



2020 Title IX Regulations: K-12 Basic Compliance Training



July 14, 2020

July 20, 2020

Presented by Jennifer Smith

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Ask Questions




Why Are We Here?



Know the Rules

SEXUAL HARASSMENT
complaint form

A close-up, high-resolution photograph of a human eye. The eye is light-colored, possibly hazel or light brown, with a dark pupil. The iris shows intricate patterns. The eyelids are visible, with some redness and texture. The text "Recognize Title IX Sexual Harassment" is overlaid in white, bold, sans-serif font, centered over the eye.

Recognize Title IX Sexual Harassment



But not just any action, the right action for
the conduct at issue!



Why is this so important?

1 in 4 women
experiences sexual
assault before age 18

10% of children are
targets of educator
sexual misconduct
before high school
graduation

48% of U.S. students are
subject to sexual
harassment or assault at
school before graduating
high school

In 2010-2011, 36% of
girls, 24% of boys and
30% of all students
grades 7-12 experienced
online sexual harassment

According to a **2017 report from
the Justice Department**, only

23 percent

of all sexual assaults are reported
to the police.

THIS DOESN'T ADD UP:

79% of public schools reported **zero incidents** of sexual harassment or bullying.



AAUW research has shown that nearly half of students in grades 7-12 reported experiencing some form of sexual harassment, yet more than three-fourths of schools reported zero incidents for the 2015-16 school year.

*Harassment
and assault can have
long lasting,
detrimental effects on
victims*

Effects on Individuals

Poor performance in school

Stress

Disengagement

Fear

Distraction

Anger

Mistrust

Conflict

Lost Opportunities

Acting out

Absenteeism

Drop-out

Suicide

ANXIETY

PTSD

DEPRESSION

Effects on Teams

Decreased focus

Lost productivity

Withdrawal

Neglect

Absenteeism

Malingering

Lack of trust in leadership

Turnover



*Unfair processes can
have
long lasting,
detrimental effects on
the parties*

Mattress Protest and Its Aftermath

Case of alleged rape at Columbia first yielded much sympathy for the accuser and protest, but ends with the university apologizing to the accused. The case has had on the discussion of sexual assault on campus.

By **Jeremy Bauer-Wolf** // July 24, 2017



The New York Times Magazine

FEATURE

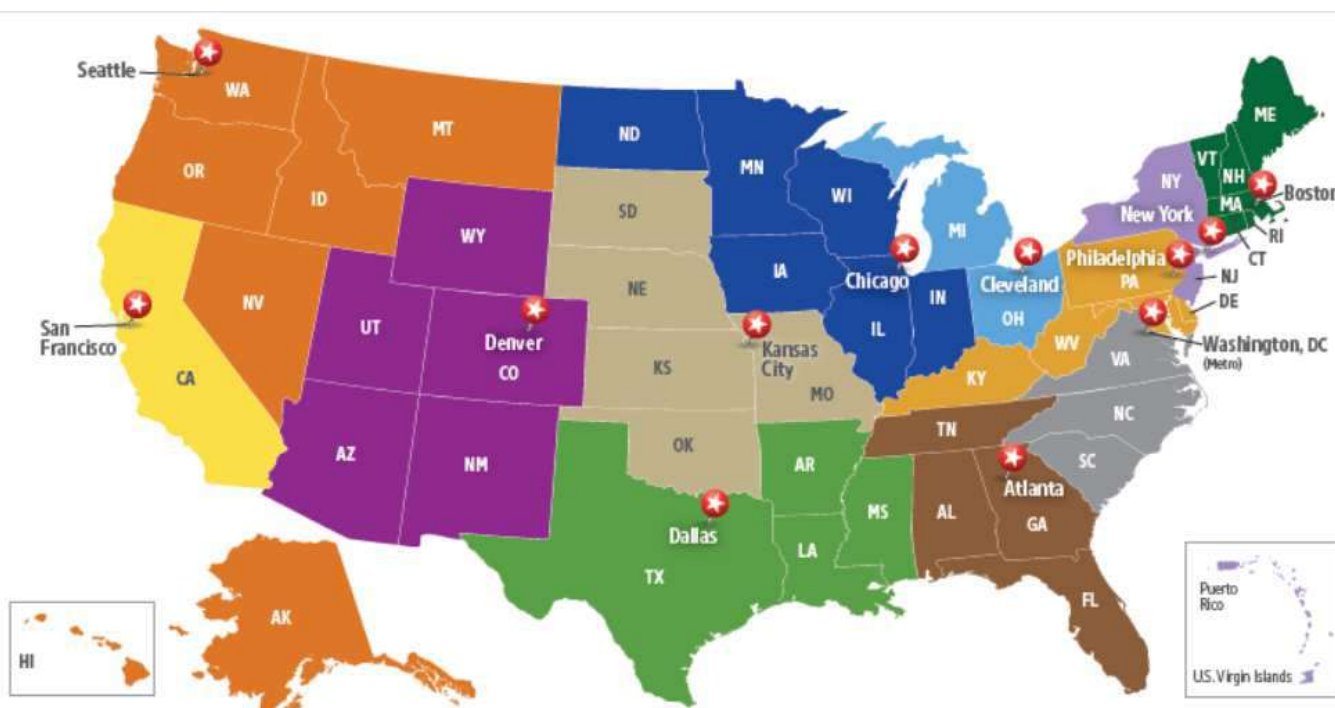
The Accusations Were Lies. But Could We Prove It?

