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 key sections of the regulations relating to sexual harassment that were 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. Title IX is enforced by the Office for Civil Rights (OCR), U.S. Department of Education.

OVERVIEW OF THE TITLE IX REGULATIONS

In broad terms, the Title IX regulations, as they were amended effective 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, other than formal complaints of sexual harassment.

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 should have adopted their Title IX grievance process in connection with implementing the 2020 amendments to the Title IX regulations. .

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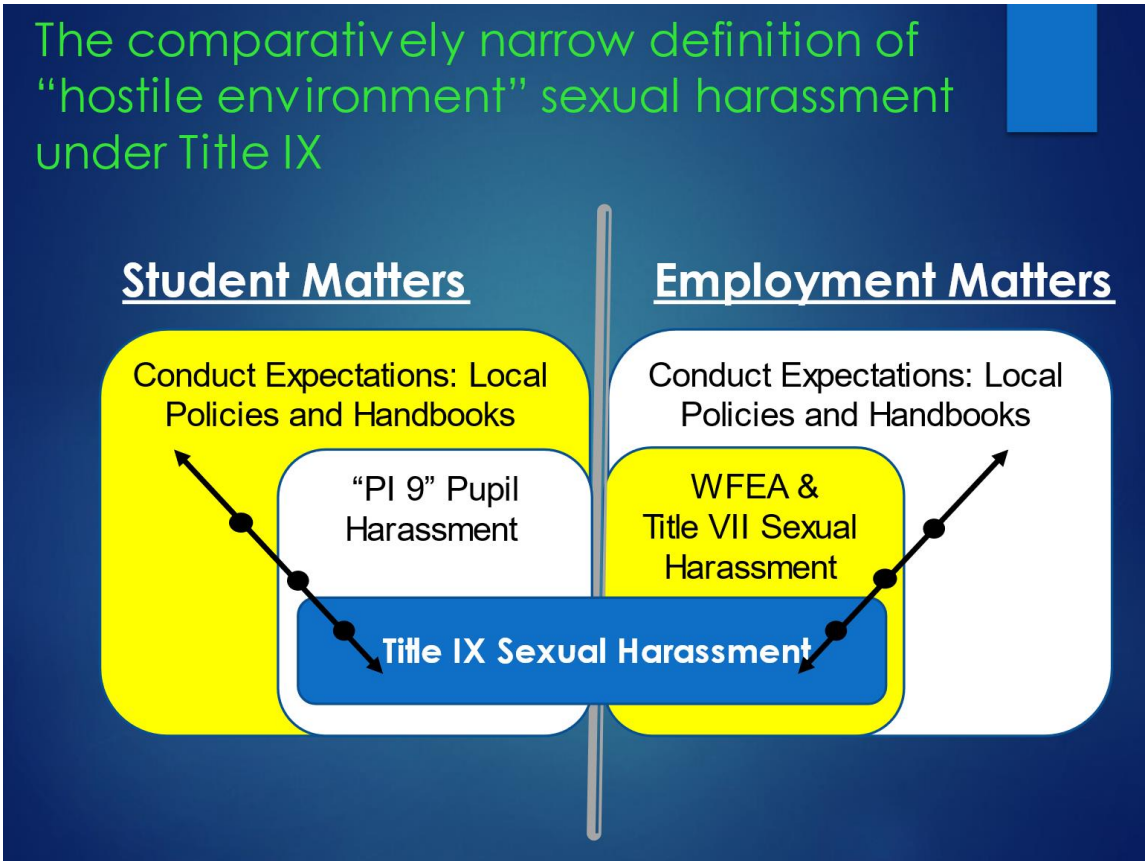
necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee's work performance or to create an intimidating, hostile or offensive work environment."

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.

D. A visual depiction of the narrow definition of "hostile environment" sexual harassment under Title IX:



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E. Additional detail on specific definitions used in Title IX:

1. "***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.

2. ***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:

   a. fear for his or her safety or the safety of others; or

   b. suffer substantial emotional distress.

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

   a. Who is or has been in a social relationship of a romantic or intimate nature with the victim; and

   b. Where the existence of such a relationship shall be determined based on a consideration of the following factors:

      i. The length of the relationship;

      ii. The type of relationship; and

      iii. The frequency of interaction between the persons involved in the relationship.

4. ***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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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 EXCEPT that there is no "actual knowledge" attributed to the school district when the only employee/official of the district with notice/knowledge is the respondent.

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

C. Some 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.

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

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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 U.S. Department of Education's Preamble to the 2020 Title IX Regulations (hereafter "Preamble"), 85 Fed. Reg. 30026 (May 19, 2020):

- "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)

- *"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

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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 **education 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. (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 the IDEA, Section 504, or the 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, if determined to be necessary or appropriate.

