

# When 1+1=IX

Building on What You Know (or Don't!) About the School District's Critical Obligations Under Title IX

January 25 & 27, 2022

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# Drawing up the Blueprints

What one question do you want to be sure that we answer today?

Please send us your question by using the chat feature at the bottom of your screen.

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# Our Punchlist

- Review the history and evolution of Title IX to better understand the new regulations
- Analyze the regulations – what they do and what they do not do
- Drill into the requirements and obligations of a district when responding to allegations of sexual harassment
- Get a blueprint that details every step of the Title IX grievance process
- Apply what you have learned to some real life situations

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For our purposes today, we have used “school district” in places where the regulations specify a “recipient of federal funds.”

- Basic Zoom Features
- Please add your name to the screen
- Mute microphone
- Chat Feature
- Post-workshop email
- Contact info
- Screen shots
- After-session discussions

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### CAUTION!

We speak in general terms today. The specific facts of each situation can make a difference in the legal principles that apply  
This presentation must not be treated as legal advice about any specific situation

Due to the rapidly changing nature of the law, information in this presentation may become outdated

When in doubt, don't act or rely upon the information contained in this presentation without seeking legal advice

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## Tools for your Title IX Toolbox

Weekly Title IX Tips & TrIX



This IX can be tricky. The new regulations, now more than a year old, are being interpreted more than ever as students and employees return. To help you navigate through all the confusion, we are committed to providing you with the latest and greatest. This IX Coordinator, Investigator, Student, Faculty, Administrator and Parent are all impacted by Title IX regulations. We hope you enjoy our weekly content - When 1 + 1 = IX, Title IX Tip and TrIX, and welcome your comments and suggestions.



This is **BestIX**. BestIX never incurs any compliance liability for you because you are the Title IX coordinator. Don't be **BestIX**.

Section 108.8 of the Title IX regulations requires each district or college to designate an employee responsible for compliance. This is called the Title IX coordinator and requires accountability for actions, whether or not



This is a **disobedience**. Title IX involves a student who has been sexually harassed or assaulted by another student. Title IX makes it one of the burdens and keeps her mouth shut. Don't be **Disobedience**.



For purposes of Title IX, an individual's or institution's best effort knowledge when notice or allegations of sexual harassment are reported to ANY employee or ANY employee generally oversees such incidents. This includes not only the Title IX Coordinator and other administrators, but any person who is a regular or ad-hoc employee, whether full-time or part-time. Make sure your employees know where to report anything they see or hear.

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**WORK ZONE  
Hard Hats  
Required!**

- This is not as new as it may seem - do not panic!
- We want you to get your questions answered – feel free to speak up when you have questions.
- We know you are busy. If you have to drop off or come in and out, we understand.

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**Who's on Crew?**

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**Who are you?**

**Where do you work and what do you do?**

**What has been your biggest Title IX challenge this past year as a result of implementing the regulations?**

**What is the question you want to be sure that we answer during this workshop?**

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# Title IX: A Work In Progress

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## The Building Blocks of Title IX

- Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, color, sex, national origin or religion
- Title VI of the Act prohibits discrimination in federally assisted programs – including education programs – on the basis of race, color and national origin, but not on the basis of sex
- Title IX of the Education Amendments of 1972 is enacted to address that gap

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## Title IX, Education Amendments of (1972)

“No person . . . 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”

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- Title IX has significantly evolved from the language found in the Education Amendments of 1972.
- The expansion of Title IX is largely due to case law and significant guidance issued by the OCR in the last 20 plus years.

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**Building on a Strong Foundation**

- **U.S. Supreme Court Decisions:**
  - *Gebser v. Lago Vista Independent School District, 1998:* (a claim involving a teacher and student) **(Tab 3)**
  - *Davis v. Monroe County Board of Education, 1999:* (student-on-student harassment) **(Tab 4)**
- **2001: U.S. Dept of Education** publishes "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties"

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**Building on a Strong Foundation**

- **2010: OCR** issues guidance on institutions' obligation to prevent sexual harassment and bullying and address complaints
  - Enforce state and federal rules
  - Harassment takes many forms
  - No requirement of intent
  - Includes hostile environment
  - If based on race, color, national origin, sex or disability, the harassment violates Title IX
- Numerous Dear Colleague Letters

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**Work Order #1:  
2020 Regulations**

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**Why Amend the Regulations?**

- Effectuate Title IX’s prohibition against sexual discrimination by requiring school districts to address sexual harassment as a form of sex discrimination in education programs and activities; and
- Obligate school districts to respond promptly and supportively to persons victimized by sexual harassment; and
- Resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process to victims and perpetrators; and Effectively implements remedies for victims.