When the university told my wife about the sexual-harassment complaints against her, we knew they weren't true. We had no idea how strange the truth really was.



Harassment Is Illegal *Including Sexual Harassment*

ED Office for Civil Rights (OCR)



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Ice Breaker



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Have you been involved in a Title IX complaint during your time at the District?

Yes

No

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Have you been involved with a student or employee issue involving unwanted conduct on the basis of sex?

Yes

No

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In the Zoom Chat



Name, Title

What is the most important question you would like answered today?





What is Title IX?





What is the first word you think of when you hear "Title IX"?



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Title IX

Title IX Statute

(20 U.S.C. §§ 1681–1688)

"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."

What falls under Title IX?

**Recruitment,
Admissions, and
Counseling**

**Financial
Assistance**

Athletics

**Sex-Based
Harassment**

**Treatment of
Pregnant &
Parenting Students**

Discipline

**Single-Sex
Education**

Employment

Retaliation


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Title IX Regulations

(34 C.F.R. Part 106 – Amended as of 8/14/2020)

- Prohibit discrimination on the basis of sex
- Establish procedural requirements
 - Policy + detailed grievance procedure
 - Designation of Title IX coordinator(s)
 - And many more requirements!



When Must the School Respond to Sexual Harassment?



It Depends Who [Well, Which Law] You Ask

Employment

- Illinois Human Rights Act
- Title VII
- Title IX

Students

- Illinois Human Rights Act
- Illinois Sex Equity Regulations
- Title IX

When must a school respond to Title IX sexual harassment?

A school with actual knowledge of [Title IX] sexual harassment in an education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent.

Notice

ACTUAL knowledge

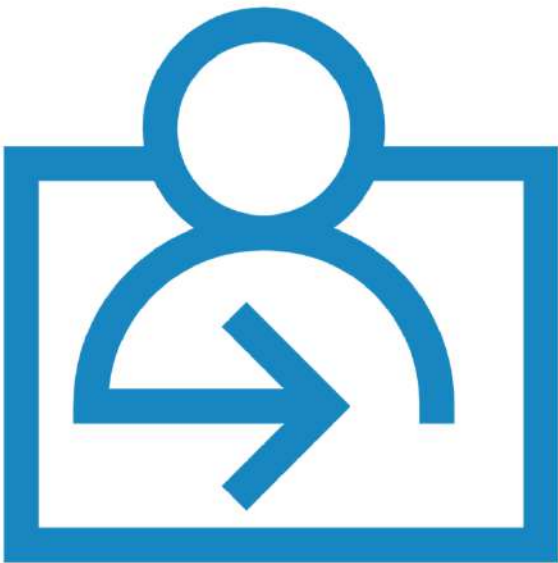
To Title IX
Coordinator or
"official with
authority" (all K-12
employees)



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Official with Authority



- Title IX Coordinator
- Any other officials who have been given authority to institute corrective measures by the school district
- K-12: All employees



Actual Knowledge

1. Sense
2. Report

Reporting Sexual Harassment: Who, How and When?

- Any person may report sex discrimination, regardless of whether the person is the alleged victim of the reported conduct
- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator
- Or by any means that results in the Title IX Coordinator receiving the person's 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

Key Word: “Allegation”

Once a school has notice of **an allegation** that, **if true**, would constitute sexual harassment, it must respond

“Well, we didn’t believe there was enough evidence it happened” does not get you past your responsibility to use your Title IX procedures

Issue Spotting

Order of protection: Principal served with order of protection requiring 17 year old male student to have no contact with 16 year old female student due to alleged sexual assault off campus.

Raise Your Hand

Is this notice under the new Title IX?



What is Sexual Harassment?



