Investigating Title IX Sexual Harassment Complaints

Round Lake Area Schools CUSD #116
October 20, 2020

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Title IX of the Education Amendments Act of 1972

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> 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.A. § 1681*

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Title IX: Brief History

- 1972: Title IX enacted
- 1974: Title IX regulations issued
- 1980: Title IX enforcement transferred to the new U.S. Department of Education Office for Civil Rights ("OCR")
- 1992: U.S. Supreme Court recognizes student right to damages for sexual harassment (*Franklin v. Gwinnett County Schools*)

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Title IX: Brief History

- 1997: OCR issues guidance on sexual harassment recognizing the responsibility of institutions to respond to allegations
- 1998: U.S. Supreme Court sets standard for teacher-on-student harassment liability as "deliberate indifference" after "actual notice" of misconduct (*Gebser v. Lago Vista School District*)
- 1999: U.S. Supreme Court narrows the definition of "sexual harassment" to require *Gebser* standard + "severe, pervasive, and objectively offensive" harassment (*Davis v. Monroe County Board of Education*)

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Title IX: *Gebser v. Lago Vista Independent School District (1998)*

A school district can be liable for damages under Title IX for employee-on-student sexual harassment if:

- An official of the school district who at a minimum has authority to institute corrective measures on the district's behalf;
- Has actual notice of the teacher's misconduct; and
- Is deliberately indifferent to the teacher's misconduct

524 U.S. 274 (1998)

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Title IX: *Davis v. Monroe County Board of Education (1999)*

A school district can be liable for damages under Title IX for student-on-student sexual harassment if:

- School board has acted with deliberate indifference to known acts of harassment in its programs or activities (the *Gebser* standard); and
- Sexual harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit

526 U.S. 629 (1999)

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Title IX: OCR Guidance

- 2001: Revised Sexual Harassment Guidance – replaced 1997 guidance to reflect updated U.S. Supreme Court standards
- October 26, 2010: Dear Colleague Letter – clarified the relationship between bullying and discriminatory harassment
- April 4, 2011: Dear Colleague Letter (rescinded) – reinterpreted Title IX as authorizing the federal government to dictate specific procedures for student-on-student sexual assault on college campuses

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Title IX: OCR Guidance

- April 29, 2014: Q&A on Title IX and Sexual Violence (rescinded) – provided guidance on legal obligations in addressing sexual violence on college campuses
- April 24, 2015 Dear Colleague Letter and Resource Guide – provided guidance on responsibilities of Title IX coordinators
- May 13, 2016: Dear Colleague Letter (rescinded) – provided guidance to schools regarding transgender students

Title IX: OCR Guidance

- September 22, 2017: Dear Colleague Letter – withdrew April 2011 DCL and April 2014 Q&A
- September 22, 2017: Q&A on Campus Sexual Misconduct

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May 2020 Title IX Regulations
Sexual Harassment

Title IX Regulations – Sexual Harassment

- On May 6, 2020, the U.S. DOE released its long-awaited final rule amending Title IX regulations (34 C.F.R. Part 106)
- Effective **August 14, 2020**
- Significant changes to the Title IX grievance procedure and, thus, the way schools handle Title IX sexual harassment complaints

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Title IX Regulations: General Overview

School district can violate Title IX when "sexual harassment" occurs:

- In a district's education program or activity; *i.e.*, locations, events, or circumstances where the district has substantial control over the alleged harasser and the context in which the alleged conduct occurred;
- By any person, against any person in the United States;
- ***Any*** district employee has notice of the allegations of sexual harassment ("actual knowledge"); and
- The district is deliberately indifferent in its response

34 C.F.R. § 106.30(a)

What Has **Not** Changed?

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What Has **Not** Changed?

- Obligation to investigate allegations of sexual misconduct
  - Previously, districts investigated allegations under Board Policy 2:260, *Uniform Grievance Procedure*; or Board Policy 7:180, *Prevention of and Response to Bullying, Intimidation, and Harassment*
- Title IX investigations of allegations not relating to sexual harassment
- Rules regarding athletic participation, employment, and single-sex education

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What **Has** Changed?

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What **Has** Changed?

