

# Title IX Team/Administrative Team Professional Development

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## Title IX

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C 1681(a) Title IX  
Education Amendments of 1972

## Where and When?

34 CFR Part 106 –  
Amendments to Title IX  
Regulations and New Sections

**Effective date:**  
August 14, 2020

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## Major Provisions

- ✓ Define conduct constituting Title IX sex harassment
- ✓ Specify conditions that activate obligation to respond to sex harassment allegations
- ✓ Impose general standard for sufficiency of response
- ✓ Specify requirements that response must include (ex. supportive measures)
- ✓ Establish procedural due process protections that must be in grievance process
- ✓ Affirm that OCR may require recipients to take remedial action for discriminating on basis of sex or otherwise violate Title IX
- ✓ Clarify that recipients are not required to deprive individuals of rights guaranteed under U.S. Constitution when responding to sexual harassment claim under Title IX
- ✓ Acknowledge intersection of Title IX, Title VII, and FERPA and legal rights of parents to act
- ✓ Update Title IX Coordinator designations, notice requirements, and policy distribution
- ✓ Prohibit retaliation

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## Complainant

The individual who is alleged to be the victim of conduct that could constitute sexual harassment.

## Respondent

The individual who has been reported to be the perpetrator of the conduct that could constitute sexual harassment.

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## Thoughts on 2020 Amendments...

### WHY were the Title IX regs amended?

Complainants and respondents have different interests in the outcome of a sexual harassment complaint.

Complainants “have a right, and are entitled to expect, that they may attend [school or work] without fear of sexual assault or harassment” and to expect recipients to respond promptly to complaints.

For respondents, a “finding of responsibility for a sexual offense can have a ‘lasting impact’ on a student’s [or employee’s] personal life, in addition to [the student’s or employee’s] ‘educational and employment opportunities’[.]” Although these interests may differ, each represents high-stakes, potentially life-altering consequences deserving of an accurate outcome.

Preamble p. 914

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## Training

- ✓ Recognize and eliminate bias for or against a complainant or respondent
- ✓ Recognize and eliminate conflicts of interest
- ✓ Understanding definition of sexual harassment under Title IX
- ✓ Understanding “scope of the District’s program or activity”
- ✓ How to conduct an investigation and grievance process
- ✓ Training investigators how to prepare an investigation report.
- ✓ Training decision makers – both initial and appeal
- ✓ Training ALL EMPLOYEES on actual notice and reporting

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# Bias

state of mind where the person has a predisposition in favor of or against someone or something

*must be conscious of bias and keep an open mind toward both parties*

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# Bias

Example: Can't assume all complainants are victims or all respondents are wrongly accused. Must listen to all facts presented.

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# Avoiding Bias

## How do I know if someone is biased?

- Requires examination of the particular facts of a situation
- Apply an objective, \*common sense approach to evaluating whether a particular person serving in a Title IX role is biased.
- Exercise caution not to apply generalizations that might unreasonably conclude that bias exist
- \*whether a reasonable person would believe bias exist

*This training provides you with the tools needed to serve impartially and without bias- must not let your prior assumptions shade your judgment.*

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# Conflict of Interest

a conflict between the private interests and the official responsibilities of a person in a position of trust

*Is the person handling the job related to a party?*

*Does the person handling the job have a financial interest in the outcome?*

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## One of the many reasons it is important to eliminate bias and conflicts of interest:

The grievance process provides that the decision may be overturned on appeal by the appeal decision maker if 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

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## Training - Impartiality

A training approach that encourages Title IX personnel to “believe” one party or the other would fail to comply with the requirement that Title IX personnel be trained to serve impartially, and violate the regulations precluding credibility determinations based on a party’s status as a complainant or respondent.

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## Training – Fair Process

- parties should be treated with equal dignity and respect by Title IX personnel
- the credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case
- in summary, training materials that promote the application of “profiles” or “predictive behaviors” to particular cases would likely run contrary to the regulatory requirements of fairness.

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## Reminder



### Strive to serve impartially

#### AVOID:

- prejudice of the facts at issue,
- conflict of interest and bias, and
- sex stereotypes

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Formal  
Complaint  
Process

## Elements of Grievance Procedure “Top Ten” List

34 C.F.R. § 106.45(b)(1)

**The following Provisions Govern the District’s Title IX Grievance Process.**

1. The district treats complainants and respondents equitably by
  - providing remedies to a complainant after a determination of responsibility for sexual harassment has been made against a respondent, and
  - by following this grievance process before imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent.
  - Remedies must be designed to restore or preserve equal access to the district’s education program or activity.