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**Why Amend the Regulations?**

- Clarify and modify Title IX regulations regarding:
  - Remedies the Department of Education may impose on school districts for Title IX violations; and
  - Title IX, Constitutional protections and other laws; and
  - The designation of a Title IX Coordinator to address sex discrimination including sexual harassment; and
  - The dissemination of non-discrimination policies and contact information for the Title IX Coordinator; and
    - Requiring the adoption of grievance process and procedures; and
    - How to claim a religious exemption; and
    - The prohibition of retaliation

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**Why Now?**

- The 2020 Regulations:
  - Impose legally binding rules on school districts rather than best practices;
  - Adopt the United States Supreme Court’s framework to address sexual harassment;
  - Provide clear guidance to school districts on how they must respond to allegations of sexual harassment while at the same time meeting requirements of constitution due process.
    - Provide specific meaning and definition to commonly used terms.

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**What are the Regulations Designed to do?**

- Define conduct constituting sexual harassment for Title IX purposes;
- Specify conditions that activate a school district’s obligation to respond to allegations of sexual harassment;
- Impose a general standard for the sufficiency of a response to those allegations by specifying requirements of a response;
- Specify when a grievance process to investigate and adjudicate allegations of sexual harassment; and
- Establish procedural due process requirements required in that grievance process to ensure a fair and reliable factual determination when a school district investigates and adjudicates a formal complaint of sexual harassment

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**Allegations of sexual harassment that occurred before August 14, 2020**

- The 2020 regulations are NOT RETROACTIVE.
- If the conduct at issue took place prior to August 14, 2020, the new regulations DO NOT APPLY.

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**Concrete Evidence:  
What Title IX does and does not do**

- Title IX **is not** “a ‘zero tolerance’ policy banning sexual harassment as such”
- Title IX **does** offer “effective protections to individuals against discriminatory practices, within the parameters set forth under the Title IX statute and Supreme Court case law.”
- Title IX **does not** preclude a school district from addressing the alleged misconduct under other provisions of the school district’s policies and procedures.

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**These regulations are the minimum steps...**

The 2020 amendments set out the minimum steps that a school must take in response to notice of alleged sexual harassment. A school may take additional actions so long as those actions do not conflict with Title IX or the 2020 amendments. A school “remain[s] free to adopt best practices for supporting survivors and standards of competence for conducting impartial grievance processes, while meeting obligations imposed under the 2020 amendments.”

United States Department of Education, Questions and Answers on Title IX Regulations on Sexual Harassment (July 2021)- Question 2

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**Updating and Distributing Revised Title IX Policies**

- A school district must adopt and publish revised policies and grievance procedures effective as of August 14, 2020 (i.e., its Title IX Policy) that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by the regulations.
- A school district must provide to 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 school district notice of the school district’s grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school district will respond.

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### Notification of Policy

- Each school district must prominently display the contact information required to be listed for the Title IX Coordinator and its policy on its website, if any, and in each handbook or catalog that it makes available to 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 school district.
- A school district must not use or distribute a publication stating that the school district treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX or its regulations.

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### The Foreman: AKA Title IX Coordinator

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### Designation of a Title IX Coordinator

- Each school district must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities, which employee must be referred to as the "Title IX Coordinator."
- The school district must notify 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 school district, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as 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.

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**The Title IX Coordinator should:**

- Understand how the district’s policies and procedures work
- Train students and staff on the Title IX grievance procedures, reporting suspected sexual harassment and any other procedures used for investigating reports of sexual violence
- Identify and address any patterns or systemic problems
- Cooperate with law enforcement and crisis centers

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**The Title IX Coordinator must:**

- Coordinate responses to all allegations of sex discrimination. This includes:
  - Implementing supportive measures
  - Monitoring outcomes
  - Identifying and addressing any patterns
  - Assessing effects on the district climate

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**The Title IX Coordinator must:**

- Be mindful of school culture and climate and collect and analyze data on school climate as appropriate
- Be available to meet with students as needed
- Avoid Conflicts of Interest
  - Title IX Coordinator should be independent
  - Report directly to Superintendent
  - Have no job responsibilities that create conflict even beyond that described in the regulations (e.g. making discipline decisions, general counsel, superintendent, principal, or athletics director)

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**LAYING THE FOUNDATION:  
Title IX Definitions**

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**Terms Defined by the Regulations**

- Sexual Harassment
- Complainant
- Respondent
- Formal Complaint
- Sexual Harassment
- Actual Knowledge
- Supportive Measures

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**What constitutes Sexual Harassment?**

- **Sexual Harassment** is defined as:
- **Quid pro quo harassment**—that is, conditioning any educational opportunity or benefit on the granting of sexual favors—constitutes a *per se* violation of Title IX, regardless of its severity or pervasiveness. *Quid pro quo* harassment constitutes *conduct* without any constitutional protection.
- Any form of **sexual assault, dating violence, domestic violence, or stalking** as defined by the Clery Act/VAWA constitutes sexual harassment. These forms of misconduct are so serious in and of themselves that no finding of “pervasiveness” is required.
- **Unwelcome conduct of a sexual nature** that is “so serious, pervasive, and objectively offensive that it effectively denies a person equal access” to an educational program as determined under a **reasonable person** standard.