For Title IX Sexual Harassment:

- Terminology and Definitions
- Policy, Notice, and Website Posting Requirements
- Grievance Procedure and Investigation Process
- Notice to and Opportunities for Exchange and Review of Evidence by Parties

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Terminology

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Terminology

- Sexual Harassment
- Education Program or Activity
- Title IX Coordinator
- Actual Knowledge
- Deliberate Indifference
- Complainant
- Respondent
- Report of Sexual Harassment
- Formal Complaint
- Supportive Measures

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Sexual Harassment

- Previously, Title IX regulations did not refer to or define "sexual harassment"
- Amended Title IX regulations explicitly define sexual harassment and establish detailed procedures for how school districts must respond to allegations of sexual harassment

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Sexual Harassment is defined as conduct on the basis of sex that satisfies one of more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the 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 the person equal access to the district's education program or activity (*hostile environment*); 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)

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Sexual Harassment

Previous OCR Guidance	Amended Title IX Regulations
• Unwelcome conduct	• Unwelcome conduct
• Determined by a reasonable person	• Determined by a reasonable person
• Severe, pervasive, **or** persistent and to **interfere with or limit** a student's ability to participate in or benefit from school services, activities, or opportunities	• So severe, pervasive, **and** objectively offensive that it **effectively denies** a person's equal access to the educational program or activity

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Sexual Harassment

- "Sexual Assault" defined as forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation (20 U.S.C. 1092(f)(6)(A)(v))
- "Dating Violence" defined as violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim; and where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship, the type of relationship, the frequency of interaction between the persons involved in the relationship (34 U.S.C. 12291(a)(10))

Sexual Harassment

- "Domestic Violence" 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 domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction (34 U.S.C. 12291(a)(8))

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Sexual Harassment

- "Stalking" defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress (34 U.S.C. 12291(a)(30))

Sexual Harassment

Examples:

- Touching
- Crude jokes or pictures
- Discussions of sexual experiences
- Teasing related to sexual characteristics
- Spreading rumors related to a person's alleged sexual activities
- Rape
- Sexual battery
- Sexual abuse
- Sexual coercion

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Education Program or Activity

- Schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States
  - Example: District-sponsored trip abroad?
- For K-12 purposes, an *education program or activity* includes any location, event, or circumstance over which the district exhibits substantial control over both the alleged harasser and the context in which the harassment occurred
  - Examples: school, field trip, extracurricular activity

34 C.F.R. § 106.44(a)

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Education Program or Activity

- Concern that narrowly defining the scope of districts' duty to respond to sexual harassment could ignore impact of technology and impact districts' obligations to address bullying or cyber-harassment based on state legislation
- In response, OCR issued commentary addressing this concern

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"[S]exual harassment definition does not make sexual harassment dependent on the method by which the harassment is carried out; use of e-mail, the internet, or other technologies may constitute sexual harassment as much as use of in-person, postal mail, handwritten, or other communications."

U.S. Dep't of Educ., OCR, *Title IX Regulations Addressing Sexual Harassment (Unofficial Copy)*, (May 6, 2020), www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf (p. 441-442)

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Title IX Coordinator

- Amended Title IX regulations require districts to designate and "authorize" an employee to coordinate the district's efforts to implement the law
- The employee is to be identified as the "Title IX Coordinator"
  - PRESS Policies updated to include "Nondiscrimination Coordinator/Title IX Coordinator"

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Title IX Coordinator

- Typically, districts do not employ a full-time Title IX Coordinator
- Designated employee(s) usually combine Title IX Coordinator responsibilities with other assigned duties
- Consider adding "Title IX Coordinator" to existing job title of currently designated employee(s) and reviewing job duties to ensure sufficient authority and time to carry out role

Actual Knowledge

- A recipient (district) with **actual knowledge** of sexual harassment in an education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent
- Expanded to notice of sexual harassment or allegations of sexual harassment to ***any*** employee for K-12
- Notice also can include report of sexual harassment to Title IX Coordinator

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Actual Knowledge

Previous OCR Guidance	Amended Title IX Regulations
A school has a responsibility to respond promptly and effectively if a school **knows or should have known** about sexual harassment	A school with **actual knowledge** of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent For K-12 educational institutions, actual knowledge of sexual harassment is defined as notice of sexual harassment or allegations of sexual harassment to ***any*** employee

34 C.F.R. § 106.30(a)

Deliberate Indifference

- A recipient with actual knowledge of sexual harassment in an education program or activity against a person in the United States **must respond promptly and in a manner that is not deliberately indifferent**
- Adopts *Gebser/Davis* standard – a higher legal standard (used in litigation for damages in federal court) than current OCR standard

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Deliberate Indifference

Previous OCR Guidance	Amended Title IX Regulations
The district must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects	The district is "deliberately indifferent" only if its response is clearly unreasonable in light of the known circumstances