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Formal  
Complaint  
Process

## Elements of Grievance Procedure “Top Ten” List

34 C.F.R. § 106.45(b)(1)

**Remedies may include supportive measures, but may also include punishing respondent.**

2. The district provides an objective evaluation of all available evidence without making credibility determinations based on a party’s status as complainant, respondent, or witness.
3. The district ensures that the Title IX coordinator, investigator, decision-maker, or any person designated to facilitate an informal process must not have a conflict of interest or bias for or against either the complainant or the respondent.

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Process

## Elements of Grievance Procedure “Top Ten” List

34 C.F.R. § 106.45(b)(1)

3. (cont.) The district further ensures that training has been provided individuals holding Title IX jobs re: definition of Title IX sexual harassment, scope of the district’s program or activity, how to conduct an investigation and grievance process, hearings [hearings not required in K12 under TIX process], appeals and informal processes.
4. There is a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility has been made at the conclusion of the grievance process.

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Formal  
Complaint  
Process

## Elements of Grievance Procedure “Top Ten” List

34 C.F.R. § 106.45(b)(1)

5. The district provides reasonably prompt time frames for completing the grievance process, including a process to accommodate permissible delays.
6. The district identifies disciplinary sanctions and remedies that may be implemented. Employee sanctions - action up to and including suspension or termination. Student sanctions - student code of conduct consequences, up to and including suspension or expulsion. Student remedies – ex. no contact restrictions, extra-curricular prohibitions, schedule changes or class reassignments, limits on future class registrations, access restrictions

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Complaint  
Process

## Elements of Grievance Procedure “Top Ten” List

34 C.F.R. § 106.45(b)(1)

7. The district adopts an allowable standard to determine responsibility. [Either the preponderance of the evidence standard OR the clear and convincing standard].
8. The district provides an appeal option. Either party may appeal.
9. The district identifies a range of supportive measures.
10. The district disallows evidence or questions that constitute or seek legally privileged information, unless the privilege is waived.

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## Which Standard of Evidence Does a District Choose?

Preponderance of the evidence requires that the evidence be “more likely than not” to prove the matter at hand. The party with the burden [district] must prove that there is a greater than 50% chance that the claim is true or is not true.

Clear and convincing evidence requires that the district must prove that there is a substantially greater than a 50% likelihood of the claim being true or not being true. The evidence is highly and substantially more likely to be true than untrue.

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## JOB (Responsibilities) in the Title IX Processes

Determine who handles these jobs:

- Title IX coordinator
- Dismissals
- Facilitator
- Investigator
- Initial decision maker (separate person(s))
- Appeal decision maker (separate person(s))

## Who can handle which Job?

- ✓ Must have a Title IX Coordinator.
- ✓ Can outsource one or more of the other jobs.

Only overlap in duties can occur in Title IX coordinator, dismissals, facilitator, and investigator roles. (Best practice to separate some of these jobs.)

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## Definition of Sexual Harassment under Title IX

*Conduct on the basis of sex that meets one or more of the following:*

### Prong 1:

An employee of the recipient (i.e. educational institution such as a school district that receives federal funds) conditioning the provision of an aid, benefit or service of the educational institution on an individual's participation in unwelcome sexual conduct (quid pro quo sexual harassment);

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## Definition of Sexual Harassment under Title IX

Cont.

*Conduct on the basis of sex that meets one or more of the following:*


### Prong 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 educational institution's education program or activity (hostile environment);


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## Prong 2 – Hostile Environment

Requires the most analysis, generally, to determine if the allegations “meet” the segments of each description

 Severe, pervasive AND objectively offensive

 Evaluated under a reasonable person standard

 Effectively denies equal access to the school's program or activity

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## Definition of Sexual Harassment under Title IX

Cont.

