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Title IX Training Update

January 27, 2025

Burris Laboratory School and
The Indiana Academy

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Goals

Provide a foundation for understanding how Title IX is applicable to schools, including what the OCR expects of schools with respect to the handling of student harassment.

Provide tools to support your work to recognize, investigate, stop, prevent, and remedy harassment.

Provide an opportunity to collaborate on how to best support your work in ensuring a harassment-free environment.



Agenda

- **Definition of Title IX**
- **Standards and Definitions**
- **Triggering Events**
- **Formal/Informal Process**
- **Conducting Investigations**
- **Hypotheticals**



Photo: Rio/Shutterstock

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.



United States Supreme Court History for Title IX

Cannon v. University holds:

- a private right of action exists under Title IX
- federal funds may not be used to support discriminatory practices
- Title IX provides protection for individuals

Franklin v. Gwinnett County Public Schools holds:

- money damages available for intentional discrimination

Private Right of Action

- Private individual rights are enforced by administrative agencies like the Office of Civil Rights and courts.
- Administrative Agencies can place federal funds at risk while judicial/court proceedings do not.



Cases that developed the judicial/court standard

Gebser v. Lago Vista Indp School Dist (1998)

- If school engages in deliberate indifference (e.g., knew or should have known and failed to respond) then it has engaged in discrimination.

Davis v. Monroe (1999)

- If committed by a peer, school is liable when it where is deliberate indifference, which means:
 - There is actual knowledge.
 - Harassment is so severe, pervasive and objectively offensive that it denies victims equal access to education.

Gebser/Davis are the starting point for the US DOE's interpretation of Title IX.



2020 Interpretation by the U.S. Department of Education

- Department believes adaptations of *Gebser/Davis* arise in the context of a school's response to reports, allegations or incidents of sexual harassment including respect for freedom of speech and allowing local schools to make decisions on appropriate remedies
- Department is persuaded by the Supreme Court that elementary and secondary schools are unlike the workplace so something may be said at the school level that is excusable based on age/maturity of students whereas it would not be in workplace

2020 Interpretation by the U.S. Department of Education

Appropriate to have a judicial and administrative enforcement under the same standards.



2025 Executive Order

“Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government” – issued Jan. 20, 2025.

Requires all federal agencies to enforce laws governing sex-based rights to “protect men and women as biologically distinct sexes.”

Rescinds all previous statements on gender identity, including the 2024 Title IX regulations and the EEOC’s 2024 enforcement guidance.

Winter Fun Fact!



**Wednesday, January 29,
marks the start of the Lunar
New Year.**

**2025 is the year of the snake
– it symbolizes wisdom and
transformation.**

When is a district liable for SH: The Standard

	OCR (administrative)	Davis (judicial)
What triggers obligation to respond?	Knows or reasonably <i>should have known</i>	<i>Actual knowledge</i>
What constitutes hostile environment sexual harassment?	Severe, pervasive, <i>or</i> persistent	Severe, pervasive, <i>and</i> objectively offensive
	Interferes with or limits participation in educational benefits	Effectively bars access to educational benefit
How must a school respond?	Response must include effective measures <i>to address and eliminate</i> harassment	Response <i>must not be clearly unreasonable</i> (must not act with deliberate indifference)

Definitions and Standards

What is Sexual Harassment?

Sexual harassment means conduct *on the basis of sex* that satisfies one or more of the following:

1. A school employee conditioning the provision of an aid, benefit, or service of the educational institution on an individual's participation in unwelcome sexual conduct.

*This is the **quid pro quo** (something for something else) type.*

Sexual Harassment, Type 2

2. Unwelcome conduct determined

- by a reasonable person
- to be sufficiently severe, pervasive and objectively offensive
- that it effectively denies a person equal access to the recipient's education program or activity.

Standard is subjective with respect to the unwelcomeness of the conduct (i.e., whether the complainant viewed the conduct as unwelcome), but as to elements of severity, pervasiveness, objective offensiveness, and denial of equal access, determinations are made by a reasonable person in the shoes of the complainant.

Sexual Harassment, Type 3

- 3. Sexual Violence**, which includes: “sexual assault” (as defined by the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act at 20 USC 1092 (f)(6)(A)(v)), “dating violence” (as defined by the Violence Against Women Act at 34 USC 12291 (a)(10)); “domestic violence” (as defined by the Violence Against Women Act at 34 USC 12291 (a)(8)); or “stalking” (as defined by the Violence Against Women Act at 34 USC 12291 (a)(30)).