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Deliberate Indifference

District's response must:

- Be prompt
- Treat Complainants and Respondents equitably
- Inform Complainant of supportive measures and process for filing a Formal Complaint, by Title IX Coordinator
- Follow Title IX grievance process

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Complainant

- An individual who is alleged to be the victim of conduct that could constitute sexual harassment
- May or may not be the individual who reported the allegation of sexual harassment to the Title IX Coordinator or any district employee
- May file Formal Complaint with the Title IX Coordinator

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Respondent

- An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
- District must have substantial control over the Respondent (alleged harasser) and the context in which the alleged conduct occurred

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Report of Sexual Harassment

- Any person may report sexual harassment, whether or not the person reporting is the person alleged to be the victim of the conduct that could constitute sexual harassment
- May be in person, mail, phone, email, or by any means that results in the Title IX Coordinator receiving the report
- May be made at any time, including during non-business hours
- May be verbal or written, and may be anonymous
- To the Title IX Coordinator or ***any*** district employee
- District employees must promptly forward all reports of sexual harassment to the Title IX Coordinator

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Formal Complaint

- 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
- May be filed with the Title IX Coordinator in person, mail, email, or any other method made available by a district; may be a hard copy or electronic document
- Must contain the Complainant's physical or digital signature, or otherwise indicate that the Complainant is the person filing the Formal Complaint
- If the Title IX Coordinator signs the Formal Complaint, he/she does not become the Complainant or otherwise a party to the complaint
- At the time a Formal Complaint is filed, the Complainant must be participating in or attempting to participate in a district's education program or activity

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Supportive Measures

- Purpose is to restore or preserve equal access to the district's education program or activity without ***unreasonably*** burdening the other party
- Include measures designed to protect safety of all parties or district's educational environment, or deter sexual harassment
- Non-disciplinary, non-punitive measures
  - Removing Respondent from an activity may be considered *unreasonably* burdensome and punitive, unless an "emergency removal"

Supportive Measures

Previous OCR Guidance	Amended Title IX Regulations
• Used terms such as "interim measures" or "interim steps" to describe measures to help a complainant maintain equal educational access	• Now called "supportive measures"
• Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents	• **Non-punitive**, individualized services, offered as appropriate and without charge to **a Complainant or a Respondent** before or after the filling of a Formal Complaint, or where no Formal Complaint has been filed

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Supportive Measures

Examples:

- Counseling services
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Hall escort
- Mutual restrictions on contact between parties
- Changes in work/school locations
- Leaves of absences
- Increased supervision of certain school areas

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Policy and Notice Requirements

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Notice of Policy and Procedures

- Must provide notice of district's nondiscrimination policy and grievance procedures—including how to report/file a complaint of sex discrimination or sexual harassment and how district will respond—to the following groups:
  - Students
  - Parents/Legal Guardians
  - Employees
  - Unions or professional organizations holding agreements with the district
  - Applicants for employment

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Notice of Policy and Procedures

- Notice must indicate:
  - The district does not discriminate on the basis of sex in the education program or activity it operates and employment, and that it is required by Title IX and its regulations not to discriminate in such a manner
  - Inquiries about the application of Title IX and its regulations may be referred to Title IX Coordinator
- Must publish notice of nondiscrimination/Title IX Coordinator's contact information (name, title, address, phone number, email) on the district's website and in any handbook to persons entitled to notification

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Notice of Policy and Procedures

- Relevant Board Policies
  - 2:260, *Uniform Grievance Procedure*
  - 2:265, *Title IX Sexual Harassment Grievance Procedure* – NEW
    - 2:265-AP1, *Title IX Sexual Harassment Response* – NEW
    - 2:265-AP2, *Formal Title IX Sexual Harassment Complaint Grievance Procedure* – NEW
    - 2:265-E, *Title IX Sexual Harassment Glossary of Terms* – NEW
  - 5:10, *Equal Employment Opportunity*
  - 5:20, *Workplace Harassment Prohibited*
  - 5:90, *Abused and Neglected Child Reporting*
  - 7:10, *Equal Educational Opportunities*
  - 7:20, *Harassment of Students Prohibited*
  - 7:180, *Prevention of and Response to Bullying, Intimidation, and Harassment*
  - 7:185, *Teen Dating Violence Prohibited*
  - 7:190, *Student Behavior*

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Title IX Sexual Harassment Grievance Process

