Title IX Training Materials

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TITLE IX MANDATED TRAINING
(20 U.S.C. 20 U.S.C. §§ 1681–1688; 34 C.F. R. part 106)

TITLE IX COORDINATORS (Module 1)

TITLE IX – THE LAW

A. Title IX Law (20 U.S.C. §§ 1681–1688)

No person in the U.S. 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.

B. Title IX Regulations (34 C.F.R. part 106). The following are the key sections of the regulations relating to sexual harassment that have been newly created or amended effective on August 14, 2020:

- Section 106.8: Addressing the designation of a Title IX Coordinator, the adoption of a grievance procedure and grievance process, and notice/dissemination of policies
- Section 106.30: Important new definitions added by the Final Rule
- Section 106.44: Addressing the requirements for districts to respond to each report or complaint of sexual harassment of which the district has actual knowledge
- Section 106.45: Requiring districts to establish and administer a grievance process for formal complaints of sexual harassment; also addressing training and recordkeeping requirements
- Section 106.71: Non-retaliation and confidentiality requirements.

C. Enforced by Office for Civil Rights (OCR), U.S. Department of Education

OVERVIEW OF THE 2020 TITLE IX REGULATIONS

In broad terms, the new Title IX regulations, which take effect on August 14, 2020, require districts to address all of the following:

A. **Nondiscrimination policy statements** regarding sex discrimination under Title IX, including express identification of the **Title IX Coordinator**.

B. A **grievance procedure** for receiving and responding to complaints of **sex discrimination** under Title IX.

C. District responses when the district has **actual knowledge** of an incident or allegation of **sexual harassment** under Title IX–regardless of whether or not a formal complaint is filed.

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D. A **grievance process** for addressing **formal complaints** of **sexual harassment** under Title IX.

E. **Notices** related to all of the above.

F. Employee **training.**

G. **Recordkeeping**, **confidentiality**, and **non-retaliation** in connection with all of the above.

MANDATORY TRAINING REQUIREMENTS

A. The individuals designated by the district as a Title IX Coordinator, investigator, decision-maker, or any person designated by a school district to facilitate an informal resolution process must receive training on the following:

- The definition of sexual harassment in § 106.30;
- The scope of the school district's education program or activity;
- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable; and
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

B. Investigators must receive training on issues of relevance in connection with the investigator's duty to create an investigative report that fairly summarizes relevant evidence.

C. Decision-makers must receive training on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant. If live hearings are used/permitted under the local grievance process (which will not be common for school districts), decision-makers must also receive training on any technology to be used at any live hearing.

D. Materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, will not rely on sex stereotypes and will promote impartial investigations and adjudications of formal complaints of sexual harassment.

E. The district will maintain for seven years all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

F. The district will make these training materials publicly available on its website.

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THE ROLE OF THE TITLE IX COORDINATOR

A. Every district must have at least one employee who is expressly designated and identified in relevant notices as the Title IX Coordinator. ("Title IX Coordinator" does not need to be the person's only job title.)

B. The Title IX Coordinator(s) must be authorized to coordinate the school district's efforts to comply with all of the district's responsibilities under the Title IX regulations. Those responsibilities encompass all forms of prohibited sex discrimination, including sexual harassment and including both student-related and employment-related matters.

C. The Title IX Coordinator(s) must be authorized to receive reports and complaints of violations of Title IX from any person, including formal complaints of sexual harassment (see below). Further, local procedures should ensure that all other administrators and school employees are aware of the need to appropriately refer Title IX matters to the Title IX Coordinator.

D. Title IX notices will inform students, parents, employees and others that inquiries about the application of Title IX and the Title IX regulations to the district may be referred to the designated Title IX Coordinator.

E. The Title IX Coordinator has specific, mandatory duties in connection with a district's response to reports, complaints, or other notices of Title IX sexual harassment, including important duties related to the identification and implementation of "supportive measures" and, in appropriate cases, the implementation of remedies.

F. The Title IX Coordinator has discretion to sign a formal complaint of sexual harassment on behalf of the district for the purpose of initiating the Title IX grievance process in situations where the alleged victim of the conduct either is unwilling or unable to file a formal complaint.

G. The Title IX Coordinator is prohibited from performing any decision-making role with respect to formal complaints of sexual harassment.

H. The Title IX Coordinator must receive certain mandatory training. However, to perform the role competently, the scope of the training should exceed the minimum mandates.

I. In many school districts the Title IX Coordinator is likely going to be responsible for ensuring that the district meets its obligations with respect to Title IX notices, staff training, and recordkeeping.

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GRIEVANCE PROCEDURE V. GRIEVANCE PROCESS

A. "**Grievance Procedure"** refers to steps for responding to and resolving reports or complaints of possible unlawful discrimination based on sex under Title IX, *other than formal complaints of sexual harassment under Title IX*. P*

1. For complaints under Title IX, the grievance procedure applies only to sex discrimination occurring in the district's education program or activity against a person **in the United States**. (See §106.8(c) and (d))

2. An example of a Title IX complaint that would **not** be a sexual harassment complaint and that would be directed to the "grievance procedure" would be a complaint that the district provides unequal financial support and facilities in athletics based on sex.

3. Most districts will use the same "procedure" for receiving and responding to complaints of unlawful discrimination that are (1) based on protected classes other than sex, or (2) based on laws other than Title IX.

4. Most districts have an existing complaint procedure that, perhaps with some modifications, can be identified and used as the Title IX grievance procedure.

5. The Title IX regulations specify a district's procedures must allow **any person at any time** to report sex discrimination, including sexual harassment (whether or not the person reporting is a person who is 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.

B. **"Grievance Process**" refers to a highly structured process for investigating and resolving **formal complaints** of **sexual harassment** under Title IX. (See §106.45) P

1. School districts around the state have either recently adopted their Title IX grievance process or are currently in the process of doing so.

2. A district is only required to utilize its Title IX "grievance process" when a formal complaint of sexual harassment under Title IX is pending. However, as a very important caveat, **use of the Title IX grievance process is also generally a pre-requisite to the imposition of any disciplinary measure or penalties for substantiated sexual harassment, as defined under the Title IX regulations**.

* NOTE: Although local policies and procedures play an important role in Title IX compliance and throughout the process of responding to reports and complaints of possible Title IX violations, the large green **P** next to any paragraph in these materials serves as a signal for Title IX coordinators and other school officials to take special care to review their **local policies and procedures** in connection with that particular point/issue. In many cases, the signal will identify an important area of local discretion.

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C. Key Points:

1. A report of sexual harassment requires an immediate response from the Title IX Coordinator but does not trigger the grievance process under Title IX.

2. Only a formal complaint of sexual harassment triggers the grievance process under Title IX.

3. A formal complaint must allege sexual harassment in an education program or activity of the district against a person in the U.S. to continue the grievance process.

4. The grievance process must treat complainants and respondents equitably by providing (1) remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and (2) by following a grievance process that complies with the Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.

    a. The grievance process must be completed (i.e., the district must reach a final determination of the allegations, including completing any appeals) before the imposition of any disciplinary measure or penalties for substantiated sexual harassment, as defined under the Title IX regulations.

    b. However, as covered later in these materials, there are two important situations in which a school district is permitted to take specific interim actions prior to the resolution of an allegation of sexual harassment. The following actions are expressly authorized by the Title IX regulations and will <u>not</u> violate the prohibition against imposing discipline/sanctions prior to the completion of the grievance process:

        i. **Emergency removal**, which may be used as a response to a threat to the physical health or safety of any student or other individual. Additional limitations and procedural requirements apply to "emergency removals."

        ii. The Title IX regulations allow a school district to place an employee on **administrative leave**, but only during the pendency of the grievance process for a formal complaint of sexual harassment.

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THE OBLIGATION TO RESPOND TO A NOTICE OF SEXUAL HARASSMENT

A district with actual knowledge of sexual harassment in an education program or activity of the district against a person in the U.S. must respond promptly in a manner that is not deliberately indifferent.

What is Sexual Harassment?

A. As defined in section 106.30(a) of the Title IX regulations, "sexual harassment" means conduct on the basis of sex that satisfies one or more of the following:

1. *An employee of the district conditioning the provision of an aid, benefit, or service of the school district on an individual's participation in unwelcome sexual conduct (quid pro quo);*

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. *Any of the following, as defined under the Title IX regulations by reference to other federal statutes:*

   a. *"sexual assault," as defined in 20 U.S.C. 1092(f)(6)(A)(v),*

   b. *"dating violence," as defined in 34 U.S.C. 12291(a)(10),*

   c. *"domestic violence," as defined in 34 U.S.C. 12291(a)*(8), or

   d. *"stalking," as defined in 34 U.S.C. 12291(a)(30).*

B. As is true of all allegations of sex discrimination under Title IX, an allegation of sexual harassment under Title IX must have occurred in the district's education program or activity and in the United States.

C. The Title IX definition of sexual harassment is generally understood to be narrower (i.e., cover less conduct) than the broader definitions of sexual harassment that apply under other laws:

1. The Wisconsin Fair Employment Act: Section 111.32(13) of the state statutes defines "sexual harassment" to mean "unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature." Under the statute, "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to "the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; the deliberate, repeated display of offensive sexually graphic materials which is not

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necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee's work performance or to create an intimidating, hostile or offensive work environment."

2. Federal Title VII: Also in the employment context, conduct that is "severe **or** pervasive" can meet the applicable standard for a hostile work environment claim under Title VII.

3. The Pupil Nondiscrimination Statute and the DPI Rules in Chapter PI 9: " 'Pupil harassment' means behavior towards pupils based, in whole or in part, on sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability which substantially interferes with a pupil's school performance or creates an intimidating, hostile or offensive school environment."

4. The District's Code of Student Conduct and Employee Handbooks: Through local policy decisions, school districts generally assert an interest in intervening in certain inappropriate conduct before it reaches the level of conduct that is legally-actionable as sexual harassment.

When Does the District Have Actual Knowledge?

A. "Actual knowledge" means notice of sexual harassment or allegations of sexual harassment to: (1) the district's Title IX Coordinator; (2) any official of the district who has authority to institute corrective measures on behalf of the district; or (3) **any employee** of the district.

B. Anyone (victim, friend, parent, guardian, witness, other individual) may report sexual harassment.

C. Examples of ways that a district could obtain actual knowledge of sexual harassment include:

- Witnessing an incident (or a perhaps a series of incidents);
- Receiving a verbal or written report about an incident or allegation from a student or other person;
- Receiving multiple reports that, taken together, provide a different picture of a person's conduct than each incident standing alone; or
- The filing of a formal complaint or any report under the district's Title IX grievance procedure or grievance process.

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What is an "Education Program or Activity" of the School District?

A. With respect to **all** aspects of sex discrimination under Title IX, the terms "*Program or activity*" and "*program"* include **all of the operations** of each recipient of federal funds that is covered by Title IX, including but not limited to a local education agency (as defined in 20 U.S.C. 8801). (See 34 C.F.R. 106.2(i))

B. In connection with "sexual harassment" under the Title IX regulations and for purposes of determining when a school district has an obligation to respond and when a district may (and may not) address allegations under its "grievance process," an "**education program or activity**" includes locations, events, or circumstances over which the school district exercised substantial control over **both** the respondent and the context in which the sexual harassment occurs." (See 34 C.F.R. 106.44(a))

C. A school district's Title IX obligations extend to sexual harassment incidents that occur off campus (1) if the off-campus incident occurs as part of the school district's "operations"; and (2) if the school district exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus.

D. In situations where there is some uncertainty whether alleged harassment occurred in the school district's "education program or activity," the district may examine factors such as whether the district funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred. However, no single factor is determinative to conclude whether a school district exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of "all of the operations of" a district.

E. Examples from the Preamble to the Regulations:

- "For example, in *Doe v. East Haven Board of Education,* the Second Circuit held that the plaintiff sufficiently alleged sexual harassment to which the district was deliberately indifferent where the harassment consisted of on-campus taunts and name-calling directed at the plaintiff after she had reported being raped off campus by two high-school boys. The final regulations would similarly analyze whether sexual harassment (i.e., unwelcome conduct on the basis of sex so severe, pervasive, and objectively offensive that it effectively deprives a complainant of equal access to education) *in the recipient's program or activity* triggered a recipient's response obligations regardless of whether such sexual harassment stemmed from the complainant's allegations of having suffered sexual assault (e.g., rape) *outside* the recipient's program or activity. Further, whether or not the off-campus rape in that case was in, or outside, the district's education program or activity, would depend on the factual circumstances, because as explained above, not all off-campus sexual harassment is excluded from Title IX coverage." (Preamble at 30200)

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- *"Lapka v. Chertoff*, 517 F.3d 974, 982-83 (7th Cir. 2008) (the Seventh Circuit reasoned that the plaintiff sufficiently alleged workplace harassment even though the alleged rape occurred while the plaintiff and assailant were socializing after hours in a private hotel room, because the bar was part of the training facility where the plaintiff and assailant were required to attend work-related training sessions and thus were on "official duty" while at that facility, including the bar located in the facility, "so the event could be said to have grown out of the workplace environment" and the plaintiff and assailant were trainees expected to eat and drink at the facility and "return to dormitories and hotel rooms provided by" the employer such that "[e]mployees in these situations can be expected to band together for society and socialize as a matter of course" justifying the Court's conclusion that the plaintiff had alleged sexual harassment (rape) that arose in the context of a workplace environment and to which the employer had an obligation to respond). Although *Lapka* was a case under Title VII, the final regulations would similarly analyze whether sexual harassment occurred in the school's program or activity by inquiring whether the school exercised substantial control over the context of the harassment and the alleged harasser." (Preamble at 30200, n. 877)

F. As noted above, the statutory and regulatory definitions of "program or activity" encompass "all of the operations of" entities that are covered by Title IX, and such "operations" may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, a school district.

   1. The factual circumstances of online sexual harassment must be analyzed to determine if it occurred in an e**ducation program or activity**, under the "substantial control" standards identified above.

   2. For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the school district exercises substantial control.

G. As previously mentioned, for purposes of the Title IX regulations, the sexual harassment must also have occurred in the United States.

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HOW TO RESPOND TO A NOTICE OF SEXUAL HARASSMENT

When the Title IX Coordinator has notice, the Title IX Coordinator must promptly respond in a manner that is not "deliberately indifferent."

A. A district is "deliberately indifferent" if its response is "clearly unreasonable" in light of the circumstances. "Clearly unreasonable" is not defined but the regulations require that a district's response treat complainants and respondents equitably by:

   1. Offering supportive measures (as defined in the regulations, see below) to a complainant, and

   2. Following a grievance process that complies with the regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures.

B. The Title IX Coordinator must promptly contact the complainant (i.e., the individual alleged to be the victim of sexual harassment, who may or may not be the person who reported the sexual harassment) to:

   1. Discuss the availability of supportive measures;

   2. Consider the complainant's wishes with respect to supportive measures;

   3. Inform the complainant of the availability of supportive measures with or without filing a formal complaint; and

   4. Explain to the complainant the process for filing a formal complaint, at least in circumstances where the original report did not take the form of a formal complaint. (See below for more information on formal complaints.).

C. For each report of Title IX sexual harassment, the Title IX Coordinator must also:

   1. Determine appropriate supportive measures and coordinate with appropriate administrators to provide supportive measures to the complainant. (Note the confidentiality requirements applicable to supportive measures, as further identified below.)

   2. Ensure that the district documents the provision of supportive measures or if supportive measures are not provided, documents the reasons why such response was not clearly unreasonable in light of the known circumstances.

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D. Screening of reports, complaints and allegations: Before initiating Title IX response procedures, as outlined above, the Title IX Coordinator may consider whether the allegations in the report (and any additional information that may be gathered), if true, would potentially meet the definition of sexual harassment under Title IX, occurred in the district's program or activity, and in the U.S. If not, Title IX coordinator may direct the complainant to non-Title IX response procedures.

E. In connection with responding to allegations of Title IX sexual harassment, a school district may also decide to take either of the following steps in appropriate cases, and the Title IX Coordinator will often be in a position to recognize whether either of the actions should be considered:

1. **Emergency Removal**: The district may remove a respondent from the education program or activity on an emergency basis.

    a. The district must undertake an individualized safety and risk analysis, determine that there is an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment that justifies removal, and provide the respondent with notice and opportunity to challenge following the removal.

    b. The allowance for emergency removal may not be construed to modify any rights under IDEA, Section 504, and ADA.

    c. Implementing an emergency removal may sometimes require a school district to additionally follow certain non-Title IX procedures (e.g., if an emergency removal is structured such that a student is not permitted to attend school, then the removal may also constitute a suspension/expulsion, and the school would need to consider its obligations to also follow applicable legal procedures related to suspension/expulsion).

2. **Administrative Leave:** The Title IX regulations allow a school district to place an employee on administrative leave if a formal complaint is pending and the district is using its grievance process to resolve the complaint.

    a. It is likely that the regulations assume that the administrative leave is paid leave.

    b. The allowance for administrative leave may not be construed to modify any rights under Section 504 or the ADA.

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What are Supportive Measures?

A. 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.

B. Such measures are designed to restore or preserve equal access to the district's education program or activity without unreasonably burdening the other party, while protecting the safety of all parties and the district's educational environment; and deterring sexual harassment. Supportive measures may be provided to a respondent, but it is not required.

C. Supportive measures may include 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 and monitoring of certain areas of the campus, and other similar measures.

D. In some situations, a district may determine that it would be necessary or appropriate to provide supportive measures to a respondent, or to provide supportive measures for the benefit of a complainant that directly affect a respondent. However, there is not an obligation to provide supportive measures to the respondent in every case, and the regulations do not require equality or parity with respect to the supportive measures that are provided to complainants and respondents.

E. A 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 district to provide the supportive measures.

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

G. In general, the identification, offering, and monitoring of supportive measures should be an ongoing and continuous part of responding to any incident, report, or complaint of sexual harassment or alleged sexual harassment under Title IX, including but not limited to the period of time when a formal complaint is pending.

H. If the district determines that the allegations of inappropriate conduct, even if proven, would not constitute sexual harassment that is covered by Title IX, then there is no obligation under the regulations to provide (or continue to provide) supportive measures. However, even in non-Title IX cases or in harassment/bullying cases that are not related to a legally-protected status, a district may elect to offer or provide an individual with interventions or supports that are substantially similar to Title IX "supportive measures."

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What is a Formal Complaint?

A. "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 district investigate the allegation of sexual harassment.

   1. A "complainant" means an individual who is alleged to be the victim of conduct that could constitute sexual harassment. (Note: A guardian who is acting on behalf of a child complainant may also file a formal complaint.) The "respondent" is the alleged perpetrator of the conduct.

   2. At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the relevant education program or activity of the district.

   3. As used in the definition, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the district) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

B. The Title IX regulations specify that a district's procedures must, at a minimum, allow a complainant to file a formal complaint with the district's Title IX Coordinator by submitting the document or electronic submission in person, by mail, or by electronic mail, using the contact information that the district has established for the district's Title IX Coordinator. (See §106.30(a))

   1. A district may designate other methods of filing a formal complaint of sexual harassment, and it is very important for the Title IX Coordinator and other relevant administrators to be aware of the specific local procedures.

   2. *Should a district designate additional methods of filing a formal complaint?* The answer to this this question is likely to vary among districts. For example, a district with a single Title IX Coordinator may need to account for situations where the Title IX Coordinator is temporarily unavailable or is the person accused of sexual harassment. However, as a general premise, districts will want to maintain reasonable control over how formal complaints can be filed because it is so important to be able to recognize when you have a formal complaint.

C. The existence or non-existence of a formal complaint is highly relevant for determining *how* a district responds to a particular incident or allegation of sexual harassment, but it does <u>not</u> resolve *whether* a district should or must respond. As covered above, **notice** of conduct that could constitute Title IX sexual harassment is sufficient to trigger obligations to respond.

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D. The authority of the Title IX Coordinator to sign a formal complaint and trigger the district's Title IX grievance process may be used, for example, when:

1. The complainant is not eligible to file a formal complaint for purposes of Title IX (e.g., the complainant is a past graduate of the district and is no longer attempting to participate in a district's program or activity);

2. The complainant declines to file a formal complaint, but the Title IX Coordinator determines that the district's interest in the matter is substantial enough that the matter should be investigated and resolved through the grievance process without the complainant's direct cooperation.

E. In developing their local grievance process, some districts may establish general guidelines or standards for the Title IX Coordinator to follow in circumstances where the regulations permit the Title IX Coordinator to sign (and thereby initiate) a formal complaint. (See §106.30) However, Title IX Coordinators and other school officials should be aware of the following:

1. The preamble to the final regulations suggests that Title IX Coordinators should have a degree of autonomy to determine whether to sign a formal complaint. At the same time, the preamble suggests that it would not be improper for the Title IX Coordinator to obtain input from other district officials (or potentially from the district's legal counsel) regarding whether a formal complaint and investigation under the grievance process are warranted. (Preamble, at pp. 30134-30135)

2. The preamble also states that the Title IX Coordinator's evaluation of whether to sign a formal complaint in the absence of the complainant electing to file a formal complaint should be evaluated in terms of whether signing a formal complaint (or not signing a complaint) would be a "clearly unreasonable" response. (Preamble, at p. 30045)

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RESPONDING TO A FORMAL COMPLAINT OF SEXUAL HARASSMENT

In responding to a formal complaint, the district must treat complainants and respondents equitably by (1) following a grievance process that complies with the Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures as against a respondent, and (2) providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent.

A. Screening Formal Complaints for Possible Dismissal: Before beginning the grievance process and even during the process, the Title IX Coordinator and other agents of the district must consider whether there is a basis for dismissal of the complaint or any of the specific allegations.

   1. Two ways a formal complaint could be dismissed.

      Mandatory Dismissal. The district **must** dismiss a formal complaint if the conduct alleged in the complaint:

      a. Would not constitute sexual harassment as defined under Title IX even if proved;
      b. Did not occur within the district's education program or activity; or
      c. Did not occur against a person in the U.S.

      Permissive Dismissal. The district **may** dismiss if:

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

   2. If dismissed, the district must promptly send written notice of the dismissal and reasons for dismissal.

   3. Dismissal decisions are appealable (see below).

   4. If the formal complaint is not dismissed upon receipt, the Title IX Coordinator must initiate the grievance process.

B. Basic Requirements Applicable to the Grievance Process. Each local Title IX grievance process must:

   1. Treat complainants and respondents equitably, as described above (see the beginning of this section).

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2. Require an objective evaluation of all relevant evidence, including an expectation that all individuals involved in the grievance process on behalf of the district must avoid prejudgment of the facts and allegations.