As always, if something doesn't rise to the level of harassment, discipline can still be issued based on inappropriate behavior/other policy/procedure/handbook violations.

Educational Program or Activity

34 CFR 106.44(a)

Schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States.

Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Triggering Title IX

- Off-campus incidents incur Title IX response:
 1. if the off-campus incident occurs as part of the recipient's "operations" pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
 2. if the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
 3. if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to §106.44(a).
- If complainant is no longer enrolled when the complaint is filed, or if the perpetrator is no longer enrolled or employed, no reason for the school to do a investigation because the school can't do anything.

Mandatory Reporting

- School must respond when *actual knowledge* of sexual harassment
- *Actual Knowledge* means notice of sexual harassment or allegations of sexual harassment to any elementary or secondary school employee.

What happens to a report?

- Definitions to Know: The “Complainant” is a person subjected to sex discrimination and the “Respondent” means any individual who is reported to be the perpetrator of sex discrimination.
- Title IX Coordinator will contact the alleged victim to:
 - Discuss filing a formal complaint AND
 - Supportive Measures.
- Formal Complaint - A written document signed by the Complainant that initiates the investigation process. After receiving this, the Title IX Coordinator will let the Complainant and Respondent (“parties”) know of the details and next steps.

Supportive Measures

Supportive measures means...

Offered as appropriate

Nondisciplinary, nonpunitive individualized services

Without fee or charge

As reasonably available

Designed to restore or preserve equal access to the education program or activity:

To the complainant or respondent

- without unreasonably burdening the other party
- including measures designed to protect the safety of all parties or the educational environment or deter sexual harassment.

Before or after the filing of a formal complaint or where no formal complaint has been filed.



Types of Supportive Measures

Counseling

Extensions of
Deadlines or other
Course-Related
Adjustments

Modifications of
Work or Class
Schedules

Campus Escort
Services

Mutual
Restrictions on
Contact Between
the Parties

Changes in Work
or Housing
Locations

Leaves of Absence

Increased Security
Monitoring of
Certain Areas of
the Campus

Other Similar
Measures

Supportive Measures

Unreasonable Burden



- Schedule and housing adjustments do not necessarily constitute an “unreasonable” burden on a respondent.
- Removal from sports teams (and similar exclusions from school-related activities, such as student government) also require a fact-specific analysis, but whether the burden is “unreasonable” does not depend on whether the respondent still has access to academic programs – must analyze whether a respondent’s access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened.

Supportive Measures do NOT include Discipline

- Possible disciplinary sanctions described or listed in a school's grievance process are not "supportive measures."

Example: If a school has listed ineligibility to play on a sports team or hold a student government position as a possible disciplinary sanction that may be imposed following a determination of responsibility, then school may not take that action against a respondent without first following the grievance process.

- If, on the other hand, the school's grievance process does not describe or list a specific action as a possible disciplinary sanction that the recipient may impose following a determination of responsibility, then whether such an action (for example, ineligibility to play on a sports team or hold a student government position) may be taken as a supportive measure for a complainant is determined by analysis of whether the action is punitive and does not unreasonably burden the respondent.

Inherently Punitive or Not?

No/Not Punitive/Can Do Without the Grievance Process

- 1. Educational conversations
- 2. Sending students to the principal's office
- 3. Changing student seating or class assignments

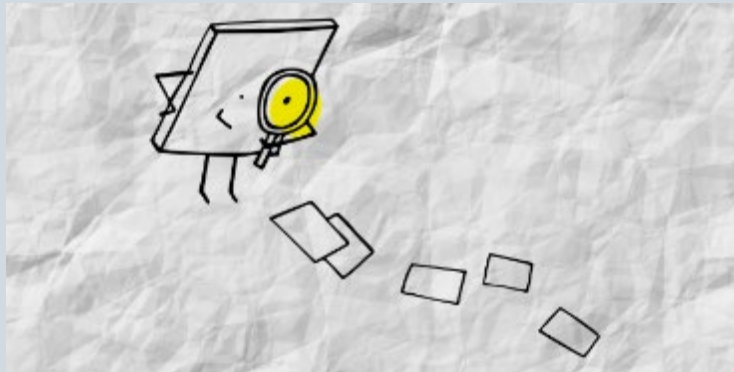
Such actions may be taken to maintain order, protect student safety, and counsel students about inappropriate behavior.

Yes/Punitive/Cannot Do Without the Grievance Process

- By contrast, expulsions and suspensions constitute disciplinary sanctions (and/or constitute punitive or unreasonably burdensome actions) that could not be imposed unless a result of the grievance process.