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. Not access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, etc. and which are made and maintained in connection with the provision of treatment to the party, unless the district obtains voluntary, written consent from the appropriate person to do so.

6. 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.

7. 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.

8. 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.

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

10. 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

11. 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.

12. 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

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

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

15. 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. P

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. Neither (1) access, consider, or disclose a party's treatment records (e.g., medical, psychological, etc.) without appropriate written consent; nor (2) 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. Evidentiary restrictions that apply throughout the grievance process apply to the decision maker(s). For example, a school district and its agents may not (1) access or consider a party's medical treatment records unless the appropriate person gives voluntary written consent; or (2) 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. 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.

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

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

6. 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. Post-determination remedies can burden the respondent.

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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.

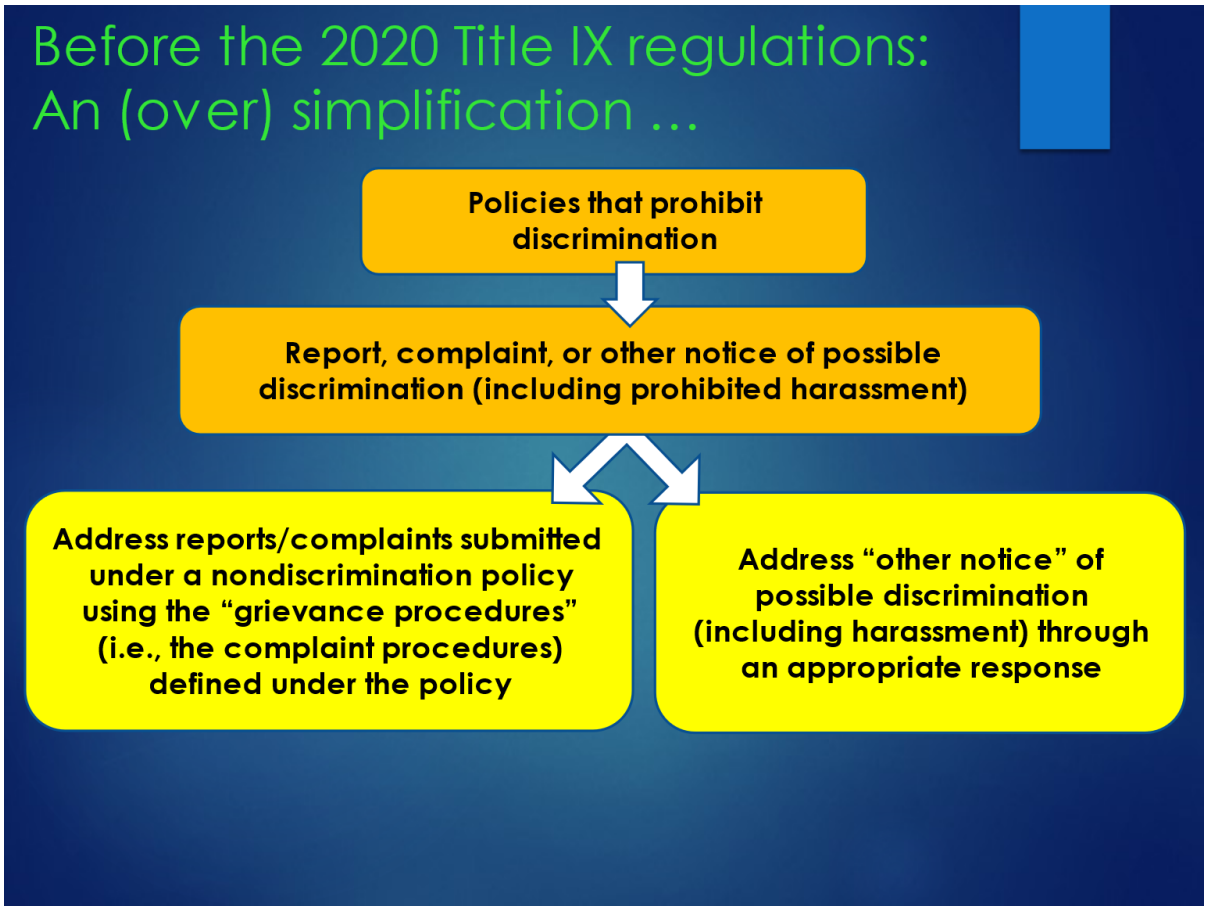
D. To the extent required by the Title IX regulations, disciplinary sanctions for Title IX sexual harassment and any remedies that could not be offered as supportive measure shall not be enforced until the determination of the complaint becomes final. The determination regarding responsibility becomes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