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**Building on what we know  
about:  
THE DEFINITION OF  
SEXUAL HARASSMENT**

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**Examples of denial of “a person’s right  
to equal access to its education  
program or activity”**

- Skipping class to avoid a harasser
- Decline in a student’s grade point average
- Difficulty concentrating in class
- Quitting a team or club
- Even crying at night and bed wetting according to the Department of Education

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**What about misconduct that does not  
meet the new definition of sexual  
harassment?**

- A school has discretion to respond appropriately to reports of sexual misconduct that do not fit within the scope of conduct covered by the Title IX grievance process.
- This includes reported sexual misconduct that a) occurs outside of a school’s education program or activity; b) occurs outside of the United States; or c) causes harm in the school environment that does not fit within the definition of sexual harassment.

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- A complainant does not need to have “already suffered loss of education before being able to report sexual harassment.”
- Effective denial of equal access to education does not require “that a person’s total or entire educational access has been denied.”
- Complainants do not need to have “dropped out of school, failed a class, had a panic attack, or otherwise reached a ‘breaking point’” or exhibited specific trauma symptoms to be effectively denied equal access.

• *United States Department of Education, Questions and Answers on Title IX Regulations on Sexual Harassment (July 2021)- Question 8*

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### Who is the Complainant?

- A **Complainant** means an individual who is alleged to be a victim of sexual harassment.
- The Complainant is not always the individual who makes the initial report.

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### Who is the Respondent?

- A **Respondent** is any individual who is reported to be the perpetrator of sexual harassment.
- Importantly, a person may be a **complainant**, or a **respondent**, even where no formal complaint has been filed and no grievance process is pending.

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### What is a Formal Complaint?

- A **formal complaint** is a document that initiates a school district’s grievance process.
- A **formal complaint** does not have to be “formal” but can come in the form of an email, written statement, letter, or by submitting a complaint form.
- A **formal complaint** can be initiated by the Complainant or the Title IX Coordinator.
- Template of a formal complaint form can be found on (Tab 11).

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### Building on what we know about: FORMAL COMPLAINTS

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- A “formal complaint” is a document filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
- The Title IX Coordinator also may file a formal complaint based on alleged sexual harassment by a complainant who is not associated with the school in any way.
- In some circumstances, the Title IX Coordinator must file a formal complaint regardless of the complainant’s relationship with the school.
  - Example: If there is actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority.

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**Formal Complaints MUST BE SIGNED**

- Regardless of whether the formal complaint is a hard copy or filed electronically it **MUST** contain the Complainant's physical or digital signature or otherwise indicate that the Complainant is the person filing the formal complaint. If submitting a formal complaint via email, a digital signature at the end will suffice.

United States Department of Education, Questions and Answers on Title IX Regulations on Sexual Harassment (July 2021)- Question 22

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- In certain circumstances, a school district can be found to be deliberately indifferent if the Title IX Coordinator does not file a formal complaint.

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**What if the Complainant is no longer enrolled?**

- A Title IX Coordinator may still file a formal complaint even if the Complainant is no longer associated with the school district.
- **REMEMBER:** The school district has an obligation under Title IX to provide **ALL** students, not just the complainant, with an educational environment that does not discriminate based on sex.

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**What does it mean to have ACTUAL KNOWLEDGE?**

- A school district has **actual knowledge** when **ANY** employee knows of sexual harassment.
  - An employee knows of sexual harassment when they have observed it or have heard about it.
  - Notice to a Title IX Coordinator or to an official with authority to institute corrective measures is actual knowledge.

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**Building on what we know about: ACTUAL KNOWLEDGE**

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When a school district has actual knowledge of sexual harassment in its education program or activity and refuses to respond to sexual harassment or a report of sexual harassment, such a refusal is clearly unreasonable under § 106.44(a) and constitutes a violation of the regulations.

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**How certain must you be for it to be considered “Actual Knowledge”?**

- A school is required to respond if it has notice of alleged sexual harassment, even if it is not certain whether the harassment has occurred.
- Actual knowledge refers to notice of conduct that **could** constitute sexual harassment.
- A school must respond when it receives notice of alleged facts that, if true, could be considered harassment under the 2020 regulations.

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**Reports from outsiders still count**

- A school district may receive actual knowledge of sexual harassment from **ANYONE**.
- There is no requirement that the person filing the complaint be participating in or attempting to participate in a school program or activity.

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**Is there a duty to notify parents / guardians?**

- To comply with 34 C.F.R. § 106.6(g) (i.e., in order to not derogate the legal rights of parents and guardians), a school district may need to notify a parent or legal guardian so that the district adequately respects any underlying legal rights of a parent or guardian to make decisions “on behalf of” a complainant, respondent, or other individual involved in a Title IX matter.
- Title IX regulations impose a duty on the district not to respond in a manner that is deliberately indifferent. 34 C.F.R. § 106.44(a).
- Thus, if it would be “clearly unreasonable in light of the known circumstances” for the district not to notify a parent or legal guardian of reported sexual harassment that affects that parent or guardian’s student, the school must notify the parent or guardian of the Title IX matter.