It Depends Who [Well, Which Law] You Ask

Employment

- Illinois Human Rights Act
- Title VII
- Title IX

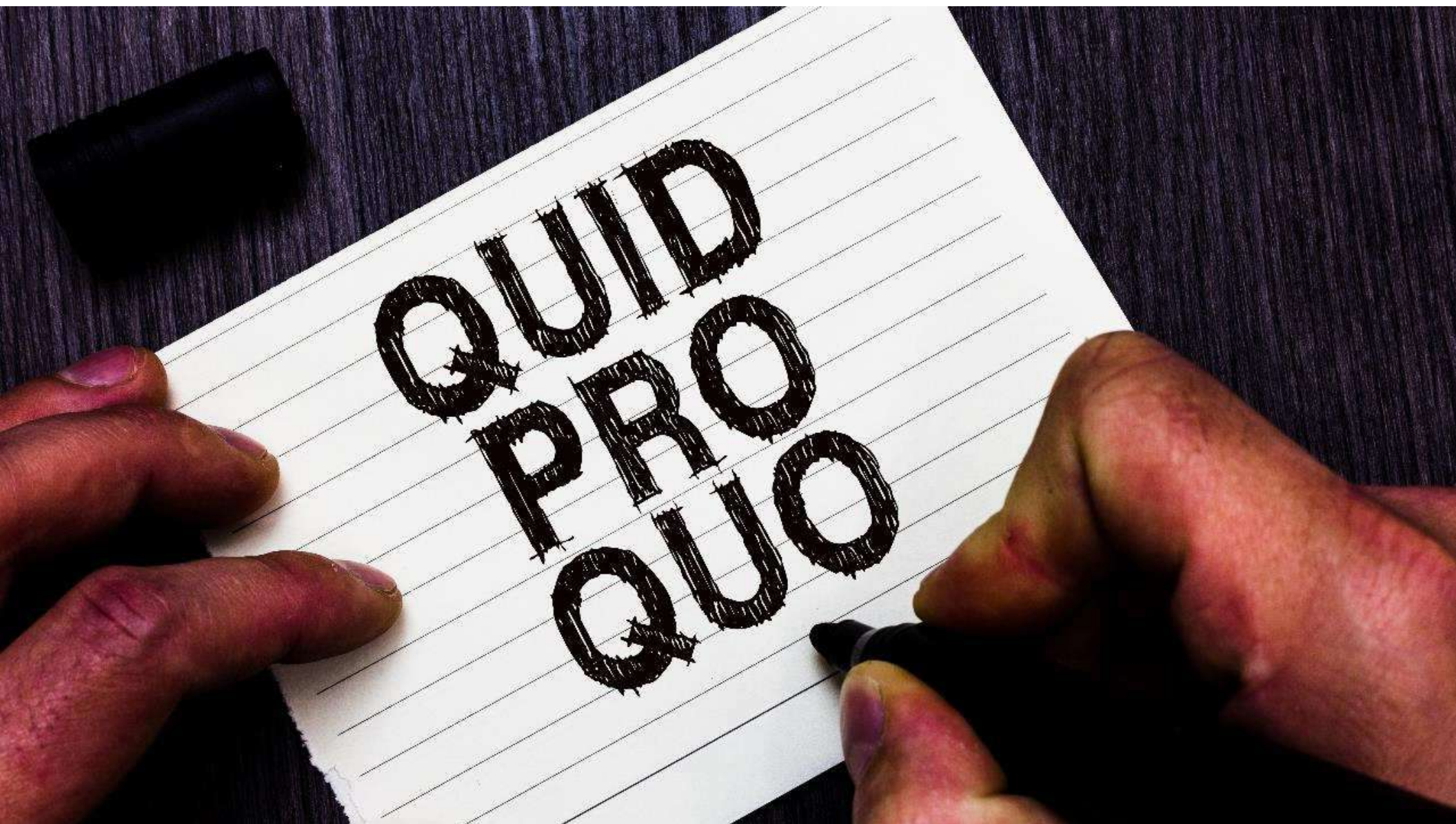
Students

- Illinois Human Rights Act
- Illinois Sex Equity Regulations
- Title IX



Title IX Sexual Harassment

- Employee quid pro quo
- Hostile environment (newly defined)
- Clery/VAWA "Big 4"



Quid Pro Quo

Quid = Something

Pro = For

Quo = Something

Title IX Quid Pro Quo

Definition: An employee of the educational institution conditioning an aid, service, or benefit of the educational institution on participation in unwelcome sexual conduct

New: Only an employee (not a volunteer, another student, etc.)

Codified: Severity and harm presumed

VAWA “Big Four”

Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Domestic Violence 34 U.S.C. 12291(a)(8)

Dating Violence 34 U.S.C. 12291(a)(10)

Stalking 34 U.S.C. 12291(a)(30)



Title IX Hostile Environment

Title IX – What is Sexual Harassment?

Old Definition

Unwelcome conduct determined by a reasonable person to be **severe, pervasive or persistent as to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities**

New Definition (8/14)

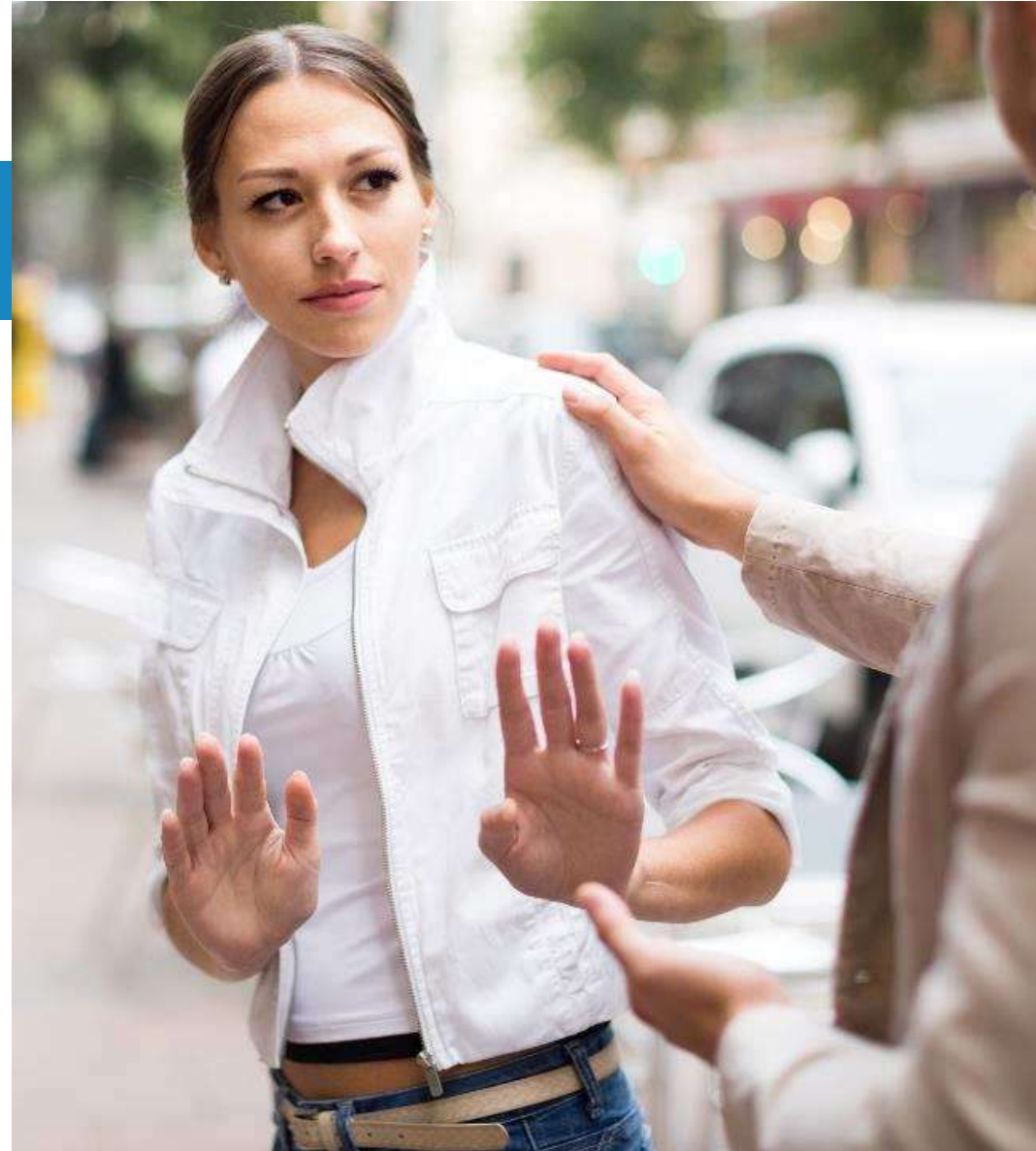
Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the school's education program or activity**