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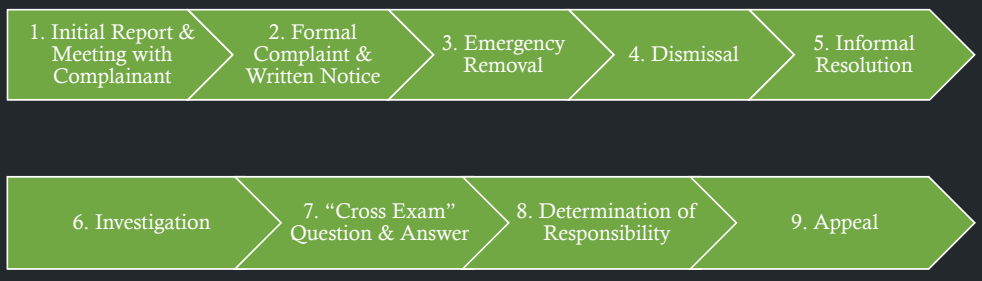
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Title IX Grievance Process

- District must comply with the Title IX sexual harassment grievance procedure **before** imposing any disciplinary consequences or other actions against a Respondent
- Two-fold district response:
  - (1) Response upon "actual knowledge" of allegation
  - (2) Response upon receiving/filing Formal Complaint – requires specific procedures for investigating, dismissal, and determining responsibility

34 C.F.R. § § 106.44, 106.45

Title IX Grievance Process



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Title IX Grievance Process: Roles

- **Title IX Coordinator**: Individual authorized to coordinate the district's compliance efforts with Title IX
- **Investigator**: Individual designated by the Title IX Coordinator to investigate a Formal Title IX Sexual Harassment Complaint
- **Initial Decision-Maker**: Individual designated by the Title IX Coordinator to reach a determination regarding responsibility in a Formal Title IX Sexual Harassment Complaint
- **Appellate Decision-Maker:** Individual/group that reviews an appeal of the Initial Decision-Maker's determination of responsibility or the dismissal of a Formal Complaint (or allegations therein)

34 C.F.R. § 106.45

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Title IX Grievance Process: Basic Requirements

- Treat Complainant and Respondent equitably
- Require an objective evaluation of all *relevant* evidence
- Require that Title IX Coordinator, Investigator, Decision-Maker, or any person designated to facilitate an informal process:
  - Not have a conflict of interest or bias for/against complainants or respondents generally or an individual Complainant/Respondent
  - Receive training on definition of sexual harassment, scope of district's education program or activity, how to conduct an investigation and the grievance process, and how to serve impartially
- Individuals in Title IX roles receive required training

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Title IX Grievance Process: Basic Requirements

- Presumption that the Respondent is not responsible for the alleged conduct until conclusion of grievance process
- Reasonably prompt timeframes for conclusion of the grievance process
  - Including for filing and resolving appeals and informal resolution processes
  - Account for temporary delays based on good cause (*e.g.*, law enforcement involvement, absences of party/witness/advisor, translation or accommodations needs)
  - Provide written notice to both parties explaining delay
  - PRESS Policy 2:265-AP2 requires grievance procedure completed within 90 school business days

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Title IX Grievance Process: Basic Requirements

- Describe the range of all possible disciplinary outcomes and remedies that may be implemented following a determination of responsibility
  - Examples: detention, in-school suspension, out-of-school suspension, alternative placement, expulsion (Board Policies 7:190, 7:200, 7:210); suspension with or without pay (consistent with applicable Board Policy and CBA)
- State whether the district uses a preponderance of evidence or clear and convincing evidence standard to determine responsibility
  - PRESS Policy 2:265 uses the *preponderance of evidence* standard (greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force); boards have the option as to which standard to use

34 C.F.R. § 106.45

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Title IX Grievance Process: Basic Requirements

- Identify appeal procedures for Complainant and Respondent
- Describe available supportive measures available to Complainant and Respondent
- Prohibit the use of evidence or questions seeking legally privileged information, unless privilege waived
  - Examples: attorney-client privilege, doctor-patient privilege

34 C.F.R. § 106.45

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Step 1

1. Initial Report & Meeting with Complainant → 2. Formal Complaint & Written Notice → 3. Emergency Removal → 4. Dismissal → 5. Informal Resolution

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Reporting Allegations of Sexual Harassment

Who?	How?	When?
Any person may report sex discrimination, including sexual harassment, regardless of whether the person is the alleged victim of the reported conduct	In person, by mail, by telephone, or by email to the Title IX Coordinator By any other means that results in the Title IX Coordinator receiving the report May be verbal or written May be anonymous	Any time, including non-business hours