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### The Courts & Actual Knowledge

#### Doe v. Fairfax Cty. Sch. Bd., 1 F.4th 257 (4th Cir. 2021)

- A former student brought an action against the school board alleging that the school's administrators acted with deliberate indifference to reports that she had been sexually harassed by another student while traveling on a bus during a school band trip.
- School administrators argued they did not have actual knowledge because they did not consider the alleged actions to be a form of sexual assault.
- **OBJECTIVE ANALYSIS:** "When a school official with authority to address complaints of sexual harassment and to institute corrective measures receive[s] a report that can objectively be construed as alleging sexual harassment, that receipt establishes actual notice of such harassment for Title IX purposes." **(Tab 6)**

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### Supportive Measures

- **Supportive measures** are defined as:
- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Such measures are designed to restore or preserve equal access to the school district's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the school district's educational environment, or deter sexual harassment.
- Supportive measures must be offered to both the Complainant **AND** Respondent.

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A **formal complaint** is **not** required in order for a school district to:

- Have **actual knowledge** of sexual harassment or allegations of sexual harassment.
- Activate a school district's obligation to respond promptly, including by offering **supportive measures** to a **complainant**

# CAUTION!

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# Building on what we know about: SUPPORTIVE MEASURES

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## Examples of Supportive Measures:

- Counseling
- Extension of deadlines
- Course-related adjustments
- Modifications of work or class schedules
- Mutual restriction on contact between the parties
- Campus escort services
- Changes in work or housing locations
- Leave of absence
- Homebound instruction
- Increased security and monitoring
- Campus bans

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## When is the best time to offer supportive measures?

- As soon the school has actual knowledge that sex-based harassment may have occurred.
  - **DO NOT WAIT UNTIL ASKED TO OFFER SUPPORTIVE MEASURES**
- An individual is entitled to supportive measures regardless of what stage you are in the investigation, or even if there is no investigation at all.
- An individual is entitled to supportive measures even if they initially refused.

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**How long must supportive measures be made available?**

- Supportive measures can be provided at any stage during the investigation/grievance process.
- As the investigation continues, so can the need for supportive measures.
- **IF NO FORMAL COMPLAINT IS INITIATED** Title IX does not require a school district to continue offering supportive measures for a particular period of time, but they are permitted to continue offering them for as long as necessary.

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**Is there a limit on the supportive measures available?**

- A school district is required to offer supportive measures **AT NO COST.**
- A School district must provide supportive measures that are “reasonably available” to restore or preserve equal access to the school district’s education program or activity.

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**HOW TO DOCUMENT SUPPORTIVE MEASURES**

- |  |  |
|--|--|
| <ul style="list-style-type: none"> <li>• <b>If Supportive Measures are offered/accepted:</b></li> <li>• Document date offered &amp; accepted</li> <li>• Document Supportive Measures received</li> <li>• Provide information regarding supportive measures <b>ONLY</b> to those employees with a need to know</li> </ul> | <ul style="list-style-type: none"> <li>• <b>If Supportive Measures are not offered:</b></li> <li>• Document date offered &amp; rejected</li> <li>• Document reason supportive measures not offered and provide a copy to the individual</li> <li>• Do not restrict the receipt of future supportive measures if necessary</li> </ul> |
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•The school district must maintain as confidential any **supportive measures** provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the school district to provide the **supportive measures**.

•The **Title IX Coordinator** is responsible for coordinating the effective implementation of **supportive measures**.

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**Must a school district continue to offer supportive measures if the Complainant is no longer enrolled/employed?**

- It depends.
  - If a Complainant takes a leave of absence, transfers, or becomes homeschooled and then re-enrolls, they are entitled to supportive measures if they are still needed to restore or preserve equal access to the educational program or activity.
  - If they leave the school district, they are not entitled to the continuation of supportive measures. They are also not entitled to supportive measures from the new school district.

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**When is the Respondent entitled to supportive measures?**

- The Respondent is entitled to receive supportive measures only if a formal complaint is filed by either the Complainant or the Title IX coordinator.
- The school district is permitted to offer supportive measures at any time but is only required to offer them after the filing of a formal complaint.

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**Must a school district notify guardians before offering supportive measures?**

It depends.

- Title IX does not require parents to be involved.
- Some supportive measures can be initiated without parental approval such as extension of deadlines, enhanced security, modified schedules, course modifications.
- With younger students, it might be difficult to determine what supportive measures are necessary without first discussing it with a parent and/or guardian.
- It could be considered “clearly unreasonable in light of the known circumstances” for the school district to not notify a parent or legal guardian of reported sexual harassment.

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**Can supportive measures be offered even if Title IX does not apply?**

• Yes.

- A school district may still offer “supportive measures to a complainant who reports sexual harassment that occurred outside the [school’s] education program or activity, and any sexual harassment that does occur in an education program or activity must be responded to even if it related to, or happens subsequent to, sexual harassment that occurred outside the education program or activity.”