3. Provide that credibility determinations may not be based on person's status as a complainant, respondent, or witness.

4. Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

5. Require that any individual designated by a district as a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process not have a conflict of interest or a bias for or against complainants or respondents generally or an individual complainant or respondent..

6. Disallow any person from performing more than one role as investigator, decision-maker, or appeal decision-maker in the same case. In addition, the Title IX Coordinator cannot serve as the decision-maker or appeal authority. **[Correction made in this paragraph on 9/29/20.]**

7. Include a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility is made at the conclusion of the grievance process.

8. Provide for investigations, determinations of responsibility, and appeal procedures that are consistent with the Title IX regulations.

9. State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, and then apply the same standard of evidence to all formal complaints and to all allegations of Title IX sexual harassment. P

10. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school district and its agents, and <u>not</u> on the parties.

11. Include reasonably prompt time frames for the conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and conducting any informal resolution processes. There must also be a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause. P

12. Include the procedures and permissible bases for the complainant and respondent to appeal. P

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13. Describe the range of supportive measures available to complainants and respondents

14. Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the school district may implement following any determination of responsibility.

C. Initial Notice to the Parties. Upon receipt of a formal complaint, the school district must provide a detailed notice to complainant and respondent.

1. Upon receipt of formal complaint, a district must provide written notice to parties who are known.

2. Written notice must include:

   a. Notice of the school district's grievance process.

   b. Notice of allegations of sexual harassment, including sufficient details known at that time (i.e., 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).

   c. 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.

   d. Information that the parties may have an advisor of their choice who may be an attorney and that they may inspect and review evidence.

   e. Inform the parties of any provision in the district's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

3. Written notice must be provided with sufficient time to prepare a response before any initial interview.

4. If other allegations are identified for investigation after the initial written notice has been issued, notice of the additional allegations must be provided to the parties whose identities are known.

5. NOTE: All written notices, reports and other materials provided to parties throughout the Title IX grievance process for formal complaints are also provided to a party's advisor if any, and normally also to parents or guardians if any party is a minor.

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D. Informal Resolution Processes. If permitted under the local grievance process, the Title IX Coordinator and other relevant district officials may consider offering an "informal resolution process."

1. An informal resolution process is any process, such as mediation, that does not involve a full investigation and adjudication of the complaint as delineated in the local grievance process.

2. Informal resolution may never be used if the formal complaint includes allegations that an employee sexually harassed a student.

3. If permitted, informal resolution may be offered at any point after a formal complaint has been filed and prior to reaching a determination of responsibility under the full grievance process.

4. If such a process is utilized, the district must:

   a. 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 grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or that could be shared; and

   b. Obtain the parties' voluntary, written consent to the informal resolution process.

5. If an informal resolution is attempted but is not successful, the district must complete a full investigation and adjudication of the complaint using the local grievance process.

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THE INVESTIGATION

The district shall ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district and not on the parties.

A. The investigation process instituted by the district shall treat complainants and respondents equitably and the investigator will:

1. Not restrict the ability of either party to gather and present relevant evidence, or to discuss the allegations under investigation;

2. Provide equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;

3. Provide the parties with the same opportunities to have others present during any complaint proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney. However, the 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;

4. Provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

5. Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence upon which the district does not intend to rely in reaching a determination regarding responsibility, as well as inculpatory and exculpatory evidence, whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation;

6. **Prior to completion of the investigative report, send to each party and the party's advisor, if any, the evidence subject to inspection and review, in an electronic format or a hard copy, and the parties shall have at least ten (10) days to submit a written response, which the investigator will consider prior to completion of the investigative report;**

7. **Create an investigative report that fairly summarizes relevant evidence and, at least ten (10) days prior to the time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or hard copy, for their review and written response; and**

8. Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

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THE DECISION-MAKING

In most school districts, the decision-maker will issue a written determination regarding responsibility on the formal complaint based upon the preponderance of the evidence standard. (The alternative standard that may be included in a local grievance process is the "clear and convincing evidence" standard.)

What is the preponderance of the evidence standard? The preponderance of the evidence requires a determination that it is **more likely than not** that the respondent engaged in the alleged sexual harassment.

What is the clear and convincing evidence standard? The clear and convincing standard requires a determination that sufficient evidence has been presented to make it **highly probable to be true** that the respondent engaged in the alleged sexual harassment.

A. Basics of Decision-making

1. After receipt of the investigative report and before reaching a determination regarding responsibility, 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. Although the Title IX regulations permit K-12 school districts to include a live hearing that involves the participation of all the parties as part of the decision-making procedures, very few school districts will opt to permit or require live hearings in their Title IX grievance process. This step of submitting questions (which is mandatory) essentially replaces any live hearing.

2. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such evidence about the complainant's prior sexual behavior is offered to prove:

   a. That someone other than the respondent committed the conduct alleged by the complainant, or

   b. If the questions and evidence concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and is offered to prove consent.

3. The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant.

4. The decision-maker must make an objective evaluation of all relevant evidence, both inculpatory (evidence that tends to establish a Respondent's responsibility for alleged

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sexual harassment) and exculpatory (evidence that tends to clear or excuse a Respondent from allegations of sexual harassment).

5. The decision-maker must not make credibility determinations based on a person's status as a complainant, respondent, or witness.

B. The Determination

1. As indicated above, most school district grievance processes will specify that decision-makers will use a "preponderance of the evidence standard" when determining whether the respondent is responsible for sexual harassment.

2. The written 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 district's code of conduct to the facts;

   e. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the district imposes on the respondent, and whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the complainant; and

   f. The district's procedures and permissible bases for the complainant and respondent to appeal, including (when applicable) notice of the right of a student complainant to appeal a final determination to the state superintendent of public instruction and notice of the procedures for making that non-Title IX appeal.

3. If a determination is made that a respondent violated the policy, the decision-makers will determine appropriate **sanctions** for the respondent.

4. If a determination is made that a respondent violated the policy, the district will provide **remedies** to the complainant.

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THE APPEAL

A. The district shall offer both parties an appeal from a determination regarding responsibility or from a dismissal of a formal complaint. An appeal must be filed within any deadline specified in the local grievance process and may be based upon any of the following: P

1. 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 was made, that could affect the outcome of the matter; and,

3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent, that affected the outcome of the matter.

4. Any other grounds for appeal that are specified in the local Title IX grievance process at the discretion of the school district. P

B. As to all appeals, a school district must:

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

2. Ensure that the appeal decision-maker complies with the standards set forth in 34 C.F.R. § 106.45(b)(1)(iii);

3. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

4. Issue a written decision describing the result of the appeal and the rationale for the result, which shall be issued within any timeline specified in the local Title IX grievance process, unless the appeal decision-maker notifies the parties that additional time is needed; and P

5. Provide the written decision on appeal simultaneously to both parties.

C. What happens if the appeal decision-maker determines one of the above grounds for appeal is satisfied? Under most local grievance processes, the likely options include the following:

1. The appeal-decision maker may adjust the determination directly.

2. If the error or other basis for granting the appeal related only to the decision-making step, the matter may be returned for further review of the investigative report by a new decision-maker(s).

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3. If the grounds for appeal relate to the investigation, or warrant additional investigation, the appeal decision-maker(s) may either re-open the record or refer the matter for further investigation before proceeding.

D. To the extent required by the Title IX regulations, disciplinary sanctions for Title IX sexual harassment and any remedies that could not be offered as supportive measure shall not be enforced until the determination of the complaint becomes final. The determination regarding responsibility becomes final either:

1. If no appeal is filed, on the date on which an appeal would no longer be considered timely; or

2. If an appeal is filed, on the date that the district provides the parties with the written determination of the result of the appeal.

ADDITIONAL REQUIREMENTS AND CONSIDERATIONS.

A. Required Notices.

1. School districts 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 all of the following:

   a. The name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator.

   b. That the school district does not discriminate on the basis of sex in the education program or activity that it operates, and that the school district is required by Title IX and Part 106 of Title 34 of the Code of Federal Regulations not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission and employment, and that inquiries about the application of Title IX and Part 106 to the school district may be referred to the school district's Title IX Coordinator, to the Assistant Secretary at the U.S. Department of Education, or both.

   c. The school district's Title IX 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.

2. In addition, each school district must prominently display the contact information for the Title IX Coordinator (as identified above) and the district's Title IX nondiscrimination policy on its website, if any, and in each handbook or catalog that

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it makes available to the persons who are entitled to receive the notifications listed above.

3. Many school districts will elect to coordinate the above-identified notice requirements with other nondiscrimination notice requirements established under state or federal law.

B. Retaliation.

1. Under the Title IX regulations, 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 the Title IX regulations, 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 under the regulations.

   a. 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 or the Title IX regulations, constitutes retaliation.

   b. The exercise of rights protected under the First Amendment does not constitute prohibited retaliation.

   c. 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 under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

2. Complaints alleging retaliation may be filed according to the **grievance procedure** for general sex discrimination claims that the school district has adopted.

C. Confidentiality.

1. Under section 106.71(a) of the Title IX regulations, a 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**:

   a. As may be permitted by the FERPA statute, 20 U.S.C. 1232g, or the FERPA regulations, 34 CFR part 99; or

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b. As required by law; or

c. To carry out the purposes of the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

2. As mentioned above, school districts 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. (This provision appears in the definition of "supportive measures" within section 106.30(a) of the Title IX regulations.)

3. A 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 for a Title IX grievance process. If a party is not an "eligible student," as defined under FERPA (e.g., the party is a minor), then the school district must obtain the voluntary, written consent of a parent or authorized guardian. (See section 106.45(b)(5)(i)).

D. Recordkeeping.

1. School districts must maintain the following records for a period of seven years (e.g., measured from the conclusion of the proceedings and the implementation of any sanctions and/or remedies):

a. In connection with a school district response to any report or formal complaint of sexual harassment, the district must create and maintain a record of any actions, including any supportive measures, that the district takes in response to the report or complaint. In each instance:

i. The district must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the school district's education program or activity.

ii. If a district does not provide a complainant with supportive measures, then the district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

b. In connection with each formal complaint of sexual harassment that is filed, a school district must maintain a record of:

i. Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the district's education program or activity;

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ii. Any audio or audiovisual recording or transcript from a hearing *(Note: A district will have these records only if hearings are permitted under the local grievance process. Most school districts will not provide for hearings)*;

iii. Any appeal and the result of an appeal; and

iv. Any informal resolution and the result therefrom.

c. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. (As mentioned above, a school district must also make these training materials publicly available on its website.)

2. In a case that involves a complainant or respondent who is a minor, a school district may, with advice of counsel, wish to consider retaining the relevant records longer than the seven years required by the regulations. For example, legal counsel may advise retaining the records until the expiration of the longest statute of limitations for filing a civil suit that is applicable to any of the allegations.

E. Harmonization with Other Laws and Local Policies.

1. Consider First Amendment issues. In cases of alleged harassment, the First Amendment must be considered if issues of speech or expression are involved. First Amendment rights may apply to the rights of complainants, respondents, or third parties.

2. Consider FERPA. There will need to be a balance between confidentiality of student records and due process considerations. Schools may need to disclose evidence as part of the process which may bring concerns with disclosure of confidential student records.

3. Consider interplay with other laws. Interaction when claims also involve other protected classes (e.g., race, disability, etc.), other state laws, or interaction with overlapping federal laws (e.g., Title VII).

4. Consider interplay with other related local policies/codes. School districts typically have (for example) multiple nondiscrimination policies, student bullying policies, workplace violence policies, and staff-student relations policies that could all be relevant to a complaint or report of sexual harassment. Rules established in student codes of conducts, extracurricular codes, and employee handbooks could likewise be relevant and require harmonization with Title IX policies and procedures.

NOTICE: These training materials, including the comments of all speakers who present the materials, do not constitute legal advice and should not be relied upon or used as legal advice. The materials will present information and commentary to facilitate a general understanding of the topics that are addressed but are not necessarily an exhaustive treatment of any legal or policy issues. If a school district requires legal advice regarding any topic, issue, situation or incident, the advice should be obtained from the school district's designated legal counsel.

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Title IX Training : Module 1

A comprehensive overview of the 2020 Title IX Regulations for School District Title IX Coordinators

August 10 and August 12, 2020

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Modules that Address Mandated Training

Module 1: A comprehensive overview of the 2020 Title IX Regulations for School District Title IX Coordinators (this module)

Module 2: Specialized Training for Investigators and Decision-Makers in the Title IX Grievance Process (expected to be available by August 31)

Module 3: Facilitating an Informal Resolution to a Formal Complaint of Sexual Harassment Under Title IX (availability TBD)

** Title IX coordinators need to participate in all of these modules.*

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Modules that Provide Expanded Training on Title IX

Module 4: What All School Employees Need to Know about Sexual Harassment Under the 2020 Title IX Regulations (expected to be available by August 21)

Module 5: What All Principals and other Supervisors Need to Know about Sexual Harassment Under the 2020 Title IX Regulations (availability TBD)

Module 6: Beyond Sexual Harassment: The Full Role and Responsibilities of a K-12 Title IX Coordinator (availability TBD)

** To be most effective, districts should also provide customized local training on the district's own Title IX policies and procedures.*

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Other Information…

- More information on "Certificates of Completion" will be forthcoming (in connection with the mandatory training modules).
- "Certificates of Completion" are <u>not</u> required by the Title IX regulations.

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About the Module 1 Content …

- The content lays the groundwork for important concepts, terminology, and required procedures. Some attendees will already be familiar with some of the content.
- A large green "P" next to any paragraph in the materials is a signal for Title IX coordinators and other school officials to take special care to review their local policies and procedures in connection with that particular point/issue.

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Questions…

<u>Website posting of training materials</u>:

- Will there be one location that a school district will be able to find all of the training materials that should be posted on the district's website?

  All "materials" from the various modules will be posted on the same WASB web pages where you access links to the live/recorded presentations of each module. (All of the materials from the mandatory modules will be on the same web page.)

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Questions…

Website posting of training materials:

- When the regulations require items to be posted on the school district's website, do those items need to be available to the public or just internally (e.g., pages accessible only by students and staff) ?

  The regulations expect that Title IX notices and the district's Title IX training materials will be posted on web pages that are open to the public.

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Questions…

The Title IX "Roles":

- Do districts ever have two Title IX Coordinators - one that focuses on student matters and one that focuses on employment matters? *Yes.*
- A Title IX Coordinator can be an investigator? *Yes.*
- If your investigator is someone other than the Title IX Coordinator, then the "grievance process" effectively requires 4 different people (coordinator, investigator, decision-maker, and appeal decision-maker)? *Yes.*
- Can the coordinator assist the investigator in the investigation process? *Yes.*

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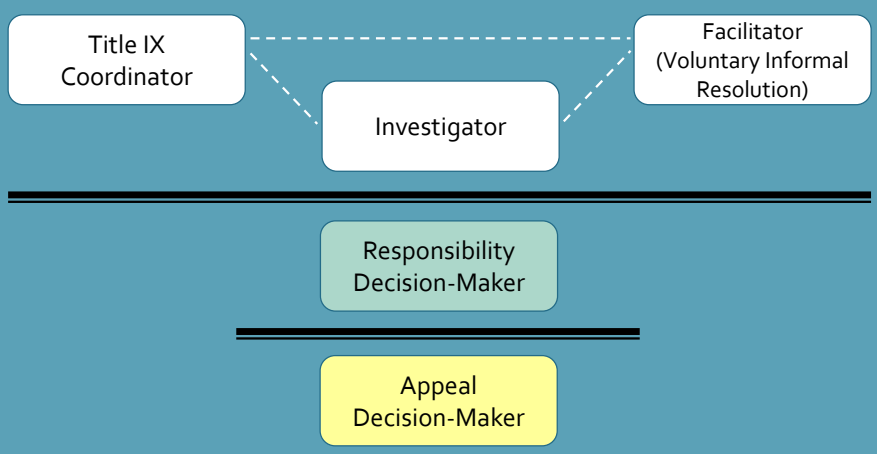
Roles in the grievance process for formal complaints of Title IX sexual harassment



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Questions…

Screening Reports/Complaints:

- Assume we initially assess a reported incident and determine that the report does not appear to allege Title IX sexual harassment (so that we are initially handling the incident as a code of conduct matter or as a "regular" student harassment complaint). However, looking into it a little more, we determine that there may be conduct that could meet the Title IX standards, what do we do at that point?

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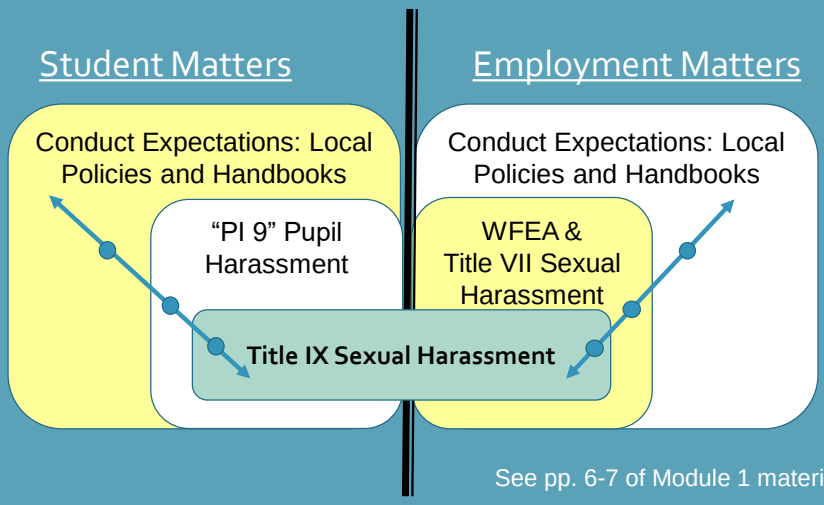
The Comparatively Narrow Definition of Sexual Harassment Under Title IX



See pp. 6-7 of Module 1 materials

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Questions…

The definition of "sexual harassment" under Title IX:

The definition of Title IX sexual harassment includes the following:

- "sexual assault," as defined in 20 U.S.C. 1092(f)(6)(A)(v),
- "stalking," as defined in 34 U.S.C. 12291(a)(30).
- "dating violence," as defined in 34 U.S.C. 12291(a)(10).
- "domestic violence," as defined in 34 U.S.C. 12291(a)(8).

What are those definitions? *See the next slides.*

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Questions…

The definition of "sexual harassment" under Title IX:

"Sexual assault," as defined in 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation, including but not limited to rape, sexual assault with an object, and groping.

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Questions…

The definition of "sexual harassment" under Title IX:

"Stalking," as defined in 34 U.S.C. 12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

1. fear for his or her safety or the safety of others; or
2. suffer substantial emotional distress.

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Questions…

The definition of "sexual harassment" under Title IX:

"Dating violence," as defined in 34 U.S.C. 12291(a)(10), means violence committed by a person-

1. Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
2. Where the existence of such a relationship shall be determined based on a consideration of the following factors:
   a. The length of the relationship;
   b. The type of relationship; and
   c. The frequency of interaction between the persons involved in the relationship.

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Questions…

The definition of "sexual harassment" under Title IX:

"Domestic violence," as defined in 34 U.S.C. 12291(a)(8), includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the state's domestic or family violence laws, or by any other person against an adult or youth victim who is protected from that person's acts under the state's domestic or family violence laws.

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Questions…

Confidentiality:

- If the identities of complainants and respondents are confidential, can the Title IX Coordinator inform the superintendent that the district has received a report or formal complaint of Title IX sexual harassment? *Yes*.
- Does the answer change if the superintendent may be a decision-maker? *No*. *Awareness of the complaint would be unlikely to be seen as creating a conflict of interest or an issue with bias.*

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Questions…

Harmonizing other Processes:

- Can another investigation (e.g., law enforcement, child abuse, DPI licensing) affect a school district's Title IX investigation? Particularly with very serious conduct such as a sexual assault or an improper staff/student relationship, outside entities would almost certainly be involved. How would that affect the Title IX grievance process and timelines?

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Questions…

Harmonizing other Processes:

- What is our obligation if someone says they just want tell us about a situation, but they don't want to file formal complaint?

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TITLE IX MANDATED TRAINING

Appendix to Module 1

APPENDIX A: SAMPLE TITLE IX NOTICE 2

APPENDIX B: SAMPLE LETTER TO COMPLAINANT FOLLOWING AN INITIAL REPORT OR COMPLAINT OF TITLE IX SEXUAL HARASSMENT 5

APPENDIX C: DOCUMENTING THE DISTRICT'S RESPONSE TO NOTICE OF SEXUAL HARASSMENT 7

APPENDIX D: SAMPLE FORMAL COMPLAINT FORM 9

APPENDIX E: SAMPLE NOTICE OF A FORMAL COMPLAINT OF TITLE IX SEXUAL HARASSMENT 11

APPENDIX F: SAMPLE NOTICE OF MANDATORY DISMISSAL OF A FORMAL COMPLAINT OF TITLE IX SEXUAL HARASSMENT 13

APPENDIX G: SAMPLE NOTICE OF DISCRETIONARY DISMISSAL OF A FORMAL COMPLAINT OF TITLE IX SEXUAL HARASSMENT 14

NOTICE: These samples do not constitute legal advice and should not be relied upon or used as legal advice. The samples do not address any school district's local policies or circumstances and are not necessarily an exhaustive treatment of any legal or policy issues. If a school district requires legal advice regarding any topic, issue, situation or incident, the advice should be obtained from the school district's designated legal counsel.

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TITLE IX MANDATED TRAINING
Appendix to Module 1

APPENDIX A: SAMPLE TITLE IX NOTICE

(This sample covers the content of various notices required by the federal Title IX regulations. Specifically, the Title IX regulations require school districts to provide notice of all of the information included in this sample to students, parents or legal guardians of elementary and secondary school students, employees, all applicants for admission or employment, and all unions or professional organizations holding collective bargaining or professional agreements with the school district. In addition, the Title IX regulations require each school district to prominently display the district's Title IX nondiscrimination policy statement and the contact information for the Title IX coordinator(s) on the district's website (if any) and in each handbook or catalog that the district makes available to the persons identified in the previous sentence.)