34 C.F.R. § 106.8(a)

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Reporting Allegations of Sexual Harassment

REMEMBER –

- District has **actual knowledge** of sexual harassment once **any** employee receives a report of alleged sexual harassment.
- Train all employees (staff, contractors, volunteers) to notify the building administrator and Title IX Coordinator immediately upon receiving report of alleged sexual harassment
  - Failure to make or forward a report up the chain of authority may result in employee discipline
- Immediately report to DCFS if allegation raises suspicion of child abuse or neglect

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Initial Response

- District must treat Complainants and Respondents equitably
- Offer supportive measures to both Complainant and Respondent
- Follow grievance process before imposing disciplinary measures on Respondent

34 C.F.R. § 106.44

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Initial Meeting with Complainant

Upon notice/report of the sexual harassment allegation, Title IX Coordinator must promptly:

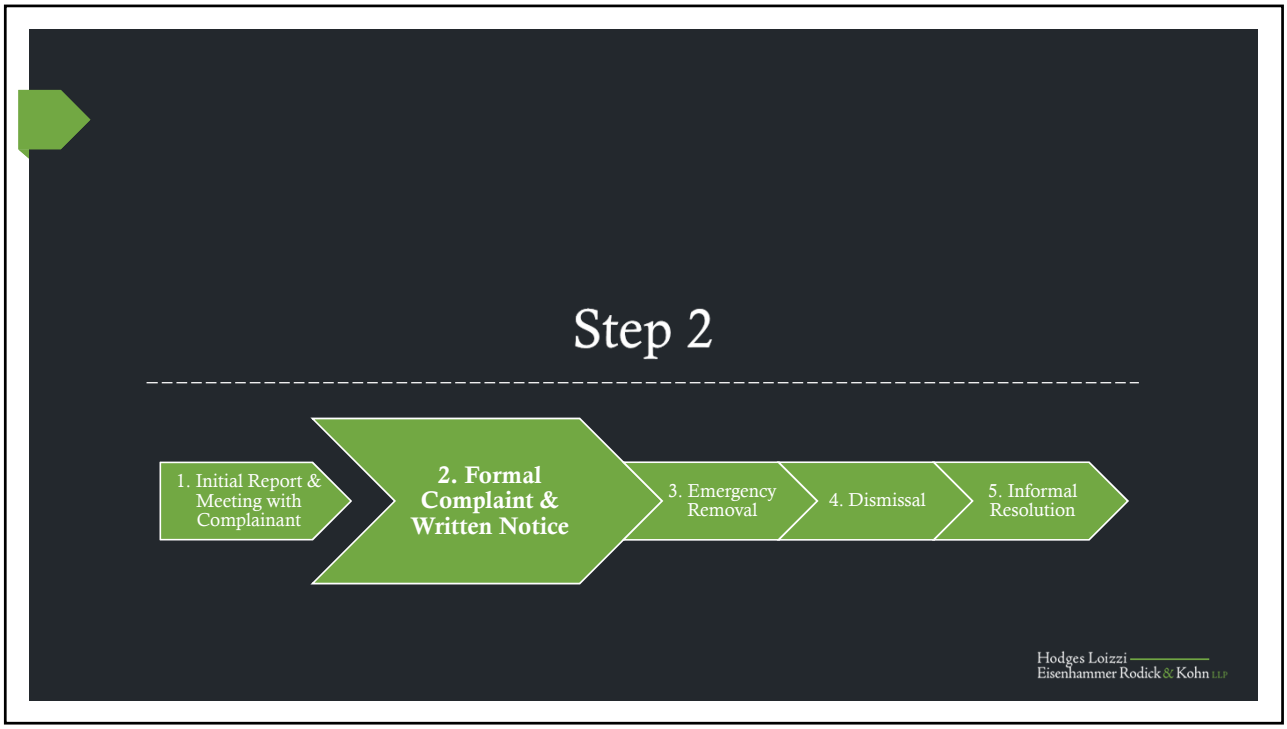
- Contact the Complainant (alleged victim) to discuss the availability of supportive measures
- Consider the Complainant's wishes with respect to supportive measures
- Inform the Complainant of the availability of supportive measures with or without the filing of a Formal Complaint
- Explain the process for filing a Formal Complaint