*Conduct on the basis of sex that meets one or more of the following:*

### Prong 3:

“Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v),  
“dating violence” as defined in 34 U.S.C. 12291(a)(10),  
“stalking” as defined in 34 U.S.C. 12291(a)(30), or  
“domestic violence” as defined in 34 U.S.C. 12291(a)(8)

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## Brief Detour: Title VII Sexual Harassment

Unlawful harassment based on applicant's or employee's sex.

- Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.
- Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.
- Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.

[EEOC.gov/sexual-harassment](http://EEOC.gov/sexual-harassment)

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## Brief Detour: Title VII Sexual Harassment

Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

[EEOC.gov/sexual-harassment](http://EEOC.gov/sexual-harassment)

Can the harasser be a student under Title VII? Can the person harassed be a student under Title VII?

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## Comparing Title IX sexual harassment and Title VII sexual harassment

### Title VII:

- Rights attach to Employees only
- Unwelcome conduct that is severe, pervasive OR objectively offensive
- Protects Employees in the workplace
- Administrative requirements (EEOC) before going to court

### Title IX

- Students and Employees
- Unwelcome conduct that is severe, pervasive AND objectively offensive
- Applies to education program or activity in education institution
- Specific, internal due process procedures are required

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## Back to Title IX: Education Program or Activity

Title IX previously defined as all the “operations of a [district]...”

However, in 34 C.F.R. § 106.44(a), the definition has been enlarged to include any location, event or circumstance over which the district exercised substantial control over both the respondent and the context in which the harassment occurs.

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## Education Program or Activity - Preamble Comments

No single factor is determinative – fact specific inquiry

“A teacher’s sexual abuse of a student ‘undermines the basic purposes of the educational system’ thereby implicitly recognizing that a teacher’s sex harassment of student is likely to constitute sex harassment ‘in the program’ of the school even if the harassment occurs off campus.”

Student using personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the district exercises substantial control.

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## Training ALL EMPLOYEES on Actual Knowledge and Reporting

“Actual knowledge” of sexual harassment is notice of sexual harassment or allegations of sexual harassment to ANY EMPLOYEE



Easy call – Complainant reports it verbally or in writing

Anonymous reporting? Yes, also included



Includes third party reporting (parent, friend or community member) verbally or in writing

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## Training ALL EMPLOYEES on Actual Knowledge and Reporting

“Actual knowledge” of sexual harassment is the same thing as a “Report” of sexual harassment. Tell the Title IX Coordinator and that person takes it from there.



Easy call – Complainant reports it verbally or in writing

Anonymous reporting? Yes, also included



Includes third party reporting (parent, friend or community member) verbally or in writing

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## Which of the Below Examples are Actual Knowledge?

Employee overhears students discussing another student having a sexual relationship with an employee

Employee sees Student 2 staring at, following, and touching Student 1 on the butt on multiple occasions. Student 1 seems to try to move away.

A community member tells an employee about a rumor that Student 1 was seen in the car with Employee 2 late at night in a parking lot and the two were kissing



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## Website and Handbook Notice Requirements



Publish Notice of Title IX Nondiscrimination on website (link to policies) and in supplement to handbooks

List Title IX Coordinator's name, title, email/ office address and telephone number

State how to file or report sexual harassment and how District will respond to students and parents/legal guardians

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Job duties

## Title IX Coordinator

1. Authorized by the District to coordinate the District's Title IX compliance program – must have capacity;
2. Receive and respond promptly to all general reports as well as formal complaints of sexual harassment;
3. Coordinate the District's responses to both reports and formal complaints of sexual harassment so that the same are prompt and equitable;
4. Meet with a complainant and inform the parent/guardian once you become aware of allegations of conduct that could constitute sexual harassment as defined in Title IX;

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Job duties

## Title IX Coordinator (cont.)

5. Identify and implement supportive measures;
6. Sign, in certain cases, the complaint of sexual harassment;
7. Engage with the parents/guardians of parties to any formal complaint of sexual harassment;
8. Coordinate with District and school-level personnel to facilitate and assure implementation of investigations, and remedies, and help to assure that the District otherwise meets its obligations associated with reports and complaints of sexual harassment;

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Job duties

## Title IX Coordinator (cont.)

9. Monitor the formal complaint progress to make sure the correct notices are provided and the steps are in the required order.
10. Set the timeframes to ensure the District promptly addresses sexual harassment allegations that fall under Title IX (policy may also address – some timeframes mandated);
11. Determine, in emergency situations, whether an individualized safety and risk analysis is required with regard to a respondent;
12. Inform the Superintendent of any employee respondents so that the Superintendent can make any required reports to Mississippi Department of Education in compliance with applicable statutes, administrative regulations, and the Mississippi Educator Code of Ethics and Standards of Conduct.