NOTICE OF SCHOOL DISTRICT POLICIES ON SEX DISCRIMINATION, THE DISTRICT'S TITLE IX COORDINATOR(S), AND PROCEDURES FOR REPORTING OR FILNG A COMPLAINT OF SEX DISCRIMINATION

Title IX Nondiscrimination Policy Statement –
As mandated by the current provisions of Title IX of the Education Amendments of 1972 and under the regulations set forth in Chapter 106 of Title 34 of the Code of Federal Regulations ("the federal Title IX regulations"), the District does not unlawfully discriminate on the basis of sex in any education program or activity that the District operates. Title IX's requirement not to discriminate in any education program or activity extends to cover, but is not limited to, District students, certain admissions processes, and District employment. Inquiries regarding how Title IX and the federal Title IX regulations apply to the District may be referred to a District Title IX Coordinator (as designated below), to the Assistant Secretary for Civil Rights at the U.S. Department of Education, or to both.

The District's commitment to nondiscrimination under Title IX and under other state and federal laws is further defined in the following policies of the School Board: *[Insert applicable references—e.g., Policy 113, Policy 411, Policy 411.1, Policy 511, and Policy 512]*.

District Title IX Coordinators –
The District employees who hold each of the positions identified below serve as Title IX Coordinators for the District:

[REGULAR POSITION TITLE] *[PHYSICAL OFFICE ADDRESS]* *[OFFICE MAILING ADDRESS, if different]* *[OFFICE TELEPHONE]* *[DISTRICT-ISSUED EMAIL ADDRESS]*	*[REGULAR POSITION TITLE]* *[PHYSICAL OFFICE ADDRESS]* *[OFFICE MAILING ADDRESS, if different]* *[OFFICE TELEPHONE]* *[DISTRICT-ISSUED EMAIL ADDRESS]*

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Reporting Sex Discrimination –
Any person (including a person who is not claiming to have been personally harmed/victimized by the alleged discrimination) may report a concern or allegation regarding prohibited sex discrimination (including sexual harassment) to the District. Such reports may be submitted as follows:

1. To a District Title IX Coordinator, either in person, by U.S. mail, by telephone, or by electronic mail, using the contact information listed above. In person reports should be made when the Title IX Coordinator is reasonably available during regular working hours. Reports submitted by telephone, mail, or electronic mail may be made at any time.

2. By any other means that results in a Title IX Coordinator actually receiving the person's verbal or written report.

{Editor's Note: The reporting procedures listed above were drafted to parallel the minimum requirements for reporting procedures under the Title IX regulations. If the district offers additional methods for filing reports and complaints of sex discrimination, such as an online form or other electronic submission portal, the above language should be modified to identify such additional procedures. Ensure that the reporting procedures identified in this notice are consistent with the reporting procedures included in any related policy or rule.}

Filing Formal Complaints of Title IX Sexual Harassment –
As required by the federal Title IX regulations, the District has established a formal grievance process for investigating and resolving "formal complaints" of "sexual harassment," as those terms are defined in the regulations.

An individual who is alleged to be the victim of conduct that could constitute sexual harassment under the federal Title IX regulations (i.e., a Title IX "complainant"), or a parent or guardian who has a legal right to act on behalf of such an individual, may file a formal complaint of sexual harassment. No Title IX complainant is obligated to file a formal complaint, but a qualifying formal complaint is necessary for the District to start an investigation using the District's formal Title IX grievance process.

Complainants are expected to file formal complaints of sexual harassment with a District Title IX Coordinator by submitting a document or electronic submission in person, by U.S. mail, or by electronic mail, using the contact information specified above. *[Carefully review any related local policy or rule and insert a description of any other procedures that the district has established for filing a formal complaint of Title IX sexual harassment.]* ***{Editor's Note: It is very important to coordinate the filing procedures included in this notice with the actual filing procedures that are identified in the applicable policy or rule. Modifications to the sample language may be needed.}***

Additional requirements for formal complaints of Title IX sexual harassment, including a description of the required content for a formal complaint, are set forth in *[insert the applicable reference—e.g., "Policy 113 within the School Board's policies"]*.

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District Response to Reports and Complaints of Sex Discrimination and to Formal Complaints of Sexual Harassment under Title IX –
The District has established grievance procedures through which the District structures its response to reports that allege unlawful discrimination on the basis of sex in any education program or activity of the District. Those procedures are set forth in *[insert the applicable reference(s)—e.g., "411-Rule 1 and 511-Rule 1, as published on the District's website"]*. The purpose of such procedures is to provide for the prompt and equitable resolution of any report or complaint of alleged sex discrimination, excluding formal complaints of sexual harassment under Title IX (which are subject to a different process).

Any time that the District has actual knowledge of sexual harassment or allegations of sexual harassment that could constitute a violation of Title IX, the District has obligations to respond to such knowledge in a manner that is not deliberately indifferent and in a manner that treats the alleged victim(s) of sexual harassment and the alleged perpetrator(s) of sexual harassment equitably. Such a response includes, but is not limited to, offering supportive measures to a complainant and investigating and resolving any formal complaint that presents allegations of Title IX sexual harassment using the formal grievance process that the District has adopted for such formal complaints. District procedures for responding to alleged sexual harassment under Title IX, including the formal grievance process, are set forth in *[insert the applicable reference(s)—e.g., "113-Rule 1, as published on the District's website"]*. ***{Editor's Note: In all cases where a Title IX notice cross-references a document/policy that is available electronically, and the notice itself is provided in an electronic format, a district should include an electronic link to the cross-referenced item(s).}***

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APPENDIX B: SAMPLE LETTER TO COMPLAINANT FOLLOWING AN INITIAL REPORT OR COMPLAINT OF TITLE IX SEXUAL HARASSMENT

NOTE: The Title IX regulations require school districts to respond to notice of Title IX sexual harassment by taking steps that include having the Title IX Coordinator directly contact the alleged victim of the harassment. This letter starts the process of contacting the complainant and providing the complainant with information about supportive measures and the process for filing a formal complaint. The sample letter assumes that an additional direct contact or some other type of follow-up meeting will occur at which the Title IX Coordinator will fulfill additional communication requirements that are established in the Title IX regulations.

[DISTRICT LETTERHEAD]

[DATE]

[NAME]
[ADDRESS]

Re: Report of Sexual Harassment

Dear ***[NAME]***:

This letter is intended to inform you that the District has received a report of alleged sexual harassment. You have been identified as the complainant, which means that you are the individual who is alleged to be the victim of conduct that could constitute sexual harassment under a federal law known as "Title IX."

I am the Title IX Coordinator for the District, and based on the report, I am required to promptly contact you and discuss the availability of "supportive measures." Such supportive measures are discussed below and are available to you with or without filing a formal complaint related to the reported conduct.

"Supportive measures" are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge. Such measures are designed to restore or preserve equal access to the District's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the District's educational environment; and deter sexual harassment. Examples of possible supportive measures include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, mutual restrictions on contact between the parties, changes in work

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locations (for employees), leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

I will contact you to discuss the availability of supportive measures. Please note that I will also consider your wishes with respect to supportive measures. I am responsible for coordinating the effective implementation of supportive measures.

Please be aware that you may also file a formal complaint related to the alleged sexual harassment. Enclosed is a copy of one or more school district policies addressing sex discrimination and sexual harassment, including the policy that identifies the process for filing a formal complaint. I will also explain to you the process for filing a formal complaint.

Sincerely,

Title IX Coordinator
[NAME OF SCHOOL DISTRICT]

Enclosure: ***[Identify Applicable District Policies]***

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TITLE IX MANDATED TRAINING
Appendix to Module 1

APPENDIX C: DOCUMENTING THE DISTRICT'S RESPONSE TO NOTICE OF SEXUAL HARASSMENT

NOTE: This sample presents one approach to documenting a school district's response to a report or other notice of conduct that could constitute Title IX sexual harassment. The Title IX regulations include specific documentation requirements. This sample takes the approach of a "memo to file." An alternative approach to the relevant documentation requirements would involve creating a form that captures the necessary information about the district's response to the report of sexual harassment.

[DISTRICT LETTERHEAD]

Memorandum

To: ***File***
From: ***Title IX Coordinator***
Date: ***[Date of Memorandum]***
Re: ***[Name of Complainant]***
Actions Taken in Response to Report of Alleged Sexual Harassment

This memorandum is intended to document that, on ***[Date of Discussion with Complainant]***, I spoke with ***[Name of Complainant]***, who was identified as the complainant in a report of sexual harassment that was brought to my attention on or about ***[Date that the Title IX Coordinator received notice of the report]***.

During that discussion, I informed the complainant of the availability of supportive measures and informed the complainant that such supportive measures were available with or without a formal complaint. I also considered the complainant's wishes with respect to supportive measures. Specifically, the complainant stated the following wishes: ***[Document wishes of complainant.]***

I also informed the complainant that he/she may file a formal complaint related to the alleged sexual harassment. I also explained to the complainant the process for filing a formal complaint.

I also communicated with the complainant in writing on the above issues and provided the complainant with a copy of District policies addressing sex discrimination and sexual harassment.

The following actions were taken in response to the report of alleged sexual harassment. ***[Describe actions taken.]***

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The measures and actions taken were designed to restore or preserve access to the District's educational program or activity. These actions restored or preserved access by: ***[Describe how the actions helped restore or preserve access]***.

I have concluded that my response was not deliberately indifferent. My response was not deliberately indifferent (or clearly unreasonable under the circumstances) because: ***[Describe basis for this conclusion].***

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APPENDIX D: SAMPLE FORMAL COMPLAINT FORM

NOTE: This is a sample formal complaint form that addresses each of the mandatory aspects of a formal complaint of Title IX sexual harassment. Even if a district makes this form available to complainants, the district should not strictly require the use of the form.

FORMAL COMPLAINT OF SEXUAL HARASSMENT

This formal complaint is filed by the complainant (or parent or guardian on behalf of the complainant) or signed by the Title IX Coordinator.

If this formal complaint is filed by the complainant, it may be filed with the Title IX Coordinator in person, by mail, by electronic mail, by using the contact information for the Title IX Coordinator, or by any additional method designated by the District. A document filed by a complainant means a document or electronic submission that contains the complainants physical or digital signature or otherwise indicates that the complainant, or a parent or guardian acting on behalf of a complainant, is the person filing the formal complaint.

This formal complaint is intended to request the District to investigate the allegation of sexual harassment.

This formal complaint must either attach or include below the specific allegations of sexual harassment against a respondent about conduct within the District's education program or activity.

The allegations of sexual harassment are as follows:
_____
_____
_____.

The conduct occurred within the District's education program or activity in the following respect: _____
_____
_____

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A respondent is any individual who is reported as the alleged perpetrator of conduct that could constitute sexual harassment. The respondent(s) related to the conduct alleged above (if known) are the following individuals: _____.

_____ _____

Printed Name of Complainant or Title IX Coordinator Date

_____

Signature of Complainant or Title IX Coordinator

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APPENDIX E: SAMPLE NOTICE OF A FORMAL COMPLAINT OF TITLE IX SEXUAL HARASSMENT

[DISTRICT LETTERHEAD]

[DATE]

[NAME]
[ADDRESS]

RE: Notice of a Formal Complaint of Sexual Harassment

Dear ***[NAME]***:

This notice is intended to inform you that a formal complaint alleging sexual harassment under Title IX has been filed by a complainant or signed by the Title IX Coordinator with the District. You are being provided this notice because you are a party to this formal complaint.

Enclosed please find a copy of the District's sexual harassment policy, including the District's Title IX grievance process for this formal complaint ***[include if applicable: "and the District's informal resolution process"]***. Please be informed 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. Please also be aware that the parties may request to inspect and review evidence that is directly related to the allegations raised in the formal complaint.

The parties may have an advisor of their choice, who may be, but is not required to be, an attorney. Please also be aware that, as provided in ***[identify the relevant policy or code of conduct provision that establishes the rule]***, the District prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Please be advised of the following allegations that potentially constitute sexual harassment: ***[Include a description of the allegations, including sufficient details known at the time. Sufficient details include the identities of the parties involved in the incident(s), if known; the conduct allegedly constituting sexual harassment under §106.30; and the date and location of the alleged incident(s), if known.]***.

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At the District's discretion, conduct that is investigated using the District's grievance process for allegations of Title IX sexual harassment may be assessed under all relevant legal standards and all applicable District policies, rules, and codes of conduct.

If, during the investigation, the District decides to investigate allegations about the complainant or respondent that are not included in the notice, the District will provide notice of the additional allegations to you. This notice is being provided to the parties with sufficient time to prepare a response before any initial interview.

Sincerely,

Title IX Coordinator
[NAME OF SCHOOL DISTRICT]

Enclosure: Sexual Harassment Policy / Grievance Process for Formal Complaints

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APPENDIX F: SAMPLE NOTICE OF MANDATORY DISMISSAL OF A FORMAL COMPLAINT OF TITLE IX SEXUAL HARASSMENT

IMPORTANT: This sample letter assumes that the complaint is being dismissed in its entirety for purposes of the District's Title IX grievance process. If only some of the allegations are being dismissed (i.e., the complaint is being dismissed in part), substantial modifications to this letter would be needed to address such "dismissal in part."

[DISTRICT LETTERHEAD]

[DATE]

[NAME]
[ADDRESS]

RE: Notice of Dismissal of Formal Complaint of Sexual Harassment

Dear ***[NAME]***:

The District has reviewed the allegations in a formal complaint of sexual harassment that was either filed by a complainant or signed by the Title IX Coordinator.

Upon review, I have concluded that the formal complaint must be dismissed. It must be dismissed because ***[Choose one: (1) the conduct alleged in the formal complaint, even if proven, would not constitute sexual harassment as defined under the federal law known as "Title IX"; (2) the conduct did not occur within the education program or activity of the District; or (3) the conduct did not occur against a person in the United States]***.

[Further explain the reason(s) for dismissal.]

Because dismissal is required under Title IX, I am sending this written notice of dismissal simultaneously to the relevant parties. Dismissal for purposes of Title IX does not preclude the District from taking further action related to the alleged conduct if doing so is determined to be appropriate under any of the District's nondiscrimination policies or other District policies or rules.

This dismissal decision may be appealed to the extent provided in the District's grievance process for formal complaints of Title IX sexual harassment.

Sincerely,

Title IX Coordinator
[NAME OF SCHOOL DISTRICT]

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APPENDIX G: SAMPLE NOTICE OF DISCRETIONARY DISMISSAL OF A FORMAL COMPLAINT OF TITLE IX SEXUAL HARASSMENT

IMPORTANT: This sample letter assumes that the complaint is being dismissed in its entirety for purposes of the District's Title IX grievance process. If only some of the allegations are being dismissed (i.e., the complaint is being dismissed in part), substantial modifications to this letter would be needed to address such "dismissal in part."

[DISTRICT LETTERHEAD]

[DATE]

[NAME]
[ADDRESS]

RE: Notice of Dismissal of Formal Complaint of Sexual Harassment

Dear ***[NAME]***:

The District has reviewed the allegations in a formal complaint of sexual harassment that was either filed by a complainant or signed by the Title IX Coordinator.

Upon review, I have concluded that the formal complaint should be dismissed. It is being dismissed because ***[Choose one: (1) the complainant has notified the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint; (2) the respondent is no longer enrolled in or employed by the District; or (3) specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint]***.

[Further explain the reason(s) for dismissal.]

This notice of dismissal is being sent simultaneously to the relevant parties. Dismissal for purposes of Title IX does not preclude the District from taking further action related to the alleged conduct if doing so is determined to be appropriate under any of the District's nondiscrimination policies or other District policies or rules.

This dismissal decision may be appealed to the extent provided in the District's grievance process for formal complaints of Title IX sexual harassment.

Sincerely,

Title IX Coordinator
[NAME OF SCHOOL DISTRICT]

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TITLE IX MANDATED TRAINING
(20 U.S.C. 20 U.S.C. §§ 1681–1688; 34 C.F. R. part 106)

TITLE IX INVESTIGATORS AND DECISION-MAKERS (Module 2)

TITLE IX – THE LAW

A. Title IX Law (20 U.S.C. §§ 1681–1688)

No person in the U.S. 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.

B. Title IX Regulations (34 C.F.R. part 106). The following are the key sections of the regulations relating to sexual harassment that have been newly created or amended effective on August 14, 2020:

- Section 106.8: Addressing the designation of a Title IX Coordinator, the adoption of a grievance procedure and grievance process, and notice/dissemination of policies
- Section 106.30: Important new definitions added by the Final Rule
- Section 106.44: Addressing the requirements for districts to respond to each report or complaint of sexual harassment of which the district has actual knowledge
- Section 106.45: Requiring districts to establish and administer a grievance process for formal complaints of sexual harassment; also addressing training and recordkeeping requirements
- Section 106.71: Non-retaliation and confidentiality requirements.

C. Enforced by Office for Civil Rights (OCR), U.S. Department of Education

OVERVIEW OF THE 2020 TITLE IX REGULATIONS

In broad terms, the new Title IX regulations, which take effect on August 14, 2020, require districts to address all of the following:

A. **Nondiscrimination policy statements** regarding sex discrimination under Title IX, including express identification of the **Title IX Coordinator**.

B. A **grievance procedure** for receiving and responding to complaints of **sex discrimination** under Title IX.

C. District responses when the district has **actual knowledge** of an incident or allegation of **sexual harassment** under Title IX regardless of whether or not a formal complaint is filed.

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D. A **grievance process** for addressing **formal complaints** of **sexual harassment** under Title IX.

E. **Notices** related to all of the above.

F. Employee **training.**

G. **Recordkeeping**, **confidentiality**, and **non-retaliation** in connection with all of the above.

MANDATORY TRAINING REQUIREMENTS

A. The individuals designated by the district as a Title IX Coordinator, investigator, decision-maker, or any person designated by a school district to facilitate an informal resolution process must receive training on the following:

- The definition of sexual harassment in § 106.30;
- The scope of the school district's education program or activity;
- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable; and
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

B. Investigators must receive training on issues of relevance in connection with the investigator's duty to create an investigative report that fairly summarizes relevant evidence.

C. Decision-makers must receive training on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant. If live hearings are used/permitted under the local grievance process (which will not be common for school districts), decision-makers must also receive training on any technology to be used at any live hearing.

D. Materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, will not rely on sex stereotypes and will promote impartial investigations and adjudications of formal complaints of sexual harassment.

E. The district will maintain for seven years all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

F. The district will make these training materials publicly available on its website.

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THE ROLE OF THE TITLE IX COORINDATOR

A. Every district must have at least one employee who is expressly designated and identified in relevant notices as the Title IX Coordinator. ("Title IX Coordinator" does not need to be the person's only job title.)

B. The Title IX Coordinator(s) must be authorized to coordinate the school district's efforts to comply with all of the district's responsibilities under the Title IX regulations. Those responsibilities encompass all forms of prohibited sex discrimination, including sexual harassment and including both student-related and employment-related matters.

C. The Title IX Coordinator(s) must be authorized to receive reports and complaints of violations of Title IX from any person, including formal complaints of sexual harassment (see below). Further, local procedures should ensure that all other administrators and school employees are aware of the need to appropriately refer Title IX matters to the Title IX Coordinator.

D. Title IX notices will inform students, parents, employees and others that inquiries about the application of Title IX and the Title IX regulations to the district may be referred to the designated Title IX Coordinator.

E. The Title IX Coordinator has specific, mandatory duties in connection with a district's response to reports, complaints, or other notices of Title IX sexual harassment, including important duties related to the identification and implementation of "supportive measures" and, in appropriate cases, the implementation of remedies.

F. The Title IX Coordinator has discretion to sign a formal complaint of sexual harassment on behalf of the district for the purpose of initiating the Title IX grievance process in situations where the alleged victim of the conduct either is unwilling or unable to file a formal complaint.

G. The Title IX Coordinator is prohibited from performing any decision-making role with respect to formal complaints of sexual harassment.

H. The Title IX Coordinator must receive certain mandatory training. However, to perform the role competently, the scope of the training should exceed the minimum mandates.

I. In many school districts the Title IX Coordinator is likely going to be responsible for ensuring that the district meets its obligations with respect to Title IX notices, staff training, and recordkeeping.

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GRIEVANCE PROCEDURE V. GRIEVANCE PROCESS

A. "**Grievance Procedure"** refers to steps for responding to and resolving reports or complaints of possible unlawful discrimination based on sex under Title IX, *other than formal complaints of sexual harassment under Title IX*. P*

1. For complaints under Title IX, the grievance procedure applies only to sex discrimination occurring in the district's education program or activity against a person **in the United States**. (See §106.8(c) and (d))

2. An example of a Title IX complaint that would **not** be a sexual harassment complaint and that would be directed to the "grievance procedure" would be a complaint that the district provides unequal financial support and facilities in athletics based on sex.

3. Most districts will use the same "procedure" for receiving and responding to complaints of unlawful discrimination that are (1) based on protected classes other than sex, or (2) based on laws other than Title IX.

4. Most districts have an existing complaint procedure that, perhaps with some modifications, can be identified and used as the Title IX grievance procedure.

5. The Title IX regulations specify a district's procedures must allow **any person at any time** to report sex discrimination, including sexual harassment (whether or not the person reporting is a person who is 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.

B. **"Grievance Process**" refers to a highly structured process for investigating and resolving **formal complaints** of **sexual harassment** under Title IX. (See §106.45) P

1. School districts around the state have either recently adopted their Title IX grievance process or are currently in the process of doing so.

2. A district is only required to utilize its Title IX "grievance process" when a formal complaint of sexual harassment under Title IX is pending. However, as a very important caveat, **use of the Title IX grievance process is also generally a pre-requisite to the imposition of any disciplinary measure or penalties for substantiated sexual harassment, as defined under the Title IX regulations**.

* NOTE: Although local policies and procedures play an important role in Title IX compliance and throughout the process of responding to reports and complaints of possible Title IX violations, the large green **P** next to any paragraph in these materials serves as a signal for Title IX coordinators and other school officials to take special care to review their **local policies and procedures** in connection with that particular point/issue. In many cases, the signal will identify an important area of local discretion.

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C. Key Points:

1. A report of sexual harassment requires an immediate response from the Title IX Coordinator but does not trigger the grievance process under Title IX.

2. Only a formal complaint of sexual harassment triggers the grievance process under Title IX.

3. A formal complaint must allege sexual harassment in an education program or activity of the district against a person in the U.S. to continue the grievance process.

