

New Title IX Regulations: Responding to Allegations of Sexual Harassment



LEASOR
CRASS

302 W. BROAD STREET
MANSFIELD, TEXAS 76063
PHONE: 682.422.0009
FAX: 682.422.0008

www.lesorcrass.com

Presented by:

Mike Leasor, Holly James, and Debbie Cano

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Training Agenda

1. What is Title IX?
2. What is “Sexual Harassment” under new Title IX regulations?
3. How must a District respond to Sexual Harassment?
 - General response obligations
 - Obligations when a formal complaint is filed – Grievance Procedure
4. Student and Employee Discipline
5. Record-Keeping Obligations



Title IX Pre-Training Survey

Point your phone's camera app toward the QR code, and a survey link will open. Please complete this brief survey. Your responses are anonymous.



If you encounter issues using the QR code, use this link:

<https://forms.gle/CmZNDwpNV9ni3XJ1A>



Discrimination Generally

State and federal law, as well as Board Policy, prohibit discrimination, including harassment, against students or employees on the basis of:

- Race, color, national origin
- Sex or gender
- Religion
- Age
- Disability

Discrimination complaints handled under Board Policy:

- DIA(LOCAL) for employees
- FFH(LOCAL) for students

New Title IX regulations only impact complaints of sexual harassment (a subset of sex/gender discrimination).

- Sexual harassment has long been prohibited by Board Policy.
- Now, if the sexual harassment is of the type defined in the new Title IX regulations, ISDs must handle those complaints in the specific manner outlined in the regs.

What is Title IX?

- History
- Enforcement
- Why the New Regulations?



What is 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**.”

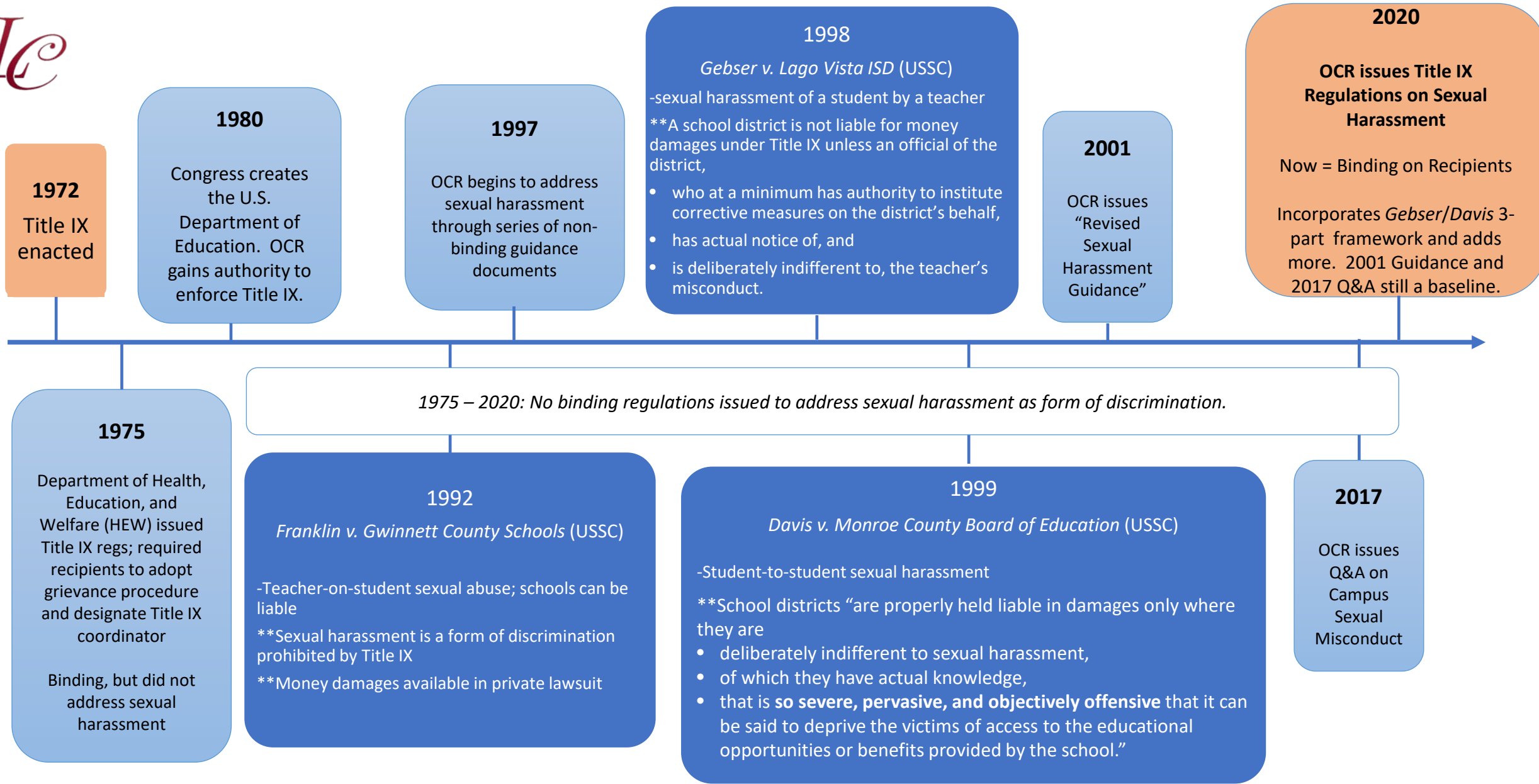
-Title IX of the Education Amendments of 1972

Administrative Enforcement - OCR

- Title IX is enforced by U.S. Dept of Education's Office of Civil Rights (OCR).
- OCR promulgates regulations and issues guidance on Title IX.
- OCR can investigate alleged violations.
- What can OCR do to an ISD?
 - Informal resolution, policy changes, etc.
 - Failure to comply = Loss of federal funding

Litigation

- Individuals can sue ISDs for alleged Title IX violations.
- Can recover money damages





Recap: Big Picture – The Changes

- In May 2020, OCR released its final rule amending Title IX regulations; rule **goes into effect August 14, 2020**.
- Before this amendment, Title IX regulations did not refer to sexual harassment.
 - Federal courts established the definitions and standards used in litigation
 - OCR set out standards for administrative liability through *nonbinding* letters and guidance.
- New/amended Title IX regs now define sexual harassment and establish procedures concerning how schools must respond to allegations of sexual harassment.
- Note that the amendments do not impact existing regulations concerning athletic participation, employment, or single-sex education. Nothing else under Title IX is affected.