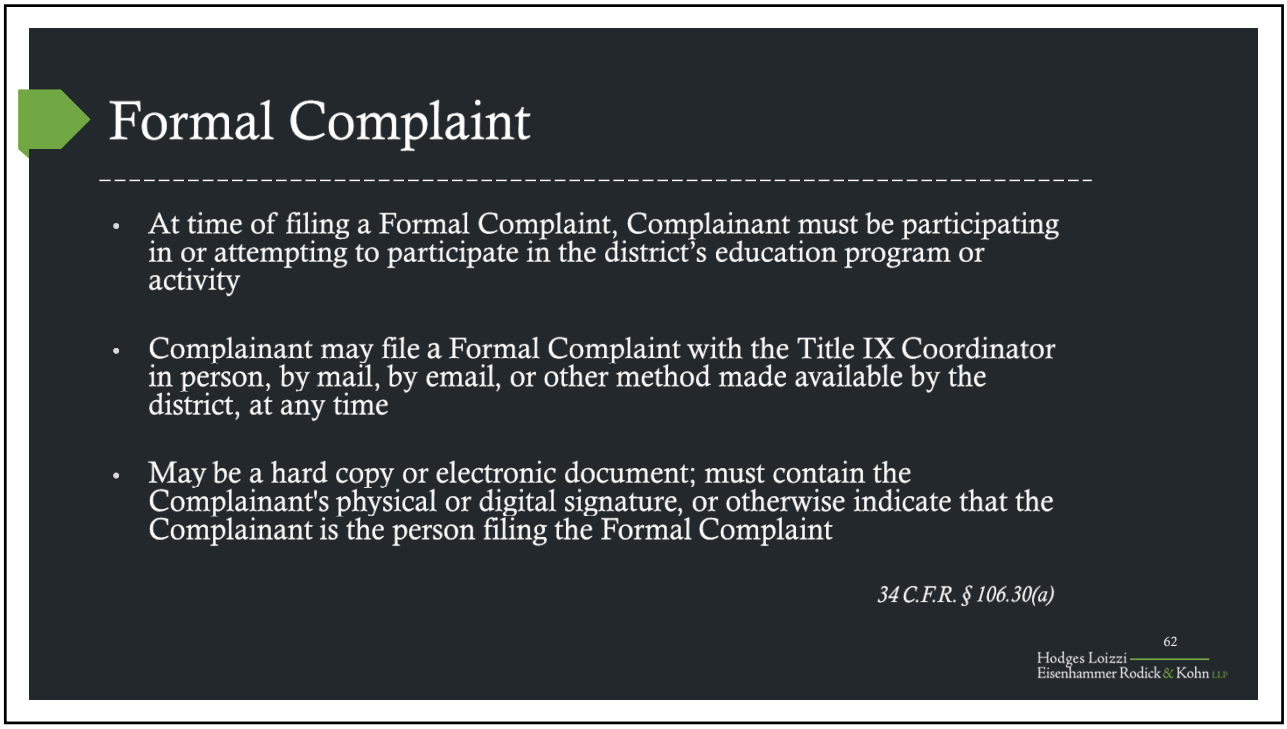
34 C.F.R. §§ 106.30(a), 106.44(a)

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Filing a Formal Complaint

- Third party reporter **cannot** file a Formal Complaint
- However, Title IX Coordinator may sign a complaint to trigger investigation to ensure district is not responding with "deliberate indifference"
  - If the Title IX Coordinator signs the Formal Complaint, s/he does not become the Complainant or otherwise a party to the complaint
- May entail implementing the formal grievance process over the Complainant's objections

34 C.F.R. § 106.30(a)

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Consolidation of Formal Complaints

Title IX regulations provide wide latitude to districts to consolidate Formal Complaints where the allegations arise out of the same facts or circumstances:

- Against more than one Respondent
- By more than one Complainant against one or more Respondents
- By one party against another party

34 C.F.R. § 106.45(b)(4)

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Written Notice of Formal Complaint

- Upon receipt of (or signing) a Formal Complaint, the district must provide written notice to **all known parties** in sufficient time to give the Respondent time to prepare a response ***before*** any initial interview

34 C.F.R. § 106.45(b)(2)

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Written Notice of Formal Complaint

Written notice must include:

- Notice of grievance process, including any informal resolution process
- Notice of allegations, including sufficient detail to allow Respondent to prepare a response
  - Identities of parties, if known
  - Conduct alleged to be sexual harassment
  - Date and location of conduct, if known

34 C.F.R. § 106.45(b)(2)

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Written Notice of Formal Complaint

- Statement that the Respondent is presumed not responsible for the conduct and that responsibility will be determined at the conclusion of the grievance process
- Notice of the parties' right to have an advisor of their choice (may be an attorney) **and to inspect and review evidence**
- Notice of any provision in the district's code of conduct (*e.g.*, Board Policy 7:190) that prohibits knowingly making false statements or providing false information in the grievance process