4. The grievance process must treat complainants and respondents equitably by providing (1) remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and (2) by following a grievance process that complies with the Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.

    a. The grievance process must be completed (i.e., the district must reach a final determination of the allegations, including completing any appeals) before the imposition of any disciplinary measure or penalties for substantiated sexual harassment, as defined under the Title IX regulations.

    b. However, as covered later in these materials, there are two important situations in which a school district is permitted to take specific interim actions prior to the resolution of an allegation of sexual harassment. The following actions are expressly authorized by the Title IX regulations and will <u>not</u> violate the prohibition against imposing discipline/sanctions prior to the completion of the grievance process:

        i. **Emergency removal**, which may be used as a response to a threat to the physical health or safety of any student or other individual. Additional limitations and procedural requirements apply to "emergency removals."

        ii. The Title IX regulations allow a school district to place an employee on **administrative leave**, but only during the pendency of the grievance process for a formal complaint of sexual harassment.

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THE OBLIGATION TO RESPOND TO A NOTICE OF SEXUAL HARASSMENT

A district with actual knowledge of sexual harassment in an education program or activity of the district against a person in the U.S. must respond promptly in a manner that is not deliberately indifferent.

What is Sexual Harassment?

A. As defined in section 106.30(a) of the Title IX regulations, "sexual harassment" means conduct on the basis of sex that satisfies one or more of the following:

1. *An employee of the district conditioning the provision of an aid, benefit, or service of the school district on an individual's participation in unwelcome sexual conduct (quid pro quo);*

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. *Any of the following, as defined under the Title IX regulations by reference to other federal statutes:*

   a. *"sexual assault," as defined in 20 U.S.C. 1092(f)(6)(A)(v),*

   b. *"dating violence," as defined in 34 U.S.C. 12291(a)(10),*

   c. *"domestic violence," as defined in 34 U.S.C. 12291(a)*(8), or

   d. *"stalking," as defined in 34 U.S.C. 12291(a)(30).*

B. As is true of all allegations of sex discrimination under Title IX, an allegation of sexual harassment under Title IX must have occurred in the district's education program or activity and in the United States.

C. The Title IX definition of sexual harassment is generally understood to be narrower (i.e., cover less conduct) than the broader definitions of sexual harassment that apply under other laws:

1. The Wisconsin Fair Employment Act: Section 111.32(13) of the state statutes defines "sexual harassment" to mean "unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature." Under the statute, "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to "the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; the deliberate, repeated display of offensive sexually graphic materials which is not

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necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee's work performance or to create an intimidating, hostile or offensive work environment."

2. Federal Title VII: Also in the employment context, conduct that is "severe **or** pervasive" can meet the applicable standard for a hostile work environment claim under Title VII.

3. The Pupil Nondiscrimination Statute and the DPI Rules in Chapter PI 9: " 'Pupil harassment' means behavior towards pupils based, in whole or in part, on sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability which substantially interferes with a pupil's school performance or creates an intimidating, hostile or offensive school environment."

4. The District's Code of Student Conduct and Employee Handbooks: Through local policy decisions, school districts generally assert an interest in intervening in certain inappropriate conduct before it reaches the level of conduct that is legally-actionable as sexual harassment.

When Does the District Have Actual Knowledge?

A. "Actual knowledge" means notice of sexual harassment or allegations of sexual harassment to: (1) the district's Title IX Coordinator; (2) any official of the district who has authority to institute corrective measures on behalf of the district; or (3) **any employee** of the district.

B. Anyone (victim, friend, parent, guardian, witness, other individual) may report sexual harassment.

C. Examples of ways that a district could obtain actual knowledge of sexual harassment include:

- Witnessing an incident (or a perhaps a series of incidents);
- Receiving a verbal or written report about an incident or allegation from a student or other person;
- Receiving multiple reports that, taken together, provide a different picture of a person's conduct than each incident standing alone; or
- The filing of a formal complaint or any report under the district's Title IX grievance procedure or grievance process.

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What is an "Education Program or Activity" of the School District?

A. With respect to **all** aspects of sex discrimination under Title IX, the terms "*Program or activity*" and "*program"* include **all of the operations** of each recipient of federal funds that is covered by Title IX, including but not limited to a local education agency (as defined in 20 U.S.C. 8801). (See 34 C.F.R. 106.2(i))

B. In connection with "sexual harassment" under the Title IX regulations and for purposes of determining when a school district has an obligation to respond and when a district may (and may not) address allegations under its "grievance process," an "**education program or activity**" includes locations, events, or circumstances over which the school district exercised substantial control over **both** the respondent and the context in which the sexual harassment occurs." (See 34 C.F.R. 106.44(a))

C. A school district's Title IX obligations extend to sexual harassment incidents that occur off campus (1) if the off-campus incident occurs as part of the school district's "operations"; and (2) if the school district exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus.

D. In situations where there is some uncertainty whether alleged harassment occurred in the school district's "education program or activity," the district may examine factors such as whether the district funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred. However, no single factor is determinative to conclude whether a school district exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of "all of the operations of" a district.

E. Examples from the Preamble to the Regulations:

- "For example, in *Doe v. East Haven Board of Education,* the Second Circuit held that the plaintiff sufficiently alleged sexual harassment to which the district was deliberately indifferent where the harassment consisted of on-campus taunts and name-calling directed at the plaintiff after she had reported being raped off campus by two high-school boys. The final regulations would similarly analyze whether sexual harassment (i.e., unwelcome conduct on the basis of sex so severe, pervasive, and objectively offensive that it effectively deprives a complainant of equal access to education) *in the recipient's program or activity* triggered a recipient's response obligations regardless of whether such sexual harassment stemmed from the complainant's allegations of having suffered sexual assault (e.g., rape) *outside* the recipient's program or activity. Further, whether or not the off-campus rape in that case was in, or outside, the district's education program or activity, would depend on the factual circumstances, because as explained above, not all off-campus sexual harassment is excluded from Title IX coverage." (Preamble at 30200)

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- *"Lapka v. Chertoff*, 517 F.3d 974, 982-83 (7th Cir. 2008) (the Seventh Circuit reasoned that the plaintiff sufficiently alleged workplace harassment even though the alleged rape occurred while the plaintiff and assailant were socializing after hours in a private hotel room, because the bar was part of the training facility where the plaintiff and assailant were required to attend work-related training sessions and thus were on "official duty" while at that facility, including the bar located in the facility, "so the event could be said to have grown out of the workplace environment" and the plaintiff and assailant were trainees expected to eat and drink at the facility and "return to dormitories and hotel rooms provided by" the employer such that "[e]mployees in these situations can be expected to band together for society and socialize as a matter of course" justifying the Court's conclusion that the plaintiff had alleged sexual harassment (rape) that arose in the context of a workplace environment and to which the employer had an obligation to respond). Although *Lapka* was a case under Title VII, the final regulations would similarly analyze whether sexual harassment occurred in the school's program or activity by inquiring whether the school exercised substantial control over the context of the harassment and the alleged harasser." (Preamble at 30200, n. 877)

F. As noted above, the statutory and regulatory definitions of "program or activity" encompass "all of the operations of" entities that are covered by Title IX, and such "operations" may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, a school district.

   1. The factual circumstances of online sexual harassment must be analyzed to determine if it occurred in an e**ducation program or activity**, under the "substantial control" standards identified above.

   2. For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the school district exercises substantial control.

G. As previously mentioned, for purposes of the Title IX regulations, the sexual harassment must also have occurred in the United States.

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HOW TO RESPOND TO A NOTICE OF SEXUAL HARASSMENT

When the Title IX Coordinator has notice, the Title IX Coordinator must promptly respond in a manner that is not "deliberately indifferent."

A. A district is "deliberately indifferent" if its response is "clearly unreasonable" in light of the circumstances. "Clearly unreasonable" is not defined but the regulations require that a district's response treat complainants and respondents equitably by:

   1. Offering supportive measures (as defined in the regulations, see below) to a complainant, and

   2. Following a grievance process that complies with the regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures.

B. The Title IX Coordinator must promptly contact the complainant (i.e., the individual alleged to be the victim of sexual harassment, who may or may not be the person who reported the sexual harassment) to:

   1. Discuss the availability of supportive measures;

   2. Consider the complainant's wishes with respect to supportive measures;

   3. Inform the complainant of the availability of supportive measures with or without filing a formal complaint; and

   4. Explain to the complainant the process for filing a formal complaint, at least in circumstances where the original report did not take the form of a formal complaint. (See below for more information on formal complaints.).

C. For each report of Title IX sexual harassment, the Title IX Coordinator must also:

   1. Determine appropriate supportive measures and coordinate with appropriate administrators to provide supportive measures to the complainant. (Note the confidentiality requirements applicable to supportive measures, as further identified below.)

   2. Ensure that the district documents the provision of supportive measures or if supportive measures are not provided, documents the reasons why such response was not clearly unreasonable in light of the known circumstances.

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D. Screening of reports, complaints and allegations: Before initiating Title IX response procedures, as outlined above, the Title IX Coordinator may consider whether the allegations in the report (and any additional information that may be gathered), if true, would potentially meet the definition of sexual harassment under Title IX, occurred in the district's program or activity, and in the U.S. If not, Title IX coordinator may direct the complainant to non-Title IX response procedures.

E. In connection with responding to allegations of Title IX sexual harassment, a school district may also decide to take either of the following steps in appropriate cases, and the Title IX Coordinator will often be in a position to recognize whether either of the actions should be considered:

1. **Emergency Removal**: The district may remove a respondent from the education program or activity on an emergency basis.

    a. The district must undertake an individualized safety and risk analysis, determine that there is an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment that justifies removal, and provide the respondent with notice and opportunity to challenge following the removal.

    b. The allowance for emergency removal may not be construed to modify any rights under IDEA, Section 504, and ADA.

    c. Implementing an emergency removal may sometimes require a school district to additionally follow certain non-Title IX procedures (e.g., if an emergency removal is structured such that a student is not permitted to attend school, then the removal may also constitute a suspension/expulsion, and the school would need to consider its obligations to also follow applicable legal procedures related to suspension/expulsion).

2. **Administrative Leave:** The Title IX regulations allow a school district to place an employee on administrative leave if a formal complaint is pending and the district is using its grievance process to resolve the complaint.

    a. It is likely that the regulations assume that the administrative leave is paid leave.

    b. The allowance for administrative leave may not be construed to modify any rights under Section 504 or the ADA.

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What are Supportive Measures?

A. 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.

B. Such measures are designed to restore or preserve equal access to the district's education program or activity without unreasonably burdening the other party, while protecting the safety of all parties and the district's educational environment; and deterring sexual harassment. Supportive measures may be provided to a respondent, but it is not required.

C. Supportive measures may include 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 and monitoring of certain areas of the campus, and other similar measures.

D. In some situations, a district may determine that it would be necessary or appropriate to provide supportive measures to a respondent, or to provide supportive measures for the benefit of a complainant that directly affect a respondent. However, there is not an obligation to provide supportive measures to the respondent in every case, and the regulations do not require equality or parity with respect to the supportive measures that are provided to complainants and respondents.

E. A 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 district to provide the supportive measures.

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

G. In general, the identification, offering, and monitoring of supportive measures should be an ongoing and continuous part of responding to any incident, report, or complaint of sexual harassment or alleged sexual harassment under Title IX, including but not limited to the period of time when a formal complaint is pending.

H. If the district determines that the allegations of inappropriate conduct, even if proven, would not constitute sexual harassment that is covered by Title IX, then there is no obligation under the regulations to provide (or continue to provide) supportive measures. However, even in non-Title IX cases or in harassment/bullying cases that are not related to a legally-protected status, a district may elect to offer or provide an individual with interventions or supports that are substantially similar to Title IX "supportive measures."

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What is a Formal Complaint?

A. "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 district investigate the allegation of sexual harassment.

   1. A "complainant" means an individual who is alleged to be the victim of conduct that could constitute sexual harassment. (Note: A guardian who is acting on behalf of a child complainant may also file a formal complaint.) The "respondent" is the alleged perpetrator of the conduct.

   2. At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the relevant education program or activity of the district.

   3. As used in the definition, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the district) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

B. The Title IX regulations specify that a district's procedures must, at a minimum, allow a complainant to file a formal complaint with the district's Title IX Coordinator by submitting the document or electronic submission in person, by mail, or by electronic mail, using the contact information that the district has established for the district's Title IX Coordinator. (See §106.30(a))

   1. A district may designate other methods of filing a formal complaint of sexual harassment, and it is very important for the Title IX Coordinator and other relevant administrators to be aware of the specific local procedures.

   2. *Should a district designate additional methods of filing a formal complaint?* The answer to this this question is likely to vary among districts. For example, a district with a single Title IX Coordinator may need to account for situations where the Title IX Coordinator is temporarily unavailable or is the person accused of sexual harassment. However, as a general premise, districts will want to maintain reasonable control over how formal complaints can be filed because it is so important to be able to recognize when you have a formal complaint.

C. The existence or non-existence of a formal complaint is highly relevant for determining *how* a district responds to a particular incident or allegation of sexual harassment, but it does <u>not</u> resolve *whether* a district should or must respond. As covered above, **notice** of conduct that could constitute Title IX sexual harassment is sufficient to trigger obligations to respond.

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D. The authority of the Title IX Coordinator to sign a formal complaint and trigger the district's Title IX grievance process may be used, for example, when:

1. The complainant is not eligible to file a formal complaint for purposes of Title IX (e.g., the complainant is a past graduate of the district and is no longer attempting to participate in a district's program or activity);

2. The complainant declines to file a formal complaint, but the Title IX Coordinator determines that the district's interest in the matter is substantial enough that the matter should be investigated and resolved through the grievance process without the complainant's direct cooperation.

E. In developing their local grievance process, some districts may establish general guidelines or standards for the Title IX Coordinator to follow in circumstances where the regulations permit the Title IX Coordinator to sign (and thereby initiate) a formal complaint. (See §106.30) However, Title IX Coordinators and other school officials should be aware of the following:

1. The preamble to the final regulations suggests that Title IX Coordinators should have a degree of autonomy to determine whether to sign a formal complaint. At the same time, the preamble suggests that it would not be improper for the Title IX Coordinator to obtain input from other district officials (or potentially from the district's legal counsel) regarding whether a formal complaint and investigation under the grievance process are warranted. (Preamble, at pp. 30134-30135)

2. The preamble also states that the Title IX Coordinator's evaluation of whether to sign a formal complaint in the absence of the complainant electing to file a formal complaint should be evaluated in terms of whether signing a formal complaint (or not signing a complaint) would be a "clearly unreasonable" response. (Preamble, at p. 30045)

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RESPONDING TO A FORMAL COMPLAINT OF SEXUAL HARASSMENT

In responding to a formal complaint, the district must treat complainants and respondents equitably by (1) following a grievance process that complies with the Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent, and (2) providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent.

A. Screening Formal Complaints for Possible Dismissal. Before beginning the grievance process and even during the process, the Title IX Coordinator and other agents of the district must consider whether there is a basis for dismissal of the complaint or any of the specific allegations.

1. Two ways a formal complaint could be dismissed.

   Mandatory Dismissal. The district **must** dismiss a formal complaint if the conduct alleged in the complaint:

   a. Would not constitute sexual harassment as defined under Title IX even if proved;
   b. Did not occur within the district's education program or activity; or
   c. Did not occur against a person in the U.S.

   Permissive Dismissal. The district **may** dismiss if:

   a. Complainant notifies of withdrawal of complaint or allegations;
   b. Respondent is no longer enrolled or employed by the district; or
   c. Specific circumstances prevent the district from gathering evidence sufficient to reach a determination.

2. If dismissed, the district must promptly send written notice of the dismissal and reasons for dismissal.

3. Dismissal decisions are appealable (see below).

4. If the formal complaint is not dismissed upon receipt, the Title IX Coordinator must initiate the grievance process.

B. Basic Requirements Applicable to the Grievance Process. Each local Title IX grievance process must:

1. Treat complainants and respondents equitably, as described above (see the beginning of this section).

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2. Require an objective evaluation of all relevant evidence, including an expectation that all individuals involved in the grievance process on behalf of the district must avoid prejudgment of the facts and allegations.

3. Provide that credibility determinations may not be based on person's status as a complainant, respondent, or witness.

4. Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

5. Require that any individual designated by a district as a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process not have a conflict of interest or a bias for or against complainants or respondents generally or an individual complainant or respondent.

6. Disallow any person from performing more than one role as investigator, decision-maker, or appeal decision-maker in the same case. In addition, the Title IX Coordinator cannot serve as the decision-maker or appeal authority. **[Correction made in this paragraph on 9/29/20.]**

7. Include a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility is made at the conclusion of the grievance process.

8. Provide for investigations, determinations of responsibility, and appeal procedures that are consistent with the Title IX regulations.

9. State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, and then apply the same standard of evidence to all formal complaints and to all allegations of Title IX sexual harassment. P

10. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school district and its agents, and <u>not</u> on the parties.

11. Include reasonably prompt time frames for the conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and conducting any informal resolution processes. There must also be a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause. P

12. Include the procedures and permissible bases for the complainant and respondent to appeal. P

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13. Describe the range of supportive measures available to complainants and respondents.

14. Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the school district may implement following any determination of responsibility.

C. Initial Notice to the Parties. Upon receipt of a formal complaint, the school district must provide a detailed notice to complainant and respondent. *(Note: An example of a sample notice is provided in the training materials.)*

1. Upon receipt of formal complaint, a district must provide written notice to parties who are known.

2. Written notice must include:

   a. Notice of the school district's grievance process.

   b. Notice of allegations of sexual harassment, including sufficient details known at that time (i.e., 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).

   c. 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.

   d. Information that the parties may have an advisor of their choice who may be an attorney and that they may inspect and review evidence.

   e. Inform the parties of any provision in the district's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

3. Written notice must be provided with sufficient time to prepare a response before any initial interview.

4. If other allegations are identified for investigation after the initial written notice has been issued, notice of the additional allegations must be provided to the parties whose identities are known.

5. NOTE: All written notices, reports and other materials provided to parties throughout the Title IX grievance process for formal complaints are also provided to a party's advisor if any, and normally also to parents or guardians if any party is a minor.

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D. Informal Resolution Processes. If permitted under the local grievance process, the Title IX Coordinator and other relevant district officials may consider offering an "informal resolution process."

1. An informal resolution process is any process, such as mediation, that does not involve a full investigation and adjudication of the complaint as delineated in the local grievance process.

2. Informal resolution may never be used if the formal complaint includes allegations that an employee sexually harassed a student.

3. If permitted, informal resolution may be offered at any point after a formal complaint has been filed and prior to reaching a determination of responsibility under the full grievance process.

4. If such a process is utilized, the district must:

   a. 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 grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or that could be shared; and

   b. Obtain the parties' voluntary, written consent to the informal resolution process.

5. If an informal resolution is attempted but is not successful, the district must complete a full investigation and adjudication of the complaint using the local grievance process.

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SELECTING AN INVESTIGATOR

A. The Title IX Coordinator may serve as the investigator, but the Title IX Coordinator is not required to serve in this capacity.

B. If possible, it may be beneficial to have another person serve in this capacity, so that the Title IX Coordinator can continue to be available for other matters or consultation on the investigation.

C. The Title IX Coordinator can consult on various issues that may arise during the investigation, including the possibility of dismissal or seeking an informal resolution.

D. The district shall require that any individual designated by a district as an investigator not have a conflict of interest or a bias for or against complainants or respondents generally or an individual complainant or respondent.

E. The district must review its policy to determine whether the policy requires another individual to be identified as the investigator and the qualifications of any such investigator in policy.

F. In addition to any requirements in policy, the district should consider various qualities in an investigator.

1. The legal complexities of the investigation

2. The potential cost of the investigation

3. The competency and training of the investigator

4. The political aspects of who conducts the investigation

5. The potential of the investigator serving as a witness in a future proceeding (arbitration, court, etc.).

IMPORTANT CONSIDERATIONS BEFORE THE INVESTIGATION

A An investigator must follow Title IX requirements.

1. The investigator must ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district and not on the parties.

2. The investigation process instituted by the district shall treat complainants and respondents equitably.

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3. The investigation must include a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility is made at the conclusion of the grievance process.

4. The investigation must consider the standard of evidence (the preponderance of the evidence standard or the clear and convincing evidence standard).

5. The investigator must follow all time frames for the conclusion of the grievance process.

B. The investigator must review and consider all relevant materials.

1. Relevant board policies and handbook provisions on student conduct, including code of conduct and pupil nondiscrimination.

2. Relevant board policies, contracts, and handbook provisions on employee conduct, including teacher contracts, employee grievance procedure, employee code of conduct, and staff discipline and nonrenewal procedures.

C. The investigator must consider any interim action.

1. Emergency removal for students.

2. Administrative leave for employees.

D. The investigator must consider whether to involve law enforcement.

1. Delay process for good cause.

2. Garrity warning.

3. Different standards for criminal conduct.

THE INVESTIGATION

A. The investigator must gather all relevant evidence.

1. Videos, text messages, emails, attendance records/timesheets, computer files social media posts, surveillance records, phone logs, physical searches, etc.

2. The investigator must not restrict the ability of either party to gather and present relevant evidence.

3. The investigator must provide equal opportunity for the parties to present inculpatory and exculpatory evidence.

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B. The investigator must consider possible witnesses and order of witnesses.

1. The investigator must provide equal opportunity for the parties to present witnesses.

2. Title IX does not require the investigator to interview character witnesses.

C. The investigator must provide notice to any party before any interview or meeting.

1. The regulations require the investigator to provide to the party whose participation is invited or expected written notice of the date, time, location, participants and purpose of the investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

2. The investigator should consider having a note-taker present at each meeting for the district.

3. The notice should also include an expectation of cooperation and an expectation of no retaliation.

4. The investigator must not restrict the ability of either party to discuss the allegations under investigation.

D. The investigator must allow parties to have someone accompany them.

1. The investigator must provide the parties with the same opportunities to have others present during any complaint proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.

2. The 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.

3. For employees, consider Weingarten rights. Weingarten rights are based in Section 7 of the National Labor Relations Act (NLRA). Even though the NLRA does not apply to public employees, the Wisconsin Employment Relations Commission referenced it in interpreting Wisconsin's similar statutory protections for municipal employees under Wis. Stats. 111.70(2)

4. For students, consider parental involvement. Review policies and procedures to determine if they discuss the role of, and notification to, the parent.

