

Title IX Sexual Harassment Regulations: Informal-Resolution Facilitators



LEASOR
CRASS

302 W. BROAD STREET

MANS

PHON

FAX

www

Presented by:
Attorney Holly James
and Dr. Debbie Cano

© 20





Training Agenda

- Overview of Title IX Regulations
- Overarching Considerations for All Title IX Personnel
- The Role of the Informal Resolution Facilitator
- Mandates and Requirements
- Facilitator Responsibilities
- Record-Keeping Requirements



Title IX Overview





What is 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.**”

-Title IX of the Education Amendments of 1972





“Sexual Harassment” Definition - § 106.30(a)

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

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct (i.e., quid pro quo sexual harassment);
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 recipient’s education program or activity; or
3. “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

“**Education program or activity**” = any location, event, or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the context in which harassment occurred

SH definition does not turn on method of harassment; can be via e-mail, internet, or other technologies, as well as in-person, mail, handwritten, or other communications





General Response Standard - § 106.44(a)

- A recipient with **actual knowledge**
- of **sexual harassment** (as defined on previous slide)
 - in an **education program or activity** of the district
 - against a person **in the United States**,
- must **respond promptly**
- in a manner that is **not deliberately indifferent**.

“Actual knowledge” means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator, any ISD official who has authority to institute corrective measures on behalf of the ISD, or to any employee of an elementary and secondary school.

“Education program or activity” includes locations, events, or circumstances over which the district exercised substantial control over both the respondent and the context in which the sexual harassment occurs

New regulations do not apply to sexual harassment alleged to have happened outside the U.S.

- Districts may still address this under the student code of conduct.
- Note that other Title IX prohibitions *do* apply outside the U.S.

“Deliberately indifferent” means clearly unreasonable in light of the known circumstances.

