



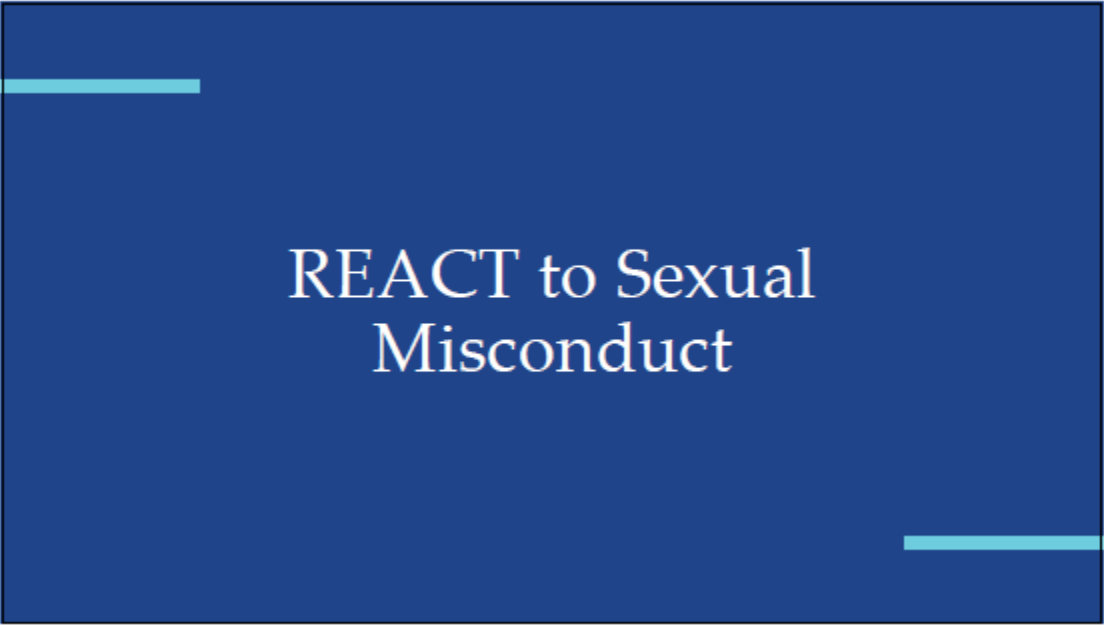
# Title IX: Responding to and Investigating Complaints of Sexual Harassment

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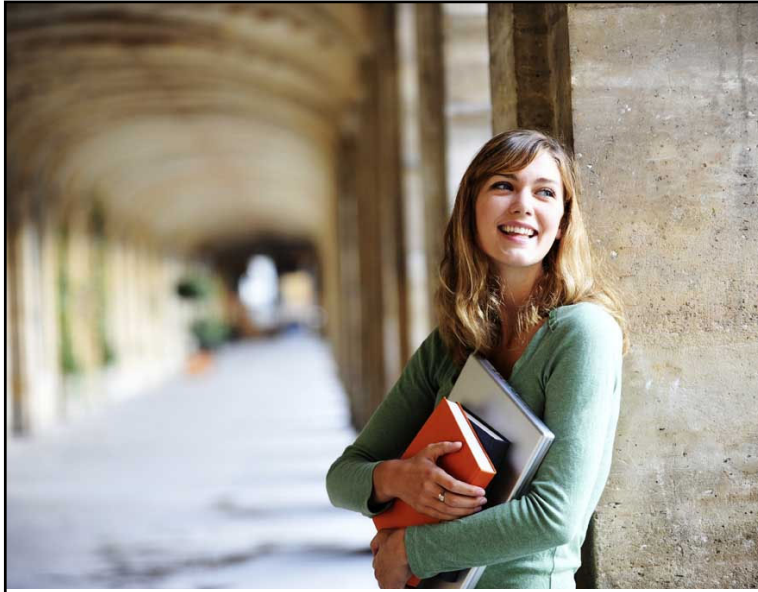
Lozano Smith Webinar  
September 10, 2020





# REACT to Sexual Misconduct





## REACT to Sexual Misconduct

- Recognize
- Evaluate
- Act
- Corrective Measures
- Thoughtful  
Reflection/Tying Up Loose  
Ends



REACT  
Recognize



## Step 1: Identify Potential Title IX Issues

### Examples of “Red Flag” Conduct

- Flirtations or propositions
- Derogatory comments
- Sexual jokes or gestures
- Spreading sexual rumors
- Massaging, grabbing, or touching
- Comments on an employee or student’s body
- Sexual acts without consent or based on coercion
- Non-consensual “sexting”
- Sexploitation





## New Definitions – Sexual Harassment

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

1. An **employee** conditioning the provision of an aid, benefit, or service of the district on the complainant's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the district's education program or activity; or
3. "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).