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Job duties

## Title IX Coordinator (cont.)

13. Coordinate with supervisor with respect to assignment of persons to fulfill the District's obligations, both general and case specific (including who will served as "Acting Title IX Coordinator" when Title IX coordinator is unavailable.
14. Coordinate with District and school-level personnel to assure appropriate training and professional development of employees and others in accordance with the training requirements in the Title IX amended regulations.
15. Develop and implement systems to maintain sexual harassment records and data for a period of seven years.

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## How Should the Title IX Coordinator Respond to Actual Knowledge/Report?

Must respond promptly to actual knowledge of sexual harassment in an education program or activity in a manner that is not deliberately indifferent

District is deliberately indifferent if its response is clearly unreasonable in light of known circumstances

MUST AVOID  
DELIBERATE  
INDIFFERENCE

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## How Should the Title IX Coordinator Respond to Actual Knowledge/Report?

Cont.

District must treat complainants and respondents equitably by

- 1) Offering supportive measures to a complainant and respondent, and
- 2) Following a grievance process BEFORE imposing any disciplinary sanctions on a respondent, and
- 3) Provide remedies to complainant AFTER determination of responsibility of respondent

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## What are Supportive Measures?

Supportive measures are non-disciplinary, non-punitive, individualized services offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint or where a complaint has not been filed

*counseling, course modifications, schedule changes, increased monitoring or supervision, etc.*

## What are Supportive Measures?

Cont.

Supportive measures should be designed to restore or preserve equal access to the educational program or activity without unreasonably burdening the other party

*For example, a supportive measure that completely removes the respondent from an activity could be considered punitive.*

## Immediate removal of respondent **ONLY** if

1. District conducts an individualized safety and risk analysis, and
2. Determines that an emergency removal is necessary to protect a student or other individual from an immediate threat to physical health or safety
3. Must provide respondent with notice and an opportunity to challenge the decision immediately after removal
4. Can implement immediate removal with regard to both student and employee respondents

## Report (aka Actual Knowledge)

- 1) meet with complainant,
- 2) offer supportive measures (available whether or not files a formal complaint),
- 3) consider wishes of complainant as to supportive measures, and
- 4) explain how to file a formal complaint

A "report" of sexual harassment is different from a "formal complaint" and each requires different actions on the part of the District.

# Formal Complaint

## Document

- 1) filed by a complainant, the complainant's parent/guardian, or signed by the Title IX Coordinator;
- 2) alleging sexual harassment against a respondent; and
- 3) requesting that the district investigate the allegations.

The formal complaint is what initiates the grievance process. DOE holds districts responsible to investigate.

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When formal complaint is filed and BEFORE beginning investigation

## Written Notice to all Parties Must Contain:

- notice of the grievance process, including informal resolution process;
- notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in Title IX, include the below known details:
  - identity of the parties(if known);
  - conduct allegedly constituting sexual harassment under Title IX
  - date and location of incident (if known);

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When formal complaint is filed and BEFORE beginning investigation

## Initial Written Notice to all Parties Must Contain:

Cont.

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;

- notice that the parties may have an advisor of their choice (may or may not be an attorney) and may inspect and review evidence under 34 C.F.R. § 106.45(b)(5)(vi)
  - identify provisions of code of conduct that prohibit knowingly providing false statements/information, and
  - must be provided to parties prior to initial interview in the investigative process so the parties can prepare
- 34 C.F.R. § 106.45(b)(2)

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## Administrative Leave

34 C.F.R § 106.44(d)

District may place employee respondents on Title IX administrative leave – only available AFTER a formal complaint is filed.

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## What Do These Jobs Entail? Dismissal of Formal Complaint

The person who handles this job evaluates the allegations to determine whether the formal complaint Must be dismissed or May be dismissed. The job could be held by a separate person or by the Title IX coordinator or the investigator.