Unwelcome Conduct

- Not **Consent**
- Not **Participation**
- Not **Silence**
- Age Matters
- Intoxication Matters
- Culture Matters
- Ability Matters

**reasonable person

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What is "severe"?

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Severe

"Severe" means something more than just juvenile behavior among students, even behavior that is antagonistic, non-consensual, and crass. The *Davis* Court made an explicit admonishment that "simple acts of teasing and name-calling" are not enough, "even where these comments target differences in gender." *Davis*, 526 U.S. at 651, 119 S.Ct. 1661; 652 ("It is not enough to show ... that a student has been teased or called offensive names." (quotation marks and editorial marks omitted)).²

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 620 (6th Cir. 2019)

What is "pervasive"?

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Pervasive

"Pervasive" means "systemic" or "widespread," *id.* at 652-53, 119 S.Ct. 1661, but for our purposes, it also means *multiple* incidents of harassment; one incident of harassment is not enough. *Id.* (explaining that this cause of action does not cover "claims of official indifference to a single instance of one-on-one peer harassment"). The *Davis* Court hypothesized that a single incident could be sufficiently *severe* that it would result in the articulated injury—and we do not doubt that a sexual assault would be such a severe incident—but the Court held that a single incident would nonetheless fall short of Title IX's requirement of "systemic" harassment.

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 620–21 (6th Cir. 2019)

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What is "objectively offensive"?

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Objectively Offensive

“Objectively offensive” means behavior that would be offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively. *Id.* at 651, 119 S.Ct. 1661. “Whether gender-oriented conduct rises to the level of actionable harassment thus depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.” *Id.* (quotation marks omitted). The victim’s perceptions are not determinative. “Indeed, the [Davis majority] ... suggests that the ‘objective offensiveness’ of a comment is to be judged by reference to a reasonable child at whom the comments were aimed.” *Id.* at 678, 119 S.Ct. 1661 (Kennedy, J., dissenting).

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 621 (6th Cir. 2019)

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Constellation of surrounding
circumstances, expectations, and
relationships

Hostile Environment Factors

Context, Nature, Scope, Frequency,
Duration, and Location of the Incidents

Identity, Number, Ages, and
Relationships of the Persons involved

ACCESS DENIED

Denial of Access

Nor do we contemplate, much less hold, that a mere “decline in grades is enough to survive” a motion to dismiss. *Ibid.* The dropoff in [the student]'s grades provides necessary evidence of a potential link between her education and [the perpetrator]'s misconduct, but petitioner's ability to state a cognizable claim here depends equally on the alleged persistence and severity of [the perpetrator]'s actions, not to mention the Board's alleged knowledge and deliberate indifference.

Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 652, 119 S. Ct. 1661, 1676, 143 L. Ed. 2d 839 (1999)

**What
about....
casual or
isolated
comments
or conduct?**



Yes or No?

Is this severe, pervasive, and objectively offensive?

A student makes multiple insensitive jokes to another student?

Yes

No

Need more
information

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A teacher makes a sexually inappropriate comment to a student in class?

Yes

No

Need more
information

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One student grabs another student's breasts during a soccer game.

Yes

No

Need more
information

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A student "uses tongue" during an acting scene without the other student's permission.