Post-Exoneration Supportive Measures

- School has discretion whether to continue supportive measures after a determination of non-responsibility.
- Determination of non-responsibility does not necessarily mean that the complainant's allegations were false or unfounded but rather could mean that there was not sufficient evidence to find the respondent responsible.



Triggering Events and Red Flags

Recognition: *When Does the School Know (or When Should It Reasonably Know) of Possible Harassment*



What Triggers A School's Obligation to Respond? 2020 language

2020 regulation: § 106.44(a): 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 in a manner that is not deliberately indifferent. A recipient is deliberately indifferent **only** if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

Triggering Events

Written complaint submitted pursuant to policy

- Complaints may be submitted orally or in writing to teacher or other employee, administrator, Compliance Officer, Superintendent or other district-level employee

Complaints submitted to outside agencies (IDOE, OCR, EEOC)

Injury reports

Anonymous reports

A handwritten note on a white background with a light blue border. The text is written in black ink and reads: "Make the boys on bus 235 Stop calling me a FAG!"

Triggering Events

Informal and verbal complaints from parents, employees or students

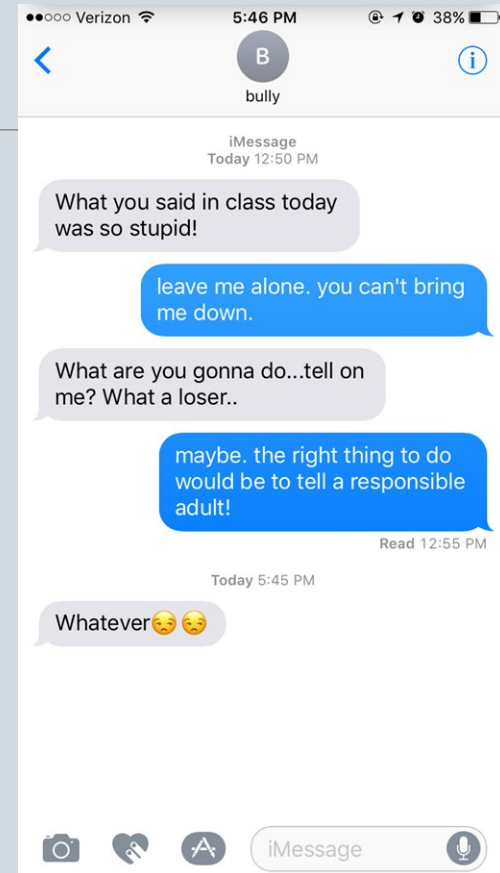
- Facebook postings
- Screenshots of text messages

Casual remark (e.g., “X picks on me”)

Grapevine reports

Behavioral/discipline incidents

Student bullying reports



Actual Knowledge

Actual knowledge means **notice** of sexual harassment or allegations of sexual harassment to a school corporation's Title IX coordinator or any school official who has authority to institute corrective measures on behalf of the school, or **to any employee of an elementary and secondary school**. As used in this definition, “notice” **includes (but is not limited to) a report** of sexual harassment to the Title IX coordinator as described in 34 CFR Sec. 106.8(a).

Actual Knowledge *Staff Reporting Obligation*

- It's like child abuse - every employee has an immediate reporting obligation, and a report to any employee is a "filing."
- Coach counts if they are an "employee." With direct payment by schools, all lay coaches/ECA sponsors are likely employees.



Actual Knowledge

Reporting Procedure

- Must prominently display Title IX coordinator contact info on website and state that any person may report sexual harassment
 - in person
 - by mail
 - by telephone, or
 - by e-mail



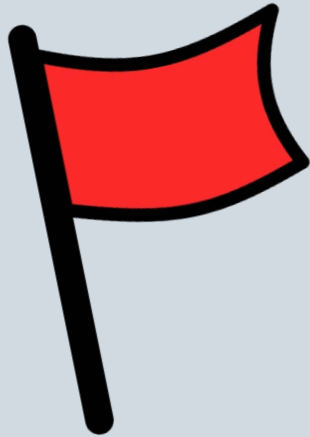
using that contact information (or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report), and that a report **may be made at any time** (including during non-business hours) by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

Education Program or Activity

- Schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States. 34 CFR 106.44(a).
- Education program or activity includes locations, events, or circumstances **over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs**, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

What to look for ...

If bullying, misconduct, or conflict has any reference to sex, gender, or sexual orientation, it should be reviewed under the anti-harassment policy.