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Process

## Discretionary Dismissal

34 C.F.R. § 106.45(b)(3)

Complaint **may** be dismissed if:

- ✓ complainant notifies the Title IX Coordinator at any time that he/she wishes to withdraw the complaint or an allegation,
- ✓ if the respondent's enrollment or employment ends, or
- ✓ If specific circumstances prevent the educational institution from gathering evidence (e.g. passage of several years between complaint and alleged conduct, non-cooperation of complainant, etc.)

Notice of dismissal must be provided to both parties, including the reasons for dismissal and chance to appeal.

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## Mandatory Dismissal

34 C.F.R. § 106.45(b)(3)

Complaint **must** be dismissed if

- ✓ the allegations do not constitute sexual harassment as defined,
- ✓ did not occur in the District's program or activity or
- ✓ did not occur against a person in the United States

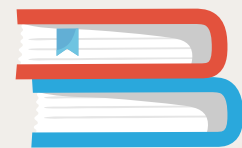
Notice of dismissal must be provided to both parties, including the reasons for dismissal and chance to appeal

**\*Dismissal for Title IX purposes doesn't preclude possible action under another provision of a district's code of conduct.**

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## What Do These Jobs Entail? Facilitator of Informal Resolution

The person who conducts the informal resolution process. Also referred to as a mediator. This job could be handled by a separate person, by the Title IX coordinator or by the investigator. If the investigator handles the informal resolution, remember that either party can withdraw from informal resolution and resume the grievance process wherever it was left, which could be in the investigation stage.



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## Informal Resolution [K12 not required to offer this]

### Formal Complaint Must Have Been Filed

- Can be offered at any point during the formal complaint process
- District may offer to facilitate an informal process that does not require a full investigation
- Both parties receive written notice of their rights and provide written, voluntary consent.
- Cannot require the waiver of the right to an investigation/decision as a condition of employment, continuing employment, enrollment or continuing enrollment.
- Cannot be offered if allegations are made against an employee by a student.
- Right to withdraw from the informal resolution process and resume the grievance process at any time with respect to the formal complaint.

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## What Do These Jobs Entail?

### Investigator

--investigates the allegations in the formal complaint under the seven components outlined in the Title IX regulations.

--districts can have more than one person trained as an investigator and trained to prepare an investigation report. Title IX coordinator (but not decision-maker) can also serve as the investigator.

### Decision maker

Two types of Decision-makers:

1) Initial decision-maker - makes decision regarding the determination of responsibility.

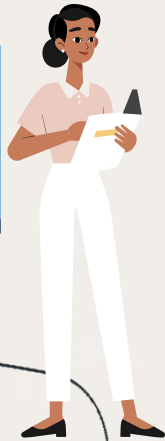
2) Appeal decision-maker - the responsibility to decide any appeal of the Initial decision makers' determination of responsibility or any appeal of a dismissal.

DMs can't be TIX coordinator or investigator

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## On What do Investigators Need to Focus?



- ✓ How to conduct an investigation in the Title IX grievance process.
- ✓ How to prepare a Title IX investigation report.

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### Formal Complaint Process

## Investigator's Job

1. Ensuring that the burden of proof and gathering evidence rests on the district (i.e. you) rather than the parties, i.e. complainant or respondent (note: certain treatment records cannot be obtained without voluntary, written consent; also parent consent must be sought under FERPA if applicable);

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## Investigator Component One Deep Dive



"burden of proof" - duty to prove or disprove a disputed fact; neither of the parties has to prove anything – this is your duty. The standard of evidence established by district policy is what you are required to prove meet the burden of proof.

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Process


## Investigator's Job

2. Providing an equal opportunity for both parties to present witnesses and evidence;
3. Making sure that both parties have the ability to discuss the allegations or gather and present evidence- for example, can't prohibit the parties from talking to witnesses to obtain evidence in support of their position;

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## Investigator Component Three Deep Dive



“parties have the ability to discuss the allegations or gather and present evidence” – cannot say “you can’t talk to anyone about this,” or restrict the parties from gathering evidence, but this right does not preclude the district from warning the parties not to discuss or disseminate the allegations in a manner that constitutes retaliation or unlawful tortious conduct (ex. defamation, libel, slander).