Yes

No

Need more
information

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A group of students (one sex) make a Facebook post rating students (another sex) by attractiveness and share with school community

Yes

No

Need more
information

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A teacher (one sex) tells a student (another sex) to trade a back rub in the classroom for a good grade on a test

Yes

No

Need more
information

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Students incessantly mock a female student for not wearing makeup saying she looks "like a boy"

Yes

No

Need more
information

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A student sends a completely nude picture to the student's significant other (another student)

Yes

No

Need more
information

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The recipient student forwards the photo to 20 classmates


Yes

No

Need more
information

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ACCESS DENIED



Title IX Sexual Harassment Must Be “In a Program or Activity”



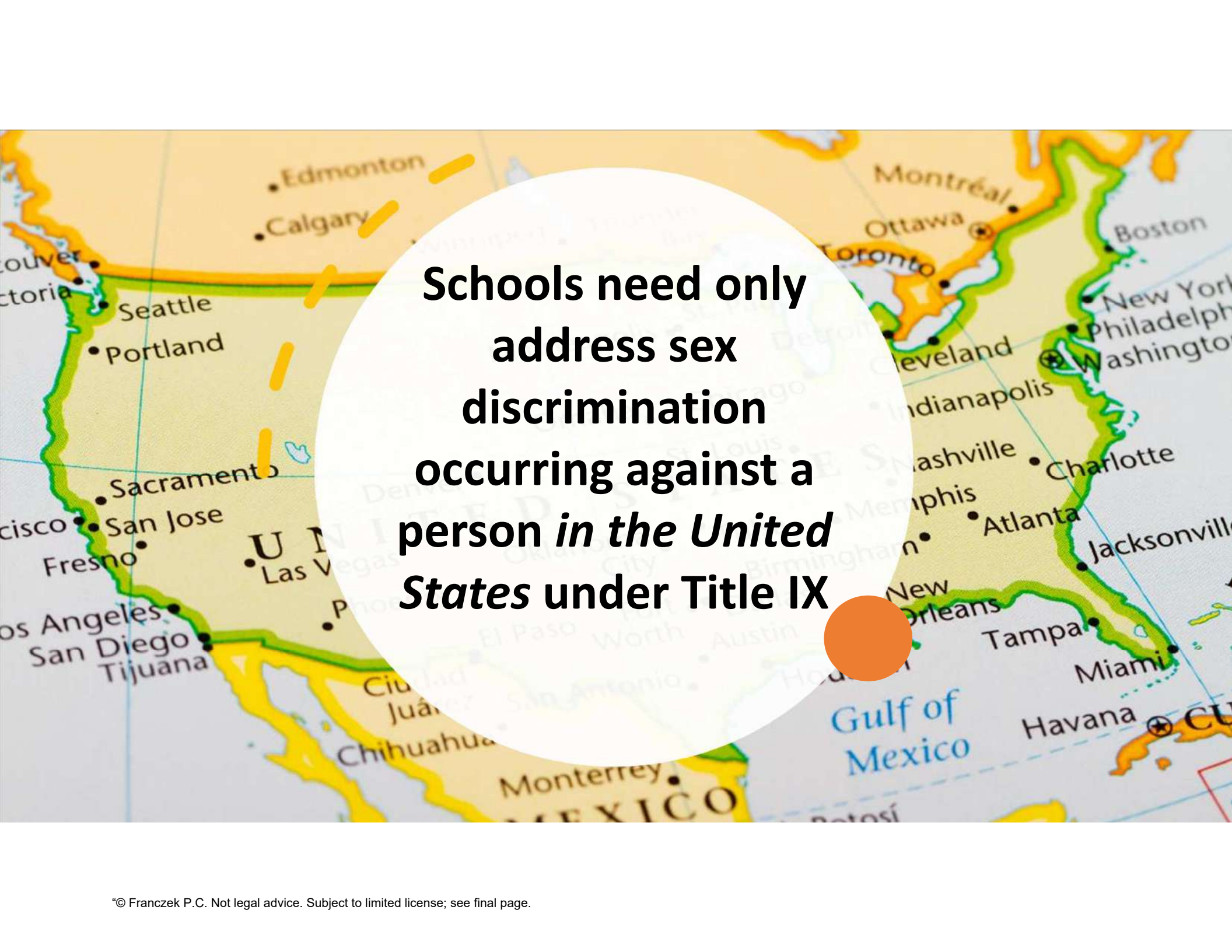


Program or Activity: Any location, events, or circumstance over which the school exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred

Online & Off Campus

Substantial control over the context?



A map of the United States is shown in the background, with various cities labeled. A large white circle is overlaid on the map, containing the text. An orange circle is positioned at the bottom right of the white circle. The text inside the white circle reads: "Schools need only address sex discrimination occurring against a person *in the United States* under Title IX".

**Schools need only
address sex
discrimination
occurring against a
person *in the United
States* under Title IX**



DISMISSALS

Mandatory if conduct alleged:

- Not sexual harassment if true
- Did not occur in the school's program or activity
- Did not occur in the United states

**can still address under non-Title IX policy

Permissive if:

- Complainant requests to withdraw in writing
- Respondent's enrollment or employment ends
- Specific circumstances prevent school from gathering evidence sufficient to reach a determine (e.g., passage of time, lack of cooperation by complainant)



How Must You Respond?