• *United States Department of Education, Questions and Answers on Title IX Regulations on Sexual Harassment (July 2021)- Question 9*

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

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**Building on what we know  
about:  
AVOIDING DELIBERATE  
INDIFFERENCE**

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**When must a school district respond?**

- A school must respond PROMPTLY when:
- (1) the school has actual knowledge of sexual harassment;
- (2) that occurred within the school’s educational program or activity; and
- (3) against a person in the United States.

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**The Courts & Deliberate Indifference**

◦ **Simonetta v. Allegheny Coll., No. CV 20-32, 2021 WL 927534 (W.D. Pa. Mar. 11, 2021)**

- A female member of the college’s football team alleged that she was subjected to unwelcome sexual advances from her teammates over the course of two days. The court dismissed the plaintiff’s deliberate indifference claim because the harassment plaintiff alleged was neither severe or pervasive enough to satisfy the objective standard of deliberate indifference.
- **HOLDING:** For a school to be held liable for deliberate indifference, the conduct complained of must be more than questionably severe or offensive to be considered severe and pervasive.  
**(Tab 6)**

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**Foster v. Bd. Of Regents of Univ. of Michigan, 982 F.3d 960, 967 (6th Circ. 2020)**

- A female MBA student alleged the university violated Title IX by showing deliberate indifference to her complaints of peer-on-peer sexual harassment.
- The Court found that the university took prompt action to remedy the complaints of sexual harassment.
  - **HOLDING:** A school district that attempts to remedy reported sexual harassment is not deliberately indifferent, regardless of whether the attempts are successful. **(Tab 8)**

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**Sexual Harassment and Online Platforms**

- Online platforms used by a school district are still considered to be “within a school’s education program or activity” for purposes of Title IX.
- There is no distinction between occurring in person versus online.
- The operations of a school include:
  - Computer and internet networks, digital platforms, computer software owned by or used in the operation of the school.

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**What about personal devices used in class?**

- A student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the school exercises substantial control.
- The factual circumstances of the online harassment must be analyzed.

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- A school district can remove a respondent from an education program or activity on an emergency basis, provided that the school district undertakes an individualized safety and risk analysis.
- It must be determined that that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies the removal.
- The Respondent must be provided with notice and an opportunity to challenge the decision immediately following the removal.
- **This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.**

### Emergency Removal

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- A non-student employee can be placed on leave during the pendency of the Title IX grievance process.
- **This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.**

### Administrative Leave

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## TIME TO CLOCK IN!

You are the Title IX Coordinator. You get to school on Tuesday and see a note on your desk that a student has reported to the guidance counselor that her teacher makes her feel uncomfortable.

Does the district have actual knowledge?

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After speaking with the student, she assures you it's not a big deal and she does not want to file a formal complaint.

What do you do next?

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The following morning, the school is buzzing with the rumor that there is a video of Mr. Holepit, the math teacher, touching a different female student.

Now what do you do?

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**BLUEPRINT FOR HOW TO RESPOND:**

The Title IX Grievance Process

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**Step 1:**

**Title IX Coordinator Contacts  
Complainant**

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- Upon receiving actual knowledge of sexual harassment, the TITLE IX COORDINATOR must contact the complainant to discuss:
  - The availability of supportive measures
  - The process for filing a formal complaint
  
- The Title IX Coordinator will determine whether to file a formal complaint if the Complainant elects not to.

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**The Grievance Process Begins**

- A school district’s “grievance process” = its Title IX policy and procedures
- DO NOT confuse “grievance process” with filing something with the grievance board; a citizen’s complaint or any other process where we file a “grievance.”
- THE GRIEVANCE PROCESS IS TRIGGERED ONCE A FORMAL COMPLAINT IS FILED

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**Step 2:**  
Notice of Allegations is Sent

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- Notice of allegations must be sent to the Respondent (and Complainant if the formal complaint is filed by the Title IX Coordinator).
- The Notice of Allegations must include ALL DETAILS known at the time it is sent.
- The Complainant's name cannot remain confidential.
- Respondent is offered supportive measures at this time.

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**Building on what we know about:  
NOTICE OF ALLEGATIONS**

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## Notice of Allegations

Upon receipt of a formal complaint, a school district must provide the following written notice to the parties who are known:

- (A) Notice of the school district's grievance process that complies with this section, including any informal resolution process.
- (B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, 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, and the date and location of the alleged incident, if known.

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## Notice of Allegations (continued)

- The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
- The written notice must inform the parties of any provision in the school district's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
  - A sample Notice of Allegation is provided in **(Tab 12)**.

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## The need for additional Notice of Allegations

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

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### Step 3:

Consider Consolidating or Dismissing

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### Consolidating Complaints

A 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.

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### Dismissal of a Formal Complaint

The school district **must investigate** the allegations in a formal complaint.  
BUT if the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the school district's education program or activity, or did not occur against a person in the United States, then the school district **must dismiss** the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX  
Such a dismissal **does not** preclude action under another provision of the school district's code of conduct.