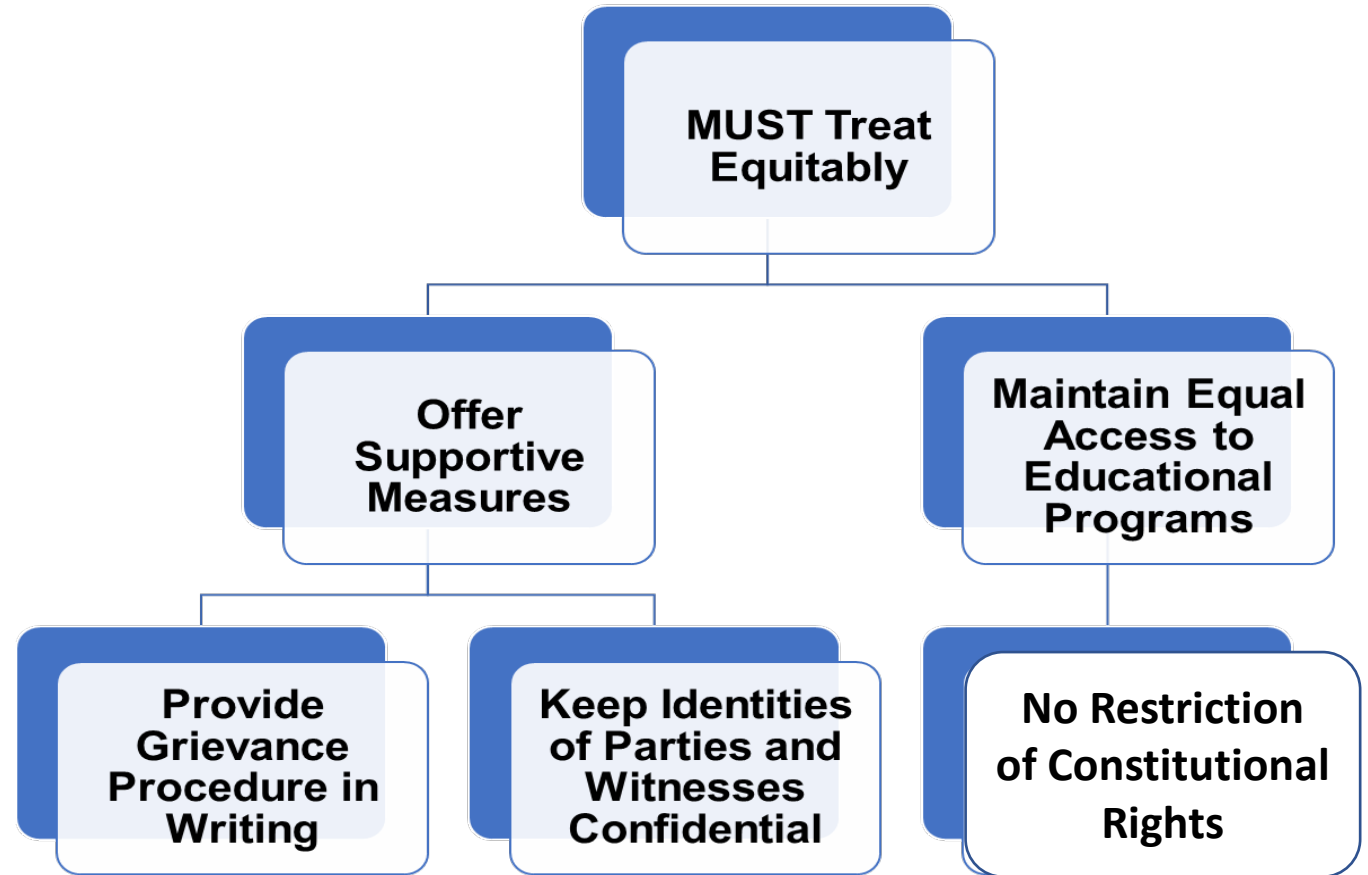




Rights of the Parties in Connection with District's Response to Sexual Harassment

"A district's response must treat complainants and respondents equitably by:

- **offering supportive measures** to a complainant, and
- **following a grievance process** that complies with § 106.45 **before the imposition of any disciplinary sanctions** or other actions that are not supportive measures against a respondent."