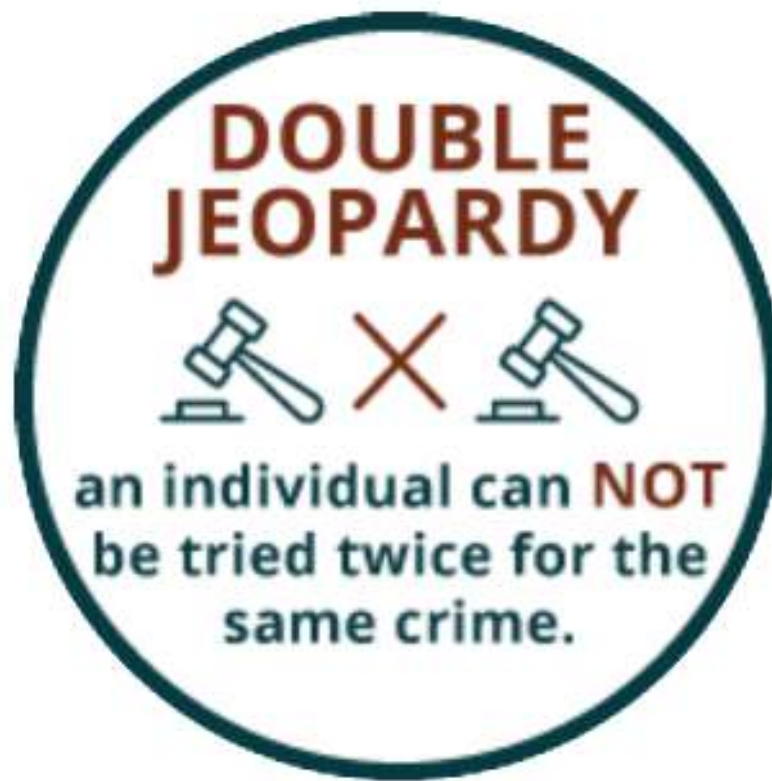


Board Policies on Harassment

Option 1: NEW Board Policy 2:265 Title IX Sexual Harassment (for TIX Sexual Harassment *only*)

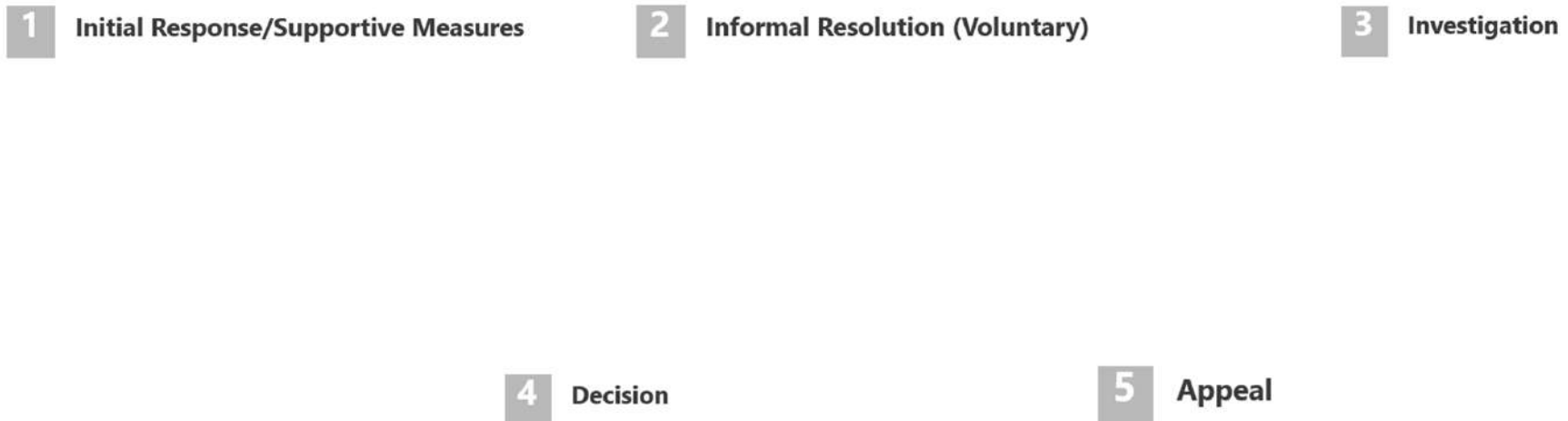
Option 2: Board Policy 2:260 Uniform Grievance Procedure (for any other violation of law, including other types of “sexual harassment”)

Option 3: Other Board policies prohibiting conduct, e.g., bullying, sex equity policies





Adequate Response



1 Initial Response/Supportive Measures

Title IX Coordinator

- Must be called Title IX Coordinator
- Must meet with alleged victims of sexual harassment (the Title IX Complainant)
upon actual knowledge of TIX SH even if no formal complaint filed
- Can delegate responsibilities

Apply to parties in both *reports* and *Formal Complaints* of sexual harassment

```
graph TD; A[Apply to parties in both reports and Formal Complaints of sexual harassment] --> B[Title IX Complainant: A person who is alleged to be the victim of conduct that could constitute sexual harassment]; B --> C[Title IX Respondent: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment];
```

Title IX Complainant: A person who is alleged to be the victim of conduct that could constitute sexual harassment

**NOT a third party who reports
Title IX Sexual Harassment
perpetrated against someone else**

**NOT the Title IX Coordinator,
even if the TIXC “signs” a Formal
Complaint**

Title IX Respondent: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Terminology

Title IX Coordinator (or designee) must promptly, **even if no Formal Complaint is filed:**

- Contact the Title IX Complainant to discuss the availability of “supportive measures”
- Consider the Title IX Complainant’s wishes with respect to supportive measures
- Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a Formal Complaint

New:
Initial
Response



Formal Complaint

Defined as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).