School District's Logistical Obligations under Title IX Regulations:

- Policy Changes, Notice
- Title IX Personnel, Training



District Tasks

- Establish official grievance process to respond to allegations of sexual harassment
 - *TASB plans to release FFH(Regulation) Aug. 3rd.*
- Designate Title IX Coordinator and other Title IX personnel. Train each accordingly.
- Update District Policy and Handbooks.
- Provide notice of Title IX Coordinator and Non-Discrimination Policy.
- Train all employees about what “sexual harassment” is under the new regulations and how to respond.



Policy & Notice Requirements

- **District must provide notice of its nondiscrimination policy and grievance procedures**, including how to file or report sexual harassment and how the ISD will respond.
 - Notice of nondiscrimination must state that District does not discriminate on basis of sex in the education program or activity that it operates, and that ISD is required by Title IX and its regulations not to discriminate in such a manner.
 - Notice must state that this requirement not to discriminate applies to employment.
 - Notice must indicate that inquiries about the application of Title IX and its regs to the District may be referred to the Title IX Coordinator, to the Assistant Secretary of the U.S. Department of Education, or both.
- Notice must be provided to students, parents/guardians, employment applicants, unions or professional organizations holding agreements with the District.
 - District must also provide notice to these groups of people of the Title IX Coordinator's name or title, email address, office address, and phone number.
- District must publish notice of nondiscrimination & Title IX Coordinator's contact info on its website and in any handbook provided to the groups above.



So how many people are now involved in the process?



Title IX Players

Recipient	Complainant	Respondent
The school district	Alleged victim	Alleged perpetrator

“Recipient” Roles:	Title IX Coordinator	Investigator	Decision Maker	Appellate Decision Maker	Informal Resolution Facilitator
What do they do?	<ul style="list-style-type: none"> Employee designated & authorized by ISD to coordinate efforts to implement Title IX. Oversees logistics of entire grievance procedure to ensure compliance with Title IX regulations. Responsible for effective implementation of any remedies determined by Decision Maker. 	<ul style="list-style-type: none"> Investigates allegations in formal complaint (interviews witnesses, gathers evidence). Prepares written investigative report. 	<ul style="list-style-type: none"> Reviews investigative report. Facilitates process for each party to submit written, relevant questions that a party wants asked of any party or witness. Evaluates evidence and issues written determination of responsibility. 	<ul style="list-style-type: none"> Conducts appeals of dismissals and determinations of responsibility by decision maker (if a party appeals). Issues written decision. 	<ul style="list-style-type: none"> Facilitates informal resolution process (e.g., mediation) between a complainant and respondent with respect to a formal complaint.
Who can they be?	<ul style="list-style-type: none"> Must be a District employee. Must be known as “Title IX Coordinator”. Cannot be same person as decision maker. Should not be same as investigator. 	<ul style="list-style-type: none"> District employee or third-party provider. Cannot be same person as any other role, except Title IX Coordinator. 	<ul style="list-style-type: none"> District employee or third-party provider. Cannot be same person as any other role. 	<ul style="list-style-type: none"> District employee or third-party provider. Cannot be same person as any other role. 	<ul style="list-style-type: none"> District employee or third-party provider. Should not be same person as any other role.
Individual designated in any of these roles must not have a conflict of interest against complainants or respondents <i>generally</i> OR against the particular complainant or respondent in a given situation					



Training Requirements for Title IX Roles

	Title IX Coordinator	Investigator	Decision Maker	Appellate Decision Maker	Informal Resolution Facilitator
Required Training for All Roles	<p>*Training must promote impartial investigations and adjudication of formal complaints and must not be based on sex stereotypes.*</p> <p><i>Mandatory Training Components:</i></p> <ul style="list-style-type: none">• The definition of sexual harassment in section 160.30;• The scope of the recipient's education program or activity;• How to conduct an investigation and grievance process, including, as applicable, hearings, appeals, and informal processes; and• How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.				
Additional Training Requirements for Certain Roles		<ul style="list-style-type: none">• Issues of relevance to create an investigative report that fairly summarizes relevant evidence	<ul style="list-style-type: none">• Any technology to be used at a live hearing.• Issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual history or predisposition are not relevant.	<ul style="list-style-type: none">• Should receive same additional training as investigator and decision maker in order to conduct appropriate appellate review of decision	



More Training

ALL District employees need to be trained regarding how to handle allegations of sexual harassment:

- Notify Title IX Coordinator immediately

Overlap with State Reporting Obligations: CPS & SBEC

CPS Reporting

- Suspected child abuse must be reported to CPS. “Abuse” includes, but is not limited to, “sexual conduct” by “a person” that is “harmful to a child’s mental, emotional, or physical welfare.” (See Family Code § 261.001 for complete list.)
- A good-faith report of child abuse or neglect is confidential and immune from civil or criminal liability. Tex. Fam. Code § 261.106.
- Failure to report suspected abuse or neglect is a crime. Tex. Fam. Code § 261.109.
- Report must be made immediately or within 48 hours.