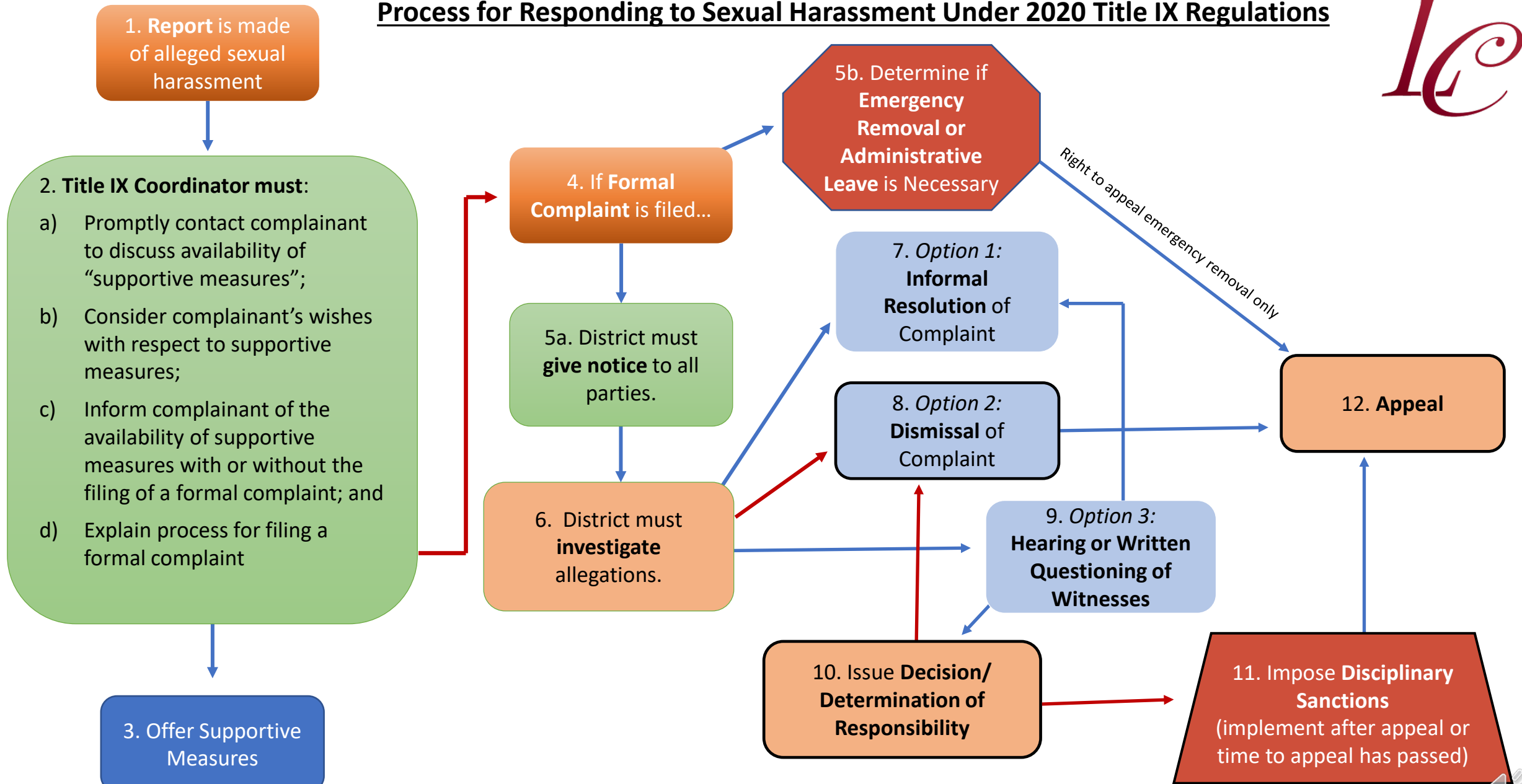


Response to a Formal Complaint § 106.44(b)

In response to a formal complaint, districts must follow a **grievance process** that complies with § 106.45 before imposing disciplinary sanctions against a Respondent.



Process for Responding to Sexual Harassment Under 2020 Title IX Regulations





Required Title IX Personnel



Overarching Considerations for All Title IX Personnel





Avoidance of Bias & Conflicts of Interest

All Title IX personnel must serve impartially and free from conflicts of interest or bias against the individual complainant and respondent involved in a formal complaint or against complainants and respondents generally.

- Bias includes but is not limited to bias against an individual's sex, race, ethnicity, sexual orientation, gender identity, disability, immigration status, or financial ability.





Prompt Timelines

Absent good cause for the District to delay an investigation, the Title IX formal-complaint process, beginning with filing or signing of the formal complaint and ending with the determination of responsibility, should be completed within a **reasonable time frame**.

- Your district's Title IX grievance process will establish that time frame.
- Days used for any voluntary informal resolution process do not count towards the time frame for concluding the formal complaint process.
- The day a document is filed is "day zero." The next District business day is "day one."





Modifying Timelines

- **All time limits shall be strictly followed** unless modified by the parties' mutual written consent or extended by the District for good cause. If the District grants an extension of time for one party, the same time extension must also be granted to the other party.
- If the District temporarily delays or extends timelines associated with the formal complaint process, the Title IX Coordinator shall provide a written explanation to the parties of the good cause basis for the delay or extension.
 - Permissible modifications to timelines include the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; the need for language assistance or accommodation of disabilities; or other good cause as determined by the Title IX Coordinator.
- The District shall make reasonable attempts to schedule meetings at a time mutually agreeable to all parties. However, extensions should not unnecessarily extend the timeline established in District policy for concluding the formal complaint process.





Confidentiality

The District must keep information confidential as required by law *except as necessary to*:

- provide supportive measures,
- conduct proceedings under the formal complaint process, when disclosure is required by law, or when permitted by the District in compliance with FERPA and state law, or
- otherwise carry out the purposes of the Title IX Regulations

- District may not restrict the ability of the parties to discuss the allegations under investigation or to gather and present relevant evidence.
- **A complainant's identity, if known, must be disclosed to the respondent once a formal complaint is filed by a complainant or signed by the Title IX Coordinator.**





Confidentiality of Parties' Identities

Other than the limited exceptions to confidentiality discussed on the previous slide, **Districts must keep confidential the identities** of anyone who has reported sexual harassment or who is alleged to be a perpetrator of sexual harassment.

OCR Warning

If a District discloses the identity of a party in circumstances other than the three limited confidentiality exceptions, OCR may deem the disclosure to be an act of improper **retaliation** against a party.





Role of Parents/Guardians and Advisors

Parents/guardians may act on their child's behalf at any time during Title IX Grievance Process.

Each party may be accompanied by an **advisor** of the party's choice during the interview with the investigator or other meetings during the formal complaint process.

Advisor may be, but is not required to be, an attorney.