Signing a Complaint

Factors to consider

Supportive Measures

What Changed?

OLD TERM (OCR Guidance)

- Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access
- Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents

NEW TERM

(Final Rule)

- **Non-punitive**, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed (34. C.F.R.106.30(a)).
- **Should be designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party**
- **Should be confidential**



Examples of Supportive Measures

- Counseling
- Course modifications
- Schedule changes
- Increased monitoring or supervision

A supportive measure that completely removes a respondent from an activity would likely be considered punitive, except for "emergency removals" for students and "administrative leaves" for employees

Emergency Removal/ Admin Leave

Immediate emergency removal

(34 C.F.R. 106.44(c))

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat to physical health or safety**
- **Notice, opportunity to challenge** provided “immediately” provided the removal
- Consider other laws, e.g., SB100, “change in placement” under IDEA

Employee administrative leave

(34 C.F.R. 106.44(d))

- Not prohibited
- Consider state law, board policy, handbooks, and bargaining agreements

What about Protective Orders?

2

Informal Resolution (Voluntary)

Informal Resolution

INFORMAL RESOLUTION IS NOT PERMITTED UNDER THE FOLLOWING CONDITIONS:

- Cannot condition enrollment, employment, or any right on waiver of right to investigation and adjudication of formal complaints under grievance procedure
- Cannot require use of informal resolution process
- Cannot offer informal resolution process until formal complaint is filed
- Not available to resolve allegations that employee sexually harassed a student

INFORMAL RESOLUTION MAY MOVE FORWARD UNDER THE FOLLOWING CONDITIONS:

- Any time prior to reaching a determination, either party may request informal resolution
- Requires voluntary, written consent from both parties
- Any party has a right to withdraw prior to agreement

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Informal Resolution Facilitators

- We do not recommend using the Title IX Coordinator or investigator(s) or decisionmakers (complaint and appeal)



Written Notice: Required

- To both parties
- In writing
- Allegations
- Requirements of informal resolution process (including circumstances under which the party cannot resume a formal complaint arising from the allegations)
- Resulting consequences of participating (e.g., records)

3 Investigation

New: Formal Complaint Response

34 C.F.R. 106.45(b)

- Requires a number of specific steps for investigating
- Major shift from previous, more deferential stance toward specific policies and practices for complaint resolution

ANATOMY OF AN INVESTIGATION

Written notice to the parties

Choosing an investigator

Required elements of an investigation

- Written notice to known parties “upon receipt of written complaint”
- In sufficient time to allow respondent to prepare a response before any **initial** interview
- Must include:
 - Notice of grievance process, including any informal resolution process
 - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known)

**More
Steps:
Written
Notice**

- Must include:
 - Statement that respondent presumed not responsible and that responsibility determined at conclusion of grievance process
 - Notice of parties' rights to have an attorney or non-attorney advisor and to inspect and review evidence
 - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during the grievance process
- Must be supplemented if new allegations opened for investigation

**More
Steps:
Written
Notice**



Written Notice: Required

- Informal resolution notice
- Notice at start of investigation
- Dismissal notice
- Interview notices
- Report
- Notice why proposed questions not asked on cross and why
- Written determination and notice of appeal rights



Written Notice: Recommended

- Document information to complainant at initial meeting, including supportive measures requested/provided
- Document that review of evidence provided to both parties
- Document opportunity to ask questions, answers, follow-up questions, etc.



Who should investigate?

- Can be the Title IX Coordinator
- But should it?

Who should investigate?

- Trained
- Unbiased
- No actual or perceived conflict of interest
 - Consider “institutional interests”
- No prejudgment of the facts


Who should investigate?

- Consider the perception of bias
 - Your friendship or other relationship with the accused or their family
 - Your personal characteristics
 - Your personal conflicts (even if just perceived)
 - Personality conflicts

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A woman with long dark hair, wearing a red sweater, is sitting at a desk. She is looking down at a laptop with a distressed expression, her hand covering her mouth. On the desk, there is a laptop, a smartphone, and two potted plants. The background is a simple indoor setting with a window and some decor.

Contents of an Investigation



Investigation 34 C.F.R. 106.45(b)(5)

- Burden of proof on school
- Certain treatment records cannot be obtained without voluntary, written consent
- No restriction of rights of parties to discuss allegations or gather or present evidence
- Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)
- Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
- All evidence provided to parties and their advisors with 10 days to respond before report
- Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility

Investigation Best Practices

- Investigation plan
- Follow steps in policies closely
- Coordinate with law enforcement as required by policy and District practice
- Remember that both complainants and respondents may be experiencing trauma and other strong emotions
- Consult with Title IX Coordinator and/or counsel as needed

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Interviewing Best Practices

- Explain your role as a neutral
- Open-ended questions followed by more tailored follow up
- Allow ample time, don't interrupt or rush
- Ask "Is there anything else?"
- Ask for other witnesses, evidence, incidents