Signs:

- Unwelcome flirtations, verbal expressions of sexual nature, commentaries about body/dress/appearance/sexual activities
- Targeted students who do not conform to stereotypical notions of masculine or feminine dress/hairstyle/appearance
- Do not discount common slang terms (example: “that’s so gay”)
- Actual or perceived sexual orientation doesn’t matter

Other Red Flags and Triggers

What to look for in alleged victim:

- Fear
- Feelings of blame, guilt, and shame
- Depression, anxiety, loneliness
- Physical illness including insomnia, high blood pressure, stomach aches, headaches
- Increased absenteeism
- Poor performance

Anyone can be a harasser, even members of the same protected group and even people who are dating.



The “Scope” of the Program

For the purposes of Title IX, the scope of the educational program or activities includes locations, events, or circumstances over which the School exercises substantial control over both the respondent and the context in which the sexual harassment occurs.

This includes all activities taking place within a school building or on School property; any athletic, extracurricular, or co-curricular activity officially recognized by the School and led by an employee; computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of the School.

Winter FUN FACT



Mardi Gras will be celebrated on March 4, with lots of King Cakes.

Did you know? If you find the baby in the King Cake you'll have good luck all year – and you'll have to host the next Mardi Gras party!

Triggers Title IX	Probably doesn't trigger Title IX
Harassment in the school building or on school property	House party on the weekend
Harassment in school or extracurricular activities	International field trip or study abroad
Teacher visiting student's home to deliver book and engaging in sexual harassment while there	
Prom in a rented ballroom	Harassment committed by a student or staff from a different school (i.e., harassment happened at "away" volleyball game)
Student using personal cell phone to perpetuate online harassment during class time	Student using personal cell phone to perpetuate online harassment at home on weekend

Off Campus or Not Enrolled

- In general, off-campus, off-hours assaults will not trigger school liability. Off-campus incidents only incur liability if:
 1. if the off-campus incident occurs as part of the recipient's "operations" pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
 2. if the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
 3. if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to §106.44(a).
- If complainant is no longer enrolled when the complaint is filed, or if the perpetrator is no longer enrolled or employed, no reason for the school to do a investigate because the school can't do anything.

Caution:

“Off campus activities”

- If harassment occurred off campus and then on campus, School must respond to the on campus incident. It *may* also respond to the associated off campus behavior (ex: *Doe v. East Haven Board of Education*, student was raped off campus but then taunted on campus)
- Nothing says that School can't respond to off-campus behavior on its own accord
- Federal courts have held schools liable for sexual harassment that occurs off campus where the underlying sexual harassment or assault causes the complainant to experience a hostile environment on campus (*Gebser/Davis*). Those cases are still valid caselaw and can still lead to civil liability, so we need to keep in mind the various standards here.

Reports v. Formal Complaints

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.

Formal Complaint v. Report

Formal Complaint

A complainant (or a third party) may report sexual harassment to a school for a different purpose than desiring an investigation. But, if an *investigation* is an action the complainant desires, the complainant must file a written document requesting an investigation.

No requirement as to a detailed statement of facts.

Report

Disclosure or report may be entirely separate from a complainant's later decision to request an investigation by filing a formal complaint.

Response to Report

Response obligations must include:

1. offering **supportive measures** to each complainant (alleged victim), and
2. having the **Title IX Coordinator contact the complainant to discuss the availability of supportive measures** with or without the filing of a formal complaint, consider the complainant's wishes regarding supportive measures, and
3. **explaining to the complainant the process for filing a formal complaint.**

No Formal Complaint

- Process ends unless Title IX Coordinator “signs” the complaint;
 - When?
 - **Decision not to investigate is “clearly unreasonable”**
 - Meant to be rare occurrence
 - Ongoing concern for Complainant or other alleged victims; anonymous report with significant concerns; or involvement of an employee.
- Supportive measures continue or discontinue at the Title IX Coordinator’s discretion.

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INVESTIGATOR

Team including: Title IX Coordinator, Deans, and Counselors

1. Lead on investigation (use building-level admin as needed)
2. Responsible for communication with parties

DECISIONMAKER

Team of 2-3 People

1. Makes ultimate decision
2. Hands out discipline if necessary

APPEAL

Superintendent

1. Hears appeals.
2. Doesn't taint the entire board if there is a teacher cancellation hearing or student expulsion appeal

Title IX Grievance Procedures Flowchart

Report. School has actual knowledge of alleged Title IX violation.