5. Additional issues arise if law enforcement is going to be in the interview. This includes the situation School Liaison Officer is involved.

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E. The investigator should consider and plan any interview.

1. The investigator should prepare an outline of questions.

2. The investigator cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

3. Consider the physical location and timing of the interview. For example, hold the interview during a non-course period in a "neutral" location.

F. The Interview

1. Explain the purpose of the interview and refer to the notice that had been provided prior to the interview.

2. The investigator should start the interview meeting by stating that it is fact-finding in nature and no conclusionary decision will be made at the meeting.

3. These General Guidelines should be the parameters during your questioning, including but not limited to:

a. Open ended questions. The investigator should ask open-ended questions. Ask open-ended questions because it gives individuals a full opportunity to explain what they saw or what happened; and the opportunity to provide a complete response addresses due process concerns.

b. Start with broad questions and become more focused.

c. Allow the accused to answer each allegation in detail.

d. Avoid leading questions (which suggest the answer to the question) and accusatory questions.

e. Avoid compound questions.

f. Note the witness' source of knowledge – personal observation or hearsay (gossip, rumors or conjecture).

g. The investigator should only disclose to witnesses what is necessary to question them and what information is required to be disclosed by law.

h. Ask repetitive questions. Repeating a question may verify the initial answer, reveal inconsistencies, or provide the witness with the opportunity to give you more information if he/she was avoiding the first question.

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i. Periodically summarize and review what is said. It helps assure that you have been hearing the witness accurately, as well as assures the witness that you have been listening. Can also be used as a tool to close a particular topic or keep a discussion on track.

j. Assess credibility. Note eye contact, facial expressions and body language when individuals are answering questions. Make note when you have an uncooperative witness.

k. Use silence. People are often uncomfortable with silence and it may prompt a nervous witness to provide you with relevant information.

l. End by asking the witness if he/she has anything else he/she would like to share.

7. Compelling Testimony from Employees

a. An employee can be compelled to testify about his/her employment performance and can be disciplined or discharged for failing to respond. Oddsen v. Board of Fire and Police Commissioners, 108 Wis. 2d 143 (1982).

b. However, courts and arbitrators have held that there must be additional evidence, cannot solely discipline based upon a refusal to testify. Also see, Hoover v. Knight, 678 F.2d 578 (5th Cir. 1982); Shell Lake School District, Dec. No. 20024-A, B (WERC, 1983).

c. *Garrity* Rights

i. The Fifth Amendment protects against criminal self-incrimination, not employment self-incrimination.

ii. A school district can compel an employee to answer questions about their conduct provided they grant the employee immunity from criminal prosecution.

iii. Thus, the Fifth Amendment is not violated when a school district asks an employee, without threat of criminal prosecution, for information regarding an incident upon which discharge from the district may be predicated.

iv. If no *Garrity* warning is given, the Seventh Circuit believes due process is not met. Franklin v. Evanston, No. 03-2127 (Sept. 27, 2004).

v. In *Garrity vs. New Jersey*, 385 U.S. 493 (1967) the U.S. Supreme Court held the following:

1) Statements obtained after *Garrity* warning has been provided: Statements obtained in the course of an investigatory interview under threat of termination from public employment could not be

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used as evidence against the employee in a subsequent criminal proceeding(s).

2) However, while the statements the employee makes may not be used against him/her in a subsequent criminal proceeding, they can still form the basis for discipline on the underlying work-related charge.

vi. Refusal to answer after *Garrity* warning has been provided: If, however, the employee refuses to answer questions after he/she been assured that his/her statements cannot be used against him/her in a subsequent criminal proceeding, the refusal to answer questions thereafter may lead to the imposition of discipline for insubordination.

vii. Adverse Inference
A school district may draw an adverse inference from an employee's failure or refusal to answer questions which are properly posed. Advise the employee of this fact, and ask the question again.

7. The investigator should consider creating a record of all interviews.

F. Investigation Analysis

1. Evaluate credibility

2. Evaluate the demeanor of witnesses

3. Review the consistency of the testimony in light of other evidence

4. Internally consistent testimony by one individual

5. Consistent with other witnesses' testimony

6. Consistent with physical evidence

7. Apply policy and handbook standards and expectations

8. Confer with other administrators involved in the investigation

G. Review Reporting Requirements: Public authorities/agencies will be informed if required by law or otherwise appropriate.

1. Child abuse: Wis. Stats. 48.981

2. Corporal punishment: Wis. Stats. 118.31; applicable criminal statutes; etc.

3. Seclusion and restraint reports Wis. Stats. 118.305(4)

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4. Immoral Conduct: The teacher is dismissed or has contract non-renewed by the employer based in whole or in part on evidence that the person engaged in *immoral conduct*. Wis. Stats. 115.31(1)(c). "115.31(1)(c) "Immoral conduct" means conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare or education of any pupil."; *See Cedarburg Educ. Ass'n. v. Cedarburg Bd. of Educ.,* 2007AP852 Wis. Ct. App. 2008. (In an unpublished decision, the Wisconsin Court of Appeals ruled that a teacher who viewed adult images on his school computer when no students were present had engaged in immoral conduct).

5. Resignation: The teacher resigns and the administrator has a reasonable suspicion that the resignation relates to the person having engaged in immoral conduct.

H. The investigator must provide the parties with an opportunity to review evidence during the investigation.

1. The regulations state that the investigator must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.

2. This right includes the ability to review evidence upon which the district does not intend to rely in reaching a determination regarding responsibility, as well as inculpatory and exculpatory evidence, whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

I. The investigator must provide all evidence to the parties prior to the completion of the investigation report.

1. Prior to completion of the investigative report, the investigator must send to each party and the party's advisor, if any, the evidence subject to inspection and review, in an electronic format or a hard copy.

2. The parties shall have at least ten (10) days to submit a written response, which the investigator will consider prior to completion of the investigative report.

J. After receiving responses from both parties, the investigator must prepare an investigation report.

1. The investigator creates an investigative report that fairly summarizes relevant evidence and, at least ten (10) days prior to the time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or hard copy, for their review and written response;

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2. The investigator must conduct an objective evaluation of all relevant evidence, including an expectation that all investigators must avoid prejudgment of the facts and allegations.

3. The investigator must make credibility determinations that may not be based on person's status as a complainant, respondent, or witness.

SELECTING A DECISION-MAKER ON RESPONSIBILITY

A. Neither the Title IX Coordinator nor the investigator may serve as the decision-maker on responsibility.

B. The district shall require that any individual designated by a district as a decision-maker not have a conflict of interest or a bias for or against complainants or respondents generally or an individual complainant or respondent.

C. The district must review its policy to determine whether the policy requires an individual to be identified as the decision-maker and the qualifications of any such decision-maker in policy.

D. In addition to any requirements in policy, the district should consider various qualities in a decision-maker.

1. The legal complexities of the decision-making process

2. The competency and training of the decision-maker

3. The political aspects of who makes the decision on responsibility

4. The potential of the decision-maker serving as a witness in a future proceeding (arbitration, court, etc.).

IMPORTANT CONSIDERATIONS BEFORE THE DECISION-MAKING PROCESS

A A decision-maker must follow Title IX requirements.

1. The decision-maker must ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district and not on the parties.

2. The decision-making process instituted by the district shall treat complainants and respondents equitably.

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3. The decision-maker must include a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility is made at the conclusion of the grievance process.

4. The decision-making process must consider the standard of evidence (the preponderance of the evidence standard or the clear and convincing evidence standard). Many districts adopt a preponderance of the evidence standard.

   a. The preponderance of the evidence requires a determination that it is **more likely than not** that the respondent engaged in the alleged sexual harassment.

   b. The clear and convincing standard requires a determination that sufficient evidence has been presented to make it **highly probable to be true** that the respondent engaged in the alleged sexual harassment.

5. The decision-maker must follow all time frames for the conclusion of the grievance process.

B. The decision-maker must review and consider all relevant materials.

1. Relevant board policies and handbook provisions on student conduct, including code of conduct and pupil nondiscrimination

2. Relevant board policies, contracts, and handbook provisions on employee conduct, including teacher contracts, employee grievance procedure, employee code of conduct, and staff discipline and nonrenewal procedures.

THE DECISION-MAKING ON RESPONSIBILITY

A. The decision-maker must receive and review the investigation report.

1. The decision-maker is not required to rely on factual conclusions or credibility determinations reached by the investigator.

2. The decision-maker must follow the steps in the process before reaching any conclusions on matters contained in the investigation report.

B. Although Title IX regulations permit K-12 school districts to include a **live hearing** that involves the participation of all the parties as part of the decision-making procedures, very few school districts will opt to permit or require live hearings in their Title IX grievance process. The steps discussed below involving submitting questions (which is mandatory) essentially replaces any live hearing.

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C. After receipt of the investigative report and before reaching a determination regarding responsibility, the decision-maker must afford each party the opportunity to submit written, **relevant** questions that a party wants asked of any party or witness.

1. The decision-maker must decide whether a question submitted by a party to another party or witness is relevant.

2. The decision-maker may deny any question that is not relevant. The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant.

3. The decision-maker may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

4. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such evidence about the complainant's prior sexual behavior is offered to prove (1) that someone other than the respondent committed the conduct alleged by the complainant or (2) if the questions and evidence concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and is offered to prove consent.

D. If relevant, the decision-maker must allow time for the other party to answer the questions and must provide each party with the answer.

1. The decision-maker must also allow for limited follow-up questions from each party.

2. The decision-maker must consider any questions and answers within the scope of the decision-maker's determination.

E. Once the question-answer process is complete, the decision-maker must make an objective evaluation of all relevant evidence.

1. The decision-maker must consider both inculpatory (evidence that tends to establish a Respondent's responsibility for alleged sexual harassment) and exculpatory (evidence that tends to clear or excuse a Respondent from allegations of sexual harassment).

2. The decision-maker must not make credibility determinations based on a person's status as a complainant, respondent, or witness.

F. Based on the process above, the decision-maker must then issue a written determination. The written determination must include the following:

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1. Identification of the allegations potentially constituting sexual harassment;

2. 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;

3. Findings of fact supporting the determination;

4. Conclusions regarding the application of the district's code of the conduct to the facts;

5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the district imposes on the respondent, and whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the complainant; and

6. The district's procedures and permissible bases for the complainant and respondent to appeal, including (when applicable) notice of the right of a student complainant to appeal a final determination to the state superintendent of public instruction and notice of the procedures for making that non-Title IX appeal.

G. The written determination may reach different conclusions, including a finding that the respondent was not responsible for any alleged violation of Title IX sexual harassment.

1. If a determination is made that a respondent violated the policy, the decision-maker will determine appropriate **sanctions** for the respondent.

2. If a determination is made that a respondent violated the policy, the district will provide **remedies** to the complainant.

3. In some circumstances, the decision-maker may conclude that additional investigation may be necessary, resulting in a requirement that the investigator conduct additional investigation on a particular issue.

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SELECTING A DECISION-MAKER ON APPEAL

A. Neither the Title IX Coordinator, the investigator, nor the responsibility decision-maker may serve as the appeal decision-maker.

B. The district shall require that any individual designated by a district as an appeal decision-maker not have a conflict of interest or a bias for or against complainants or respondents generally or an individual complainant or respondent.

C. The district must review its policy to determine whether the policy requires an individual to be identified as the appeal decision-maker and the qualifications of any such decision-maker in policy.

D. In addition to any requirements in policy, the district should consider various qualities in an appeal decision-maker.

1. The legal complexities of the appeal decision-making

2. The competency and training of the appeal decision-maker

3. The political aspects of who makes the decision on appeal

4. The potential of the appeal decision-maker serving as a witness in a future proceeding (arbitration, court, etc.).

THE DECISION-MAKING ON APPEAL

A. The district must offer **both** parties an appeal (1) from a determination regarding responsibility or (2) from a dismissal of a formal complaint.

B. An appeal must be filed within any deadline specified in the local grievance process. An appeal that is not filed by the deadline may be dismissed.

C. To the extent required by the Title IX regulations, disciplinary sanctions for Title IX sexual harassment and any remedies that could not be offered as supportive measures shall not be enforced until the determination of the complaint becomes final. The determination regarding responsibility becomes final either:

1. If no appeal is filed, on the date on which an appeal would no longer be considered timely; or

2. If an appeal is filed, on the date that the district provides the parties with the written determination of the result of the appeal.

D. An appeal may be based upon any of the following:

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1. 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 was made, that could affect the outcome of the matter; and,

3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent, that affected the outcome of the matter.

4. Any other grounds for appeal that are specified in the local Title IX grievance process at the discretion of the school district. P

E. As to all appeals, a school district must notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties.

F. The district must give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.

G. After allowing both parties to submit a written statement, the appeal decision-maker must issue a written decision describing (1) the result of the appeal and (2) the rationale for the result. P

1. The written decision must be issued within any timeline specified in the local Title IX grievance process, unless the appeal decision-maker notifies the parties that additional time is needed.

2. The appeal decision-maker must provide the written decision on appeal simultaneously to both parties.

H What happens if the appeal decision-maker determines one of the above grounds for appeal is satisfied? Under most local grievance processes, the likely options include the following:

1. The appeal-decision maker may adjust the determination directly.

2. If the error or other basis for granting the appeal related only to the decision-making step, the matter may be returned for further review of the investigative report by a new decision-maker(s).

3. If the grounds for appeal relate to the investigation, or warrant additional investigation, the appeal decision-maker(s) may either re-open the record or refer the matter for further investigation before proceeding.

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ADDITIONAL REQUIREMENTS AND CONSIDERATIONS.

A. Required Notices.

1. School districts 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 all of the following:

   a. The name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator.

   b. That the school district does not discriminate on the basis of sex in the education program or activity that it operates, and that the school district is required by Title IX and Part 106 of Title 34 of the Code of Federal Regulations not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission and employment, and that inquiries about the application of Title IX and Part 106 to the school district may be referred to the school district's Title IX Coordinator, to the Assistant Secretary at the U.S. Department of Education, or both.

   c. The school district's Title IX 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.

2. In addition, each school district must prominently display the contact information for the Title IX Coordinator (as identified above) and the district's Title IX nondiscrimination policy on its website, if any, and in each handbook or catalog that it makes available to the persons who are entitled to receive the notifications listed above.

3. Many school districts will elect to coordinate the above-identified notice requirements with other nondiscrimination notice requirements established under state or federal law.

B. Retaliation.

1. Under the Title IX regulations, 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 the Title IX regulations, 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 under the regulations.

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a. 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 or the Title IX regulations, constitutes retaliation.

b. The exercise of rights protected under the First Amendment does <u>not</u> constitute prohibited retaliation.

c. 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 under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

2. Complaints alleging retaliation may be filed according to the **grievance procedure** for general sex discrimination claims that the school district has adopted.

C. <u>Confidentiality</u>.

1. Under section 106.71(a) of the Title IX regulations, a 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**:

a. As may be permitted by the FERPA statute, 20 U.S.C. 1232g, or the FERPA regulations, 34 CFR part 99; or

b. As required by law; or

c. To carry out the purposes of the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

2. As mentioned above, school districts 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. (This provision appears in the definition of "supportive measures" within section 106.30(a) of the Title IX regulations.)

3. A 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

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school district obtains that party's voluntary, written consent to do so for a Title IX grievance process. If a party is not an "eligible student," as defined under FERPA (e.g., the party is a minor), then the school district must obtain the voluntary, written consent of a parent or authorized guardian. (See section 106.45(b)(5)(i)).

D. Recordkeeping.

1. School districts must maintain the following records for a period of seven years (e.g., measured from the conclusion of the proceedings and the implementation of any sanctions and/or remedies):

   a. In connection with a school district response to any report or formal complaint of sexual harassment, the district must create and maintain a record of any actions, including any supportive measures, that the district takes in response to the report or complaint. In each instance:

      i. The district must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the school district's education program or activity.

      ii. If a district does not provide a complainant with supportive measures, then the district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

   b. In connection with each formal complaint of sexual harassment that is filed, a school district must maintain a record of:

      i. Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the district's education program or activity;

      ii. Any audio or audiovisual recording or transcript from a hearing *(Note: A district will have these records only if hearings are permitted under the local grievance process. Most school districts will not provide for hearings)*;

      iii. Any appeal and the result of an appeal; and

      iv. Any informal resolution and the result therefrom.

   c. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. (As mentioned above, a school district must also make these training materials publicly available on its website.)

2. In a case that involves a complainant or respondent who is a minor, a school district may, with advice of counsel, wish to consider retaining the relevant records longer

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than the seven years required by the regulations. For example, legal counsel may advise retaining the records until the expiration of the longest statute of limitations for filing a civil suit that is applicable to any of the allegations.

E. Harmonization with Other Laws and Local Policies.

1. Consider First Amendment issues. In cases of alleged harassment, the First Amendment must be considered if issues of speech or expression are involved. First Amendment rights may apply to the rights of complainants, respondents, or third parties.

2. Consider FERPA. There will need to be a balance between confidentiality of student records and due process considerations. Schools may need to disclose evidence as part of the process which may bring concerns with disclosure of confidential student records.

3. Consider interplay with other laws. Interaction when claims also involve other protected classes (e.g., race, disability, etc.), other state laws, or interaction with overlapping federal laws (e.g., Title VII).

4. Consider interplay with other related local policies/codes. School districts typically have (for example) multiple nondiscrimination policies, student bullying policies, workplace violence policies, and staff-student relations policies that could all be relevant to a complaint or report of sexual harassment. Rules established in student codes of conducts, extracurricular codes, and employee handbooks could likewise be relevant and require harmonization with Title IX policies and procedures.

NOTICE: These training materials, including the comments of all speakers who present the materials, do not constitute legal advice and should not be relied upon or used as legal advice. The materials will present information and commentary to facilitate a general understanding of the topics that are addressed but are not necessarily an exhaustive treatment of any legal or policy issues. If a school district requires legal advice regarding any topic, issue, situation or incident, the advice should be obtained from the school district's designated legal counsel.

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TITLE IX MANDATED TRAINING

PROCEDURES FOR LIVE HEARINGS DECISION-MAKING ON RESPONSIBILITY

I. Live Hearings Are *Not* Required for K-12 School Districts.

A. Title IX regulations **permit (but do not require)** K-12 school districts to include a **live hearing** that involves the participation of all the parties as part of the decision-making procedures. It will be unlikely that any school district will likely opt to permit or require live hearings in their Title IX grievance process. Instead, they will likely incorporate the question and answer process that is identified within the training materials.

B. If a school district opts to permit such live hearings, then the school district likely **has discretion** on how such a live hearing will be conducted. The school district **could** provide for a live hearing similar to those hearings required under 34 C.F.R. s. 106/45(b)(6)(i) for **post-secondary institutions** (discussed below), or the district could set forth other procedures for a live hearing.

C. "If an elementary and secondary school recipient chooses to hold a hearing (live or otherwise), this provision leaves the recipient significant discretion as to how to conduct such a hearing, because § 106.45(b)(6)(i) applies only to postsecondary institutions. The Department desires to leave elementary and secondary schools a much flexibility as possible to apply procedures that fit the needs of the recipient's educational environment. The Department notes that § 106.45(b) requires any rules adopted by a recipient for use in a Title IX grievance process, other than those required under § 106.45, must apply equally to both parties. Within that restriction, elementary and secondary school recipients retain discretion to decide how to conduct hearings if a recipient selects that option." Federal Register, Vol. 85, No. 97 (May 19, 2020), p. 30365.

II. Requirements for Live Hearings by Post-Secondary Institutions.

A. Location

1. Live hearings may be conducted with all parties physically present in the same geographic location, or at the decision-maker's discretion, any or all parties, witnesses, and other participants may appear at the live

hearing virtually, with technology enabling participants simultaneously to see and hear each other.

2. At the request of either party, the decision-maker must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or the witness answering questions.

B. Hearing Procedures

1 If a party does not have an advisor present at the live hearing, the institution must provide without fee or charge to that party, an advisor of the institution's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

2. Each party's advisor must be permitted to ask any witnesses (including the other party) all relevant questions and follow-up questions, including questions challenging credibility of the witness.

3. Questions, including cross-examination questions, must be conducted by directly, orally, and in real time by the party's advisor and never by a party personally, notwithstanding the discretion of the institution under 34 C.F.R. 106.45(b)(5)(iv) to otherwise restrict the extent to which advisors may participate in the proceedings.

4. Each party's advisor will only be permitted to ask relevant cross-examination and other questions of a party or witness.

5. Before a witness (including the Complainant and the Respondent) answer a cross-examination or other question, the decision-maker must first determine whether the question is relevant. If a question is not relevant, the decision-maker will not allow the question and must explain any decision to exclude a question as not relevant.

6. 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 provide that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

7. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility. However, the decision-maker cannot draw any inference about a determination regarding responsibility based solely on the party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

C. Record Keeping

The decision-maker must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

Scenario for the Investigation

You are the Title IX coordinator at the Forward School District. A student came into your office on September 8, 2020 and reported the following to you. The student identified herself as Marta C. and she stated to you that she is a friend of Jane D. and that she is on the swim team with Jane D.

Jane D. is a student and a swimmer at the Forward School District. During the summer of 2020 (late June on a weekend) Jane D went to a friend's family's cabin at a lake in Wisconsin. Jane D's friend's name is Emma G. Emma G. and her two siblings (including her brother Fred G. who is involved in this matter) also attend the Forward School District. Emma G. is also on the swim team and her brother, Fred G., is on the diving team. The students were not under the supervision of a school authority or any adults at the cabin. While swimming in the lake by the cabin, Fred G. allegedly groped Jane D. Jane D. told Fred G. that his behavior was inappropriate and to cut it out. After that weekend, Jane D. declined further invitations made by Emma G. to go to her family's cabin.

During the course of the summer, other members of the swimming and diving team started texting Jane D. and telling her that Fred G. liked her and wanted to be her boyfriend. Jane D. stated to them that she was not interested in being Fred G.'s girlfriend. In addition, Jane D. relayed to them the fact that she felt Fred G.'s conduct at the cabin was inappropriate, illegal and that she felt violated by his actions. The friends of Fred G. exchanged texts and snapchat messages with Emma G. and Marta C. during the end of August and during the first week of school telling them that Jane D. was spreading false rumors about Fred G.. The accusations in the snapchat conversations and texts sent by the friends of Fred G. were that Jane D. had been telling friends that Fred G. was a "rapist" and that Jane D. didn't want to have anything to do with him when the swimming and diving season started.