A VISUAL REVIEW OF SOME KEY POINTS

A. Prior to the 2020 amendments to the Title IX regulations:



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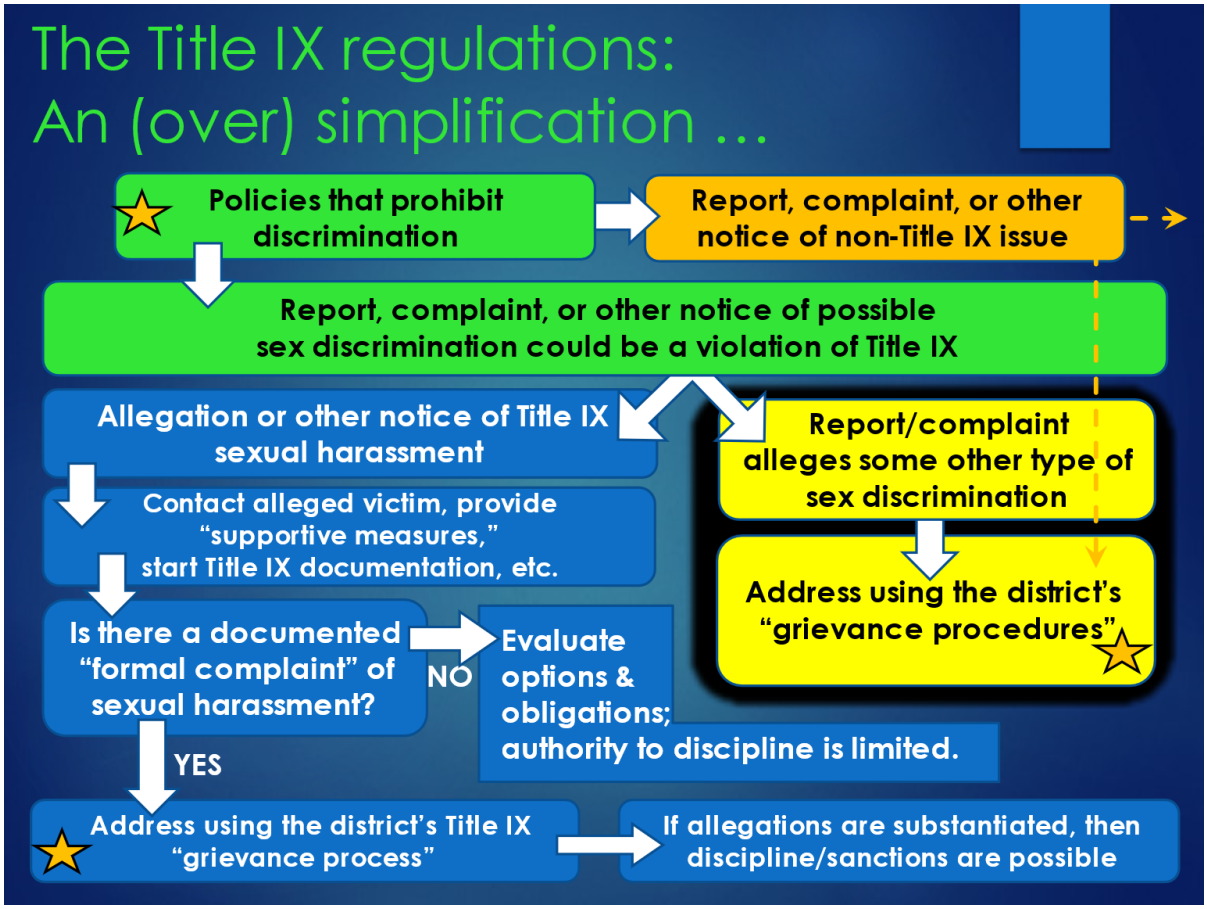
B. After the 2020 amendments to the Title IX regulations:



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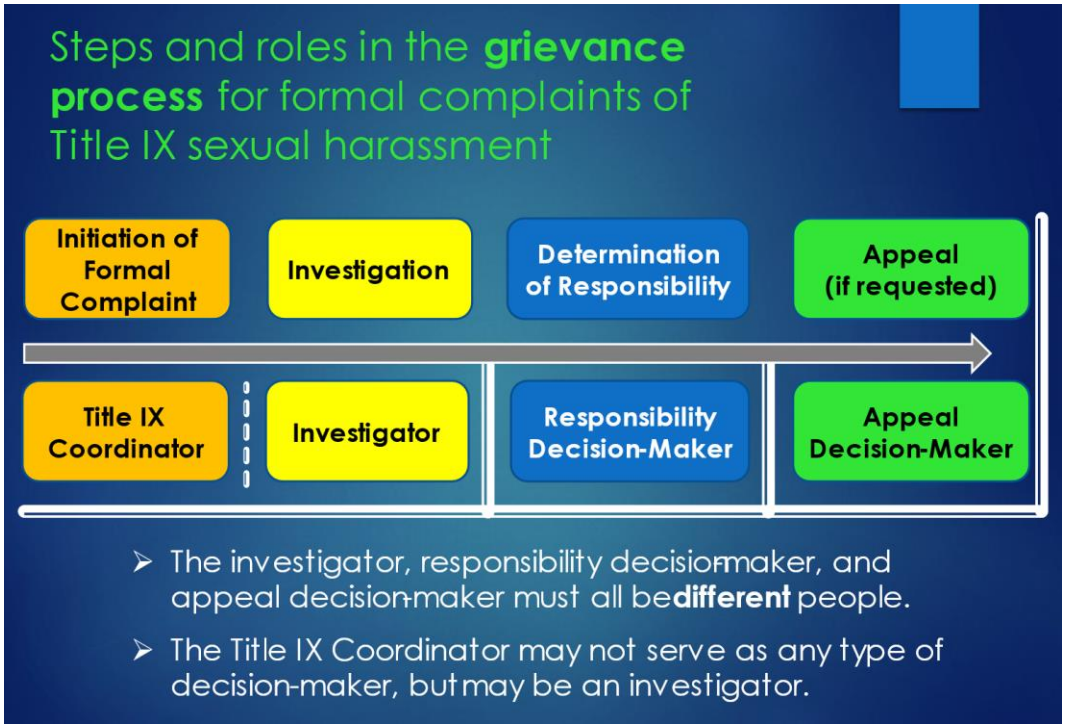
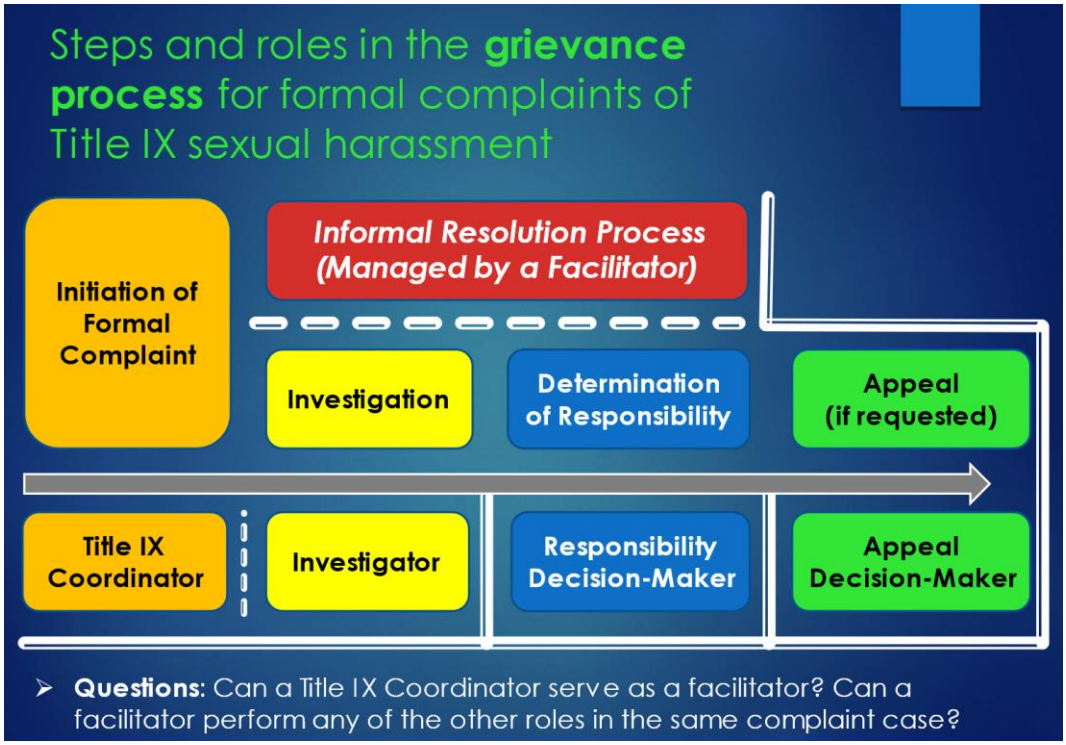
C. Steps and Roles Related to a Title IX Grievance Process

1. Without an Informal Resolution Component



2. With an Informal Resolution Component



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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 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

   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

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(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)).

4. In any way connected to the grievance process, a school district 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.

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.)

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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).

   a. As one example, consider a respondent to a formal complaint of Title IX sexual harassment who is also a student with a disability under the Individuals with Disabilities Education Act (IDEA). The IDEA imposes additional obligations on the part of the school district, and grants additional rights to the student, prior to any removal or sanction that would constitute a "change in placement" (e.g., the district would likely be required to conduct a "manifestation determination").

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.

F. Additional Resource: U.S. Department of Education Office for Civil Rights, "Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021; Updated June 28,2022), available at: **https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf**

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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