## Title IX Jurisdiction

Allegations of sexual harassment fall under Title IX when:

- The conduct occurs against a person in the United States;
- The conduct occurs in an education program or activity over which the district exercised substantial control over both:
  - 1) the respondent, and
  - 2) the context in which the sexual harassment occurs; and
- The complainant was participating/attempting to participate in the educational program or activity at the time the complaint was filed.







# REACT Evaluate



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*Evaluate*

## Step 2: Assess the Nature of the Complaint



## Receiving Complaints (In General)

### TYPES OF COMPLAINANTS

- Student
- Parent
- Employee
- Member of Public
- Anonymous Person

### TYPES OF COMPLAINTS

- Verbal
- Written
- No Complaint (Rumor or Observation)



## Involved Parties May Include...

- Student-on-student
- Employee-on-student
- Employee-on-employee
- Student-on-employee
- Same-sex parties





## Receiving a Complaint

### Formal v. Informal Complaints

- “Don’t tell anyone, but...”
- “Student X is a bully. He threw me into the lockers today because of my outfit.”
- “My teacher gave me an unfair grade because she hates me.”
- “We were playing tag and he slapped my butt.”



## Receiving a Complaint



- Notify the Title IX Coordinator
- Assess whether a CPS report should be filed (continue to reassess)
- Title IX Coordinator should promptly schedule a meeting with the victim





## Contact the Victim

- Conduct initial discussion with complainant/victim to better understand the complaint and if it rises to the level of sexual harassment under Title IX
- Discuss options for supportive measures
- Explain options for filing a formal complaint with the district
- Discuss the district's policy that prohibits retaliation



## Evaluate the Allegations

### Consider:

1. Severity of the allegations
2. Imminent harm
3. Criminal acts
4. Mandated reporting obligations
5. Involved parties (adult and student)
6. Complainant's request for actions





## Does the Complaint/Allegation Trigger a Title IX Obligation?

1. Does the alleged conduct, if true, constitute sexual harassment under Title IX?
2. Is there jurisdiction over the conduct?

\*If “no” to any of the above, any formal complaint must be dismissed.



## 1) If the Alleged Conduct is True, Does it Rise to the Level of Sexual Harassment Under Title IX?

1. Any **employee** conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct;
2. Any unwelcome conduct that a reasonable person would find so ***severe, pervasive, and objectively offensive*** that it denies a person equal education access; OR
3. Any instance of sexual assault, dating violence, domestic violence or stalking (as defined in the Clery Act or Violence Against Women Act)





## 2) Is there Title IX Jurisdiction Over the Conduct?

1. Education Program or Activity
  - a) Substantial control over the respondent; and
  - b) Substantial control over the context in which the sexual harassment occurred
2. Within the United States
3. At the time of filing a formal complaint, complainant must be participating/attempting to participate in the educational program



## Do You Have a “Formal” Title IX Complaint?

- *Formal Complaint:* A document filed by a complainant (who is also the victim or the victim’s parent/guardian) or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the district investigate the allegation.
- If no formal complaint is filed by the complainant, the Title IX Coordinator should assess whether to independently initiate a complaint based on a threat to safety.





## What if the Complainant says “Do Nothing”?

- The Title IX Coordinator must inform them of their options
  - Example: supportive measures without filing a formal complaint
- The Title IX Coordinator may sign a formal complaint on the victim’s behalf
  - Assess the conduct!
  - If NOT filing a formal complaint would be deliberately indifferent, the Title IX Coordinator has the discretion to sign a formal complaint on the complainant’s behalf



## Evaluate How to Proceed (Possible Options)

1. Dismissal
2. Informal resolution
3. Formal Complaint/Investigation
4. Supportive Measures
5. Other actions needed immediately







# REACT Act



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*Act*

## Step 3: Implement Supportive/Urgent Measures



## Supportive Measures

“Non-disciplinary, non-punitive individualized services offered [...] to the complainant or respondent before and after the filing of a formal complaint or where no formal complaint has been filed.”

- Designed to restore or preserve equal access to the educational program without unreasonably burdening either party
- Should be determined on a case-by-case basis
- Cannot be retaliatory



## Supportive Measures

Examples:

- Counseling
- Medical services
- Academic support (e.g., extension of deadlines or other course adjustments)
- No-contact orders
- Increased security
- Changed schedules (e.g., modification of work or class schedule)
- Leaves of absences (employees)
- Emergency removals in compliance with Title IX

*Document the implemented supportive measures, but don't stop there!*





## Emergency Removals (Students)

School districts are prohibited from disciplining a student for alleged sexual harassment until a full Title IX investigation has been completed.