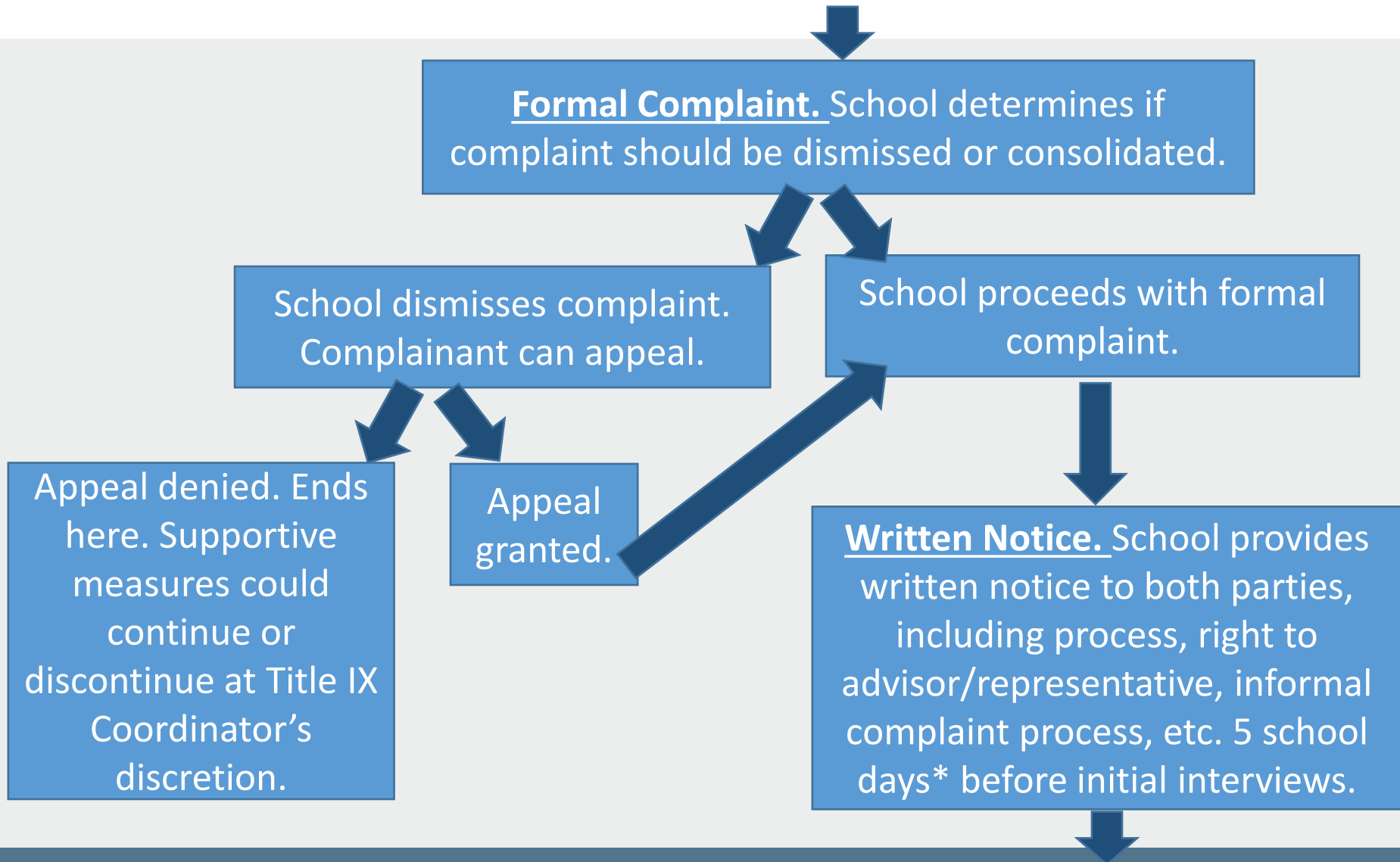
Initial Response. Title IX Coordinator contacts Complainant (alleged victim) within 2 school days* to discuss supportive measures, if Complainant wants to file formal complaint, etc. Determination if emergency removal is appropriate.

Complainant doesn't want formal complaint. Ends here unless Title IX Coordinator moves forward on own. Supportive measures could continue or discontinue at Title IX Coordinator's discretion.

Formal Complaint. Complainant files formal written complaint within 10 school days* of conversation with Title IX Coordinator. School determines if complaint should be dismissed or consolidated.

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Written Notice. School provides written notice 5 school days* before initial interviews.



Informal Resolution. Both parties agree to informal resolution (not available in all situations). No investigation.

Investigation of Allegations. School may interview/take statements from parties (may have representative present), witnesses, review educational and personnel records, legal or medical records if provided, etc. Both parties can present evidence. Will usually take 30 school days.*



Investigation of Allegations. Will usually take 30 school days.*



Review of Evidence. Both parties provided all evidence, given 10 school days to respond. Non-disclosure agreements require before evidence exchange.