SBEC Reporting of Employee Sexual Misconduct

- District must notify SBEC if an employee is terminated or resigns and there is evidence that the employee engaged in sexual misconduct with a student or minor.
- District must complete investigation even if employee resigns.
- Principal must notify Superintendent not later than the 7th business day after the employee’s termination or resignation following an alleged incident of misconduct.
- Superintendent must notify the Commissioner not later than the 7th business day after Supt. receives report from Principal or knew about employee’s termination or resignation.

What is “Sexual Harassment” under the New Regulations?



What is “Sexual Harassment”?





“Sexual Harassment” Definition - § 106.30(a)

“**Sexual Harassment**” = conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct (i.e., quid pro quo sexual harassment);
2. 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 recipient’s education program or activity; or
3. “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).

#2 adopts the Supreme Court’s *Davis* standard, which is a higher standard than OCR applied in the past.

“**Education program or activity**” = any location, event, or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the context in which harassment occurred

SH definition does not turn on method of harassment; can be via e-mail, internet, or other technologies, as well as in-person, mail, handwritten, or other communications



Type 1: Quid Pro Quo Harassment

“An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct (i.e., quid pro quo sexual harassment)”

- This type of harassment can only be committed by employees, not students.
 - But the target of quid pro quo can be a student or another employee.
- The “bargain” proposed by the employee can be express or implied.
- **Quid pro quo harassment need not be severe and pervasive.**
 - OCR: “abuse of authority in the form of **even a single instance** of quid pro quo harassment (where the conduct is not ‘pervasive’) is inherently offensive and serious enough to jeopardize equal educational access[.]”

Wide range of conduct can fall on the spectrum for quid pro quo harassment.

Express propositions for sex in exchange for grades or a promotion

Back rubs/leg pats, student feels compelled to allow



Type 2: Severe, Pervasive, AND Objectively Offensive Conduct

“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 recipient’s education program or activity”

Remember *Davis*?

Per OCR 2001 Guidance:

- Kiss on the cheek by a first grader = not sexual harassment.
- **“School personnel should consider the age and maturity of students in responding to allegations of sexual harassment.”**

Under this new definition of sexual harassment in the 2020 regs, a kiss on the cheek at any age is probably not sexual harassment (not “so severe, pervasive, and objectively offensive....”)

“Education program or activity” = any location, event, or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the context in which harassment occurred



Type 3: Offenses Under Violence Against Women Act (VAWA)

1. “Sexual Assault” (20 U.S.C. 1092(f)(6)(A)(v))
2. “Dating Violence” (34 U.S.C. 12291(a)(10))
3. “Domestic Violence” (34 U.S.C. 12291(a)(8))
4. “Stalking” (34 U.S.C. 12291(a)(30))

➤ Any of these would likely involve a **simultaneous criminal investigation**.



Poll Question #1



Discussion Activity

In your Zoom breakout groups, respond to the question:

Could the interaction between Greg and Barb develop into a sexual harassment complaint?

- Why or why not?
- One person from each group will report out following the discussion session.
- You have 10 minutes for this activity.





Break
Time!

05:00

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How Must a District Respond to Sexual Harassment?



General Response Standard - § 106.44(a)

“**Education program or activity**” includes locations, events, or circumstances over which the district exercised substantial control over both the respondent and the context in which the sexual harassment occurs

- A recipient with **actual knowledge**
- of **sexual harassment**
- in an **education program or activity** of the recipient
- against a person **in the United States**,
- must **respond promptly**
- in a manner that is **not deliberately indifferent**.

New regulations do not apply to sexual harassment alleged to have happened outside the U.S.

- Districts may still address this under the student code of conduct
- Note that other Title IX prohibitions *do* apply outside the U.S.



What is “Actual Knowledge”?

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to:

- a recipient’s Title IX Coordinator or
- any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or
- **to any employee of an elementary and secondary school.**

- This means that if a student tells a teacher or a cafeteria worker about conduct that may be sexual harassment (or if the employee sees it happen), then that triggers the District’s obligations under the new regs.
- This is why it is critical for all employees to be trained on what sexual harassment is and that they need to notify the district’s Title IX Coordinator asap if the employee hears/sees something that *may* be sexual harassment.
 - Note that the determination of whether conduct actually *is* sexual harassment is made after an investigation.



What is a “Deliberately Indifferent” Response?