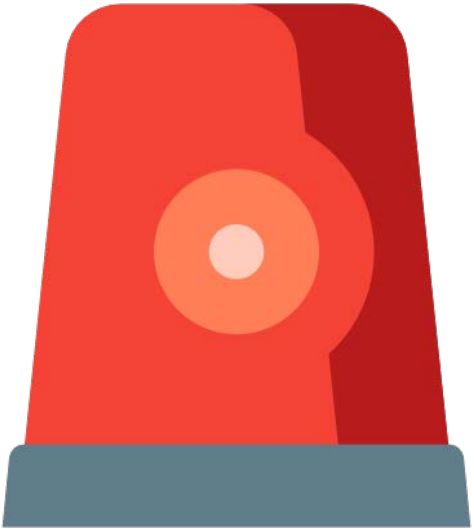
Advisors & Confidentiality

1. In order to preserve the confidentiality of student information protected by FERPA, the **District may require the parent of a minor student to sign a release form** indicating consent to allow the District to release information related to the allegations to the designated advisor.
2. District must inform any designated advisors that **confidential information** received during the Title IX formal complaint process, including the evidence received for inspection and review as well as the investigation report, **may be used only for purposes of the Title IX formal complaint process** and may not be further disclosed or disseminated.
3. Note: Any restriction or requirement regarding an advisor must apply equally to all parties.





Required Reporting



- At any point during a District's investigation that evidence is uncovered that requires reporting to law enforcement, CPS, SBEC, or another entity, District employees must take the necessary actions to do so in compliance with law or board policy.





Equitable Treatment

- A District's treatment of complainants, respondents, witnesses, and any other person involved in a formal complaint process must not discriminate on the basis of sex.
- All parties involved must be treated fairly, with dignity, respect, and sensitivity and without bias, prejudice, or reliance on stereotypes.





Presumption of Nonresponsibility

All District actions must presume that the respondent is **not responsible** for the alleged conduct until after a final determination in a formal complaint process.

In a formal complaint process, a respondent may face Title IX disciplinary sanctions for sexual harassment only after a fair process determines responsibility.

However, even if a Title IX formal complaint is not filed or signed, the District may investigate and respond to prohibited conduct in accordance with board policies and the Student Code of Conduct.





Standard of Evidence: Preponderance of the Evidence

TASB Model Grievance Process: “The District uses the preponderance of evidence standard of evidence to determine responsibility unless stated otherwise in FFH(LOCAL).”

➤ Same standard must apply to all formal complaints (employees and students)

51%

“Preponderance of the Evidence” means that a proposition is more likely than not to be true.





Privileged Information

Districts cannot use information protected under a legally recognized privilege unless the person holding the privilege has waived it.

If a party seeks or uses information protected under a legally recognized privilege, the party must provide written documentation indicating that the individual holding the privilege has waived the privilege and consents to use of the information for purposes of the formal complaint process.



shutterstock.com • 343376627





District Bears the Burden of Proof

The **burden of proof** and **burden of gathering evidence** sufficient to reach a determination regarding responsibility **rests with the District** and not with the parties.



shutterstock.com • 3414938

- **Parties have right to participate fully and robustly** in investigation process if they choose by gathering evidence, presenting fact and expert witnesses, reviewing the evidence gathered, responding to investigative report, and asking questions of other parties and witnesses before the determination of responsibility.





Understanding “Relevance”

Evidence is considered relevant if:

- (1) it has **any tendency to make a fact more probable or less probable** than it would be without the evidence; and
- (2) the **fact is of consequence** in determining the complaint.

