

# The New Title IX Complaint Process

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What school leaders need to know

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# What do the new regulations require?

- When should schools respond to sexual harassment allegations?
- How should schools respond to sexual harassment allegations?
- What else should schools and districts know?

# What do the new regulations require?

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- Generally, the new regulations require a school or district to respond “promptly” and not in a “deliberately indifferent” manner (i.e., not “clearly unreasonable in light of the known circumstances”) when it has “actual knowledge” of “sexual harassment” in its “education program or activity” against a person in the United States.
- **May 6:** The Department issued a press release and related resources regarding the new regulations.
- **May 19:** The new regulations were published in the Federal Register (85 Fed. Reg. 30,026).
- **August 14:** The new regulations became effective.

# What are the basic steps outlined in the new regulations?

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- District or school receives actual knowledge of conduct that may constitute sexual harassment.
- District-level or school-based Title IX Coordinator meets with alleged victim to discuss supportive measures and the process for filing a formal complaint.
- Investigator leads the investigation after the formal complaint is in place and written notice is given to the involved individuals and their parents/guardians. Investigator gathers and reviews evidence, and prepares an investigative report; the involved individuals and their parents/guardians review and respond to the report.
- Decision-maker provides opportunity for involved individuals and their parents/guardians to prepare written questions to be answered by the other side. Decision-maker reviews all materials and makes a written responsibility determination – an impartial determination as to whether the alleged conduct occurred – including sanctions.

# Who's who - Title IX Coordinator

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- District must have at least one district-level Title IX Coordinator and can designate a Title IX Coordinator at each school.
- The district-level or school-based Title IX Coordinator's overall responsibility is to coordinate compliance efforts by, among other things:
  - Developing materials and ensuring that professional development occurs for staff involved in Title IX efforts.
  - Creating systems to centralize records and gather relevant data.
  - Meeting with alleged victim and his or her parents/guardians once made aware of alleged sexual harassment (cannot be delegated to support staff).
  - Coordinating implementation of supportive measures.
  - Signing a formal complaint to initiate grievance process (cannot be delegated to support staff).

# Who's who – Title IX Coordinator

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- As a practical matter, certain Title IX Coordinator responsibilities are more appropriately carried out at one level – district or school.
- The district-level Title IX Coordinator should, for example:
  - Develop materials and ensure that professional development occurs for staff involved in Title IX efforts.
  - Create systems to centralize records and gather relevant data.
- **The school-based Title IX Coordinator should, for example:**
  - Meet with alleged victim and his or her parents/guardians once made aware of alleged sexual harassment (cannot be delegated to support staff).
  - Coordinate implementation of supportive measures.
  - Sign a formal complaint to initiate grievance process (cannot be delegated to support staff).

# Who's who - Investigator

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- The school-based Investigator carries out an investigation by conducting interviews of the involved individuals and witnesses, collecting documentary and other evidence, and drafting an investigative report.
- The school-based Title IX Coordinator may serve as Investigator, but the person cannot have a conflict of interest or bias.
- As a practical matter, Investigator may be an administrator such as the assistant principal.
- For bigger schools you do have the option of having a district-based investigator AND a school-based investigator. Districts can outsource the investigation.

# Key Tasks of Investigator

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- The school-based Investigator carries out an investigation by conducting interviews of the involved individuals and witnesses, collecting documentary and other evidence, and drafting an investigative report.
- The school-based Title IX Coordinator may serve as Investigator, but the person cannot have a conflict of interest or bias.
- As a practical matter, Investigator may be an administrator such as the assistant principal.
- For bigger schools you do have the option of having a district-based investigator AND a school-based investigator. Districts can outsource the investigation.
- **Timelines and steps:** The accused party must be given notice of the complaint and “sufficient details” along with “sufficient time” to prepare for the initial investigative interview. After an investigation is complete, both parties and their representatives must be given electronic or paper copies of all evidence, and they have 10 days to review and respond to it. The investigator then compiles an investigative report, which is given to both parties. Once the investigative report is complete but prior to any final determination, the parties have another 10 days to respond to the investigative report, including the ability for the parties to ask written cross-examination questions to the other party. After all this, the decision-maker then compiles the final decision, which is shared with both parties, and the appeal process begins.