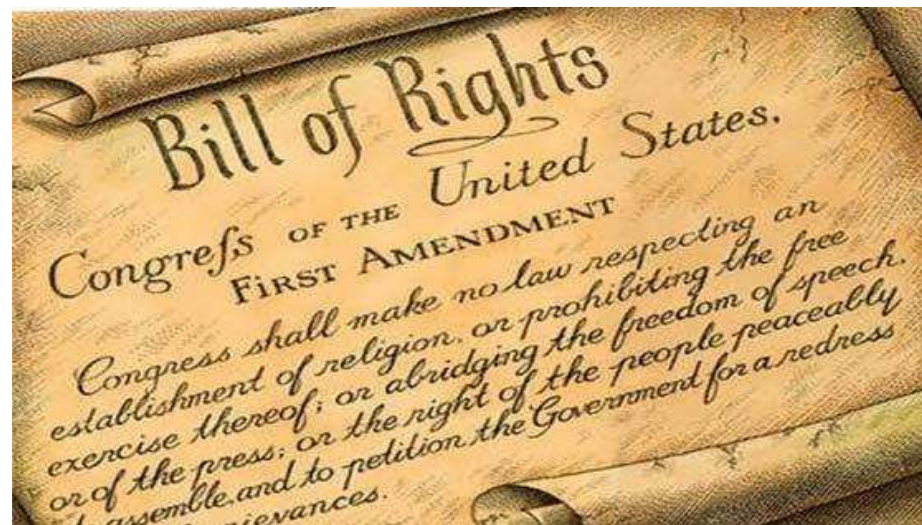
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Notice to Parties in Interviews

- What to expect about future contact (timing, updates, encourage follow-up to you)
- Written copy of policies/procedures
- Notify about protections from retaliation – provide specific examples
- No “Gag” order but can warn of retaliation risks

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First Amendment Rights



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Investigation Plans Aren't Static

Reassess plan for
investigation
frequently



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Gathering Other Evidence

Warning! Medical Records

- Notice of allegations should not divulge either party's medical information
- Prohibited from accessing or using medical, psychological, or similar records in grievance process without a party's (or parent's) voluntary, written consent

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Opportunity to Review Evidence

- Before the investigatory report is completed, evidence relating to the allegations must be sent to each party and advisor and should include all evidence (including that which the school does not intend to rely upon and exculpatory and inculpatory evidence)
- Parties have 10 days to provide a written response

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Investigation Report Should Include

Applicable policies and
procedures



Timeline of investigation

Description of allegations

Unbiased summary of evidence
gathered, including interviews

Credibility determination(s)

Investigation Report Writing

- Fairly summarizes the relevant evidence
- Provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility



Decision



Decisionmaker(s) (Complaint)

- Cannot be the Title IX Coordinator or the investigator(s)

Determinations of Responsibility 34 C.F.R. 106.45(b)(6)

- Live hearing with live cross by party advisors required for higher ed, **not K-12**; Hearings permitted for K-12
- Each party allowed to submit written, **relevant** questions to be asked of another party or witness to the decisionmaker, who will provide each party with the answers and the opportunity for follow-up questions

Relevance

- Rape shield laws – for CP only
 - Unless
 1. Used to prove someone other than respondent committed the conduct or
 2. Specific incidents related to the RP to show consent
- Treatment records
- Legally privileged information

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Rulings on Relevance in Written “Cross”

- Provide reasoning for irrelevance
- Admit and consider all relevant evidence
- Questions must be appropriate
- Identify exceptions



The Decision

Written Determination

Identify	Identify the allegations
Describe	Describe procedural steps taken
Cite	Cite potential policy violations
Summarize	Fairly summarize all relevant evidence
Provide	Provide statement of result, with rationale, for each allegation
Appeal	Appeal procedures



**Remember the
Standard of
Proof**

**Preponderance
of the Evidence**

Remedies

- Can be punitive/disciplinary
- Can be supportive measures or similar actions as well
- Can address individuals or larger community



Appeal

Appeal Process

- Available to both parties
- Three bases for appeal:
 - Procedural issue affecting the outcome;
 - New evidence that wasn't reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome; or
 - TIXC, investigator, or decision-maker had 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.

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Appeal Process

- Notify party of appeal in writing
- Apply procedures equally for both parties
- Opportunity to submit written statement
- Issue written decision to both parties

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Decisionmaker(s) (Appeal)

Cannot be the Title IX
Coordinator or the
investigator(s) or the
decisionmaker (complaint)

Bias, Conflicts of Interest, and Other Fairness Concerns

Bias

The Title IX Coordinator, investigator, decision-maker, or informal resolution facilitator must not have a conflict of interest or bias for or against Complainants or Respondents generally or for or against any individual Complainant or Respondent. And that they not prejudice any matter before them.

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**What is the first word you think of when you think of
"bias"?**

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**What is the first word you think of when you think of
"conflict of interest"?**

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

**What is the first word you think of when you think of
"prejudgment"?**

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pollev.com/app

5 Min Guided Breakout

What steps can you take to avoid:

Prejudgment

Conflict of Interest

Bias



Recordkeeping



Recordkeeping

Must maintain the following for 7 years:

- Sexual harassment investigation documents, including:
 - Determination regarding responsibility
 - Recordings or transcripts of live hearing
 - Disciplinary sanctions imposed on Respondent
 - Remedies provided to Complainant
- Appeal and result
- Informal resolution and result
- Actions taken in response to a report of sexual harassment
- Actions taken in response to a formal complaint of sexual harassment

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Recordkeeping

Responses to formal and informal complaints and actions taken in response should include:

- The basis for the school's conclusion that its response was not deliberately indifferent
- Documentation that it has taken measures designed to restore or preserve equal access to the school's education program or activity
- Supportive measures or if no supportive measures are provided, document the reasons why such a response was not clearly unreasonable in light of the known circumstances

Questions



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