Rape-Shield Protections for Complainants

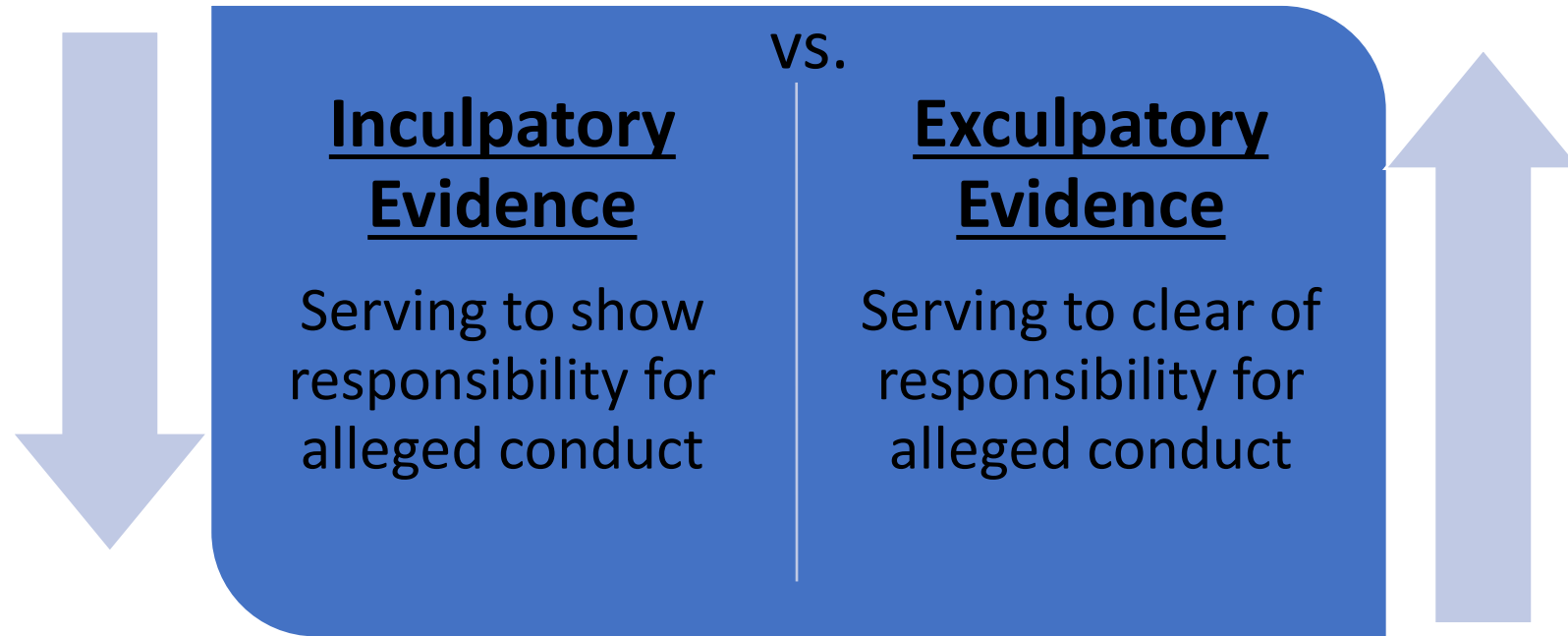
Evidence about a **complainant’s prior sexual behavior or sexual predisposition is not relevant** unless the evidence:

- is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- concerns specific incidents of the complainant’s prior sexual behavior with respect to the respondent and is offered to prove consent.





Exculpatory vs. Inculpatory Evidence



Districts must consider both exculpatory and inculpatory evidence and must provide the parties an equal opportunity to present and review such types of evidence.



Informal Resolution Facilitator's Role





Informal-Resolution Facilitator: Your Role in Context

- **Facilitates informal resolution process between a complainant and respondent with respect to a formal complaint.**
- The Information Resolution Facilitator may be:
 - District employee or third-party provider.
 - Ideally, should not be same person as any other Title IX role in order to avoid conflicts of interest.



Informal Resolution Facilitator Mandates, Requirements, and Responsibilities





Informal Resolution Facilitator: Required Training

Required Training for All Roles

Training must promote impartial investigations and adjudication of formal complaints and must not be based on sex stereotypes.

Mandatory Training Components:

- The definition of sexual harassment in section 160.30;
- The scope of the recipient's education program or activity;
- How to conduct an investigation and grievance process, including, as applicable, hearings, appeals, and informal processes; and
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.





Informal Resolution: Written Notice

At any time prior to reaching a determination regarding responsibility, the district may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, *provided that the district –*

(i) **Provides written notice to the parties 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 could be shared;

(ii) **Obtains the parties' voluntary, written consent** to the informal resolution process; and

(iii) **Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.**

A district may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with Section 106.45.

A district may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed.





When?

An informal resolution may occur at any time **AFTER** the filing of a formal complaint and **BEFORE** reaching a determination of responsibility.



Voluntary Consent

- The Title IX Coordinator **MUST** obtain the parties' voluntary, written consent to the informal-resolution process.





Parties' Right to Withdraw

If a party declines or at any time withdraws from an informal-resolution process, the Title IX Coordinator will notify the other party that the informal resolution process has been terminated and resume the formal complaint process.





Initiating the Informal-Resolution Process

Either party may request informal resolution by making a **written request** to the Title IX Coordinator, who will promptly notify the other party of this request.

➤ *The other party is not required to agree to participate.*

Formal Complaint
MUST Be Filed First!





Remedies

- The district may take the specific factual circumstances into account in deciding what **remedies are appropriate** for the complainants and what disciplinary sanctions are appropriate for the respondent.” (OCR at 447, n. 643.)
- **Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity.**
- Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; **however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.**





Disciplinary Consequences

- Disciplinary consequences may be included within an Informal Resolution Agreement.
- **NOTICE Requirement:** Consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared, **MUST be provided to the parties.**





Discipline Guidance

Employees

- Consult Board Policy (CJ, DC, DH, and DHB), District Administrative Regulations, and Employee Handbook protocols.
- Possible disciplinary sanctions: directives, reassignment, nonrenewal, and termination.
- Remember SBEC reporting duty under Texas law.