Swimming and diving have had only a couple of practices since the school year started. Fred G. and Jane D. haven't had any contact or interactions, but at the first practice one of Fred G.'s friends, Sam F. told Jane D. to stop the rumors she was spreading about Fred G. or he would tell others about Jane D.'s prior sexual activities. At the second day of practice Sam F. walked by Jane D. and mocked grabbing her buttocks and said, "I had to stop or you would have called me a rapist." Other boy divers laughed when they heard Sam F.'s comments to Jane D. Jane D. made it through practice that evening, went home and called Marta C. She was crying when she was talking to Marta C. as she recounted her interactions with Sam F. and the other boys on the diving team.

DISCLAIMER: All the characters and events described in the above fact pattern are purely fictitious and are not based upon any actual persons, experiences or facts. Any resemblance to a person living or dead, or actual events, is purely coincidental. Any coincidental resemblance should not be interpreted by the reader as a recitation of a prior or present factual scenario.

Investigation Report
Wisconsin School District
September 25, 2020
Investigation Related to Formal Complaint of Sexual Harassment under Title IX
Prepared by Investigator Christine Doe, High School Principal, Wisconsin School District
Sent to both parties and their advisors in electronic format on September 25, 2020

I. Identification of the Allegations Potentially Constituting Sexual Harassment

On September 1, 2020, Complainant high school student Jane Smith (Complainant) filed a formal complaint against Respondent high school student Peter Jones (Respondent), alleging sexual harassment under Title IX. In her formal complaint, Complainant alleged that Respondent made multiple comments to her and others at the school related to an alleged sexual incident on August 29, 2020, between Complainant and another high school male student that occurred off-campus during a party at a private home. Specifically, according to her formal complaint, Complainant alleged that, on August 31, 2020, Respondent shouted at her in the high school south hallway during school that she was a "slut" and that she should "watch her back." Respondent also allegedly told another high school female student, Amanda Johnson, on August 31, 2020, during a high school class, that Complainant needed to stop "leading guys on" or she would "get what she deserved."

II. Description of the Procedural Steps Taken

A. Formal Complaint and Notice of Formal Complaint

Complainant filed the formal complaint on September 1, 2020, with the Title IX Coordinator Becky Jackson.

Upon receipt of the formal complaint, the Title IX Coordinator provided written notice on September 2, 2020, by hand delivery to Complainant and Respondent. The written notice included (1) notice of the district's grievance process, (2) notice of the allegations of sexual harassment, (3) a statement that Respondent was presumed not responsible for the alleged conduct and that a determination regarding responsibility would be made at the conclusion of the grievance process, (4) a statement that the parties may have an advisor of their choice who may be an attorney and that they may inspect and review evidence; and (5) notice that the District's code of conduct prohibits knowingly making false statement or knowingly submitting false information during the grievance process.

B. Selection of Investigator and Overall Investigation Approach

Upon receipt of this formal complaint, the District contacted me on September 2, 2020, to conduct an investigation under the grievance process. I reviewed the complaint and informed the Title IX Coordinator that, as an investigator, I did not have a conflict of interest or a bias against complainants or respondents generally or against the Complainant or Respondent.

During my investigation, I ensured that the burden of proof and burden of gathering evidence rested on the District, and not on the parties. My investigation also included a presumption that the Respondent was not responsible for the alleged conduct until any determination on responsibility at the conclusion of the grievance process. I avoided any prejudgment of the

facts and allegations. The standard of evidence in this matter is the preponderance of the evidence standard.

During my investigation, I did not require, allow, rely upon, or otherwise use questions or evidence that constituted, or sought disclosure of, information protected under a legally recognized privilege. No individual waived any privilege during the investigation. In addition, I did not 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.

Prior to the investigation, I was informed by the Title IX Coordinator of supportive measures that had been offered to Complainant. I also discussed with the Title IX Coordinator whether any dismissal of the complaint had been considered, and the Title IX Coordinator informed me that dismissal was not appropriate in this case. I also discussed and considered whether emergency removal for any student was necessary. I determined not to pursue emergency removal based on the circumstances.

C. Relevant Board Policies and Code of Conduct Provisions

Prior to my investigation, I also identified relevant board policies and code of conduct provisions. In particular, I identified the applicable Title IX sexual harassment policy and grievance process. I also identified a policy that addresses student harassment under state law and a policy that addresses student bullying.

D. Pre-Investigation Gathering of Relevant Evidence

Prior to the investigation, I conducted a review of relevant evidence. Specifically, I asked our high school principal to provide me with any relevant disciplinary records related to the Complainant and Respondent. In addition, I asked our technology department to search for any email between the Complaint and Respondent within the last several weeks and to retrieve any video of the Complainant and Respondent on the date of the alleged incident. No disciplinary records or emails were identified. As explained below, a video was identified that showed an interaction between the Respondent and the Complainant, as well as the Respondent and a witness.

E. Investigation Procedure

1. Witness Interviews

On September 2, 2020, I provided by hand delivery to the Complainant written notice of an investigative interview to occur on September 3, 2020, at 4:00 p.m. at the high school office. In the written notice, I informed the Complainant that the purpose of the interview was to ask questions related to her formal complaint and that I would be participating in the interview and the high school office administrative assistant would also be present only to take notes of the interview. The notice also informed the Complainant that she could have an advisor of her choice present during the interview, but that the advisor must not engage in any conduct that

disrupts the investigation during the interview, including answering questions on behalf of the Complainant. In the notice, I also informed the Complainant that she may present any relevant inculpatory or exculpatory evidence to me during the investigation and that she may present to me at any time a list of any fact or expert witness with relevant testimony to the investigation. Finally, I advised the Complainant that I expected her honesty during the interview, and that she should not engage in any action that constitutes retaliation against any individual.

On September 4, 2020, I met with the Complainant. Also present at the investigative interview were the high school administrative assistant; John Advocate, the Complainant's attorney/advisor; and the Complainant's mother. During the interview, the Complainant provided me with verbal testimony relevant to her allegations. No written statement was taken from the Complainant. The Complainant did not provide me with any relevant physical evidence. The Complainant identified one student, Amanda Johnson, who she identified as a relevant witness.

On September 4, 2020, I provided by hand delivery to Amanda Johnson written notice of an investigative interview to occur on September 8, 2020, at 4:00 p.m. at the high school office. In the written notice, I informed the witness that she has been identified as a potential witness who may have information that is relevant to a pending investigation, that the investigation related to events alleged to have occurred in late August, and that she has not been accused of any misconduct. I advised the witness that I expected her honesty during the interview, and that she should not engage in any action that constitutes retaliation against any individual.

On September 8, 2020, I met with Amanda Johnson. Also present at the investigative interview were the high school administrative assistant and Ms. Johnson's father. During the interview, Ms. Johnson provided me with verbal testimony relevant to the allegations. No written statement was taken from her, and she did not provide me with any relevant physical evidence.

On September 8, 2020, I provided by hand delivery to the Respondent written notice of an investigative interview to occur on September 10, 2020, at 4:00 p.m. at the high school office. In the written notice, I informed the Respondent that the purpose of the interview was to ask questions related to a formal complaint of sexual harassment. The other contents of the notice were similar to the contents provided to the Complainant.

On September 10, 2020, I met with the Respondent. Also present at the investigative interview were the high school administrative assistant; Susan Counselor, the Respondent's attorney/advisor; and the Respondent's mother. During the interview, the Respondent provided me with verbal testimony relevant to the Complainant's allegations. No written statement was taken from the Respondent. The Respondent did not provide me with any relevant physical evidence. The Respondent did not provide me with any relevant witnesses.

As part of my duty to develop a complete and accurate record, on September 5, 2020, I reviewed security camera footage from the high school south hallway. The camera does not record audio. I determined that the camera showed the Respondent passing by the Complainant

and witness Amanda Johnson on August 31, 2020, at the time of the alleged incident. The video appears to show a brief interaction among those three individuals. The video did not show any other identifiable person in the area who might be interviewed as an additional witness.

2. Delivery of Relevant Evidence and Written Responses

On September 11, 2020, prior to completion of my investigation report, I sent in electronic format to the Complainant and the Respondent, and to their advisors, the evidence subject to inspection and review. The evidence provided included evidence upon which I did not intend to rely on in reaching my determination, as well as inculpatory and exculpatory evidence, obtained from a party or another source. The evidence provided consisted of the video and notes of investigatory interviews. In my cover letter to both parties, I informed both parties that the information is intended solely for use with the District's Title IX sexual harassment grievance process and must not be shared with anyone for another purpose. I also informed both parties that they had ten (10) days, or until September 21, 2020, to submit a written response and that I would consider their written response prior to the completion of the investigation report.

III. Findings of Fact and Credibility Determinations

Based on my objective evaluation of all relevant evidence, including the written responses to the evidence provided by the parties (which are included in the investigative record), and based on my credibility determinations that were not based on the person's status, I have made the following findings of fact.

On Monday, August 31, 2020, Respondent made multiple comments to Complainant at the school. Specifically, Respondent confronted her in the high school south hallway during school and told her that she was a "slut" and that she should "watch her back." Respondent denied making these statements, but he admitted to confronting the Complainant in the hallway and asserted that he only told Complainant that she should stay away from him and his friends. However, Amanda Johnson also stated that she heard the Respondent make the statements alleged by the Complainant. Ms. Johnson also alleged that the Respondent was extremely angry, got very close to the Complainant, and used a very angry tone with Complainant. Ms. Johnson reported that she felt very uncomfortable and observed Complainant to be very afraid. Ms. Johnson reported that the Complainant did not say anything to Respondent immediately before or after the incident.

Ms. Johnson also reported that the Respondent then approached her separately in class later that same day and told her that Complainant needed to stop "leading guys on" or she would "get what she deserved." Ms. Johnson again observed the Respondent to be very angry. She stated that she did not say anything to Respondent immediately before or after this incident. Respondent admitted to talking to Ms. Johnson in class and admitted to saying that Complainant needed to stop leading guys on, but he denied making any sort of threatening statement toward Complainant.

Based on my investigation, Ms. Johnson provided very credible testimony, and she alleged that she was friends to both the Complainant and the Respondent. I also believe that Ms. Johnson did not have any incentive to provide false testimony in this instance. As a result, I believe that Ms. Johnson likely provided the most accurate account on both actions by the Respondent.

EXAMPLE OF WRITTEN NOTICE OF ALLEGATIONS

[Editor's Note - Please do the following: *(1) Insert the identity of the recipient and parent/guardian if the recipient is a minor pupil. Also send to the recipient's advisor (if any). (2) Although not required by Title IX code and regulations, you may wish to send the notification via certified mail. (3) Please note that the letter does not need to be sent simultaneously to all parties, but must be sent to each individual party with sufficient advance notice that the recipient has time to prepare a response before any initial interview.]*

RE: WRITTEN NOTICE OF ALLEGATIONS UNDER TITLE IX AND NOTIFICATION OF GRIEVANCE PROCESS UNDER TITLE IX

The District has received a formal complaint of sexual harassment under Title IX (20 U.S.C. §§ 1681–1688), Title IX Regulations (34 C.F. R. part 106), and Board Policy *(insert board policy and procedure reference here)*. According to the law and applicable regulations the District must provide a detailed written notification to the parties that are involved in the complaint. This letter constitutes that required notification of the allegations of sexual harassment and notification of the District's grievance process as required by Title IX.

The District's Title IX sexual harassment grievance process is located here (*insert link*) and is attached to this letter.

The following is a summary of the allegations of sexual harassment contained in the complaint:

> ***[Editor's Note****: Include sufficient details known at the time of the issuance of the letter of notification (i.e., 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).]*

Please note that by law the District's receipt of the complaint and the District's inclusion in this letter of the above statement regarding the allegations of sexual harassment does not imply that a decision by the District has been made regarding the complaint.

By law the respondent is presumed not responsible for the alleged conduct and a determination regarding responsibility is made at the conclusion of the grievance process.

As a party in this matter you have the right to an advisor of your choice. That advisor may be an attorney and that advisor may inspect and review evidence. The District, however, does not supply an advisor for you in this process.

[Editor's Note*: You must inform the parties of any provision in the District's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.]*

[Editor's Note*: Please note that the written notice must be provided with sufficient time to prepare a response before any initial interview.]*

We have scheduled a meeting to meet with you and your adviser (if any) on (*insert date*).

Please note that if other allegations are identified for investigation after the initial written notice has been issued, notice of the additional allegations must be provided to the parties whose identities are known.

Please note that all written notices, reports and other materials provided to parties throughout the Title IX grievance process for formal complaints are also provided to a party's advisor if any, and normally also to parents or guardians if any party is a minor.

My contact information is as follows:

Insert Contact Information Here

Please feel free to contact me with any questions or comments.

Sincerely,

Insert name

INSERT HARD COPY OF POLICY AND/OR PROCEDURE WITH GRIEVANCE PROCESS HERE

Written Determination
Wisconsin School District
October 15, 2020
Investigation and Decision Related to Formal Complaint of Sexual Harassment under Title IX
Prepared by Responsibility Decision-Maker Alice Hanson, Director of Student Services, Wisconsin School District
Written Determination Sent to Both Parties on October 15, 2020

I. Identification of the Allegations Potentially Constituting Sexual Harassment

On September 1, 2020, Complainant high school student Jane Smith (Complainant) filed a formal complaint against Respondent high school student Peter Jones (Respondent), alleging sexual harassment under Title IX. In her formal complaint, Complainant alleged that Respondent made multiple comments to her and others at the school related to an alleged sexual incident on August 29, 2020, between Complainant and another high school male student that occurred off-campus during a party at a private home. Specifically, according to her formal complaint, Complainant alleged that, on August 31, 2020, Respondent shouted at her in the high school south hallway during school that she was a "slut" and that she should "watch her back." Respondent also allegedly told another high school female student, Amanda Johnson, on August 31, 2020, during a high school class, that Complainant needed to stop "leading guys on" or she would "get what she deserved."

II. Description of the Procedural Steps Taken

A. Formal Complaint and Notice of Formal Complaint

Complainant filed the formal complaint on September 1, 2020, with the Title IX Coordinator Becky Jackson.

Upon receipt of the formal complaint, the Title IX Coordinator provided written notice on September 2, 2020, by hand delivery to Complainant and Respondent. The written notice included (1) notice of the district's grievance process, (2) notice of the allegations of sexual harassment, (3) a statement that Respondent was presumed not responsible for the alleged conduct and that a determination regarding responsibility would be made at the conclusion of the grievance process, (4) a statement that the parties may have an advisor of their choice who may be an attorney and that they may inspect and review evidence; and (5) notice that the District's code of conduct prohibits knowingly making false statement or knowingly submitting false information during the grievance process.

B. Selection of Investigator and Overall Investigation Approach

Upon receipt of this formal complaint, the District contacted Christine Doe on September 2, 2020, to conduct an investigation under the grievance process. Ms. Doe determined that she did not have a conflict of interest or a bias against complainants or respondents generally or against the Complainant or Respondent.

C. Investigation Procedure

1. Pre-Investigation Gathering of Evidence

Prior to the investigation, the investigator conducted a review of relevant evidence, including a review of any relevant disciplinary records related to the Complainant and Respondent, any email between the Complaint and Respondent within the last several weeks, and any video of the Complainant and Respondent on the date of the alleged incident. No disciplinary records or emails were identified. A video was identified that showed an interaction between the Respondent and the Complainant, as well as the Respondent and a witness.

2. Witness Interviews

On September 2, 2020, the investigator provided by hand delivery to the Complainant written notice of an investigative interview to occur on September 3, 2020, at 4:00 p.m. at the high school office. The written notice informed the Complainant that the purpose of the interview was to ask questions related to her formal complaint and that the participants would be the investigator and the high school office administrative assistant. The notice also informed the Complainant that she could have an advisor of her choice present during the interview, but that the advisor must not engage in any conduct that disrupts the investigation during the interview, including answering questions on behalf of the Complainant. The notice also informed the Complainant that she may present any relevant inculpatory or exculpatory evidence to the investigator during the investigation and that she may present to the investigator at any time a list of any fact or expert witness with relevant testimony to the investigation. Finally, the investigator advised the Complainant that there was an expectation of her honesty during the interview, and that she should not engage in any action that constitutes retaliation against any individual.

On September 4, 2020, the investigator met with the Complainant. Also present at the investigative interview were the high school administrative assistant; John Advocate, the Complainant's attorney/advisor; and the Complainant's mother. During the interview, the Complainant provided the investigator with verbal testimony relevant to her allegations. No written statement was taken from the Complainant. The Complainant did not provide the investigator with any relevant physical evidence. The Complainant identified one student, Amanda Johnson, who she identified as a relevant witness.

On September 4, 2020, the investigator provided by hand delivery to Amanda Johnson written notice of an investigative interview to occur on September 8, 2020, at 4:00 p.m. at the high school office. The written notice informed the witness that she has been identified as a potential witness who may have information that is relevant to a pending investigation, that the investigation related to events alleged to have occurred in late August, and that she has not been accused of any misconduct. The investigator advised the witness that there was an expectation of her honesty during the interview, and that she should not engage in any action that constitutes retaliation against any individual.

On September 8, 2020, the investigator met with Amanda Johnson. Also present at the investigative interview were the high school administrative assistant and Ms. Johnson's father. During the interview, Ms. Johnson provided the investigator with verbal testimony relevant to

the allegations. No written statement was taken from her, and she did not provide me with any relevant physical evidence.

On September 8, 2020, the investigator provided by hand delivery to the Respondent written notice of an investigative interview to occur on September 10, 2020, at 4:00 p.m. at the high school office. The written notice informed the Respondent that the purpose of the interview was to ask questions related to a formal complaint of sexual harassment. The other contents of the notice were similar to the contents provided to the Complainant.

On September 10, 2020, the investigator met with the Respondent. Also present at the investigative interview were the high school administrative assistant; Susan Counselor, the Respondent's attorney/advisor; and the Respondent's mother. During the interview, the Respondent provided me with verbal testimony relevant to the Complainant's allegations. No written statement was taken from the Respondent. The Respondent did not provide me with any relevant physical evidence. The Respondent did not provide me with any relevant witnesses.

The investigator also reviewed security camera footage from the high school south hallway. The camera does not record audio. The investigator determined that the camera showed the Respondent passing by the Complainant and witness Amanda Johnson on August 31, 2020, at the time of the alleged incident. The video appears to show a brief interaction among those three individuals. The video did not show any other identifiable person in the area who might be interviewed as an additional witness.

3. Delivery of Relevant Evidence and Written Responses

On September 11, 2020, prior to completion of her investigation report, the investigator sent in electronic format to the Complainant and the Respondent, and to their advisors, the evidence subject to inspection and review. The evidence provided included evidence upon which she did not intend to rely on in reaching my determination, as well as inculpatory and exculpatory evidence, obtained from a party or another source. The evidence provided consisted of the video and notes of investigatory interviews. The investigator informed both parties that they had ten (10) days, or until September 21, 2020, to submit a written response and that she would consider their written response prior to the completion of the investigation report. Both parties submitted written responses.

4. Investigation Report

On September 25, 2020, the investigator completed her investigation report. She sent the investigation report to both parties and their advisors in electronic format on September 25, 2020. The investigator also provided me with a copy of the report on September 25, 2020. The investigation report fairly summarized the relevant evidence and was provided to me at least ten (10) days prior to my determination regarding responsibility. The investigator conducted an objective evaluation of the relevant evidence and made credibility determinations that were not based on the person's status as complainant, respondent, or witness.

5. Question and Answer Period

After receipt of the investigative report and before reaching a determination regarding responsibility, I afforded each party the opportunity to submit written, relevant questions that the party wanted asked of any party or witness. In this respect, on September 29, 2020, I informed both parties in writing that each party had until October 5, 2020, to submit written questions to me. In my cover letter, I informed both parties that I would be making decisions on whether a question submitted by a party was relevant and that I may deny any question that was not relevant. I informed both parties that I would explain to any party proposing a question any decision to exclude a question as not relevant. I also informed both parties that questions and evidence about the Complainant's sexual predisposition or prior sexual behavior would not be relevant, unless a clear exception applied. I also explained that I would not allow any questions that would seek disclosure of information under a legally recognized privilege.

On October 5, 2020, the Respondent sent to me one question to ask of the Complainant, specifically whether she remained in school on the day on which Respondent made the alleged comments. I determined that the question was relevant. As a result, I submitted the question to the Complainant and informed the Complainant that she needed to provide a written answer to me by October 8, 2020. The Complainant provided me with a written answer on October 7, 2020. Her answer was that she left school on that day because she was fearful of the potential actions by the Respondent. The Complainant also provided me with a copy of her attendance record on that day, which showed that she missed most of the day of school on that day. On October 7, 2020, I provided the Respondent with the Complainant's response to the question. On October 7, 2020, I informed both parties that I would permit any follow-up questions, but any additional follow-up question would be limited to the subject matter of the Respondent's question and any follow-up question needed to be provided to me by October 12, 2020. Neither party provided any additional follow-up questions to me.

III. Findings of Fact and Credibility Determinations

Based on my objective evaluation of all relevant evidence, including the questions and answers provided by the parties during the decision-making process, and based on my credibility determinations that were not based on the person's status, I have made the following findings of fact.

I adopt the findings of fact reached by the investigator. On Monday, August 31, 2020, Respondent made multiple comments to Complainant at the school. Specifically, Respondent confronted her in the high school south hallway during school and told her that she was a "slut" and that she should "watch her back." Respondent denied making these statements, but he admitted to confronting the Complainant in the hallway and asserted that he only told Complainant that she should stay away from him and his friends. However, Amanda Johnson also stated that she heard the Respondent make the statements alleged by the Complainant. Ms. Johnson also alleged that the Respondent was extremely angry, got very close to the Complainant, and used a very angry tone with Complainant. Ms. Johnson reported that she felt very uncomfortable and observed Complainant to be very afraid. Ms. Johnson reported that the Complainant did not say anything to Respondent immediately before or after the incident.