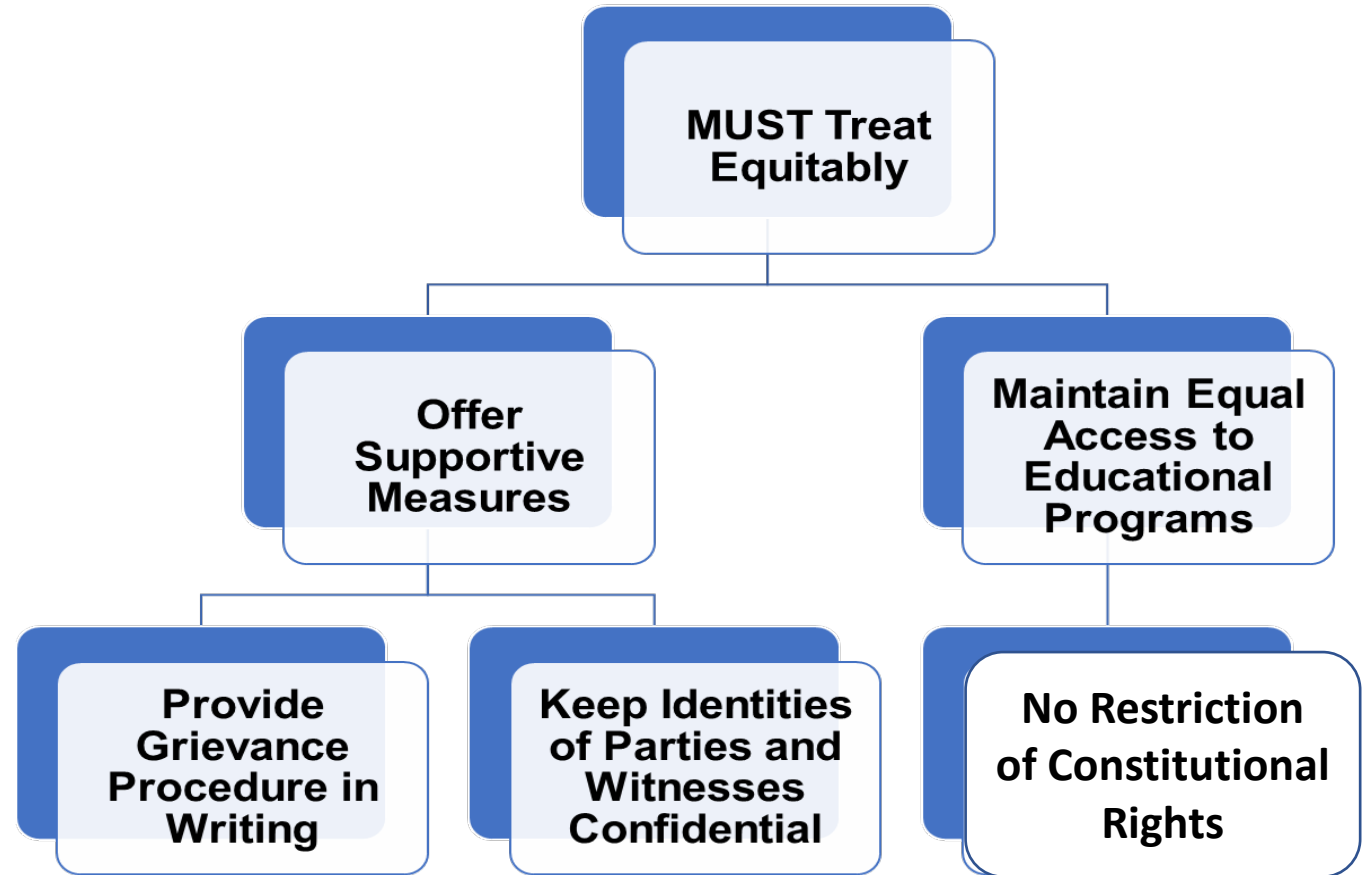
“A recipient is **deliberately indifferent** only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”



Rights of the Parties in Connection with District's Response to Sexual Harassment

“A district's response must treat complainants and respondents equitably by:

- **offering supportive measures** to a complainant, and
- **following a grievance process** that complies with § 106.45 **before the imposition of any disciplinary sanctions** or other actions that are not supportive measures against a respondent.”





Response to a Formal Complaint § 106.44(b)

(1) In response to a formal complaint, a recipient must follow a **grievance process that complies with § 106.45.**

- With or without a formal complaint, a recipient must comply with § 106.44(a).

(2) The Assistant Secretary [of the Department of Education] will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under Title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

If a formal complaint is filed:

1. District must investigate the allegations;
2. District must follow grievance process before imposing disciplinary sanctions



Basic Requirements for Title IX Grievance Process - Section 106.45(b)(1)

	<i>District's Grievance Process Must:</i>
Provide for equitable treatment of both parties	<p>Treat complainants and respondents equitably</p> <ul style="list-style-type: none">• by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and• by following a grievance process that complies with Section 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent. <p>Remedies must be designed to restore or preserve equal access to the recipient's education program or activity.</p> <ul style="list-style-type: none">• Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;
Objective Evaluation of Evidence	<p>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</p>



Continued - Basic Requirements for Title IX Grievance Process

	<i>District's Grievance Process Must:</i>
Designated District Personnel Must Not Have Conflict of Interest or Bias and Must Receive Training	<p>Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a district 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.</p> <p>Districts must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.</p> <ul style="list-style-type: none">• Districts must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.• A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. <p>Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;</p> <p>© 2020 Leasor Crass, P.C.</p>



Continued - Basic Requirements for Title IX Grievance Process

	<i>District's Grievance Process Must:</i>
Presumption of Non-Responsibility	Include 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;
Prompt Time Frames	<p>Include reasonably prompt time frames for conclusion of the grievance process,</p> <ul style="list-style-type: none">• including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the district offers informal resolution processes, and• a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.• Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.
Notice of Possible Disciplinary Consequences	Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the district may implement following any determination of responsibility;



Continued - Basic Requirements for Title IX Grievance Process

	<i>District's Grievance Process Must:</i>
Standard of Evidence	<p>State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard,</p> <ul style="list-style-type: none">• apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and• apply the same standard of evidence to all formal complaints of sexual harassment;
Appeal Procedures and Bases	<p>Include the procedures and permissible bases for the complainant and respondent to appeal;</p>
Notice of Available Supportive Measures	<p>Describe the range of supportive measures available to complainants and respondents</p>
No Violations of Privilege	<p>Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.</p>



Break
Time!