EXCEPTION: An Emergency Removal

- Respondent must be an immediate threat to the physical health or safety of any student or individual;
- The immediate threat must arise from the allegations of sexual harassment; and
- Respondent is provided with notice and an opportunity to challenge the decision immediately after removal.



## Administrative Leave (Employees)

There are no restrictions under Title IX for placing an employee accused of sexual harassment on administrative leave.





## Step 4: Determine Whether Complaint or Allegations Trigger Title IX Obligations

### Mandatory Dismissals

Districts *MUST* dismiss a Title IX complaint, or any allegations therein if:

- The alleged conduct, if true, does not constitute sexual harassment under Title IX; or
- The conduct did not occur in the district's education program or activity; or
- The conduct did not occur against a person in the United States; or
- The complainant was not participating/attempting to participate in the educational program at the time the complaint was filed.



## Discretionary Dismissals

Districts *MAY* dismiss a formal complaint, or any allegations therein if:

- A complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegations therein;
- The respondent is no longer enrolled or employed by the district; or
- Specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.



## Dismissals (Mandatory and Discretionary)

- The decision to dismiss a formal complaint should be made in consultation with the Title IX Coordinator.
- Notice of dismissal must be issued to both parties in writing.
- Parties must be informed of their right to appeal the dismissal on the basis of:
  1. Procedural irregularity;
  2. New evidence that was not reasonably available earlier; or
  3. Involved personnel had a conflict of interest or bias.





Even if You Determine Title IX Is NOT Triggered or the Complaint Should Be Dismissed, Do NOT Stop There!

- *Consider whether the alleged conduct may otherwise violate district policy or employee/student conduct standards*



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Step 5:  
Initiate an Investigation into the  
Formal Complaint or Engage in the  
Informal Resolution Process



## Investigation Timelines



- Title IX - “reasonably prompt time frame”
- District policies



## Send Written Notice of Investigation

Send “notice” letters to both the complainant and the respondent





## Notice of Investigation

1. Identify investigation process, including informal resolution process
2. Identify allegations with sufficient details
3. Include a statement that respondent is presumed not responsible and that a determination is made at the conclusion of the process
4. Explain that they may have an advisor of their choice inspect and review the evidence
5. Identify the district's code of conduct that prohibits knowingly making false statements or submitting false information
6. Do not restrict either party's ability to discuss the allegations under investigation



## Informal Resolution

- Informal resolution is a process that does not involve a full investigation and adjudication.
- It can only be offered when:
  - A formal complaint is filed;
  - The school district has sent a written notice about the allegations and the informal resolution process;
  - A written determination has not yet been made; and
- Both parties have provided voluntary, written consent to the process.
- Either party can withdraw from the informal resolution process at any time, and should be notified of this right.
- Informal resolution cannot be used for allegations where an employee is alleged to have sexually harassed a student.





## Step 6: Gather, Review, and Preserve Evidence

### Legal Framework

Preponderance of the  
Evidence  
-or-  
Clear and Convincing





## Title IX Evidence Requirements

- District has the burden of gathering evidence.
- District cannot access or use a party's medical, psychological or other similar records unless they obtain the party's voluntary, written consent.
- District cannot restrict parties from discussing allegations or gathering and presenting relevant evidence.
- District must provide an opportunity for parties to present fact and expert witnesses and other exculpatory or inculpatory evidence.



## Reviewing and Preserving Evidence

### Documentation & Evidence

- |                          |                                       |
|--------------------------|---------------------------------------|
| ▪ Emails                 | ▪ Internet usage and websites visited |
| ▪ Phone records          | ▪ Voicemail messages                  |
| ▪ Attendance records     | ▪ Pictures                            |
| ▪ Travel logs            | ▪ Audio/Video                         |
| ▪ Security records       | ▪ Credit Card Receipts                |
| ▪ Computer records/files | ▪ Observing Locations                 |
| ▪ Complaint              | ▪ Collective Bargaining Agreement     |







BREAK



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*Act*

Step 7:  
Conduct Witness Interviews



## Witness Interviews

- Start with an outline of questions, but be flexible!
- Use the outline as more of a roadmap for issues you need to touch on with each witness.
- If there are a series of incidents, consider a linear roadmap.
- Keep in mind big picture goals.
- At the end, ask: Is there anything else?
- *If possible, have a 2<sup>nd</sup> administrator in the room*



## Trauma-Informed Approach

- Do NOT Victim-Blame
- Choose a Comfortable Setting That is Not Triggering
- Build Rapport
- Ask Difficult Questions With Care - Explain Why You're Asking the Question
- Allow the Witness to Freely Speak and Then Ask Follow Up Questions





## Interview Questions

- “Did you tell anyone about what happened to you?”
- “Tell me how that made you feel.”
- “Did you ever feel like this before?”
- “What was your thought process at that time?”
- “I’m asking you this to try to understand...”



