



Implementing Title IX's New Regulations

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Agenda

- Big Picture for Title IX's New Regulations
- Action Steps: What Districts need to do to implement the new regulations
 - Including practical advice for navigating sexual harassment investigations and required trainings under the new regulations
- Conclusion and Q&A



Title IX's New Regulations

The Big Picture: Major Themes

- **Fairness**: The need to balance protecting victims of sexual harassment with the rights of the accused
- **Due Process**: Ensuring that those accused of sexual harassment are provided fair and equitable procedures
- **Protecting victims of sexual harassment**: Require Districts to respond to sexual harassment and provide victims of sexual harassment with supportive measures and some, though not exclusive, control over the investigation of sexual harassment.

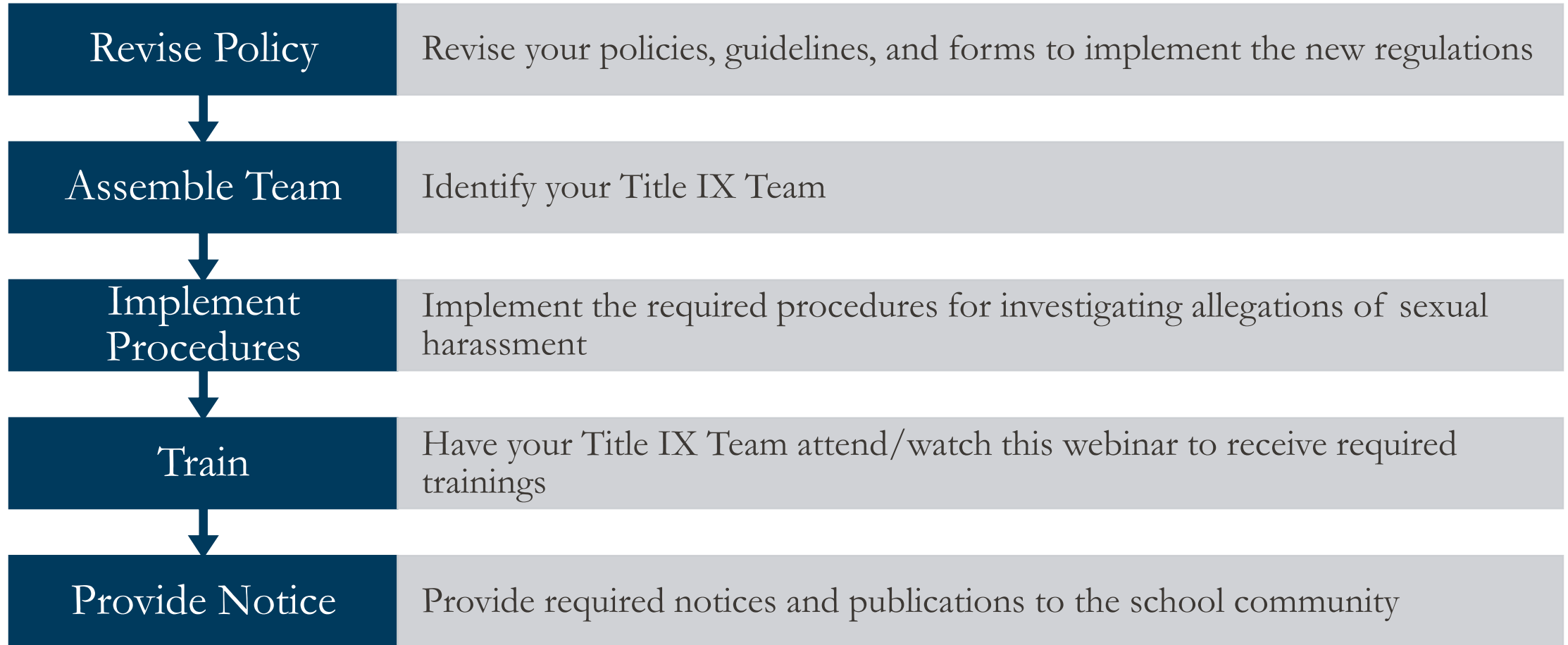
The Big Picture: Major Changes

- The New Regulations outline new procedures that schools must follow when investigating and responding to formal complaints of sexual harassment.
- They also state that a K12 school district has “actual knowledge” of sexual harassment when any employee of the school has notice of the alleged harassment.
 - All district personnel should be trained on recognizing and reporting instances of suspected sexual harassment.