# Who's who – Decision Maker

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- The school-based Decision-maker reaches the responsibility determination by applying the standard of evidence selected by the district: “**preponderance of the evidence**” or “clear and convincing.”
- Neither the district-level Title IX Coordinator, school-based Title IX Coordinator, nor Investigator may also be Decision-maker. However, Investigator may offer recommendations to Decision-maker.
- As a practical matter, Decision-maker may be the principal (the highest school-level administrator).
- The regulations allow school to outsource this role. (KLO will be providing this service) but there still may need to be a district decision-maker for the discipline.

# Key Tasks of Decision Maker

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- **Determination regarding responsibility:** The decision-maker, who may not be the Title IX coordinator or the investigator, must issue a written determination that identifies the allegations in the formal complaint; describes all procedural steps taken; includes findings of facts and conclusions about the application of the district's code of conduct; states the decision reached on each allegation and the rationale for that decision; and explains the procedures and permissible bases for appeals.
- By our count the new regulations require a minimum 23 days to complete the Title IX investigation and decision-making processes.

# How is Discipline Handled?

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- Under the regulations, the entire Title IX process must be complete before any disciplinary measures are meted out.
- Emergency removal is a very high bar.
- Rely on your attorney(s) to document choices.
- Difficult issue under the new regulations.

# THINK ABOUT IT: Assessing coordination, staffing needs

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- At the district level, do you:
  - Have designated Title IX Coordinator?
  - Ensure Title IX compliance by developing and providing professional development to individual schools?
  - Require the school-based Title IX Coordinator or Investigator to also be Decision-maker? If so, this needs to change – How will you identify and train additional personnel?



# Actual Knowledge

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- A school or district has **actual knowledge** when notice or allegations of sexual harassment are reported to any school employee; or any employee personally observes such behavior. A school or district employee includes Title IX Coordinator, administrators, teachers, teacher's aides, bus drivers, cafeteria workers, counselors, school resource officers, maintenance staff workers, or any other employee.
- Actual knowledge is met when any employee:
  - Witnesses the conduct.
  - Hears about the conduct from the alleged victim or anyone else (e.g., parent, friend, peer, anonymous reporter).
  - Receives a written report of the conduct from the alleged victim or anyone else.

“Sexual  
Harassment”  
is conduct on  
the basis of  
sex that is...

### Category 1

- Quid pro quo harassment by a school employee to a student – the employee conditions some type of aid, benefit, or service on the student’s participation in unwelcome sexual conduct

### Category 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”

### Category 3

- Other conduct defined by federal law:
  - Sexual assault
  - Dating violence
  - Domestic violence
  - Stalking

# “Education program or activity”

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- “Education program or activity” includes locations, events, or circumstances over which a school district exercised substantial control over the alleged perpetrator and the context in which the sexual harassment occurred.
- Depending on the circumstances, may cover incidents that occur off school district property or online (e.g., field trip, school district digital platform).

# Comparing prior guidance to the new regulations

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2001/2017 Prior Department Guidance	New Regulations
Conduct = “so severe, persistent, <u>or</u> pervasive”	Conduct = “so severe, pervasive, <u>and</u> objectively offensive”
Knowledge = The school district “knows or reasonably should know” of the conduct	Knowledge = The school district has “actual knowledge” of the conduct



# What do the new regulations require?

- When should schools respond to sexual harassment allegations?
- **How should schools respond to sexual harassment allegations?**
- What else should schools and districts know?

# How should schools respond to sexual harassment allegations?

## **The basic command**

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- If a school has actual knowledge of sexual harassment allegations, the school must respond promptly and in a manner that is not deliberately indifferent (i.e., not “clearly unreasonable in light of the known circumstances”).
- A school must offer “supportive measures” to the alleged victim (complainant) and follow a grievance process that meets certain minimum requirements before imposing discipline or other actions that are not supportive measures against an alleged perpetrator (respondent).
- A school may not continue with the grievance process in the absence of a formal complaint.