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Process

## Your Job - Investigator

4. Ensuring that the parties have the same opportunity to have an advisor (who may be an attorney) present during all interviews and proceedings; any restrictions on advisor participation apply equally to both parties – a student may have both a parent and advisor present;
5. With regard to an investigative interview or other meeting, providing written notice to a party who is invited or expected to attend and including the date, time, participants, purpose, and location and providing the notice with enough time to allow the party and advisor (if obtained) to prepare to participate;

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## Investigator's Job

6. Providing both parties and their advisors, if any, an equal opportunity to review all evidence that is directly related to the allegations in the formal complaint, including evidence on which the district does not intend to rely and any exculpatory or inculpatory evidence from any source; must be provided to both parties prior to the completion of the final investigative report and in time to give the parties at least 10 days to submit a written response, which investigator must consider before completing the investigation report.

This is the first ten day time period.

## Investigator Component Six Deep Dive

“evidence directly related to the allegations” – all evidence that involves in some way any part of any allegation.

- Both parties get all the evidence collected, though district has confidentiality responsibility.
- Title IX requires transparency and must be balance with FERPA concerns
- Establish best practices



## “Evidence on Which the District Does Not Intend to Rely”

cannot leave out any information related to the allegations, even if you do not think it is important or probative

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## “Exculpatory Evidence”

tends to exonerate the respondent as to an allegation –can be as to some or all of the allegations

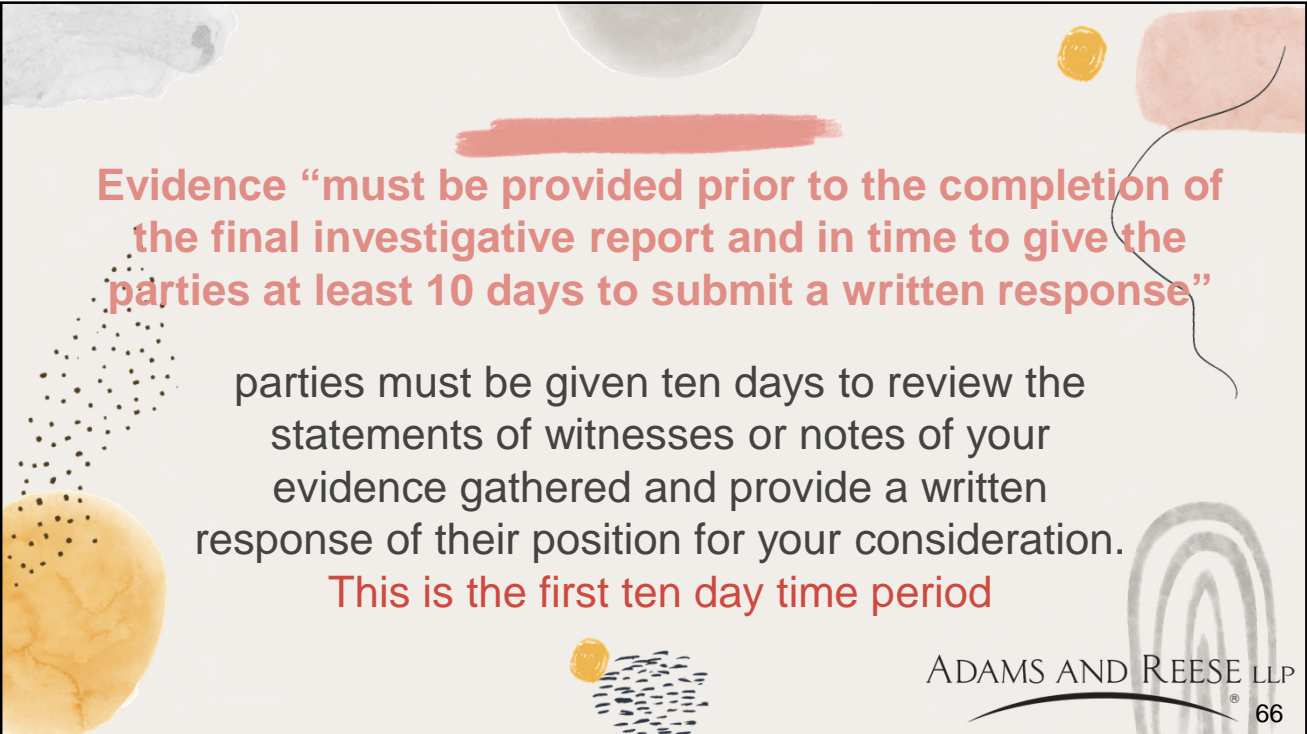
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## “Inculpatory Evidence”

tends to prove the respondent is responsible for conduct alleged – can be as to some or all of the allegations

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**Evidence “must be provided prior to the completion of the final investigative report and in time to give the parties at least 10 days to submit a written response”**

parties must be given ten days to review the statements of witnesses or notes of your evidence gathered and provide a written response of their position for your consideration.