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### Dismissal of a Formal Complaint

- The school district **may dismiss** the formal complaint or any allegations therein, if at any time during the investigation or hearing:
  - a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
  - the respondent is no longer enrolled or employed by the school district; or
  - Specific circumstances prevent the school district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
    - Upon a dismissal, the school district must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

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### What if the Respondent is no longer enrolled?

The school district still has an obligation to respond promptly by contacting the complainant and offering supportive measures.

The school **MAY** dismiss a complaint if the respondent leaves after a formal complaint has been filed, but it is not required.

A school district should consider whether a respondent poses an ongoing risk to the school's community.

A school district should also consider if a determination of responsibility provides a benefit to the complainant.

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### Reasons to continue the Title IX grievance process...

- Even if the respondent is no longer enrolled or employed by a school district, there may still be some reasons why an investigation should continue:
1. Determine if there is an ongoing risk (possible campus ban?)
  2. Identify additional individuals who are entitled to supportive measures
  3. Determine the scope of harassment. (i.e. employee responses)
  4. Determine if there is a pattern of harassment in particular programs
  5. Obligations under W. Va. Code 18A-2-8

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**Step 4:**

**Consider Informal Resolution**  
(if permitted)

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**Informal Resolution**

- A school is district is not required to offer an informal resolution process but may facilitate informal resolution at any time prior to reaching a determination regarding responsibility.
- PROHIBITED IF THE ALLEGATIONS ARE THAT AN EMPLOYEE SEXUALLY HARASSED A STUDENT

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**Building on what we know about:  
INFORMAL RESOLUTION**

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### What is the process for Informal Resolution?

- The 2020 regulations leave the term “informal process” undefined to allow the school district the discretion to adopt whatever process best serves the need of its community.
- School districts may exercise discretion to make fact-specific determinations about whether to offer informal resolution in response to a formal complaint.
- A school 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.
  - A school 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.

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### Requirements of Informal Resolution:

- If a school chooses to offer an informal process, the 2020 amendments require that the school obtains the complainant’s and the respondent’s voluntary, written consent before using any kind of “informal resolution” process. **(Tab 16)**

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### In order to have an informal resolution, the school district must:

- (i) Provide to the parties a written notice 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 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.

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**Step 5:**  
 Select the Investigator and  
 Decision-Maker

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**Choosing the Investigator**

<p><b>An Investigator must have:</b></p> <ul style="list-style-type: none"> <li>• Training on what constitutes sexual harassment</li> <li>• Training on how to conduct an investigation</li> <li>• Training on issues of relevance to create an investigative report that fairly summarizes relevant evidence</li> <li>• The ability to provide an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence</li> </ul>	<p><b>An Investigator must NOT have:</b></p> <ul style="list-style-type: none"> <li>• A conflict or bias against the complainant or respondent, generally or individually.</li> </ul>
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**Inside versus Outside Investigators**

When might you choose an outside investigator?  
 Do you have to be licensed to perform an investigation if you work for the school system?  
 Do you have to be licensed to perform an investigation if you do not work for the school system?

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### Choosing the Decision-Maker

**A Decision-Maker must have:**

- Training on what constitutes sexual harassment
- Training on issues on relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.
- The ability to provide an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence

**A Decision-Maker must NOT have:**

- A conflict or bias against the complainant or respondent, generally or individually.
- Prejudgment of the facts.

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- 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.

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### Avoiding Prejudgment of the Facts

DO's	DON'Ts
Base all decisions on individualized facts, and not on stereotypical notions of what "men" and "women" do or do not do.	Pass judgment on the allegations presented by either party or witnesses.
Avoid any and all stereotypes.	"Believe" one party over the other.
Approach the allegations of both parties with neutrality	Jump to any conclusions without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties involved.
Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of the story.	

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**Remember:**

- The Title IX Coordinator, investigator, and decision-maker are **3 different people.**
- The Title IX Coordinator cannot be the Decision-Maker.
- The Investigator cannot be the Decision-Maker.
- All must be trained and all trainings must be posted online or available by hard copy.

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**Step 6:**

Conduct the Investigation

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**An Investigation may include:**

- The investigation may include, among other things, interviewing the complainant, the respondent, and any witnesses; reviewing law enforcement investigation documents if applicable; reviewing relevant student or employment files (preserving confidentiality wherever necessary); and gathering and examining other relevant documents, social media, and evidence

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**Provide Written Notice Before Each Interview**

- The regulations require the district to 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.
- Inform them of their right to have an advisor present and document it!

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**The Investigator’s Burden**

- The burden of proof rests with the school district and the Investigator to gather all of the evidence.
- The burden is not on the Complainant to prove that the alleged sexual harassment occurred.
- The burden is not on the Respondent to prove that the alleged sexual harassment did not occur.