Implementing Title IX's New Regulations

Action Steps: What K12 Schools Need to Do



Action Step: Revise Your Policies

- Designate at least one Title IX Coordinator
- Outline and publish a grievance procedure that provides for the “prompt and equitable resolution” of complaints alleging sexual harassment that follows the procedures outlined in this presentation

Action Step: Assemble the Title IX Team

Members:

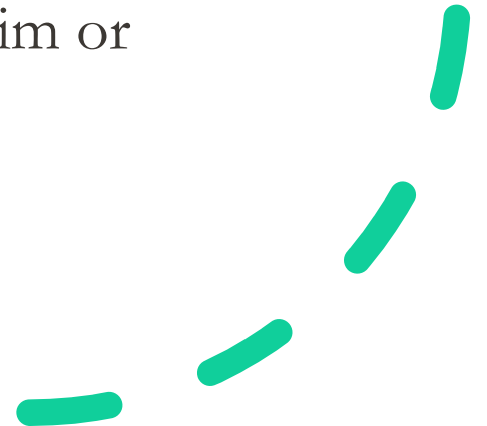
- Title IX Coordinator,
- Investigators,
- Decision-Maker,
- Appellate Decision-Maker, and
- Any informal resolution facilitators.

Responsibilities for all team members:

- Objectively evaluate all relevant evidence
- Not make credibility determination based on a person's status as a complainant, respondent, or witness
- Avoid prejudgment, conflicts of interest, or bias

Required
Training:
Avoiding
prejudgment,
bias, and
conflicts of
interests

- Avoiding prejudgment
 - Must objectively evaluate the facts; don't make up your mind before you've collected all the facts
 - Can't base decisions on a person's status as a complainant, respondent, or witness
 - Must evaluate all relevant evidence, including inculpatory and exculpatory evidence
- Avoiding bias
 - Don't make assumptions based on someone's identities or status as an alleged victim or perpetrator



Required
Training:
Avoiding
prejudgment,
bias, and
conflicts of
interests

- Avoiding conflicts of interest
 - Avoid wearing multiple hats with different roles
 - Avoid investigating or making decisions regarding individuals with whom you have a personal relationship that would impact your judgment/ability to be impartial





Responding to Allegations of Sexual Harassment

Responding to Sexual Harassment

- A District with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, *must* respond promptly in a manner that is not deliberately indifferent.
 - A District is deliberately indifferent if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

Required
Training:
Responding to
Sexual
Harassment:
What is Actual
Knowledge?

- Actual Knowledge:
 - For K12 schools, the District will have actual knowledge when any District employee is aware of conduct that constitutes sexual harassment or of allegations that, if proved, would constitute sexual harassment.



Required
Training:
Responding to
Sexual
Harassment:
What is Sexual
Harassment?