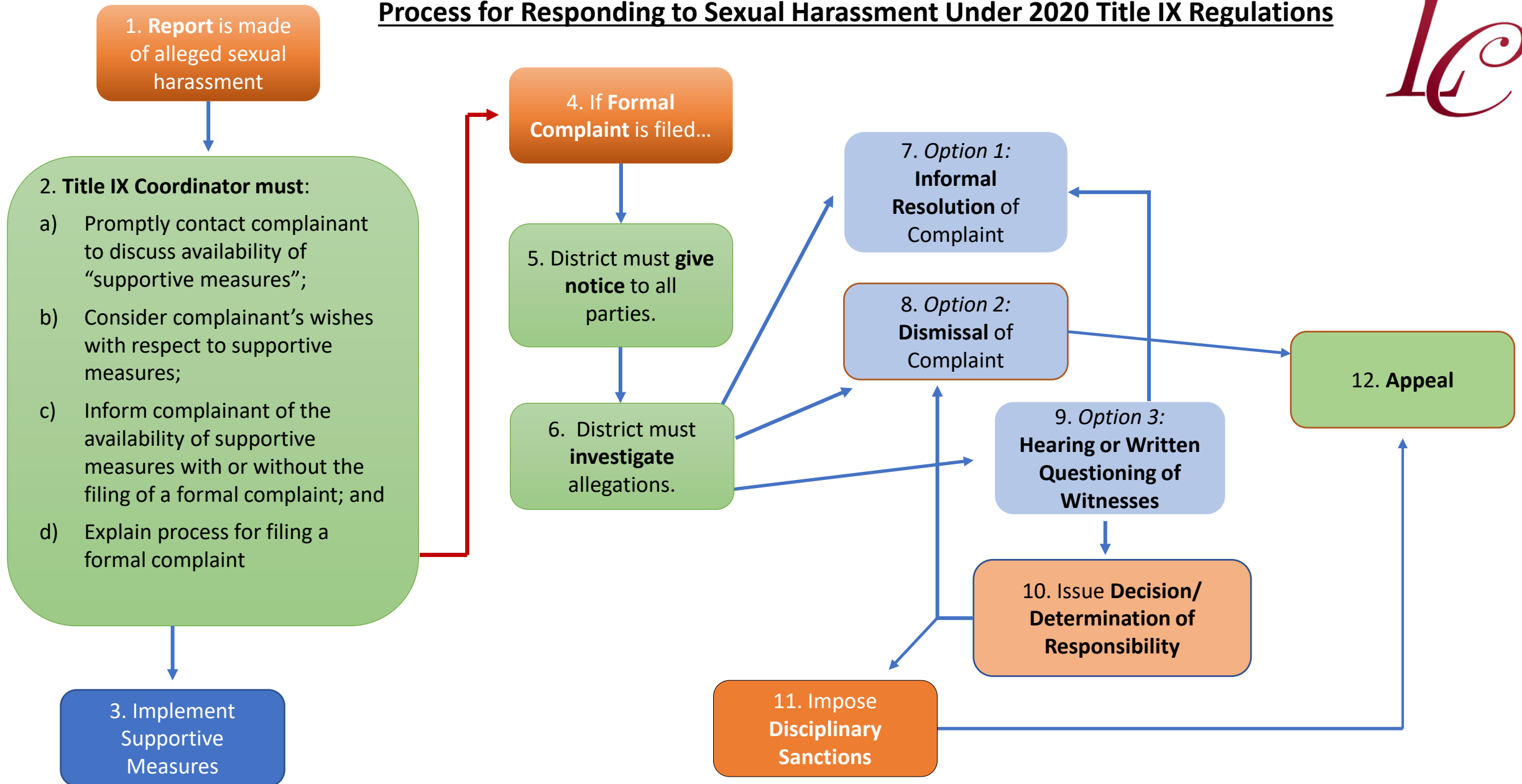
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Poll Question #2

Process for Responding to Sexual Harassment Under 2020 Title IX Regulations





1. Report is made of alleged sexual harassment



2. Title IX Coordinator – Discussion with Complainant



After a report is made of alleged sexual harassment, the Title IX Coordinator must:

- a) Promptly contact complainant to discuss availability of “supportive measures”;
- b) Consider complainant’s wishes with respect to supportive measures;
- c) Inform complainant that supportive measures are available with or without the filing of a formal complaint; and
- d) Explain process for filing a formal complaint.

3. Supportive Measures



Purpose

Supportive measures should be designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party.

In other words, a supportive measure that completely removes a respondent from an activity would likely be considered punitive.

What are they?

- 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

Examples

Counseling, course modifications, schedule changes, and increased monitoring or supervision

Rights of Both Parties

4. Formal Complaint



Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator **alleging sexual harassment** against a respondent and **requesting that the recipient investigate** the allegation of sexual harassment.

Complainant may file a formal complaint with the Title IX Coordinator by mail, email, or other method made available by ISD.

Title IX Coordinator may sign the complaint if the Complainant is unwilling to file a formal complaint.

- OCR included this option to ensure that an ISD does not respond to sexual harassment with deliberate indifference.
- This could involve implementing the formal grievance procedure over complainant's objections.
- Note that the complainant must still be provided access to supportive measures and receive written notice of steps in the grievance procedure even if they are not a willing participant in the procedure

Parent or guardian may act on student's behalf at any time during process.

At time of filing complaint, a complainant must be participating in or attempting to participate in the education program or activity of the ISD. (Complaints cannot be filed by or o/b/o former students.)

Filing of Formal Complaint triggers District's duty to investigate.

5. Notice to be Provided After Formal Complaint is Filed

Upon receipt of a formal complaint, **District must provide the following written notice to all known parties:**

- (1) Notice of the **District's grievance process**, including any informal resolution process.
- (2) Notice of the **allegations of sexual harassment**, including sufficient details known at the time and **with sufficient time to prepare a response before any initial interview**.
 - Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under the regulations, and the date and location of the alleged incident, if known.

The written notice must also:

- include a statement that **the respondent is presumed not responsible** for the alleged conduct;
- include a statement that a determination regarding responsibility is made at the conclusion of the grievance process;
- inform the parties that they **may have an advisor of their choice**, who may be, but is not required to be, an attorney;
- inform the parties that they **may inspect and review evidence**; and
- inform the parties of any provision in the district's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Note: If, in the course of an investigation, the district decides to investigate allegations about the complainant or respondent that are not included in the written notice provided, the district must provide notice of the additional allegations to the parties whose identities are known.