# How should schools respond to sexual harassment allegations?

## **First, they need procedures that comply with the new regulations:**

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- The new regulations require a district to notify stakeholders and publish on its website and in its handbooks and catalogs:
  - Title IX Coordinator contact information: Names, office addresses, emails, phone numbers.
  - General statement regarding nondiscrimination on the basis of sex.
- A district also must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging sex discrimination and a grievance process specific to sexual harassment allegations that meets certain minimum requirements.
  - The grievance procedures and grievance process must describe how to report or file a complaint of alleged sex discrimination, how to report or file a formal complaint of alleged sexual harassment, and how schools will respond.

# How should schools respond to sexual harassment allegations?

## Overview of select general requirements the grievance process

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- Provide for the “prompt and equitable” resolution of student and employee complaints.
- Treat complainants and respondents equitably.
- Require an objective evaluation of all relevant evidence.
- Require that Title IX Coordinator, Investigator, Decision-maker, or any other key player have no conflicts of interest or bias for or against complainants or respondents, and that all such individuals receive specified professional development.
- Include a presumption of innocence for respondents.
- Designate reasonably prompt time-frames for resolution and the range of possible disciplinary actions.
- Use either the “preponderance of the evidence” or “clear and convincing” standard and apply it equally to employee and student complaints.
- Provide complainant and respondent (and their parents/guardians) an equal opportunity to review any evidence obtained that is directly related to the allegations raised in a formal complaint.
- Address certain other procedural steps enumerated at 34 C.F.R. § 106.45 of the new regulations, many of which we address below.

# How should schools respond to sexual harassment allegations?

## **Revisiting the basic steps outlined in the new regulations**

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- District or school receives actual knowledge of conduct that may constitute sexual harassment.
- District-level or school-based Title IX Coordinator meets with alleged victim to discuss supportive measures and the process for filing a formal complaint.
- Investigator leads the investigation after the formal complaint is in place and written notice is given to the involved individuals and their parents/guardians. Investigator gathers and reviews evidence, and prepares an investigative report; the involved individuals and their parents/guardians review and respond to the report.
- Decision-maker provides opportunity for involved individuals and their parents/guardians to prepare written questions to be answered by the other side. Decision-maker reviews all materials and makes a written responsibility determination – an impartial determination as to whether the alleged conduct occurred – including sanctions.

# Meeting to Offer Supportive Measures

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- A school's Title IX responsibilities are triggered once it is put on notice of alleged sexual harassment (i.e., actual knowledge). The Title IX Coordinator must “promptly” contact the alleged victim and his or her parents/guardians to discuss the availability of and consider their wishes regarding supportive measures.
- The grievance policy must describe the range of available supportive measures. Examples include:
  - Counseling.
  - Extensions of deadlines or other course-related adjustments.
  - Changes to class schedules.
  - Increased monitoring/security of certain areas.
- The school must inform the alleged victim and his or her parents/guardians that supportive measures are available with or without the filing of a formal complaint, and also explain the process for filing a formal complaint.
- This is the responsibility of the Title IX Coordinator—**HOWEVER** Comments to new regs state that this discussion can be delegated to another staff member.

# Formal complaint to initiate the rest of the grievance process

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- No investigation of alleged sexual harassment may occur until after a formal complaint has been filed.
- The formal complaint must be filed by the alleged victim or his or her parent/guardian. It must describe the sexual harassment allegations and request that the school district investigate.
  - The formal complaint may be filed at any time as long as the alleged victim is “participating in or attempting to participate in the education program or activity” of the school district at the time of filing (e.g., current student).
  - The school or district should create a standard formal complaint form.
- The Title IX Coordinator may initiate a formal complaint and investigation on his or her own if the decision is not clearly unreasonable in light of the known circumstances (e.g., alleged perpetrator may pose an ongoing safety threat).

# Grievance process after a formal complaint is filed

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- What are the basic parts of the grievance process after a formal complaint is filed?
  - Notice
  - Investigation
  - Written questions and answers
  - Responsibility determination
  - Appeal
- A district must set reasonably prompt time-frames for carrying out the grievance process.