Ms. Johnson also reported that the Respondent then approached her separately in class later that same day and told her that Complainant needed to stop "leading guys on" or she would "get what she deserved." Ms. Johnson again observed the Respondent to be very angry. She stated that she did not say anything to Respondent immediately before or after this incident. Respondent admitted to talking to Ms. Johnson in class and admitted to saying that Complainant needed to stop leading guys on, but he denied making any sort of threatening statement toward Complainant.

I also adopt the credibility determination made by the investigator. Specifically, the investigator concluded that, based on her investigation, Ms. Johnson provided very credible testimony, and she alleged that she was friends to both the Complainant and the Respondent. The investigator believed that Ms. Johnson did not have any incentive to provide false testimony in this instance. As a result, I also find that Ms. Johnson likely provided the most accurate account on both actions by the Respondent.

IV. Conclusions Regarding Application of the District's Policy to the Facts / Statement and Rationale Concerning the Allegations

The District's Title IX Sexual Harassment policy states that sexual harassment includes conduct based on sex that includes "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." The District must find that such sexual harassment occurred by a preponderance of the evidence.

In this instance, the Respondent on two different occasions made comments about Complainant that were based on the sex of the Complainant, calling her a "slut" and telling one of Complainant's friends to stop "leading guys on." Further, the Respondent made very serious statements related to the Complainant, telling her that she should "watch her back" and that she "would get what she deserved."

Based on a review of all relevant evidence, the comments were unwelcome in nature. There is no evidence to indicate that the comments were invited or welcomed by the Complainant. Instead, the comments appeared to be prompted solely by the Respondent's frustration and anger toward the Complainant based on the incident that occurred between the Complainant and one of his friends.

The collective comments were certainly based on the sex of the Complainant. Further, standing alone, the isolated "slut" and stop "leading guys on" comments were inappropriate, but would not rise to the level of comments that a reasonable person would find so severe, pervasive, and objectively offensive to deny the Complainant equal access to the District's program or activity. However, when such comments are also combined with very threatening statements that the Complainant must "watch her back" and that she "would get what she deserved," then such comments become increasingly closer to the standard in the District's policy. Further, in this instance, the Respondent made the comments in a very angry and threatening tone toward both the Complainant and one of her friends. Both the Complainant and her friend were very uncomfortable and very fearful as a result of the comments made by the Respondent. In

addition, the Complainant went home on that particular day out of fear of the Respondent's comments.

The Respondent does not have any past disciplinary record, which would suggest that any threatening comments were perhaps exaggerated in nature. However, based on the very angry nature of the comments, it is reasonable for the Complaint to believe that such comments could have resulted in Respondent following through on these threats in an immediate and perhaps harmful nature. As a result, I find that, based on the totality of the circumstances, a reasonable person would find that the conduct was so severe, pervasive, and objectively offensive that it denied the Respondent to access to the educational program or activity.

The comments were made only on two instances on a single day, so it raises some question about the pervasiveness of the comments; however, based on the overall threatening nature of the comments and the fact that the comments were repeated to two different individuals, I find that the pervasive element is met.

The comments by Respondent also violated other District policies and codes of conduct. In particular, the District has another student sexual harassment policy based on state law. The District also finds that, based on the test established under that policy, the conduct by the Respondent violated that policy. In addition, the District's code of conduct prohibits any conduct by a student that is threatening in nature. As a result, the conduct by the Respondent also violated that policy as well.

V. Determination Regarding Responsibility, Sanctions, and Remedies

Based on the evidence, I find that the Respondent is responsible for conduct that violates the District's Title IX sexual harassment policy. In addition, the conduct by the Respondent also violated other policies and codes of conduct in the District.

Although the comments by the Respondent were very serious in nature, there was no further physical action by the Respondent and the Respondent has shown remorse in his comments. Further, the Respondent has had no previous disciplinary action while in the District. As a result, I am recommending a short out-of-school suspension for the Respondent for his actions and then additional harassment training for the specific student. I also recommend that the Respondent must also follow a no-contact order with the Complainant for at least the next thirty (30) days, effective on the date that this decision is final.

I am also recommending remedies for the Complainant. Specifically, as noted above, the Respondent must follow a no-contact order for the next thirty (30) days. In addition, I recommend that the Complainant is provided any counseling or other services, as appropriately identified by the counselor.

VI. Permissible Bases for the Complainant and the Respondent to Appeal

The Complainant or the Respondent may appeal this decision as permitted by the District's policy, which includes a requirement that either party must file an appeal within ten (10) days of this written determination. An appeal may be based upon any of the following: (1) 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 was made, that could affect the outcome of the matter; and/or (3) the Title IX Coordinator, investigator(s), or decision-maker 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.

Either party may also appeal any final determination to the state superintendent of public instruction, as permitted by District policy and state law.

Title IX Training:

IMPORTANT BACKGROUND FOR FACILITATORS OF INFORMAL RESOLUTIONS OF FORMAL COMPLAINTS OF TITLE IX SEXUAL HARASSMENT

(MODULE 3, PART 1 OF 2)

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and Boardman & Clark LLP

1

Overview

Title IX is a federal law that prohibits sex discrimination (including sexual harassment) in a school district's education programs, activities, and operations. It protects students, employees, and other persons.

New U.S. Department of Education regulations have changed the way that school districts must respond to allegations of **sexual harassment**. The changes place a premium on a school district's ability to:

1. Recognize possible incidents, reports, and complaints of conduct that could constitute sexual harassment under Title IX; and
2. Implement a response that complies with Title IX, other applicable laws, and district policy.

When there is a documented **formal complaint** that alleges Title IX sexual harassment, the federal regulations require the school district to resolve the matter through a "**grievance process**," which can involve either very formal investigation, decision-making, and appeal steps, or an "**informal resolution process**." If the local grievance process allows for informal resolution, that is where the role of a **facilitator** comes in.

2

Overview

At the end of this part of the training module, you should be able to answer the following questions about sexual harassment under Title IX:

- How does Title IX uniquely define sexual harassment?
- What is the scope of an "education program or activity" under Title IX, including for purposes of an allegation of Title IX sexual harassment?
- What is the role of the district's Title IX Coordinator(s)?
- What obligations does a school district have to respond to actual knowledge of possible Title IX sexual harassment?
  - What are "supportive measures" under Title IX?
  - How does Title IX restrict a school district's ability to impose disciplinary consequences for sexual harassment?
  - What are the main elements of a "grievance process" that is used to respond to formal complaints of Title IX sexual harassment?
- What do the Title IX regulations require in terms of fairness to the parties and avoiding conflicts of interest and bias?

3

Title IX: The big picture

- Title IX is a federal law that prohibits the school district from unlawfully discriminating against any person on the basis of sex in any **education program or activity** that the district operates.
- Title IX extends to protect students, employees, and other persons from prohibited **sex discrimination**, including **sexual harassment**.
  - Examples of "sex discrimination" covered by Title IX that are **not** a type of "sexual harassment":
    - Providing inferior opportunities, facilities or funding for school-sponsored athletics, based on sex.
    - Refusing to consider a qualified female applicant for a custodial/maintenance position.
- Title IX is one of several different laws that prohibit sex discrimination (including sexual harassment) in schools.
- Conduct that constitutes unlawful sexual harassment will also violate school district policies and may be expressly identified in student codes of conduct and/or employee handbooks.

4

Why did Title IX start to receive renewed attention in 2020?

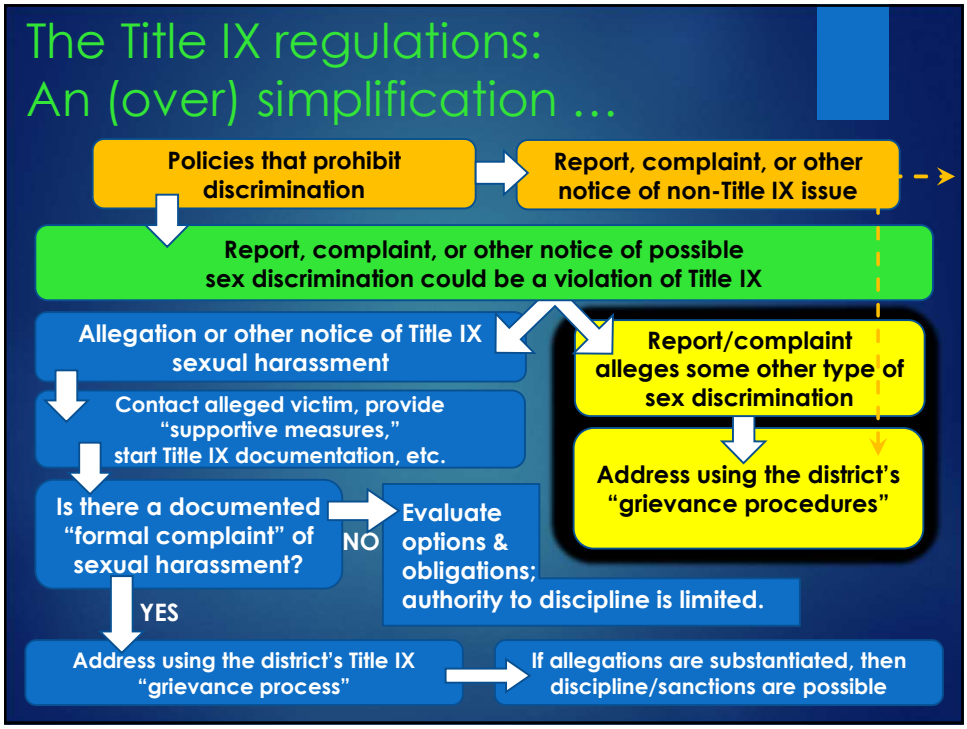
- The U.S. Department of Education, which is responsible for the administration and enforcement of Title IX, issued new regulations under Title IX that took effect on August 14, 2020. The Title IX regulations have the force of law.
- Examples of some of the significant changes made by the 2020 amendments to the Title IX regulations include the following:
  - The new regulations create a **definition of sexual harassment** that is unique to Title IX.
  - The new regulations change the way that **school districts are required to respond to alleged Tile IX sexual harassment**, including changing the procedures that school districts will use to investigate and make decisions about such allegations.
  - The new regulations are intended to promote **equitable treatment** and to protect the rights of **both** alleged victims of Title IX sexual harassment, as well as alleged perpetrators of Title IX sexual harassment.

5

Every school district has at least one Title IX Coordinator

- Every school district must designate **at least one employee** to coordinate the district's efforts to comply with its responsibilities under Title IX and the Title IX regulations. The employee must be referred to as the "**Title IX Coordinator**."
- A Title IX Coordinator's responsibilities include:
  - Addressing questions that students, parents, employees, and others may have about the application of Title IX to the school district.
  - Receiving reports and complaints of possible sex discrimination, including any reports or documented **formal complaints** of sexual harassment.
  - Playing an active and important role in the district's response to reports, complaints, or other notices of Title IX sexual harassment.
- Every school district employee should be able to immediately identify the district's Title IX Coordinator(s). Facilitators of informal resolutions will likely have regular interaction with the school district's Title IX Coordinator.

6



7

How does Title IX define sexual harassment?

Under Title IX, sexual harassment means conduct **on the basis of sex** that occurs in any **education program or activity** of the school district and that also satisfies **one or more** of the following:

1. Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, <u>and</u> objectively offensive** that it effectively denies a person equal access to the district's education program or activity;
2. An employee of the district has conditioned the provision of an aid, benefit, or service of the district on an individual's participation in unwelcome sexual conduct; **OR**
3. The conduct is any of the following:
   a. "sexual assault," as defined in <u>20 U.S.C. 1092(f)(6)(A)(v);</u>
   b. "stalking," as defined in <u>34 U.S.C. 12291(a)(30);</u>
   c. "dating violence," as defined in <u>34 U.S.C. 12291(a)(10); **or**</u>
   d. "domestic violence," as defined in <u>34 U.S.C. 12291(a)(8)</u>.

8

What is the scope of a school district's "education program or activity"?

- Title IX generally takes a broad view of the term "education program or activity" in a manner that encompasses all aspects of school district operations, including district employment.
- Specifically with respect to sexual harassment, the Title IX regulations indicate that "education program or activity" includes locations, events, or circumstances in the United States over which the school district exercised substantial control over both:
  1. the alleged perpetrator of the conduct; and
  2. the context in which the relevant conduct occurs.
- Interpretation: There has to be a nexus, or connection, to the school district's scope of authority to establish and enforce conduct rules/expectations for the situation. The scope is **not** limited to school district property and would also **not** be strictly limited to school hours or to an employee's work hours.

9

How does Title IX define sexual harassment?

Under Title IX, sexual harassment means conduct **on the basis of sex** that occurs in any **education program or activity** of the school district and that also satisfies **one or more** of the following:

1. 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;
2. An employee of the district has conditioned the provision of an aid, benefit, or service of the district on an individual's participation in unwelcome sexual conduct; **OR**
3. The conduct is any of the following:
   a. "sexual assault," as defined in 20 U.S.C. 1092(f)(6)(A)(v);
   b. "stalking," as defined in 34 U.S.C. 12291(a)(30);
   c. "dating violence," as defined in 34 U.S.C. 12291(a)(10); **or**
   d. "domestic violence," as defined in 34 U.S.C. 12291(a)(8).

10

What is the significance of Title IX's unique definition of sexual harassment?

- A school district is required to implement a full **Title IX response** to allegations of sexual harassment only when the allegations reflect conduct that, if proven, could constitute a violation of Title IX's definition of sexual harassment.
- Particularly with respect to allegations that someone's conduct has created an unlawful "hostile environment," the Title IX definition of sexual harassment generally requires conduct that is **somewhat** more serious/substantial than is required under other legal standards. In other words, it can **sometimes** be harder to allege and prove a "hostile environment" claim under Title IX than under other legal standards.
- Title IX's focus on relatively more serious conduct means that some reports or allegations of possible sexual harassment will be processed under the district's Title IX procedures, and some will not. When Title IX does **not** apply, the district may still assess the conduct and process the report under other legal standards and/or under the district's own policies or rules.

11

The comparatively narrow definition of "hostile environment" sexual harassment under Title IX (students)

Conduct Expectations in Local Policies and Handbooks

Ch. PI 9 (Wis. Admin. Code)

Behavior towards pupils based, in whole or in part, on sex … [or] sexual orientation … which

substantially interferes with a pupil's school performance **or**

creates an intimidating, hostile **or** offensive school environment

Title IX:

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

12

What is the significance of Title IX's unique definition of sexual harassment?

- Title IX requires a screening process for allegations of sexual harassment:
  - Facilitators of informal resolutions within a Title IX grievance process will only be involved where there are allegations that, if proven, could plausibly constitute sexual harassment **as defined by Title IX**.
  - If the allegations presented in a formal complaint, even if proven, would not constitute sexual harassment under Title IX, then the complaint must be dismissed *for purposes of Title IX and the Title IX grievance process*.
  - Allegations dismissed for purposes of Title IX may still be addressed as potential *non-Title IX sexual harassment*, or as some other violation of a school district's rules and conduct expectations.
- To the extent a person is a victim of sexual harassment, or is accused of alleged sexual harassment, it is important for that person to know that special rights and procedures apply when the allegations assert a possible violation of Title IX.

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What is the significance of Title IX's unique definition of sexual harassment?

- Title IX's focus on relatively more serious conduct has direct implications for the extent to which using an informal resolution process (and having any role for a facilitator) will be:
  - Desirable/practical from the perspective of **the school district**. (Will the district even offer informal resolution?)
  - Desirable from the perspective of **the parties**. (The alleged victim and the alleged perpetrator of the sexual harassment must voluntarily consent to attempting an informal resolution.)
  - Lawful.
- Through policy or through guidelines developed to implement a policy, a school district could significantly restrict the types of sexual harassment allegations for which the district may consider offering informal resolution processes.

14

How is the district required to respond to "actual knowledge" of sexual harassment under Title IX?

- For any individual who is alleged to be the **victim** of conduct that could constitute sexual harassment under Title IX (i.e., a Title IX "**complainant**"), the district is required to take steps such as the following:
  - The Title IX Coordinator must promptly contact the complainant to discuss the availability of "**supportive measures**."
  - The Title IX Coordinator must inform the complainant of the option of filing a formal complaint and explain the process for filing a **formal complaint**. (A formal complaint needs to take the form of a document or electronic submission and must meet other requirements.)
  - The district must offer appropriate "**supportive measures**" regardless of whether the complainant files a formal complaint.
  - If the complainant files a **formal complaint** of Title IX sexual harassment, then the school district must investigate the allegations using its written Title IX "**grievance process**."

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What are "supportive measures"?

- "**Supportive measures**" are 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. The purpose of supportive measures is to restore or preserve equal access to the district's education program or activity without unreasonably burdening the other party. Two possible examples are (1) modifications to work or class schedules, and (2) issuing mutual a "no contact" directive.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- It will normally be important for a facilitator of an informal resolution process to be aware of the supportive measures that have been offered and implemented. Some supportive measures might be continued, ended, or modified as part of a resolution.

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How is the district required to respond to "actual knowledge" of sexual harassment under Title IX?

- For any individual who has been **reported to be the perpetrator** of conduct that could constitute sexual harassment under Title IX (i.e., a Title IX "**respondent**"), the district's obligations include the following:
  - The district must ensure that any "supportive measures" do not unreasonably burden any party.
  - Before the district imposes any disciplinary sanctions against a respondent, the district must follow the district's formal Title IX **grievance process** and make a determination of responsibility.
  - The district must apply a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- The Title IX regulations make limited allowances for certain "**emergency removals**" of a respondent and for the use of administrative leave for a respondent who is an employee.

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What are **formal complaints** of sexual harassment under Title IX?

A "formal complaint" is a **document filed by a complainant or signed by the Title IX Coordinator** alleging sexual harassment against a respondent and requesting that the district investigate the allegation(s) of sexual harassment.

- As used in the definition, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
- At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the relevant education program or activity of the district.
- The authority of the Title IX Coordinator to "sign" a formal complaint *on behalf of the district* is available for situations where a complainant is not eligible to file the complaint and for certain situations where the complainant is unwilling to file a formal complaint.

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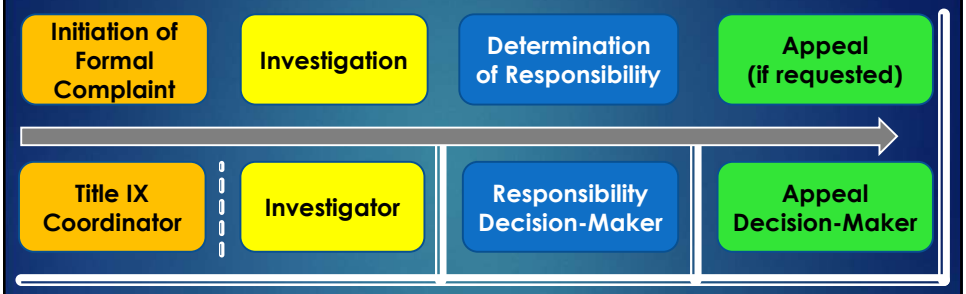
Steps and roles in the **grievance process** for formal complaints of Title IX sexual harassment



- The investigator, responsibility decision-maker, and appeal decision-maker must all be **different** people.
- The Title IX Coordinator may not serve as any type of decision-maker, but may be an investigator.

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How different is the Title IX "grievance process" from a school district's typical pre-disciplinary investigation?

Very different! A few examples:

- The person who determines whether a respondent is responsible for misconduct must be someone other than the person who conducted the investigation to develop the relevant facts/evidence. Both of these individuals must have completed training that is mandated by Title IX.
- Certain written notices must be provided to the parties, including notice of the formal complaint and advance written notice of any investigative interview.
- At the close of the investigation, the investigator will have to provide the parties with a copy of **all** material evidence gathered during the investigation and provide the parties with an opportunity to respond to the evidence.
- Before the matter is addressed by the "decision-maker," the investigator must prepare a highly-structured investigative report that must be provided to the parties for comment.
- Before making a decision, the decision-maker must offer the parties an opportunity to identify questions for the other party or for a witness.

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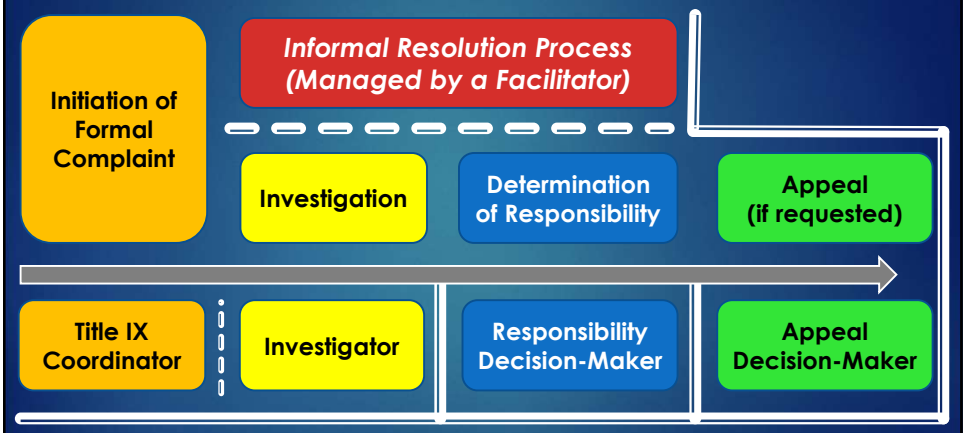
Steps and roles in the **grievance process** for formal complaints of Title IX sexual harassment



- **Questions**: Can a Title IX Coordinator serve as a facilitator? Can a facilitator perform any of the other roles in the same complaint case?

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Some highlights of the facilitated informal resolution process

- Under the regulations, an informal resolution process is any process, such as mediation, that attempts to resolve a formal complaint of Title IX sexual harassment and that does **not** involve a full investigation and adjudication under the school district's grievance process.
- Informal resolution may not be offered unless a formal complaint has been filed. After a formal complaint has been filed, informal resolution may be offered any time prior to reaching a determination regarding responsibility under the steps of the grievance process.
- The parties must provide their voluntary, written consent to participate in informal resolution. A party may withdraw from the informal resolution process at any time prior to agreeing to a resolution.
- Informal resolution may **NOT** be offered to resolve allegations that an employee sexually harassed a student.
- The person who facilitates the informal resolution process must be trained as required by the Title IX regulations.