6. The Investigation



When investigating a formal complaint and throughout the grievance process, **a district must—**

- Ensure that the **burden of proof and the burden of gathering evidence** sufficient to reach a determination regarding responsibility **rest on the District** and not on the parties
 - *Note: District cannot access, consider, disclose, or otherwise use a party's treatment records without that party's voluntary, written consent to do so for purposes of the grievance procedure.*
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- Provide the parties with the **same opportunities to have others present during any grievance proceeding**, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding
 - *But District may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.*
- Provide, to a party whose participation is invited or expected, **written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;**

6. The Investigation - *continued*



The District must:

- Provide both parties an **equal opportunity to inspect and review any evidence** obtained as part of the investigation that is directly related to the allegations raised in a formal complaint,
 - including the evidence upon which the district does not intend to rely in reaching a determination regarding responsibility and
 - inculpatory or exculpatory evidence whether obtained from a party or other source,
 - *so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.*
- Prior to completion of the investigative report, **the district must send to each party and the party's advisor, if any, the evidence** subject to inspection and review in an electronic format or a hard copy, and the **parties must have at least 10 days to submit a written response**, which the investigator will consider prior to completion of the investigative report.
 - The district must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and
- **Create an investigative report that fairly summarizes relevant evidence** and,
 - **at least 10 days prior** to a hearing (if a hearing is required or otherwise provided) or other time of **determination regarding responsibility, send to each party** and the party's advisor, if any, **the investigative report** in an electronic format or a hard copy, **for their review and written response.**

Rights of the Parties

Parties may discuss allegations, gather, and present evidence.

Written investigative report summarizing relevant evidence at least 10 days before hearing.

Written notice to of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare.

All evidence provided to parties and their advisors with 10 days to respond before report.

May submit written, relevant questions to be asked of another party or witness to the decision maker.

Rape Shield Protections for Complainants

Questions about a complainant's prior sexual behavior or sexual predisposition only possible to establish that another person committed the alleged conduct or that the conduct was consensual.

If a recipient dismisses a complaint, written notice must be promptly provided to **both parties** simultaneously, including the reasons for mandatory or discretionary dismissal.

7. Informal Resolution



At any time prior to reaching a determination regarding responsibility, the **district may facilitate an informal resolution process**, such as mediation, that does not involve a full investigation and adjudication, *provided that the district –*

(i) **Provides written notice to the parties disclosing:**

- the allegations,
- the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations,
- *provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and*
- any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) **Obtains the parties' voluntary, written consent** to the informal resolution process; and

(iii) **Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.**

A district may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with Section 106.45.

A district may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed.



Poll Question #3

8. Dismissal of Complaint



Mandatory Dismissal IF:

- Allegation would not constitute “sexual harassment” as defined in section 106.30 even if proven;
- Did not occur in the school’s program or activity; OR
- Did not occur in the United states.

**Can still address these complaints under non-Title IX policy/Student Code of Conduct.*

Discretionary Dismissal IF:

- Complainant notifies the Title IX Coordinator in writing requesting to withdraw the formal complaint.
- Respondent’s enrollment or employment ends.
- Specific circumstances prevent recipient from gathering evidence sufficient to reach a determine (e.g., passage of time, lack of cooperation by complainant).

OCR’s commentary alludes to the passage of several years between a formal complaint and the alleged conduct, or a complainant ceasing to cooperate with the grievance process, as examples of “specific circumstances.”

- If the district dismisses a complaint, written notice **must be promptly provided to both parties simultaneously** and include the reasons for mandatory or discretionary dismissal.

9. Live Hearing or Written Questions to Parties (Decision Maker)

Live hearings are required only for postsecondary institutions. K-12 school districts may incorporate hearings into their grievance process if they choose.

With or without a hearing, *after* the recipient has sent the investigative report to the parties and *before* reaching a determination regarding responsibility, the 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.

With or without a hearing, **questions and evidence about the complainant's sexual predisposition or prior sexual behavior** are not relevant,

- *unless* such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

10. Determination of Responsibility by the Decision Maker



Decision-maker(s) must issue a written determination regarding responsibility.

- To reach this determination, decision-maker must apply the standard of evidence chosen by the District for its Title IX grievance process (preponderance of the evidence or clear and convincing).

The written determination must include:

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including

- any notifications to the parties,
- interviews with parties and witnesses,
- site visits,
- methods used to gather other evidence, and
- hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the district's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including

- a determination regarding responsibility,
- any disciplinary sanctions the district imposes on the respondent, and
- whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the complainant; and

(F) The district's procedures and permissible bases for the complainant and respondent to appeal.

District must provide the written determination to the parties simultaneously.

The determination regarding responsibility becomes final *either*

- on the date that the district 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.

The Title IX Coordinator is responsible for effective implementation of any remedies.

12. Appeal (Appellate Decision Maker)

District must offer both parties an **appeal from a determination regarding responsibility**, and **from a district's dismissal of a formal complaint or any allegations therein**, on the following bases:

1. Procedural irregularity that affected the outcome of the matter;
 2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 3. The Title IX Coordinator, investigator(s), or decision-maker(s) 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.
- A recipient may offer an appeal equally to both parties on additional bases.

As to all appeals, the district must:

- A. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- B. Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
- C. Ensure that the decision-maker(s) for the appeal does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent;
- D. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;**
- E. Issue a written decision describing the result of the appeal and the rationale for the result; and**
- F. Provide the written decision simultaneously to both parties.