34 C.F.R. § 106.45(b)(2)

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Written Notice of Formal Complaint

- District must provide additional written notice(s) to all parties if, during the investigation, the district decides to investigate allegations not included in the first written notice
- Decide whether the district will conduct investigation or appoint a qualified investigator (*best practice*: provide written notice of investigator if appointed)

34 C.F.R. § 106.45(b)(2)

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Complainant/Respondent Identity Unknown

- Possible scenarios:
  - Third party reports allegation of sexual harassment but does not reveal Complainant's identity
  - Complainant reports allegation anonymously
  - Complainant does not know Respondent's identity
- If unknown, written notice need not include the Complainant's or Respondent's identity
- If Complainant's or Respondent's identity later discovered, provide another written notice to all parties

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Step 3



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Emergency Removal

District may remove Respondent from the education program or activity on an emergency basis to protect a student or other individual from "an immediate threat to physical health or safety" ***after*** an individualized safety and risk analysis

- Must provide Respondent with notice and opportunity to challenge decision immediately following the removal (*best practice*: written notice)
- Interaction with SB 100 for Respondent-Student: must follow 105 ILCS 5/10-22.6
- Remember IDEA and Section 504 rights: emergency removal can trigger "change of placement" for Respondent-Student
- District may place Respondent-Employee on administrative leave during the pendency of a grievance process

34 C.F.R. § 106.44

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Step 4

1. Initial Report & Meeting with Complainant
2. Formal Complaint & Written Notice
3. Emergency Removal
4. **Dismissal**
5. Informal Resolution

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Dismissal of Formal Complaint

- Amended Title IX regulations establish mandatory and discretionary reasons a Title IX sexual harassment Formal Complaint, or an allegation therein, may be dismissed during or after an investigation
- If district dismisses a Formal Complaint, **written notice** must be promptly provided to both parties simultaneously, including the reasons for mandatory or discretionary dismissal, and the right to appeal the dismissal

34 C.F.R. § 106.45(b)(3)

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Dismissal of Formal Complaint

Mandatory Dismissal – After Investigation	Discretionary Dismissal – During Investigation
• If the conduct would not constitute sexual harassment as defined by the Title IX regulations, even if proved	• If Complainant notifies the Title IX Coordinator at any time that s/he wishes to withdraw the Formal Complaint or any allegation therein
• If the conduct did not occur in the district's program or activity	• If Respondent is no longer enrolled in or employed by the district
• If allegations did not occur against a person in the United States	• If specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the Formal Complaint or any allegation therein (*e.g.*, passage of several years between Formal Complaint and alleged conduct; Complainant ceases to cooperate with grievance process)

34 C.F.R. § 106.45(b)(3)

Note: Dismissal under Title IX does <u>not</u> preclude required action under another law or Board policy

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Dismissal of Formal Complaint

- Analysis Standard: Accepting all facts alleged in the Formal Complaint as true, the allegations still do not meet the definition of "sexual harassment"
- Must document rationale for dismissal to show that district is not acting in a deliberately indifferent manner
- If dismissing Formal Complaint, but investigating allegation(s) under different process, *e.g.*, 2:260 or 7:180, include in written notice

Step 5

1. Initial Report & Meeting with Complainant
2. Formal Complaint & Written Notice
3. Emergency Removal
4. Dismissal
5. **Informal Resolution**

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Informal Resolution Process

- Prohibited unless Formal Complaint is filed
- Allowed at any time after a Formal Complaint is filed and during the grievance process, prior to reaching a determination regarding responsibility
- Cannot involve a full investigation and adjudication of the allegations
- Cannot be offered for a complaint alleging that an employee harassed a student
- Not defined, but may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice

34 C.F.R. § 106.45(b)(9)

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Informal Resolution Process: Requirements

- Written notice to both parties disclosing:
  - Allegations
  - Informal resolution process requirements
    - Including the circumstances where parties are precluded from resuming a Formal Title IX Sexual Harassment 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 for the Formal Title IX Sexual Harassment Complaint
  - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- Both parties provide voluntary, written consent

