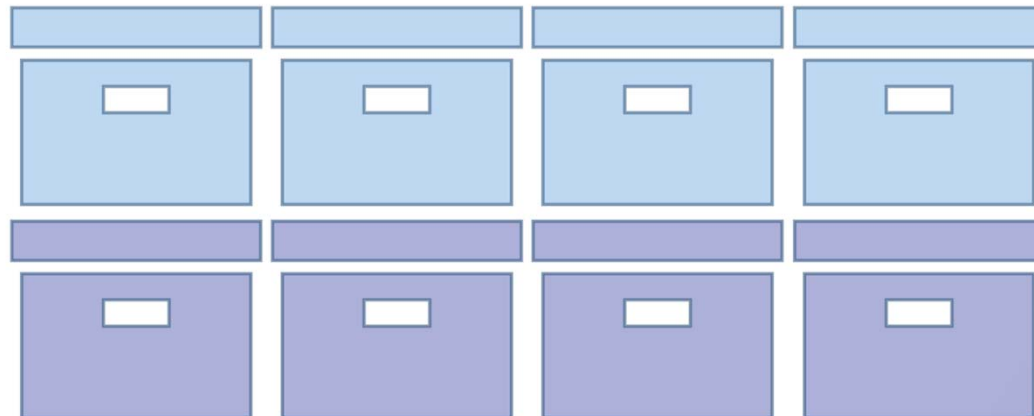
## Forms and Documentation

- Documentation to show initial response to report of sexual harassment
- Formal complaint form
- Notice to complainant and respondent regarding mandatory or permissive dismissal of formal complaint (before grievance process) and right to appeal dismissal
- Form to opt in or out of informal resolution process
- Notice to complainant and respondent at initiation of grievance process
- Notice forms regarding interviews/meetings during grievance process
- Potential checklist for investigator and decisionmaker to ensure the investigative report and decision contain all information required by the new regulations
- Appeal forms
- Checklist for recordkeeping



# Homework

- Recordkeeping
  - Update document retention schedule
  - Make sure all relevant personnel know of new recordkeeping procedures (Title IX Coordinator, investigator(s), decisionmaker(s), etc.)



# Questions? Comments?



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