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**Investigating Formal Complaints**

- When investigating a formal complaint and throughout the process, a school district must:
- Ensure that the burden of proof and the burden of gathering evidence rests on the school district and not on the parties.
- The school district cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school district obtains that party’s voluntary, written consent to do so.
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

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**Keep Everything Equal!**

- Provide both parties an equal opportunity to inspect and review any evidence.
- Provide both parties an equal opportunity to submit information or evidence that could be inculpatory or exculpatory.
- Provide both parties information related to any delay and the reason for the delay.

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- Do 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 the process, 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; however, the school 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.

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**Building on what we know  
about:  
PARALLEL  
INVESTIGATIONS**

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**Investigations involving CPS/DHHR:**

- Just like the school system, CPS is required to conduct investigations
- Just like the school system, CPS must interview children and other witnesses.
- One difference is that unlike Title IX investigators, CPS cannot interview a student without prior permission from their parent/guardian.

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**Possible Issues with Parallel Investigations:**

- Problems with multiple interviews of the same students
- Different standards
- Need for protocols between school board and DHHR/CPS
  - If your county does not have one, you should get one
  - Ditto for protocols with law enforcement and prosecutor

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**Recommended Protocols**

- Designation of when protocol applies and when it does not
- Designation of who takes the lead in the investigation
- Determination of what information will be shared and in what format
- Establishment of time frames and back-up plans

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### Working with Law Enforcement

- Criminal investigation is initiated at the discretion of law enforcement
  - Title IX investigation is not discretionary, and the standards are different from a criminal investigation
  - Respondents may refuse to participate in an interview with Investigator

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### Working with Law Enforcement

- The school district should not wait for the conclusion of a criminal investigation or criminal proceedings to begin a Title IX investigation.
- A brief delay may be appropriate while law enforcement is gathering evidence, but districts must still implement supportive measures to protect the complainant.
- Consider establishing protocol on how the school district and law enforcement will work together.

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### Step 7:

Provide Parties with the Report of Evidence - 106.45(b)(5)(vi)

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**REPORT OF EVIDENCE**

- After all of the evidence is collected, but prior to completion of the investigative report, the school district **must** send to each party and the party's advisor, if any, the evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint, including:
  - The evidence upon which the district does not intend to rely in reaching a determination regarding responsibility
  - All inculpatory or exculpatory evidence whether obtained from a party or other source.
- 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.

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**REPORT OF EVIDENCE**

Includes:

- List of witnesses
- Date of each witness interview
- Summaries of the interviews or audio recordings of each
- All documents received during the course of the investigation (including the Formal Complaint and any notices sent to the parties)
- **(Tab 13)**

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**Step 8:**

Investigator drafts Investigation Report- 106.45(b)(5)(vii)

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## INVESTIGATION REPORT

- Unlike the Report of Evidence that includes all evidence obtained during the course of the investigation, the Investigation Report is prepared using only that information that the Investigator determined to be relevant.
- At least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, the Investigator must 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.
- **(Tab 14.)**

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## 10 Day Rules

- **Report of Evidence**- shared with the parties **10 days** prior to drafting the Investigation Report.
- **Investigation Report**- shared with the parties **10 days** prior to a hearing or other time of determination regarding responsibility.

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## Step 9:

### The Decision-Making Process

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### The Decision-Making Process

#### Post-Secondary

- Title IX grievance process MUST provide for a live hearing.
- At the live hearing, cross-examination is conducted by each party's advisor directly, orally, and in real time.
- Only relevant cross-examination and other questions may be asked of a party or witness
- Decision-maker must determine whether each question is relevant prior to it being answered.

#### Elementary/Secondary Schools

- Title IX grievance process MAY, but need not, provide for a hearing.
- If no live hearing, the decision-maker 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.
- Decision-maker must determine whether each question is relevant prior to it being answered.

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### Determining Relevance

Regardless of whether cross examination occurs during a live hearing or through written questions, certain questions are not relevant and will not be permitted.

- QUESTIONS THAT ARE NOT RELEVANT:
  - 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 must explain to the party proposing the questions any decision to exclude a question as not relevant.

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### Step 10:

Decision-Maker Drafts Written Determination of Responsibility

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**DETERMINATION OF RESPONSIBILITY**

- Following the live hearing or the exchange of written questions, the Decision-Maker must prepare a written **Determination of Responsibility**. Tab 15
- The Determination of Responsibility is a statement of, and rationale for, **the result as to each allegation**.
- The Decision-Maker makes his/her determination based upon the information contained in the Investigation Report as well as the information obtained during the live hearing and/or the written exchange of questions.
- To reach this determination, the school district must apply the chosen standard of evidence (clear and convincing or preponderance of evidence).
- Either party can appeal that decision on the basis of (1) procedural irregularity, (2) new evidence, or (3) bias on the part of the investigators or decision-makers.

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**The Determination Must Include:**

- (A) Identification of the allegations potentially constituting sexual harassment;
- (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 school 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 school district imposes on the respondent, and whether remedies designed to restore or preserve equal access to the school district's education program or activity will be provided by the school district to the complainant; and
- (F) The school district's procedures and permissible bases for the complainant and respondent to appeal.