**This is the first ten day time period**

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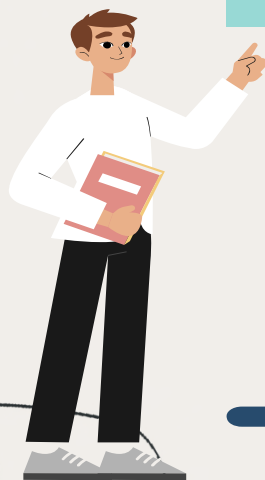


## Investigator's Job

7. Preparing a written investigation report that fairly summarizes the relevant evidence and providing the report to the parties and their advisors at least 10 days before a determination of responsibility for review and written response.

This is the second 10 day time period

## Investigator Component Seven Deep Dive



“fairly summarizes the relevant evidence” -  
evidence is relevant if

- A. it has any tendency to make a fact more or less probable than it would be without the evidence; and
- B. the fact is of consequence in determining the action.





## Investigation – Party/Witness Statements

Follow up with witness regarding party/witness prepared statement that doesn't contain information initially stated in the party/witness interview

Follow up with parties/witnesses if you learn information from a later witness about which you need to ask someone you've already interviewed

**Notify parents/guardians - parents/guardians have the "right to act" on behalf of all students who are parties**

Witness statements should have the name of the person giving statement, position/grade, date of statement, date of incident(s), pages numbered.

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## Investigation – Notes and Video Footage

Investigator notes should include correct dates, times, locations, page numbers

Pretend that someone who does not know anything about the matter can read your notes and be able to understand all the information obtained

**Immediately save any potentially applicable video footage**

Be prepared to handle issues related to evidence on phones/social media and legally securing phone/social media evidence

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## Ideal Title IX Investigation Report

- Summarizes the steps you took in the investigation;
- Summarizes what you determine to be relevant evidence;
- Includes relevant inculpatory and exculpatory evidence;
- Shows that you considered parties' written response re evidence and covers whether responses comport with/contradict other evidence;
- Does not make finding of responsible/not responsible;
- Can make credibility assessments by evaluation of evidence (some disagreement on this), though the decision-maker is not bound by assessment

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**“providing the report to the parties/advisors at least 10 days before a determination of responsibility for review and written response”**

Before the initial decision-maker determines whether the respondent is responsible, the parties have ten days to review the investigation report and prepare a written response to be provided to the initial decision-maker.

**This is the second ten day time period.**

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## The Initial Decision-Maker Phase

### Hearings

Title IX compliant hearings are not required in K-12 educational institutions for Title IX formal complaints. (required in post-secondary institutions)



### Written Questions

After the District has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker must provide each party the opportunity to submit written, relevant questions that the party wants asked of another party or witness, provide each party with the answers, and provide for limited follow-up questions.

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## The Initial Decision-Maker Phase

### Determination of Responsibility

The decision-maker issues a written determination of responsibility that:

1. Identifies the allegations that potentially constitute sexual harassment as defined in the amendments;
2. Describes the District's procedural steps taken from the receipt of the complaint to the determination;
3. Includes findings of fact supporting the determination;

4. Includes conclusions regarding application of the code of conduct to the facts;

5. Includes a statement of, and a rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions imposed upon the respondent, and whether remedies to restore or preserve equal access to the District's education program or activity will be provided to the complainant; and

6. Includes procedures for appeals.

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## The Initial Decision-Maker Phase

### Show Your Work Decision-Maker!!

The decision-maker has to:

- Make an independent decision.
- Address in the written decision the things that come AFTER the investigation report
  - Written responses of the Parties come after the investigation report
  - Written questions come after the investigation report

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## The Initial Decision-Maker Phase

### Show Your Work Decision-Maker!! (cont.)

The decision-maker must address the evidence using the following terminology:

Determine what is “**Inculpatory Evidence**”

tends to prove the respondent is responsible for conduct alleged – can be as to some or all of the allegations

Determine what is “**Exculpatory Evidence**”

tends to exonerate the respondent as to an allegation – can be as to some or all of the allegations

“Fairly Summarize the **Relevant Evidence**” - evidence is relevant if

- it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.
- Does it matter or is it important with regard to the facts?