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A facilitator must have detailed knowledge of the local Title IX grievance process

- Before commencing any informal resolution process (and, ideally, before agreeing to serve as a facilitator in any complaint case), a facilitator should obtain and carefully read the applicable grievance process. It will cover many important items, including:
  - Timelines/deadlines applicable to informal resolution processes.
  - Potential local restrictions, rules, or guidelines that relate specifically to the informal resolution process and the role and authority of a facilitator.
  - The standard of proof that the school district applies to allegations of Title IX sexual harassment under its grievance process.
- The grievance process will reiterate important mandates found in the Title IX regulations, including the presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Contact the applicable school district's Title IX Coordinator with any questions about that district's written grievance process or your role as a facilitator.

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The Title IX regulations require facilitators (and all other roles defined in the grievance process) to serve **impartially**

- Facilitators must avoid any prejudgment of the facts at issue.
- To the extent applicable to the process and allegations, facilitators:
  - Must engage in an objective analysis of relevant evidence.
  - Must not judge credibility based on a person's status as a complainant, respondent, or witness.
- Facilitators must avoid conflicts of interest.
  - Conflicts could arise, for example, due to (1) involvement in an incident that forms the basis of the allegations; (2) familial or close personal relationships, or other significant prior history, with any of the parties; or (3) certain supervisor-subordinate relationships.
  - A person assigned or being considered as a facilitator should self-disclose any potential conflict that may not be readily apparent and allow the district to determine if the potential conflict is relevant to performing the role.

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The Title IX regulations require facilitators (and all other roles defined in the grievance process) to serve **impartially**

- Facilitators must avoid bias, including:
  - Bias for or against complainants or respondents, generally; and
  - Bias for or against any individual complainant or respondent.
- Consistent with the basic requirements of any Title IX grievance process, the facilitator must treat complainants and respondents **equitably** during the attempt to reach an informal resolution. For example, if the facilitator permits one party to provide a witness statement or other evidence, the facilitator is likely required to provide an equivalent opportunity to all other parties.
- Facilitators are expected to avoid applying any sex-based stereotypes to their analysis of the matter.
- If an issue with bias or any conflict of interest arises during the informal resolution process, bring the issue to the attention of the Title IX Coordinator or District Administrator.

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Sexual harassment incidents can overlap with other important issues and responsibilities

Examples:

- Some sexual harassment scenarios involving students who are minors can also constitute **child abuse** (or suspected child abuse) that is subject to mandatory reporting to appropriate authorities.
- Some sexual harassment scenarios can involve a **threat of school violence** that is subject to mandatory reporting to law enforcement.
- Some sexual harassment scenarios may involve a need to consider whether an administrator needs to make a **report of educator misconduct** to DPI (i.e., for purposes of a licensing-related investigation).

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What else is there to know about Title IX?

Facilitators are expected to adhere to the relevant Title IX **confidentiality requirements**, including the following:

- With limited exceptions (such as to the extent disclosure is necessary to comply with and carry out the purpose of Title IX and its regulations), Title IX requires the district to keep confidential the identity of any individual who makes a report or complaint of sex discrimination, any alleged victim of sexual harassment, any person who has been reported to be the perpetrator of sex discrimination (including sexual harassment) and any witness.
  Note: This does **not** prevent **intra-district** disclosure of such information based on legitimate educational or supervisory/managerial interests.
- 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.

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What else is there to know about Title IX?

Title IX (similar to several other anti-discrimination laws) prohibits **retaliation**.

- It is unlawful for either the school district or any other person to intimidate, threaten, coerce, or discriminate against any individual:
  - For the purpose of interfering with any right or privilege secured by Title IX or the Title IX regulations, 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 under the Title IX regulations.
- The restrictions against retaliatory conduct extend to **any person**—not just to persons who are assigned to act on behalf of the district.
- The district will accept and process reports of Title IX retaliation using the grievance procedures that the district has established for general complaints of sex discrimination under Title IX.

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Some next steps…

- **Participate in Part 2 of this training module in order the complete the module.**
- If you are employed by a school district, read through the written policies and procedures that your district has revised in light of the 2020 Title IX regulations, paying special attention to:
  - The procedures the district has established for reporting discrimination/harassment and for filing a formal complaint of Title IX sexual harassment.
  - The district's "grievance procedures" for responding to reports or complaints of unlawful discrimination (including sex discrimination).
  - The district's "grievance process" for investigating and resolving documented formal complaints of Title IX sexual harassment.
- If you would like additional general information about sexual harassment under the 2020 Title IX regulations, the school district that is providing you with this training has access to additional Title IX training resources that you may review.

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TITLE IX MANDATED TRAINING
(20 U.S.C. 20 U.S.C. §§ 1681–1688; 34 C.F. R. part 106)

FACILITATORS OF INFORMAL RESOLUTIONS
(Module 3, Part 2)

TITLE IX – THE LAW

A. Title IX Law (20 U.S.C. §§ 1681–1688)

No person in the U.S. 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.

B. Title IX Regulations (34 C.F. R. part 106). The following are the key sections of the regulations relating to sexual harassment that have been newly created or amended effective on August 14, 2020:

- Section 106.8: Addressing the designation of a Title IX Coordinator, the adoption of a grievance procedure and grievance process, and notice/dissemination of policies
- Section 106.30: Important new definitions added by the Final Rule
- Section 106.44: Addressing the requirements for districts to respond to each report or complaint of sexual harassment of which the district has actual knowledge
- Section 106.45: Requiring districts to establish and administer a grievance process for formal complaints of sexual harassment; also addressing training and recordkeeping requirements
- Section 106.71: Non-retaliation and confidentiality requirements.

C. Enforced by Office for Civil Rights (OCR), U.S. Department of Education

FORMAL COMPLAINT AND GRIEVANCE PROCESS

A. "**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 district investigate the allegation of sexual harassment. (Note: A parent or guardian who is acting on behalf of a child complainant may also file a formal complaint.)

1. A "**complainant**" means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

2. The "**respondent**" is the alleged perpetrator of the conduct.

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B. In response to a **formal complaint** of sexual harassment under Title IX, a recipient must follow a **grievance process** that complies with 34 C.F.R. §106.45. ***See*** 34 C.F.R. §106.44(b)(1).

C. A district's response must treat complainants **equitably** by offering supportive measures to a complainant and by following a grievance process before imposition of disciplinary sanctions or other actions that are not supportive measures against a respondent. ***See*** 34 C.F.R. §106.44(a).

D. In addition, any provisions, rules, or practices other than those required by the Title IX regulations that a school district adopts as part of its grievance process for handling formal complaints of sexual harassment must apply **equally to both parties**. ***See*** 34 C.F.R. §106.45(b).

E. Within the grievance process, the regulations set forth **"basic requirements"** for the grievance process. ***See*** 34 C.F.R. §106.45(b)(1). Some of the basic requirements include that each local Title IX grievance process must:

1. Require an objective evaluation of all relevant evidence, including an expectation that all individuals involved in the grievance process on behalf of the district must **avoid prejudgment of the facts and allegations**.

2. Provide that credibility determinations may not be based on person's status as a complainant, respondent, or witness.

3. Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

4. Require that any individual designated by a district as a Title IX Coordinator, investigator, decision-maker, **or any person designated to facilitate an informal resolution process** not have a conflict of interest or a bias for or against complainants or respondents generally or an individual complainant or respondent..

5. Include a presumption that the respondent is **not responsible** for the alleged conduct until a determination of responsibility is made at the conclusion of the grievance process.

6. State whether the standard of evidence to be used to determine responsibility is the **preponderance of the evidence standard or the clear and convincing evidence standard**, and then apply the same standard of evidence to all formal complaints and to all allegations of Title IX sexual harassment.

7. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school district and its agents, and **not** on the parties.

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F. Within the grievance process, the regulations set forth requirements for an **"investigation of a formal complaint."** ***See*** 34 C.F.R. §106.45(b)(5). Some of the requirements within the investigation include that the investigator will:

1. **Not** restrict the ability of **either** party to gather and present relevant evidence, or to discuss the allegations under investigation;

2. Provide **equal** opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;

3. Provide the parties with the **same** opportunities to have **others present** during any complaint proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney. However, the 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;

4. Provide to the **party** whose participation is invited or expected **written notice** of the date, time, location, participants, and purpose of investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

5. Provide both parties an **equal** opportunity to **inspect and review any evidence** obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence upon which the district does not intend to rely in reaching a determination regarding responsibility, as well as inculpatory and exculpatory evidence, whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation;

G. Within the grievance process, the regulations set forth a process for a **"determination regarding responsibility"** after an investigation has occurred involving a formal complaint of sexual harassment under Title IX. ***See*** 34 C.F.R. §106.45(b)(7).

H. Within the grievance process, the regulations allow for an **informal resolution process** after a formal complaint is filed. ***See*** 34 C.F.R. §106.45(b)(9).

1. Specifically, it states that, at any time **prior to** reaching a determination regarding responsibility, the district **may facilitate an informal resolution process** that does **not** involve a full investigation and adjudication, if certain requirements are met.

2. Based on the above, at any time, prior to a determination regarding responsibility, even after an investigation has begun, the parties may voluntarily agree to an informal resolution process.

3. The district must be prepared to identify a facilitator who may be authorized to conduct an informal resolution if the local grievance process allows for such a process.

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INFORMAL RESOLUTION PROCESS

A. Informal Resolution Processes. If permitted under the local grievance process, the Title IX Coordinator and other relevant district officials may consider offering an **"informal resolution process"** when a formal complaint has been filed. P*

1. If permitted, informal resolution may be offered at any point **after a formal complaint has been filed** and **prior to reaching a determination of responsibility** under the full grievance process.

2. The regulations state that, if permitted, a district **may not require** as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, **waiver** of the right to an investigation and adjudication of formal complaints of sexual harassment.

3. District **cannot require** parties to go through any informal resolution process.

4. Districts must also **not** intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or the Title IX regulations, 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 under the regulations. This non-retaliation requirement also prohibits such conduct toward parties with respect to any decision to participate or refuse to participate in an informal resolution process.

5. The regulations state that an informal resolution process **may never be used** if the formal complaint includes allegations that **an employee sexually harassed a student**. The portion of the district's grievance process that addresses informal resolution, or other policy guidelines that the District adopts for the consistent implementation of the grievance process, may identify other situations where informal resolution may not be used, such as sexual assault cases.

B. Facilitator of the Informal Resolution Process. Districts must carefully consider who will serve as a facilitator of the informal resolution process and what expectations will be placed on the facilitator.

1. The facilitator must have received training as required under the regulations.

2. The facilitator must **not** have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

* NOTE: The large green **P** serves as a signal for Title IX coordinators and other school officials to take special care to review their **local policies and procedures** in connection with that particular issue and to identify an important area of local discretion.

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3. Although not expressly prohibited by the Title IX regulations, there are sound reasons that, in nearly all formal complaint cases, a district would **not** want to assign the facilitator as either the investigator or decision-maker in the same case.

4. Unless the district sets forth limitations on a facilitator serving as a witness, facilitators should be aware that they could be a witness in the formal grievance process. For example, if the informal resolution is not successful, in some instances, the investigator may wish to interview the facilitator to determine whether parties provided inconsistent statements at different times.

5. The district must ensure that facilitators understand the structure of the intended informal resolution process and their role and scope of authority.

C. Notice to the Parties. If such a process is utilized, the district must provide to the parties a **written notice** disclosing certain information.

1. The written notice must include the **allegations** in the formal complaint.

2. The written notice must include the **requirements** of the informal resolution process.

   c. The **requirements** of any informal resolution process may differ from case to case. In some local district policies, the informal resolution process may be very specifically defined. However, in other policies, the informal resolution process may not specify the requirements in order to give some flexibility to the district in any case.

   b. The regulations specify that, at any time **prior to** agreeing to a resolution within the informal resolution process, any party has the **right to withdraw** from the informal resolution process and resume the grievance process with respect to the formal complaint. This information should be included in the notice.

   c. This notice must also include the circumstances under which it **precludes the parties from resuming a formal complaint** arising from the same allegations. For example, the notice could state as follows: "After agreeing to a resolution, a party may not withdraw from the resolution in whole or in part in order to (1) insist on a full investigation and adjudication of the formal complaint, (2) challenge or appeal elements of the resolution, or (3) file a new formal complaint arising from the same allegations."

3. The written notice must also include any **consequences** resulting from participating in the informal resolution process.

   a. Consequences may vary from case to case. One example of a consequence may be that, upon agreeing to a final resolution, the parties forfeit certain rights and procedures that would be available under a full investigation and written

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determination of the formal complaint. Another example may be that a party who agrees to a final resolution generally may not, after agreement to the final resolution, challenge or dispute any sanctions or remedies that were included in the final resolution.

b. This notice must also include the **records** that will be maintained or that could be shared. Such records may include the written notice itself and any final resolution.

4. Where the complainant or respondent is a minor or legally incompetent person, then the party's parent or guardian must receive the required notice.

D. Written Consent of the Parties. If such a process is utilized, the district must also obtain the parties' **voluntary, written consent** to the informal resolution process.

1. Consent to informal resolution cannot be the product of coercion or undue influence.

2. Each party should only agree to engage in the informal resolution process because the party believes such a process may further the party's own wishes and desires.

3. The voluntary aspect of informal resolution likely means that the district should **not** consider or draw any positive or negative inferences from a party's willingness, or unwillingness, to participate in an informal resolution process, or from a party's decision to withdraw from an informal resolution process prior to reaching an agreement. Those decisions by a party would not be relevant to determining the facts or reaching an adjudication of a complaint.

E. Types of Informal Resolution Processes. According to the regulations, an informal resolution process is any process, such as mediation, that does not involve a full investigation and adjudication of the complaint as delineated in the local grievance process.

1. Districts have discretion on whether to offer an informal process. Districts remain free to create (or not create) an informal resolution process that serves their unique educational needs.

2. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, mediation or restorative justice.

3. Mediation may involve an admission to certain conduct by the respondent, a mutual acknowledgement of partial responsibility by both parties, or mutual acknowledgement that the parties agree on the conduct, but perceive the conduct in different ways. A mediation model may result in a mutually agreed upon resolution to the situation without the respondent admitting responsibility.

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4. Restorative justice generally involves a respondent admitting wrongdoing and working to redress the harm caused. Any admission does not mean that the district has also reached that determination.

5. The Department of Education provided extensive commentary accompanying the 2020 Title IX regulations. Within its commentary, the Department stated that it believes that the option of informal resolution gives districts an avenue to educate and change behavior in a way that the adversarial formal grievance process might not. Benefits of such informal resolution process may include greater party control over outcomes (which may improve parties' sense of justice and increase compliance with outcomes) and yielding remedies and sanctions more customized to the needs of unique situations. ***See*** *Federal Register*, Vol. 85, No. 97 (May 19, 2020), page 30400.

F. Conducting the Informal Resolution Process.

1. The facilitator likely must treat complainants and respondents equitably. Consistent with the basic requirements of the grievance process, the facilitator must also likely presume that the respondent is not responsible for the alleged conduct. In addition, the facilitator must not require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waive the privilege.

2. Consistent with the requirements of any investigation, the facilitator must also likely provide the parties with the same opportunities to have others present during any meeting, including by an advisor of their choice. In addition, the facilitator must likely provide a party whose participating is expected with written notice of the date, time, location, participants, and purpose of any meeting, with sufficient time for the party to prepare.

3. An informal resolution process must include reasonably prompt time frames for filing and resolving any process, which may include delays for good cause as appropriate.

4. An informal resolution process should identify how the parties will be meeting. The facilitator should carefully consider risks in allowing parties to be present in the same room together, which may raise issues with potential additional harassment.

5. The district should consider whether the facilitator will conduct any questioning or investigation into the matter. In some instances, there may be no dispute over the facts. As a result, the facilitator may just need to identify a specific resolution to the problem. In other instances, the parties may not agree to the specific facts. In those instances, the facilitator may need to consider whether the disputed facts need to be resolved. The facilitator may or may not be authorized to resolve disputed facts, but instead the facilitator may just be authorized to reach a resolution based on the disputed facts.

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6. If the facilitator will conduct fact finding, then the facilitator may want to provide some notice the parties. Such notice may state that the parties are expected to provide truthful information during the informal resolution process and that statements that a party makes during the informal resolution process may become relevant evidence in connection with any subsequent investigation or adjudication of the complaint if the informal resolution process is not successful or does not fully resolve the complaint. The facilitator should be cautious about promising confidentiality in these matters.

7. The facilitator should carefully consider both parties input on the facts and their desire on the specific outcome desired. The facilitator should also consider any interest that the district may have on any outcome and any resolution.

8. The facilitator must consider any issue where new allegations arise during the informal resolution process, that may not be addressed or included in the pending complaint.

9. Through an informal resolution process, a district may impose disciplinary sanctions against a respondent without conducting an investigation and without reaching a final written determination.

10. The facilitator should reach a final written resolution that is signed by the parties and/or their parents and the district. The facilitator should be cautious about overstepping any authority in these instances. The final resolution may include (1) whether the parties take responsibility for the matter, (2) any disciplinary sanctions that may be imposed or recommended against the respondent, (3) any remedies that may be provided to the complainant, and (4) whether the parties reserve any rights on certain elements of the resolution. Once entered, the resolution will likely become binding according to its terms.

G. Resuming an Investigation. If an informal resolution is attempted but is not successful, the district must complete a full investigation and adjudication of the formal complaint using the local grievance process.

H. Recordkeeping.

1. School districts must maintain the following records for a period of seven years (e.g., measured from the conclusion of the proceedings and the implementation of any sanctions and/or remedies).

2. In connection with each formal complaint of sexual harassment that is filed, a school district must maintain a record of:

   a. Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the district's education program or activity;

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b. Any audio or audiovisual recording or transcript from a hearing (Note: A district will have these records only if hearings are permitted under the local grievance process. Most school districts will not provide for hearings);

c. Any appeal and the result of an appeal; and

d. Any informal resolution and the result therefrom.

3. In connection with a school district response to any report or formal complaint of sexual harassment, the district must create and maintain a record of any actions, including any supportive measures, that the district takes in response to the report or complaint. In each instance:

   a. The district must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the school district's education program or activity.

   b. If a district does not provide a complainant with supportive measures, then the district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

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APPENDIX A: SAMPLE NOTICE TO PARTIES OF INFORMAL RESOLUTION PROCESS

NOTE: The Title IX regulations require school districts to notify parties of certain information related to an informal resolution process. This sample presents one approach to documenting this notice, but any such notice will need to be specifically tailored to the situation and your local policy. The Title IX Coordinator will usually be the individual who provides such notice, which should be based on any input from the individual who is serving as facilitator of the process.

[DISTRICT LETTERHEAD]

[DATE]

[NAME]
[ADDRESS]

Re: Notice of Informal Resolution Process

Dear ***[NAME]***:

As you are aware, a formal complaint alleging Title IX sexual harassment has been filed involving you. This letter is intended to notify you that the district offers parties an option to engage in an informal resolution process. When the option is offered, the District is required to provide notice to you about this informal resolution process.

First, the District is required to provide notice to you of the allegations in the formal complaint. The formal complaint alleges that ***[INCLUDE DETAILS OF ALLEGATIONS HERE]***.

Second, the District is required to notify you of the requirements of the informal resolution process. The informal resolution process will include various requirements, including ***[INCLUDE REQUIREMENTS OF THE PROCESS, e.g., that a facilitator will be appointed to serve as mediator to the process and will require both parties to be present in separate rooms at the District office to mediate the allegations]***. This notice must include the circumstances under which the District precludes the parties from resuming a formal complaint arising from the same allegations. In this respect, please note that the parties are precluded from resuming a formal complaint arising from the same allegations if ***[INCLUDE CIRCUMSTANCES, e.g., if the parties reach a final agreement that resolves all matters involving the parties on the specific allegations]***.

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Please note, however, that, at any time prior to agreeing to a resolution in this informal process, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.

Third, the District is required to notify you of any consequences resulting from participating in the informal resolution process. In this respect, please note that the consequences include that ***[INCLUDE POSSIBLE CONSEQUENCES, e.g., a resolution that results in disciplinary sanctions against the respondent or that prohibits future investigation of the particular allegations]***. This notice must also inform you of the records that will be maintained or that could be shared. In this respect, please note that ***[INCLUDE DESCRIPTION OF RECORDS, e.g., records may include a resolution agreement between the parties that will not be shared, except as may be required by law.]***.

Finally, the District is required to obtain the parties' voluntary written consent to the informal resolution process. Enclosed a voluntary written consent form for your consideration and approval.

If you are willing to participate in an attempt to reach an informal resolution of the pending formal complaint, please return the written consent to ***[INDENTIFY THE APPROPRIATE PERSON AND CONTACT INFORMATION, e.g., this would likely be the Title IX Coordinator.]*** by no later than ***[DATE].*** If you do not submit your written consent by the deadline, the District will treat the lack of consent as your rejection of the offer to attempt to reach a facilitated informal resolution of the matter.

Please feel free to contact me with any questions about this notice or about the informal resolution process.

Sincerely,

Title IX Coordinator
[NAME OF SCHOOL DISTRICT]

Enclosure: Voluntary Written Consent Form
[Identify Applicable District Policies]

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APPENDIX B: SAMPLE VOLUNTARY WRITTEN CONSENT FOR INFORMAL RESOLUTION PROCESS

NOTE: The Title IX regulations require school districts to obtain voluntary written consent from both parties related to an informal resolution process. This sample presents one approach to documenting this voluntary written consent, but the contents of this consent form may vary and must be based on your local policy. The Title IX Coordinator will usually be the individual who obtains such consent.

[DISTRICT LETTERHEAD]

VOLUNTARY CONSENT FORM FOR INFORMAL RESOLUTION OF A FORMAL COMPLAINT OF TITLE IX SEXUAL HARASSMENT

This form is provided on behalf of _____, a party to a formal complaint for sexual harassment under Tittle IX. The District has provided me with the required notice dated _____, 20__.

By signing this form, the party, or, as appropriate, his or her parent/guardian, consents to the informal resolution process to resolve the formal complaint. (Note: A parent or guardian must sign for any party who is not eighteen years old at the time of this consent.)

I acknowledge and agree that my consent is based on my desire to engage in the informal resolution process and that my consent is not the result of any coercion or undue influence.

_____ _____

Signature of Party or Parent / Guardian Date

IMPORTANT: If you wish to consent to the informal resolution process, return this form by no later than _____, 20__, to _____ at _____.

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