Think – Pair – Share

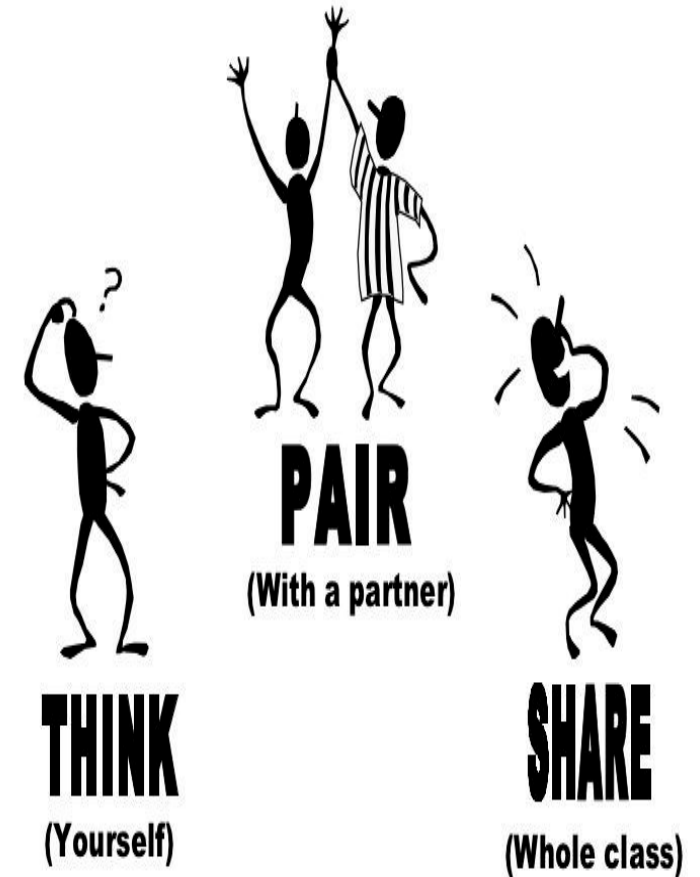
A. Individually, write down your response to the following questions:

- *What questions do you have at this point in the training?*
- *What concerns about Title IX are you thinking about?*
- *What ideas came to mind during the training?*
- *What do you need to support your understanding of Title IX?*

B. Discuss your responses with your Zoom breakout group.

C. Group Representative: Enter 1-2 main ideas in Chat.

D. Group debrief following discussion break.





Break
Time!

05:00

mins: secs: type:

11. Disciplinary Sanctions and Related Issues



Emergency Removal of Student-Respondent

§ 106.44(c)

Nothing in [the Title IX Regulations] precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that:

1. the recipient undertakes an **individualized safety and risk analysis**,
2. determines that an **immediate threat to the physical health or safety** of any student or other individual arising from the allegations of sexual harassment justifies removal, and
3. **provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.**

Per OCR: A district may need to initiate an emergency removal, in addition to offering supportive measures, in order to fulfill its duty not to respond with deliberate indifference.

- As an example of a situation that might justify emergency removal, OCR's commentary about the new regulations states that "if a respondent reacts to being accused of sexual harassment by threatening physical self-harm, an immediate threat to the respondent's physical safety may 'arise from' the allegations of sexual harassment and could justify an emergency removal."

An emergency removal does not modify any rights under the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

- **School districts must coordinate their compliance efforts with special education staff members.**
- Emergency removal of a student in a Title IX proceeding could potentially constitute a change of placement triggering procedural protections under IDEA or Section 504.



Administrative Leave of Employee-Respondent

§ 106.44(d)

A non-student employee respondent may be placed on administrative leave during the pendency of the grievance process.

- Leave cannot be punitive (must be a paid leave).
- Watch for any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.



Notice of Disciplinary Outcomes/Remedies

- Recall that a description or list of possible disciplinary outcomes and remedies that may be implemented following a determination of responsibility must be provided to the parties after a formal complaint is filed.
- **Note:** There are allowable supportive measures which do not constitute disciplinary action that a district may take to protect the safety of parties and deter sexual harassment, such as a no-contact order prohibiting communication with the complainant, supervising the respondent, and informing the respondent of the district's policy against sexual harassment.



Disciplinary Decisions – District’s Discretion

Per OCR: “As the Supreme Court noted [in *Davis*], Federal courts should not second guess schools’ disciplinary decisions, and the Department likewise believes that disciplinary decisions are best left to the sound discretion of recipients.”

“Recipients deserve flexibility to design sanctions that best reflect the needs and values of the recipient’s educational mission and community, and that most appropriately address the unique circumstances of each case.”

OCR “expressly defers to a recipient’s judgment with respect to disciplinary action against a respondent ***whom the recipient has determined to be responsible for sexual harassment.***”



Student Discipline

- Follow the District's Student Code of Conduct guidelines concerning disciplinary decisions.
- No disciplinary/punitive sanctions can be imposed until after there is a determination of responsibility by the decision maker as part of the required grievance procedure under the new Title IX regulations.
- Comply with 504 and Special Education mandates regarding disciplinary assignments, durations, services, and settings.



Retaliation

Caution: Charges against an individual for **code of conduct violations** not involving sex discrimination or sexual harassment, *but arising out of the same facts or circumstances* as a report or complaint of sex discrimination or sexual harassment, **constitute retaliation** if the purpose of the charges is to interfere with any right or privilege secured by Title IX or its regulations.

But: Charging a person with a code of conduct violation based on the person **knowingly making a materially false statement** in **bad faith** in an investigation **is not retaliation**, *provided, however, a determination of responsibility alone is not sufficient to determine that a person made a materially false statement in bad faith.*



Warnings Against Retaliation

A district may warn a respondent that retaliation is prohibited and inform the respondent of the consequences of retaliating against the complainant, as part of a supportive measure provided for a complainant.