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## The Appeal Decision-Maker Phase

Both parties have the right to appeal

- 1) a determination of responsibility and
- 2) the District's dismissal of a formal complaint for the following reasons:

A procedural irregularity that affected the outcome

Conflict of interest or bias on the part of the Title IX Coordinator, investigator, or decision-maker that affected the outcome

New evidence that was not reasonably available at the time of the determination regarding responsibility and could affect the outcome

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## Steps in the Appeal Process

Provide both parties...

A written notice of the appeal

A written decision simultaneously.

An equal opportunity to submit a written statement in support of, or challenging, the determination.

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# Retaliation



Retaliation is prohibited against any person for the purpose of interfering with Title IX rights or because the person participated, or refused to participate, in any manner in a proceeding under Title IX regulations.

Complaints of retaliation may be reported and filed under the Title IX grievance process.

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# Confidentiality

The District must keep confidential the identity of a person who complains of or reports sexual harassment, including parties and witnesses, except as permitted by law to carry out the purpose of the regulations with regard to conducting an investigation into the complaint.

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## Record Keeping

The District must keep records related to reports of sexual harassment for a minimum of seven years, including investigation records, disciplinary sanctions, remedies, appeals and records of any action taken, including supportive measures.

- A. Records should reflect that the District's response was not deliberately indifferent and that measures were taken to restore or preserve equal access to the education program or activity.
- B. If the District does not provide a complainant with supportive measures, the District must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
- C. The District must also retain for seven years any materials used to train Title IX Coordinators, investigators, decision-makers and any employee designated to facilitate an informal process.
- D. The District must post training materials on the District website.

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## OCR's Role?

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## Title IX – Notice of Public Rulemaking (NPRM)

### Timeline - **Proposed** Regs

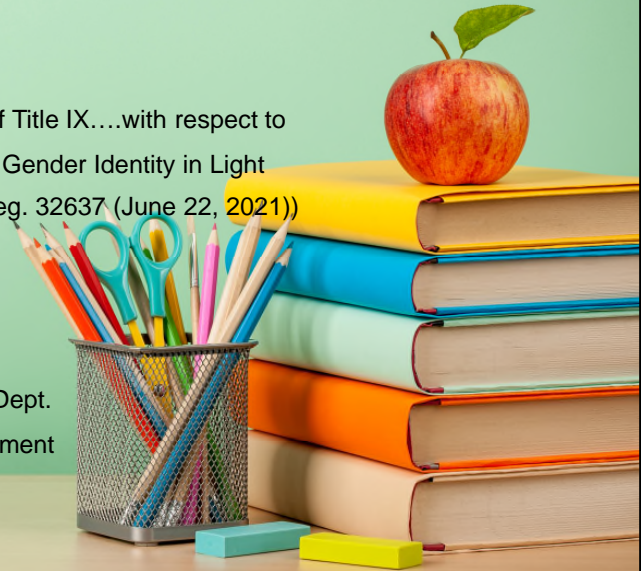
- Released June 23, 2022
- published July 12, 2022
- 60 day comment period ended Sept. 12, 2022
- Effective date - ??? (probably not until SY 2023-24)

## Current Regs REMAIN in effect

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## TEMPORARILY ENJOINED IN MISSISSIPPI (and 19 other states)

- **Title IX Interpretation** (Enforcement of Title IX...with respect to Discrimination on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*" 86 Fed. Reg. 32637 (June 22, 2021))
- **Dear Educator Letter** ("Letter to Educators on Title IX's 49<sup>th</sup> Anniversary" June 23, 2021))
- **Fact Sheet** ("U.S. Dep't of Justice & U.S. Dept. Educ., Confronting Anti-LGBTQI+ Harassment in Schools" (June 23, 2021))



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## TEMPORARILY ENJOINED IN MISSISSIPPI (and 19 other states)

- **EEOC Technical Assistance Document (Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity"** (June 15, 2021) (directed to schools regarding employees)



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