Investigative Report. Investigator provides report to both parties summarizing relevant evidence.



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graph TD; A[Investigative Report] --> B["Hearing"/Exchange of Questions. Live hearing required in postsecondary. Can hold live hearing in K-12 but not recommended. Instead, each party can submit to the Decisionmakers written, relevant questions to be asked of the other party or witness. Each party can submit written response to investigative report. Both submissions are due 10 school days* after receipt of the report. Decisionmakers collect answers to questions, provides opportunity for follow-up questions. Usually takes 30 school days.*];
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Investigative Report

“Hearing”/Exchange of Questions. Live hearing required in postsecondary. Can hold live hearing in K-12 but not recommended.

Instead, each party can submit to the Decisionmakers written, relevant questions to be asked of the other party or witness. Each party can submit written response to investigative report. Both submissions are due 10 school days* after receipt of the report. Decisionmakers collect answers to questions, provides opportunity for follow-up questions. Usually takes 30 school days.*

Suggested Roles*

Investigator ≠ Title IX

*Coordinator
(Title IX coordinator should manage supportive measures)*

Decisionmaker = Teams of 2-3

Appeal = Superintendent

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Hearing/Exchange of Questions.

Decision. Decisionmakers issues written decision, including disciplinary sanctions if applicable, within reasonable time

Appeal. Either party may appeal final determination within 10 school days of receiving it.

Appeal Granted.

Superintendent considers appeal within 45 school days.* If appeal granted, Board Member directs Decisionmaker to make changes.

Appeal Denied. Superintendent considers appeal within 45 school days.* Appeal denied. Ends here.

Note: Appeal of Title IX decision may affect expulsion hearing (for students) or contract cancellation process (for teachers)

Winter FUN FACT



The actual St. Patrick was associated with the color blue! Following the use of the clover as a symbol of Ireland, the Irish began associating St. Patrick with green.

Conducting Investigations

Considerations When Interviewing

Do's

- Determine order of interviews
- Determine what relevant information you need (to determine if there was harassment – review standard)
- Outline questions, but listen carefully and follow up
- Consider when to use open-ended questions and when to use closed-ended questions
- Appreciate how trauma may impact memory and presentation
- Ask clarifying questions to ensure understanding
- Anticipate the hard questions (Will I get in trouble if I tell you this? Do I need my parent present?)
- Find a safe, neutral location for the interviews
- Keep good notes of your process and the interviews (including date, your name, interviewee, whether anyone else present, whether anyone failed to respond, efforts to reschedule)

Considerations When Interviewing

Don'ts

- Avoid conclusory language (harassment v. touching)
- Avoid accusatory questions
- Avoid or minimize potential re-traumatization, if possible, but follow up on difficult topics and questions, if necessary
- Avoid evaluative responses, but use active listening skills to elicit response
- Avoid defining either party's experience

What Information Is Relevant?

- Evidence is relevant if it has “any tendency” to make a fact that is “of consequence” to the determination of sexual harassment “more or less probable than it would be without the evidence.”
 - The evidence must be directed to a matter of consequence, essentially the definition of sexual harassment.
 - The evidence must be probative – it must make something more or less probative. It does not have to be in dispute. Whether something is more or less likely is guided by logic and human experience.

What Information Is Not Relevant?

The final regulations deem certain information not relevant to the grievance process:

- Information protected by a legally recognized **privilege** (106.45(b)(1)(x));
- Evidence about a **complainant's prior sexual history** (106.45(b)(6)(i)-(ii)); and
- Any medical, psychological, and similar records unless the party has given voluntary, written consent (106.45(b)(5)(i)).

Considerations When Interviewing

- Explain who you are (and anyone else in room)
- Explain the process and that you'll be taking notes
- Thank them for participating in the process
- Have the policies/procedures handy
- Ask them to describe what occurred, then follow up on details
- Ask who they have talked with about this
- Explain what will happen after the interview
- Get commitment to tell the truth
- Let witness do most of the talking
- Ask if any questions

Interview Complainant

- Identify – who, what, when, where
- Specific descriptions of incident(s)
- Get chronology of what happened and establish timeline
- Describe the scene
- Determine what happened/offended Complainant
- Impact on Complainant
- Discuss Complainant's response
- Identify witnesses and what they will say
- Any documentary evidence (text messages, surveillance footage, etc)
- What relief is being requested
- Explain no retaliation
- Anything else you'd like me to know/Anyone I should talk with
- Any questions

Other Interviews

- Potential witnesses named by Complainant
 - Purpose for interview – investigating allegations [against Respondent regarding an incident that reportedly occurred ...]
 - Complainant indicated you might have information
 - Who/when/why/how of what you did or did not witness or hear
 - Did you observe any changes in Complainant/Respondent's behavior
 - Have either of the parties contacted you about this
 - Ask that they not discuss the interview
 - Explain no retaliation for telling the truth
- In closing
 - Any other information?
 - Contact me if you remember anything, or if observe anything relevant.