# Notice

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- Once a formal complaint is filed, the school must provide to the known involved individuals, including parents/guardians:
  - Written notice of the sexual harassment allegations in sufficient detail by including the identities of the involved individuals (if known), the conduct allegedly constituting sexual harassment, and the date and location of the incident (if known).
  - A copy of the grievance policy.
- The written notice also must:
  - Include a statement that the alleged perpetrator is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
    - Generally, no disciplinary action may be taken against an alleged perpetrator until after the grievance process is carried out. The grievance policy must describe the range of possible sanctions or remedies.
  - Inform the involved individuals that they may have an advisor of their choice and may inspect and review evidence.
  - Inform the involved individuals of any code of conduct provision that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

# Investigation

## **General requirements to remember**

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- The school or district must ensure that it has the burden of proof and the burden of gathering evidence sufficient to reach a responsibility determination; these burdens do not belong to the involved individuals.
- The school or district must not restrict the ability of the involved individuals to discuss the allegations under investigation or gather and present relevant evidence.

# Investigation

## What must the investigator do?

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- Provide an equal opportunity for the involved individuals to present witnesses (including fact and expert witnesses) and other inculpatory and exculpatory evidence. Privilege considerations apply.
- Provide an equal opportunity to the involved individuals and their parents/guardians to inspect and review evidence and respond prior to completing the investigative report.
- Create an investigative report that fairly summarizes relevant evidence and share with the involved individuals and their parents/guardians for review and response.

# Written Questions and Answers

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- A school must use written questions and answers as part of its grievance process.
- Decision-maker must:
  - Allow the involved individuals and their parents/guardians to submit written, relevant questions to ask the other side (including witnesses).
  - Decision-maker must explain any decision to exclude a question as irrelevant.
    - The alleged victim's prior sexual behavior is not relevant unless offered to prove that someone other than the alleged perpetrator committed the alleged conduct, or to prove consent. Consent is not defined in the new regulations.
  - Provide each side with the answers to their questions.
  - Allow for additional, limited follow-up questions.

# Responsibility Determination

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- A school must use a Decision-maker who is not the same person as the Title IX Coordinator or Investigator.
- Decision-maker must apply the standard of evidence selected by the district – **“preponderance of the evidence”** or “clear and convincing standard” – to reach a determination as to whether the alleged conduct occurred.
- Decision-maker must issue a written determination that:
  - Identifies the allegations.
  - Describes the procedural steps taken by the school district.
  - Lays out the responsibility determination, including findings of fact, disciplinary sanctions, applicability of code of conduct, and remedies.
  - Outlines appeal procedures.

# Appeal

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- Appeal of the responsibility determination or dismissal of a formal complaint must be offered if an involved individual or his or her parents/guardians assert that:
  - A procedural irregularity affected the outcome.
  - New evidence may affect the outcome and was not previously reasonably available.
  - The Title IX Coordinator, Investigator, or Decision-maker had a conflict of interest or bias that affected the outcome.
- The Decision-maker on appeal may not be the initial Decision-maker, the Investigator, or the Title IX Coordinator.
- The Decision-maker on appeal must be trained!

# When must or may a school dismiss a formal complaint?

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- A school must dismiss a formal complaint for purposes of Title IX sexual harassment under certain circumstances, including:
  - The alleged conduct, even if true, would not constitute sexual harassment.
  - The alleged conduct, even if true, did not occur in the school district's education program or activity.
  - The alleged conduct, even if true, did not occur against a person in the United States.
- A school has discretion to dismiss a formal complaint during the grievance process under certain circumstances, including:
  - The alleged perpetrator is no longer enrolled or no longer employed by the school district.
  - The alleged victim and his or her parents/guardians notifies the Title IX Coordinator in writing that the formal complaint or any allegations therein are withdrawn.
  - Specific circumstances prevent the school district from gathering evidence sufficient to reach a determination regarding the formal complaint or allegations therein.