Students

- Consult the District's Student Code of Conduct guidelines concerning disciplinary options.

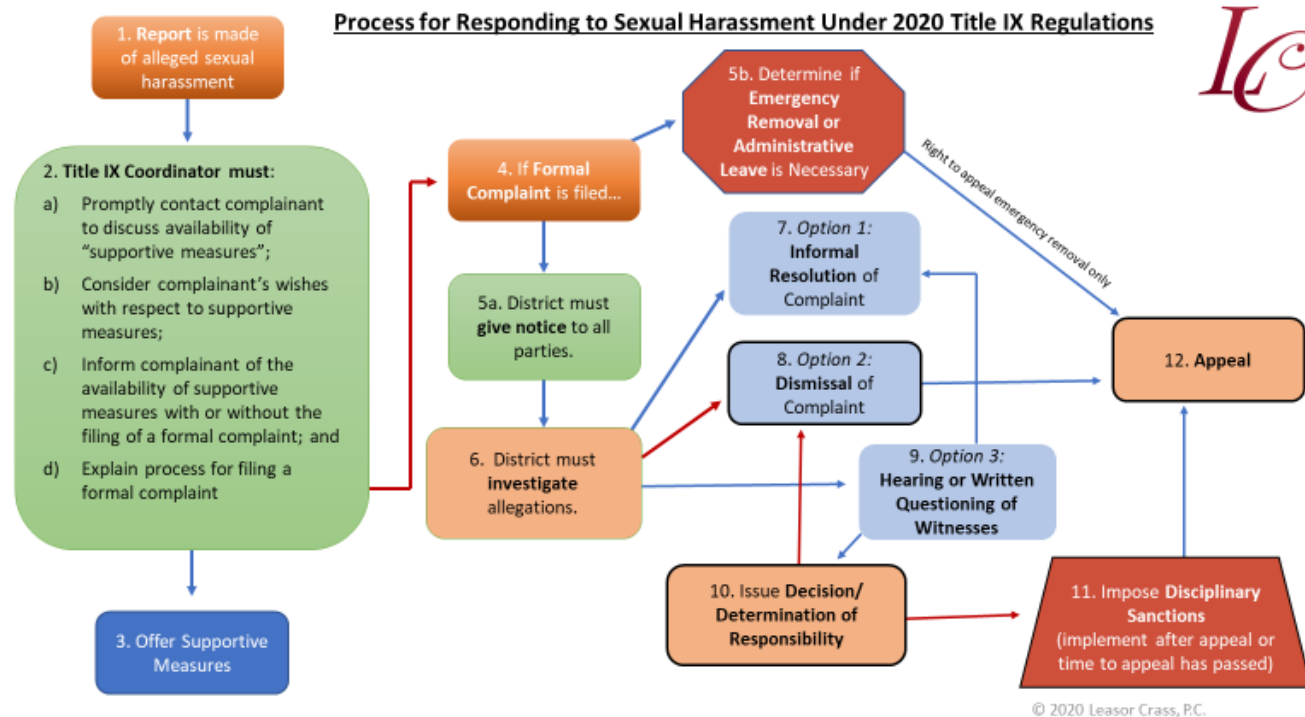


Withdrawing from the Informal-Resolution Process



Either party may withdraw from an informal-resolution process **BEFORE** the determination of responsibility and resume the formal complaint process.

Resumption of the Formal Grievance Process



After a party's withdrawal, the Title IX Coordinator will notify the other party that the informal resolution process has been terminated and will **resume the formal complaint process.**



Records





Record-Keeping

A district must maintain for a period of **seven years** records of –

(A) **Each sexual harassment investigation** including

- any determination regarding responsibility and any audio or audiovisual recording or transcript of any live hearing,
- 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;

(B) **Any appeal** and the result therefrom;

(C) **Any informal resolution and the result therefrom**; and

(D) All **materials used to train** Title IX Coordinators, investigators, decision makers, and any person who facilitates an informal resolution process.

- A district must make these training materials publicly available on its website, or if the district does not maintain a website, the district must make these materials available upon request for inspection by members of the public.



Title IX Sexual Harassment Regulations: Informal-Resolution Facilitators



LEASOR
CRASS

302 W. BROAD STREET

MANS

PHON

FAX

www

Presented by:
Attorney - Holly James
and Dr. Debbie Cano

© 20