## Credibility Determinations

1. Demeanor;
2. Inherent plausibility;
3. Motive to lie;
4. Corroboration, or lack thereof;
5. Past record of conduct;
6. Opportunity and capacity to observe/actual knowledge;
7. Consistent or inconsistent statements;
8. Reputation for veracity or deceit; and
9. Bias.





## Confidentiality & Preserving the Integrity of the Investigation

- Confidentiality cannot be promised.
- All evidence will be shared with the complainant/victim and the respondent.
  - Both parties will have an equal opportunity to inspect and review any evidence that is directly related to the allegations.



## Lybarger/Spielbauer Warning/Rights



- Fifth Amendment Protection Against Self-Incrimination
- Lybarger/Spielbauer Warning – Public employees may be compelled to answer potentially incriminating questions about their job performance as long as they are not required to waive the constitutional protections.





## Fifth Amendment Rights for Students

- School cannot use student's silence during an investigation against them in a disciplinary proceeding as an admission of guilt.
- However, you may inform the student of the impact of withholding their side of the story.



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## Step 8: Review of Evidence by the Parties



## Review of Evidence By the Parties

- Send the parties any evidence directly related to the allegations raised in the formal complaint
  - Includes evidence the district does not intend to rely on in reaching its decision regarding responsibility
  - Use of a draft investigation report or report of evidence
- Must be done prior to the completion of the investigation report
- Parties should be given at least 10 days to respond to the evidence, which must be considered by the investigator

\*The investigator should work with the Title IX Coordinator to securely transmit the evidence to the parties, and to assess whether redactions may be appropriate.



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## Step 9: Prepare the Investigation Report



## Investigation Report

- The final investigation report should be prepared by the investigator and must summarize relevant evidence.
- Parties must be offered the opportunity to provide a written response to the investigation report.
- Must be sent to the parties at least 10 days before a written determination regarding responsibility is issued by the decision-maker.



## Investigation Report (Recommended Content)

- Identify the date the investigation commenced
- Identify the investigator
- Identify interim measures offered to and accepted by the parties
- Summary of the investigation process
- Identify the legal standard of review applied to the review of evidence/applicable policies
- Identify number of/identity of witnesses
- Summary of evidence – documents and witness statements





## Step 10: Decision-Maker Makes a Determination of Responsibility for Sexual Harassment

### Submission of Written Questions

- The decision-maker must allow parties the opportunity to submit written, relevant questions that they want to ask any other party or witness
- Once the parties are provided with the answers, they are permitted to submit additional, limited follow-up questions from each part
- Decision-maker determines relevancy, or explains why questions were deemed irrelevant
- Complainant's sexual history is irrelevant unless offered to prove someone else committed the conduct or for proof of consent



## Written Determination Regarding Responsibility – Issued by the Decision-Maker

- **Identification of the allegations** potentially constituting sexual harassment
- **A description of the procedural steps** taken from formal complaint through the determination of responsibility
- **Findings of Fact** supporting the determination
- **Conclusions** regarding the application of the district's code of conduct to the facts



## Written Determination Regarding Responsibility – Issued by the Decision Maker (Cont.)

- **Rationale** for each finding and conclusion, including a **determination of responsibility** for each allegation
- Statement of **potential disciplinary sanctions**
- **Appeal rights**





## Step 11: Appeal Rights

### Appeal Rights for Both Parties at the District

Parties may appeal the written determination on the following bases:

1. Procedural irregularity
2. New evidence that was not reasonably available earlier
3. Title IX personnel had a conflict of interest or bias

\*Students/employees may also be afforded the right to file a complaint or an appeal with federal and/or state agencies (e.g., OCR, CDE, DFEH, EEOC).





# REACT Corrective Measures



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*Corrective  
Measures*

## Step 12: Corrective Actions



## Corrective Actions

- Staff/student discipline
- Ensuring no retaliation
- Additional support for involved parties
- Generalized training for staff/students in class, school, or district-wide
- Generalized notification of policies/ rules
- Increased monitoring and check-ins
- Changes to district practice



## REACT Thoughtful Reflection and Tying Up Loose Ends