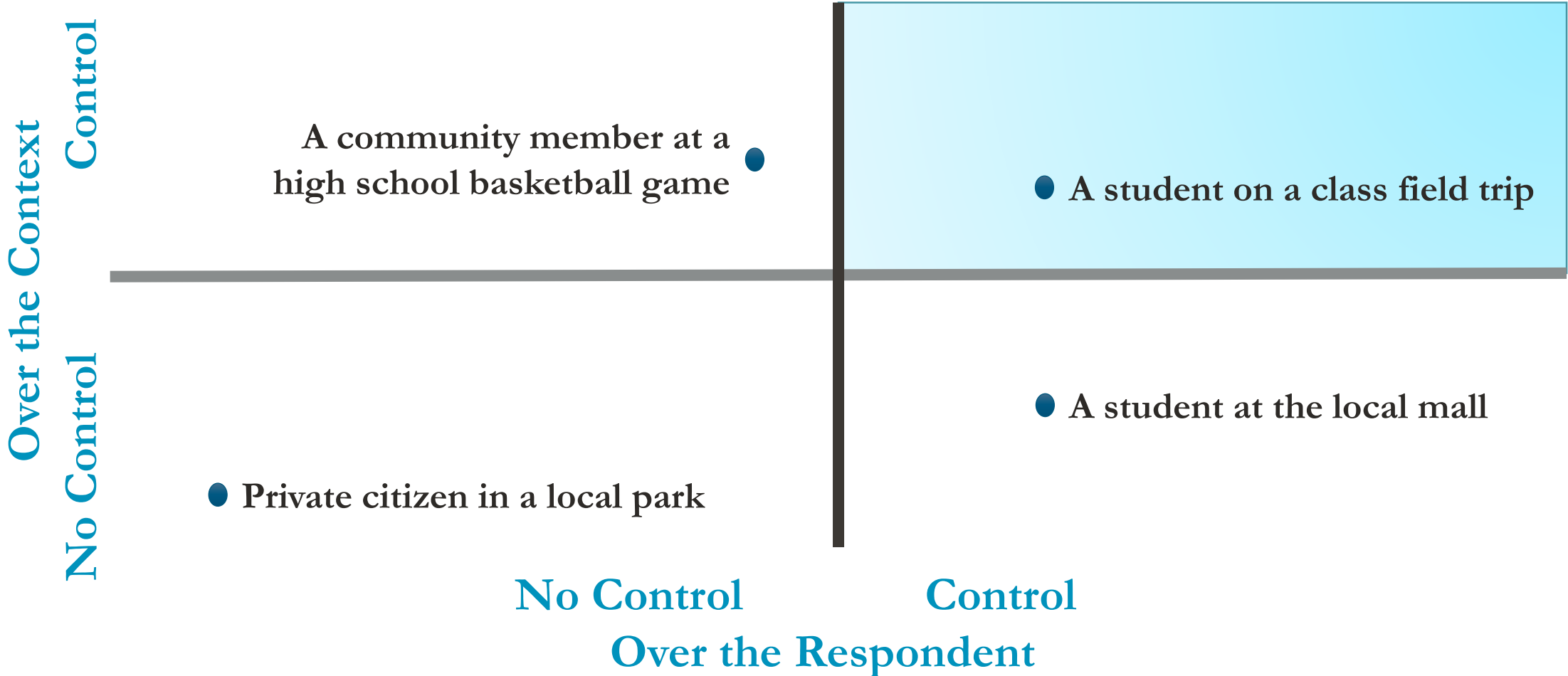
- **Sexual Harassment:** Any conduct, on the basis of sex, that satisfies one or more of the following:
 - Quid pro quo harassment: An employee conditioning a benefit on an individual's participation in unwelcome sexual conduct;
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access; or
 - “sexual assault,” “dating violence,” “domestic violence,” or “stalking” as those terms are defined under Federal law.

Required Training:
Responding to Sexual Harassment: What is the District's Educational Program or Activity?

- Education program or activity includes locations, events, or circumstances over which the District exercises substantial control over both:
 - The respondent
 - and
 - The context in which the sexual harassment occurs.



The District's Educational Program or Activity



Required
Training:
Responding to
Sexual
Harassment:
Activity Beyond
the Scope of
the Regulations

- For the regulations to apply, the victim of the alleged sexual harassment must be participating in or attempting to participate in the education program or activity of the District.
 - However, the new regulations do not apply to conduct that occurs outside of the United States.
- **Practical Note:** Just because these regulations do not apply does not mean the District cannot take action under its Code of Conduct.

Responding to Sexual Harassment

- Once the District has actual knowledge of allegations of sexual harassment, the Title IX Coordinator should promptly contact the complainant to:
 - Discuss the availability of **supportive measures**, with or without the filing of a formal complaint, and
 - Explain to the complainant the process for filing a **formal complaint**.
- Even without a formal complaint, the District must not be deliberately indifferent.
 - District should document the allegations, the actions it took in response, and why those actions demonstrate the District was not deliberately indifferent.
 - The Title IX Coordinator may also *independently* initiate a formal complaint.

Responding to Sexual Harassment: Supportive Measures

- **Supportive Measures**: Non-disciplinary, non-punitive individualized services offered to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
 - Supportive measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party.
 - Examples 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.

A Formal Complaint of Sexual Harassment

- Informal notice of potential sexual harassment:
 - Any person may report sexual harassment at any time either in person, by mail, by telephone, by email, or by any other means that result in the Title IX Coordinator (or for K12 schools, any school employee) receiving the person's verbal or written report.
 - This triggers the District's obligation to avoid being deliberately indifferent.
- Formal Complaints:
 - This is a written report submitted by the complainant or signed by the Title IX Coordinator.
 - This triggers the District's obligations to follow the procedures for investigating allegations of sexual harassment.

Formal Complaint Terminology

- **Complainant**: An individual who is alleged to be the victim of conduct that could constitute sexual harassment
- **Formal Complaint**: A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment by a respondent and requesting the District investigate the allegation.
 - Note: where the Title IX Coordinator signs the complaint, they are not a complainant or otherwise made a party
- **Respondent**: An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Once a Formal Complaint has Been Filed...

- The District is required to:
 - Offer supportive measures to the complainant;
 - Follow the grievance process for the respondent before taking any disciplinary or punitive actions.
 - Reminder: Supportive measures must be non-disciplinary and non-punitive.