Respondent Interview

- Define the allegation at issue
- Explain the rule that was allegedly violated
- Ask to give a complete description of what happened and follow up on details using your timeline
- Confront with general allegations
- Confront with more specifics
- Any witnesses and what will they say
- Any evidence (text messages, etc)
- Ask about possible motivation for allegation
- Explain no retaliation against complainant
- Anything else you'd like me to know/Anyone I should talk with
- Any questions

Other Interviews

- Potential witnesses named by Respondent
 - Same general questions as other witnesses
 - Did you observe any changes in Complainant/Respondent's behavior
 - Ask that they not discuss the interview
 - Explain no retaliation for telling truth or against Complainant
- Complainant and/or Respondent Follow Up
 - If necessary
 - Clarify allegations and inconsistencies
 - Gather additional information

Review Records and Evidence

- Review other contemporaneous evidence
 - Video
 - Photos
 - Receipts
 - Attendance records
 - Log sheets
 - Phone/email/text records
 - Notes made by either party at the time of allegations

Analyzing the Evidence

- Credibility decisions
 - Biased/motivation to lie
 - History of similar conduct
 - Corroboration/consistency
 - Plausibility
 - What's logical, but be careful about your own biases about what makes sense
 - Don't allow irrelevant inconsistencies to distract from the big picture
 - Other behaviors, discipline, but be careful
 - Eye contact, voice tone, demeanor during interviews, but be careful about bias
 - Be able to explain why someone's version is credible or not

Allow Parties to Inspect and Review Evidence

Must provide all evidence, even that not relied upon, to the parties for inspection, parties have 10 days to respond.

Evidence must be “directly related to the allegations”

- Non-treatment records and information, such as a party’s financial or sexual history, must be directly related to the allegations at issue in order to be reviewed by the other party.
- School has discretion on how to provide the evidence.
- May redact information not directly related to the allegations.
- “Confidential” information may not be redacted if directly related to the allegations.

106.45(b)(5)(vii)

Non-Disclosure Agreement

NON-DISCLOSURE AGREEMENT

→ This NON-DISCLOSURE AGREEMENT (the “**Agreement**”) made as of the _____ day of [month], [year] (the “**Effective Date**”), by and between [School Name] (“**School**”) and _____ [by and on behalf of (Student Name if under 18)] (“**Receiving Party**”), sets forth the terms and conditions of the confidential disclosure of and restrictions on the use of records/information by each party.

Consistent with Federal regulations, the School must provide due process protections to alleged victims and alleged perpetrators of sexual harassment in its educational program and activity. 34 CFR Part 106. The regulations provide several instances where sensitive information may be exposed including, but not limited to i) all parties must receive notice of the allegations contained in a formal complaint, 34 CFR 106.45(b)(2); ii) both parties have an opportunity to inspect and review any evidence directly related to the allegations, 34 CFR 106.45(b)(5)(vi); iii) both parties may review the investigative report created at the conclusion of any investigation, 34 CFR 106.45(b)(5)(vii). The regulations further provide that each party may have an advisor of his or her choice and that such advisor shall also have access to the information described above. 106.45(b)(5)(iv). In an effort to allow both parties to gather and present relevant evidence under 34 CFR 106.45(b)(5)(iii) while protecting the sensitive information contained therein, this Agreement is hereby entered into by the above listed parties.

- For purposes of this Agreement, “**Confidential Information**” shall include any and all statements, records, video, photographs, or knowledge related to the allegations made in a Title IX investigation by the School. If Confidential Information is in written form, the School shall label or stamp the materials with the word “**Confidential**” or some similar warning. If Confidential Information is transmitted orally, the School shall promptly provide a writing indicating that such oral communication constituted Confidential Information.
- The Receiving Party shall hold and maintain the Confidential Information in strictest confidence for the sole and exclusive benefit of the School. Receiving Party shall not, without prior written approval of the School, use for Receiving Party's own benefit, publish, copy, or otherwise disclose to others, or permit the use by others for their

Prepare Investigative Report and Send to Parties

“Create an investigative report that fairly summarizes relevant evidence and, **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**, 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.**”

106.45(b)(5)(vii)

- Identify disputed and undisputed facts.
- Address credibility issues.