Comparing  
prior guidance  
to the new  
regulations  
**Examples of  
changed  
requirements**

2001/2017 Prior Department Guidance	New Regulations
It may be appropriate for a school to take <b>interim measures</b> during the investigation of a complaint	<b>Supportive measures</b> must be offered once a school has actual knowledge of sexual harassment allegations
Decision-maker <b>can</b> be same person as Title IX Coordinator or Investigator	Decision-maker <b>cannot</b> be same person as Title IX Coordinator or Investigator
A school <b>may</b> offer the right to appeal a responsibility determination	A school <b>must</b> offer the right to appeal a responsibility determination



# Professional Development Requirements

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- A district must provide professional development to individuals designated as a Title IX Coordinator, Investigator, Decision-maker, or Facilitator of an informal resolution process.
- Training materials must be made publicly available via district website.
- As good practice, the district should also provide professional development to other employees who are not part of the core Title IX team.

# Professional Development Requirements

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- Required professional development topics for individuals designated as a Title IX Coordinator, Investigator, Decision-maker, or Facilitator of an informal resolution process include:
  - Definition of sexual harassment.
  - Scope of the school district's education program or activity.
  - How to conduct an investigation and grievance process.
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
  - Relevance determinations, both for questions and evidence, and for information to be included in investigative report.

# Recordkeeping Requirements

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- A district must maintain certain records for a seven-year period. Examples of required recordkeeping include:
  - Investigation, appeal, and informal resolution records.
  - Records of any actions – including any supportive measures – taken in response to a report of formal complaint of sexual harassment.
    - Among other things, the school must document why its response was not deliberately indifferent or “clearly unreasonable in light of the known facts”.
- Records of professional development training materials.

# THINK ABOUT IT: Professional development, recordkeeping

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- At the district level, how will you:
  - Create standardized approaches to professional development and recordkeeping practices?
  - Prepare appropriate professional development materials for the Title IX team?
  - Ensure that public-facing materials remain accurate and up to date?
  - Facilitate effective communication between the school district and individual schools?



# What do the new regulations require?

- When should schools respond to sexual harassment allegations?
- How should schools respond to sexual harassment allegations?
- **What else should schools and districts know?**

# What else should schools and districts know?

## Emergency removal and administrative leave

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- Generally, a school may not sanction an alleged perpetrator until after the grievance process is carried out. However, the regulations provide exceptions for emergency removal and administrative leave under certain circumstances and in compliance with disability laws.
  - Emergency removal may occur if the school district has (1) undertaken an individualized safety and risk analysis; (2) determined that an immediate threat to the physical health or safety of a student or other individual arising from the allegations justifies removal; and (3) provided the alleged perpetrator with notice and an opportunity to challenge the decision immediately following the removal.
- A school district may place an employee on administrative leave for the duration of the grievance process without having to follow the emergency removal criteria outlined above.

# What else should schools and districts know?

## Informal resolution process

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- Though not required, a district may offer an informal resolution process to involved individuals and their parents/guardians after a formal complaint has been filed.
  - Informal resolution cannot be offered if the alleged perpetrator is an employee.
  - The district must develop and share its procedures for informal resolution.
  - A school must obtain voluntary, written consent from the involved individuals and their parents/guardians to participate in informal resolution after sharing:
    - The allegations.
    - The requirements of the informal resolution process.
    - Any consequences resulting from participation in the informal resolution process (e.g., records that will be maintained or could be shared).
- Anyone may withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.

# What else should schools and districts know?

## **Relation to other laws**

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- A school or district may not restrict rights protected under the U.S. Constitution, including the First, Fifth, and Fourteenth Amendments.
- The new regulations set minimum requirements for Title IX compliance. State and local law may prescribe additional responsibilities related to a district's response to sexual harassment allegations. In cases of conflict, however, the new regulations preempt state and local law.



# Preparing for Title IX Compliance

## Examples of school and district actions

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- Review and revise Title IX policies and procedures.
- Review and revise codes of conduct and handbooks.
- Conduct professional development for Title IX team and staff, both at the centralized school district level and at individual schools.
- Educate and train students and parents/guardians
- Provide via the district website information such as Title IX Coordinator contact information, grievance process, and professional development materials.

# Questions?

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