Emergency Removals and Administrative Leave

- Schools may remove student respondents on an emergency basis if:
 - The student poses an immediate threat to others arising from the allegations of sexual harassment and the student is provided with notice and an opportunity to challenge the decision immediately after the removal.
 - **Practical Note:** Be careful about removing students with disabilities. The IDEA and Section 504 have different requirements for when schools may change a child's placement.
- For employees, the new regulations do not preclude a school from placing an employee on administrative leave during the grievance process.



Action Step: Implementing the Grievance Process

General Considerations for the District's Grievance Procedures

- Must presume that the respondent is not responsible for the alleged conduct (innocent until proven guilty),
- Must include “reasonably prompt time frames,”
- Must describe the range of possible disciplinary sanctions and remedies,
- Must state the standard of evidence (either a “preponderance of evidence” or “by clear and convincing evidence”),
- Must include procedures and grounds for appealing the conclusion of the initial decision-maker,
- Must describe the range of supportive measures available to complainants and respondents, and
- Must protect privileged information, unless the person holding the privilege waives it.

Step 0: Dismissal

- **Mandatory Dismissal:**
 - A formal complaint must be dismissed if:
 - The conduct does not constitute sexual harassment,
 - The conduct did not occur within the District's educational program or activities, or
 - The conduct did not occur within the United States,
 - **Practical Note:** Such a dismissal does not preclude action under another provision of the District's code of conduct.

Step 0: Dismissal

- Discretionary Dismissal:
 - The District may dismiss the formal complaint at any time if:
 - The complainant notifies the Title IX Coordinator in writing that they would like to withdraw the complaint or an allegation;
 - The respondent is no longer enrolled or employed by the District; or
 - Specific circumstances prevent the District from gathering evidence sufficient to reach a determination.
- Upon a dismissal, the District must promptly send written notice of the dismissal and the reason(s) simultaneously to the parties.

Step 1: Notice

- Upon receiving a formal complaint, the District must provide written notice to the involved parties. The notice must include:
 - Notice of the District's grievance process;
 - Notice of the allegations of sexual harassment with sufficient details to prepare a response, including the identities of the parties involved in the incident, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known;
 - 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;
 - Information that the parties may have an advisor of their choice; and
 - Information regarding any provisions in the District's code of conduct that prohibit knowingly making false statements or submitting false information during the grievance process.

Step 1: Notice

- If, at any point during the investigation, the District decides to investigate allegations that are not contained in the original notice, they must provide notice of the additional allegations.

Confidentiality

- Schools must keep confidential the identity of any individuals who have made a report or complaint of sexual harassment, any witnesses, and any complainants and respondents, except:
 - As may be permitted by FERPA;
 - As required by law; or
 - To carry out the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding arising under Title IX.

Step ??: Informal Resolutions

- A District may offer (but may not require) an informal resolution process, like mediation, once a formal complaint has been filed.
- To engage in an informal resolution process, the District must:
 - Provide a written notice to the parties disclosing the allegations, the requirements of the informal resolution process, and the right of parties to withdraw from the informal resolution process at any time and continue with the formal complaint; and
 - Obtain the voluntary, written consent of all parties.
- An informal resolution process ***may not*** be offered to resolve allegations that an employee sexually harassed a student.


Step 2: Investigation: General Considerations

- Burden of proof and burden of gathering evidence is on the District.
- District must obtain a party's (or their parent's) voluntary, written consent to access medical or other professional's records.
- Both parties must be provided equal opportunities to present witnesses and engage in the process.
- Don't restrict the ability of either party to discuss the allegations under investigation.
- Provide written notice of the date, time, location, participants, and purpose for all hearings, interviews, or other meetings to those invited or expected to participate.
- Provide both parties an equal opportunity to inspect and review any evidence obtained.

Required Training: How to Conduct an Investigation

- Be flexible; Every investigation is different
- Let the evidence and testimony guide your investigation
- Typically, start with the complainant
- Get specifics (who, what, when, where)
- Ask witnesses who to talk to next and why
- Ask if witnesses have any evidence related to the investigation
- Ask who the witnesses have talked to about the investigation or incident
- Typically, save the respondent for once the investigator has a fuller understanding of the complaint and underlying incident(s)
 - Prepare an outline for questions and topics to be covered, as established by other testimony and evidence.

Step 3: Evidentiary Disclosures and Collecting Written Responses from the Parties

- Before completing the investigative report, the District must send to each party and the party's advisor, if any, the "evidence obtained as part of the investigation that is directly related to the allegations." 
- Parties must have at least 10 days to submit a written response, which the investigator will consider when writing the investigative report.