- Such a warning is not a punitive or disciplinary action against the respondent.
- Warning may be given even before a formal complaint is filed as a supportive measure.



Choosing an Appropriate Disciplinary Response

Appropriate steps should be taken to end the harassment.

- For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents or both.

Disciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school's code of student conduct while considering the impact of separating a student from her or his education.

Any disciplinary decision must be made as a proportionate response to the violation.



Employee Discipline

- Follow Board Policy (CJ, DC, DH, and DHB), District Administrative Regulations, and Employee Handbook protocols.
- Must complete Title IX grievance process before disciplining an employee for sexual harassment.
 - Note that a District cannot use its Title IX informal resolution process where there is alleged sexual harassment of a student by District employee.
- Possible disciplinary sanctions: directives, reassignment, nonrenewal, termination
- Remember SBEC reporting duty under Texas law



Employee Discipline – SBEC Reports

Permissible [Discretionary] Reports

- The superintendent may notify SBEC of any educator misconduct that he or she believes in good faith may be subject to sanctions under 19 Administrative Code, Chapter 249, Disciplinary Proceedings, Sanctions, and Contested Cases, and/or Chapter 247, Educators' Code of Ethics. 19 TAC 249.14(d).

Mandatory Reports

(TEC) §22.093 – must report to commissioner when any non-certified employee resigns or is terminated and there is evidence that the employee:

- Abused or otherwise committed an unlawful act with a student or minor; or
- Was involved in a romantic relationship with or solicited or engaged in sexual contact with a student or minor.

Superintendents or directors are still required to report certified educators to the State Board of Educator Certification (SBEC) under TEC §21.006 and Texas Administrative Code (TAC) §249.14.

- Principal must notify Superintendent not later than the 7th business day after the employee's termination or resignation following an alleged incident of misconduct.
- Superintendent must notify the Commissioner not later than the 7th business day after Supt. receives report from Principal or knew about employee's termination or resignation.
- To simplify the reporting process, superintendents should send all reports to the TEA Division of Educator Investigations.



Poll Question #4

Records



Record-Keeping

A district must maintain for a period of **seven years** records of –

(A) **Each sexual harassment investigation** including

- any determination regarding responsibility and any audio or audiovisual recording or transcript of any live hearing,
- any disciplinary sanctions imposed on the respondent, and
- any remedies provided to the complainant designed to restore or preserve equal access to the district's education program or activity;

(B) **Any appeal** and the result therefrom;

(C) **Any informal resolution** and the result therefrom; and

(D) All **materials used to train** Title IX Coordinators, investigators, decision makers, and any person who facilitates an informal resolution process.

- A district must make these training materials publicly available on its website, or if the district does not maintain a website, the district must make these materials available upon request for inspection by members of the public.



Record-Keeping - *continued*

For each response required under § 106.44, a district **must create, and maintain for a period of **seven years**, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.**

- In each instance, the district must document the basis for its conclusion that its response was not deliberately indifferent, and
- document that it has taken measures designed to restore or preserve equal access to the district's education program or activity.
- If a district does not provide a complainant with supportive measures, then the district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
- The documentation of certain bases or measures does not limit the district in the future from providing additional explanations or detailing additional measures taken.

Putting It All Together

Application Exercise

Point your phone's camera app toward the QR code and a Google doc will open.

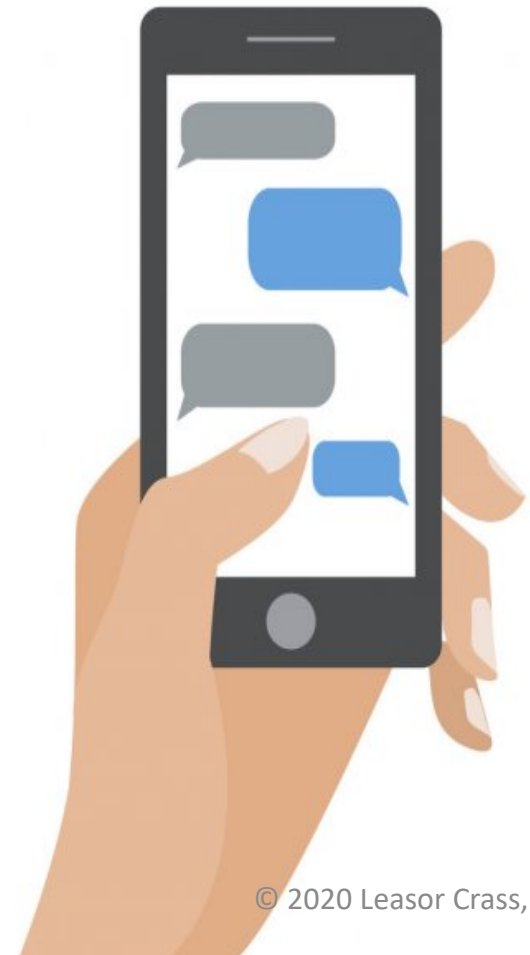


➤ **If you encounter issues using the QR code, use this link:**

<https://docs.google.com/document/d/1LrAbhZSNE6JhQbszkyzbwp23grDagfrOgpoxdaa-Pxw/edit?usp=sharing>

Application Exercise

- **Review the Google doc with your group.**
- **You have 20 minutes to complete the activity.**
- **One group member will report out to the larger group following the activity period.**



Q & A

New Title IX Regulations: Responding to Allegations of Sexual Harassment



LEASOR
CRASS

302 W. BROAD STREET
MANSFIELD, TEXAS 76063
PHONE: 682.422.0009
FAX: 682.422.0008

www.lesorcrass.com

Presented by:

Mike Leasor, Holly James, and Debbie Cano

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