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- It is the **Decision-Maker's responsibility** not only to make a **determination regarding responsibility**, but also to make a **determination as to any disciplinary sanctions** to be imposed by the school district as well as any remedies required to restore or preserve equal access to the education program or activity.
- It is the **Title IX Coordinator's responsibility** to ensure the effective **implementation of any sanction** or remedies.

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**Step 11:**

Determination of Responsibility  
Provided to Parties

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- The written determination must be provided to the parties simultaneously.
- The determination regarding responsibility becomes final either on the date that the school 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.

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**Step 12:**

The Appeal Process

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• Both parties must be offered an appeal from a determination regarding responsibility, and from a school district’s dismissal of a formal complaint or any allegations therein.

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**The Bases for Appeal**

- An appeal may be made on the following bases:
  - (A) Procedural irregularity that affected the outcome of the matter;
  - (B) 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
  - (C) 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 school district may offer an appeal equally to both parties on additional bases.

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**As to all appeals, the school 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 complies with the standards set forth for the bases for the appeal;
- (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.

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**Retaliation**

- No school district or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.
- Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation.

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**Retaliation**

- The school district must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under the new Title IX regulations.
- The exercise of rights protected under the First Amendment does not constitute retaliation.

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**Retaliation**

- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

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### Record Keeping

- A school district must maintain for a period of 7 years records of:
  - (A) Each sexual harassment investigation including
    - any determination regarding responsibility
    - any audio or audiovisual recording or transcript
    - any disciplinary sanctions imposed on the respondent, and
    - any remedies provided to the complainant designed to restore or preserve equal access to the school 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 school district must make these training materials publicly available on its website, or if the school district does not maintain a website, the school district must make these materials available upon request for inspection by members of the public.

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### Record Keeping

- For each response required under § 106.44, a school district must create, and maintain for a period of 7 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 school 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 school district's education program or activity.
- If a school district does not provide a complainant with supportive measures, then the school 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 school district in the future from providing additional explanations or detailing additional measures taken.

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# Title IX is ~~still~~ Under Construction

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## Work Order #2:

Expand Title IX to add that discrimination on the basis of sex includes: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity

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## Bostock v. Clayton County, 140 S. Ct. 1731, 590 U.S. (2020)

In June of 2020, The Supreme Court in Bostock held that sex discrimination, as prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity. The Court explained that to discriminate on the basis of sexual orientation or gender identity “requires an employer to intentionally treat individual employees differently because of their sex.” (Tab 5)

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## 2021 Notice of Interpretation

- On June 16, 2021 the U.S. Department of Education’s Office for Civil Rights issued a Notice of Interpretation (Tab 9).
- The Notice of Interpretation provides that OCR will enforce Title IX’s prohibition on discrimination on the basis of sex to include: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity offered by a recipient of federal financial assistance.
- Stems from the landmark U.S. Supreme Court decision in *Bostock v. Clayton County*, in which the Supreme Court recognized that it is impossible to discriminate against a person based on their sexual orientation or gender identity without discriminating against that person based on sex.

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**Bostock’s Application to Title IX**

◦ As explained in the Notice of Interpretation:  
◦ “For the reasons set out below, the Department has determined that the interpretation of sex discrimination set out by the Supreme Court in Bostock—that discrimination “because of . . . sex” encompasses discrimination based on sexual orientation and gender identity—properly guides the Department’s interpretation of discrimination “on the basis of sex” under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.”

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**Work Order #3:  
Rewrite 2020 Regulations**

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**Demolition is Underway**

- In March of 2021, President Biden signed an executive order directing Education Secretary, Miguel Cardona to suspend, revise, or rescind the 2020 Title IX regulations, OR being the process of collecting comments to draft new regulations.
- New regulations are expected to be announced in **April of 2022**

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**Demolition is Underway**

- Also in March of 2021, the Justice Department's Civil Rights Division issued an interpretation of the Supreme Court's 2020 ruling in *Bostock v. Clayton County, Georgia*, which held that an employer cannot fire an employee for being gay or transgender. The interpretation extended the rule to schools.
- "After considering the text of Title IX, Supreme Court case law, and the developing jurisprudence in this area, the [Civil Rights] Division has determined that the best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation."

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**Creating a Positive School Culture and Climate**

- Make clear to staff and students that discrimination of any kind, including sexual harassment, will not be tolerated
- Inform students on the types of behavior that constitute sexual harassment and how to report

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**Monitor Culture and Climate**

- This includes the culture and climate of schools and other school activities (e.g., athletics, clubs, etc.)
- Off-campus activities that come on to the school campus (cyberbullying)
- If sexual harassment is reported, monitor for potential retaliation against the complainant or witnesses

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## **Hammering it Home!**

**Have we answered all of your questions?  
Attorneys can move into breakout rooms  
to answer any one-on-one questions.**

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