Step 4: Creating an Investigative Report

- The District must create an investigative report that fairly summarizes relevant evidence
- At least 10 days before a hearing or a decision is made, the District must send to each party and the party's advisor, if any, the investigative report for their review and written response.

Required Training: Writing an Investigative Report

- **Relevance**: Does this fact or piece of evidence tend to prove or disprove the alleged sexual harassment occurred?
 - Watch out for evidence of prior sexual conduct; this evidence is only relevant in very narrow circumstances
- Be fair and impartial
- Stick to the facts (who, what, when, where)
- Avoid conclusions about credibility and responsibility, but include all facts relevant to making those determinations
 - The purpose of the Investigative Report is to provide the necessary information to the decision-maker.
 - Be sure to give them everything they need to make their decision

Step 5a: Holding a Hearing



- Holding a hearing is *optional* for K12 schools.
- At the hearing:
 - Both parties must be allowed to call, question, and cross-examine witnesses,
 - At the request of one of the parties, the parties may be separated so long as both parties can simultaneously see and hear the party or witness answering questions, and
 - The hearing may be done virtually if the decision-maker is trained in the required technology.
- An audio recording or transcript of the hearing must be provided to the parties.

Step 5b: The Parties' Responses to the Investigative Report and Further Factual Development

- After the recipient has sent the investigative report to the parties but before reaching a determination regarding responsibility, the decision-maker must give 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.
 - **Practical Note:** This step is required whether or not the school chooses to hold a hearing.

Required Training: What Questions are Relevant?

- **Question to ask:** Would the answer to this question tend to prove or disprove that the alleged sexual harassment occurred?
- **Irrelevant/Inappropriate Questions:** Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.
 - **Narrow exceptions:** May be offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

Step 6: The Decision

- The decision-maker must issue a written decision simultaneously to both parties regarding responsibility.
- The written decision must include:
 - The allegations,
 - A description of the procedural steps taken by the District,
 - A findings of facts supporting the determination,
 - Conclusions regarding the application of the Code of Conduct to the facts,
 - A determination regarding responsibility, any disciplinary sanctions, and whether the complainant will receive any remedies from the District, and
 - The District's procedures and bases for appeal.

Step 7: Appeals

- **Mandatory grounds for appeal:** Districts must offer both parties the opportunity to appeal a decision on the following grounds:
 - **Procedural irregularities** that affected the outcome of the matter,
 - New evidence that was not reasonably available at the time of the determination, or
 - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias against a party or class.
- **Discretionary Appeals:** Districts may offer appeals on other grounds. These will be laid out in Board policy.

Step 7: Procedures for Appeals

- Notify the other party in writing when an appeal is filed;
- Ensure that the decision-maker for the appeal is not the Title IX Coordinator, the investigator, or the original decision-maker;
- Ensure that the appellate decision-maker is trained and free from bias or a conflict of interest;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide a written decision simultaneously to both parties.




Action Step: Required Notices, Publications, and Record Retention Policies

Required Notices

- Districts Must Provide Notice of:
 - The name, title, and contact information for the Title IX Coordinator;
 - The District's antidiscrimination policy, including a statement that the District does not discriminate on the basis of sex in its educational programs or activities, in admissions, or employment;
 - How to inquire about the application of Title IX, which may be referred to the Title IX Coordinator, to the Assistant U.S. Secretary of Education, or both; and
 - The District's grievance procedures and process, including how to file a complaint and how the District will respond.

Required Notices

- **Who must be notified?**
 - Applicants for admission and employment,
 - Students,
 - Parents and legal guardians,
 - Employees, and
 - Unions or professional organizations holding collective bargaining or professional agreements with the District.
- **Important Note:** Notice is different than publication. Districts should provide the notices required under Title IX by prominently displaying this information in each handbook or catalog that it makes available to the individuals entitled to notice above. Posting this information on your website likely does not satisfy the notice requirements. 

Required Publications

- The District is required to post on its website:
 - The Title IX Coordinator's name and contact information,
 - The District's grievance procedures for investigating allegations of sex discrimination, and
 - All materials used to train the District's Title IX Team (like this presentation)

Record Keeping: Document, document, document

- Districts must maintain their Title IX records for seven years. This includes:
 - Documents related to a complaint or an investigation,
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, and
 - Any time, with or without a formal complaint, the District takes an action to address allegations of sexual harassment, including the supportive measures taken.
 - These records should also include the District's rationale for why its response to the alleged harassment was not "deliberately indifferent."

Questions?



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thank you