Allow Parties to Submit Written Questions

After the investigative report has been sent to the parties and **before reaching a determination regarding responsibility**, the decisionmaker(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.

106.45(b)(6)(ii)

Decisionmaker Issues Determination

Must include:

- Identification of the allegations potentially constituting sexual harassment;
- 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;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
- The recipient's procedures and permissible bases for the complainant and respondent to appeal.

How to Serve Impartially

Remember:

- “The **burden of proof and the burden of gathering evidence** sufficient to reach a determination regarding responsibility **rests on the recipient and not on the parties.**” 106.45(b)(5)(i).
- Parties have equal opportunity to **present witnesses (fact and expert) and other inculpatory and exculpatory evidence.** 106.45(b)(5)(ii).
- Recipient must not restrict a party’s **ability to discuss the allegations under investigation** or **gather and present evidence.** 106.45(b)(5)(iii).
 - Does not apply to discussion of **information** not “the allegations under investigation” i.e. evidence or the report.
 - Does not apply where an individual reports sexual harassment but does not file a formal complaint.
 - Does not limit a school’s ability to restrict parties from contacting each other.

How to Serve Impartially

Remember:

- Standard of evidence to determine responsibility is the **preponderance of the evidence** standard. This same standard of evidence is applied to all formal complaints of sexual harassment. 106.45(b)(1)(vii).
- The presumption of non-responsibility (i.e., the **respondent is not responsible for the alleged conduct** until a determination regarding responsibility is made at the conclusion of the grievance processes). 106.45(b)(1)(iv).
- Avoid real or perceived **conflicts of interest**.
 - Person named as Harasser or Witness ≠ Member of investigatory team.
 - If district-level administrator, board member, or Title IX Coordinator is named as Harasser or Witness, good idea to call in outside investigator.
 - Request recusal if appropriate.
- Be aware of and monitor our own personal **biases**.

It's All About the Process

OCR and Courts will generally not second-guess the outcome of an investigation, as long as the investigation is conducted according to policy and appropriate standards.

**READ, RE-READ, ASK QUESTIONS,
FOLLOW THE PROCEDURES**

SHOW YOUR WORK

Follow Up!

- Retain documentation (7 years)
 - Complete notes and reports
 - Ensure everything signed and dated
- Check in with Complainant
- Check in with Respondent (if still employed/enrolled)
- Review policies and procedures

Appeals

- Must provide some sort of appeal option.
- Must allow appeals for **at least** the following:
 1. There was a **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; or
 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.

Hypo #1

Olivia, an openly gay student, has 9th grade math class with Luna. One day, Luna keeps smacking her lips in the back of the class. Olivia tells Luna to stop making the noises. In return, Luna calls Olivia a “fruit.”

- Title IX Report?
- Sexual Harassment?

Hypo #2

Paul, a 10th grader, is in the bathroom washing his hands when Jake, another 10th grader enters the restroom. Jake says, “What’s up *itch?” and then proceeds to ask Paul if he wants to fight. Paul responds “no.” Jake then yanks Paul’s pants down.

- Title IX Report?
- Sexual Harassment?

Hypo #3

Two high school male soccer players, Student A and Student B, confide in their coach that they are in a romantic relationship and that they have not come out to anyone else. Later, during a game, Student A scores a goal. Student B hugs Student A in celebration. The coach yells, “Get a room!” And in the locker room after the game chastises Student A and Student B for public displays of affection.

- Title IX Report?
- Sexual Harassment?

Hypo #4

During the 8th grade field trip to Washington D.C., Finn slapped Ava's butt at the Smithsonian, each time Ava goes to the bathroom Finn requests she send him pictures of her breast, and during a bus ride Finn cups Ava's breast without permission.

- Title IX Report?
- Sexual Harassment?

Hypo #5

On Monday, Kelsey reports that Kyle sexually assaulted her over the weekend at a house party.

- Title IX Report?
- Sexual Harassment?

Hypo #6

Blake presents as non-binary and requests that classroom teachers utilize gender-neutral pronouns. In math class, Blake's classmates tease them asking whether they are a boy or girl. The math teacher, Ms. Sims, laughs and interjects, "Well, there's one way to find out!" And adds that students are either boys or girls. After class, Blake tries to talk to Ms. Sims about the interaction and Ms. Sims states that they shouldn't take themselves so seriously.

- Title IX Report?
- Sexual Harassment?

Questions?

Thank you.

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