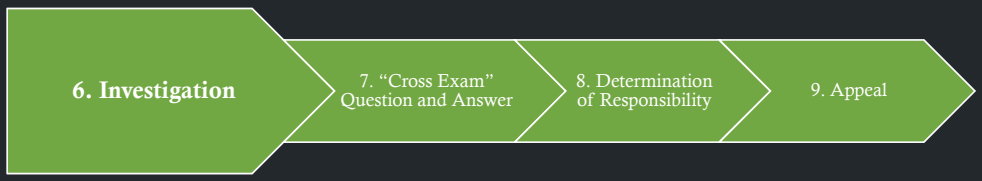
34 C.F.R. §§ 106.45(b)(9)(1), (2)

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Step 6



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Title IX Investigation Requirements

When investigating a complaint and throughout the grievance process, the Investigator must:

- Ensure that burden of proof and of gathering evidence rests on the district, rather than parties
- Provide an equal opportunity for parties to present witnesses and evidence (fact and expert witnesses; inculpatory and exculpatory evidence)
- Not restrict either party's ability to discuss the allegations or gather and present evidence

34 C.F.R. §§ 106.45(b)(5)(a)-(c)

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Title IX Investigation Requirements

- Provide the parties with the same opportunities to have others present during interviews and other parts of the grievance process, including an advisor/attorney of their choice
- Provide, to a party who is invited or expected to attend, written notice of date, time, participants, purpose, and location of any investigative interviews or other meetings, with sufficient time to allow the party to prepare to participate

34 C.F.R. §§ 106.45(b)(5)(d), (e)

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Title IX Investigation Requirements

- Provide the parties (and their advisors/attorneys, if any) an equal opportunity to inspect and review any evidence obtained **during the investigation** that is directly related to the allegations in the Formal Complaint (*including* evidence the district does *not* intend to rely on in reaching a determination regarding responsibility, and inculpatory or exculpatory evidence)

34 C.F.R. § 106.45(b)(5)(f)

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Title IX Investigation Requirements

- Prior to the completion of the investigation report, send to each party (and the party's advisor/attorney, if any) the evidence subject to inspection and review in an electronic format or a hard copy
- Provide each party with **10 days** to submit a written response
- Upon receipt of a party's written response to the evidence, review the response and send a copy to the other party

34 C.F.R. § 106.45(b)(5)(f)

Note: PRESS 2:265-AP2 specifies 10 school business days so all days within the policy and procedures are "school business days"

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Title IX Investigation Requirements

- Prepare an investigation report that fairly summarizes all relevant evidence
- Send the investigation report to each party (and the party's advisor/attorney, if any) the investigation report, in an electronic format or hard copy, for their review and written response
- The investigation report must be sent to the parties **10 days** before the Initial Decision-Maker's determination regarding responsibility

34 C.F.R. § 106.45(b)(5)(g)

Note: PRESS 2:265-AP2 specifies 10 school business days so all days within the policy and procedures are "school business days"

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Title IX Investigation Requirements

- At the conclusion of the investigation, Investigator sends to the Initial Decision-Maker in an electronic format or hard copy:
  - Formal Complaint;
  - All evidence gathered during the investigation that is directly related to the Formal Complaint's allegations (including evidence the district does not intend to rely on in reaching a determination regarding responsibility, and inculpatory or exculpatory evidence); and
  - Investigation report with any written response received from the parties

34 C.F.R. § 106.45(b)(5)(g)

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Title IX Investigation Best Practices

- Beginning an Investigation
- Conducting the Investigation
- Collecting Evidence

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Beginning an Investigation

- Review the allegations in the initial report and Formal Complaint
- Determine nature of the allegations:
  - "Sexual harassment" (proceed with procedures under Board Policy 2:265)
  - Harassment/discrimination on another basis (proceed with procedures under Board Policy 2:260)
  - Bullying (proceed with procedures under Board Policy 7:180)

Beginning an Investigation

- Title IX Coordinator can investigate the Formal Complaint or appoint a qualified person to conduct the investigation
- Investigator should **not** be:
  - Individual with close relationship with Complainant or Respondent
  - Teacher or non-supervisory employee

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Title IX Roles

	Title IX Coordinator	Investigator(s)	Initial Decision-Maker(s)	Appellate Decision-Maker(s)
Investigator(s)	●	●	✕	✕
Initial Decision-Maker(s)	✕	✕	●	✕
Appellate Decision-Maker(s)	✕	✕	✕	●
Informal Resolution Facilitators	✕	✕	✕	✕

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Conducting Investigation: General Guidelines for Interviews

- Consider writing out questions or interview target topics prior to the interview
- Take your time during the interview
- Take notes during the interview; inform interviewees that you will be taking notes
- Do not audio or video record interviews
- Take note of the interviewee's mannerisms

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Conducting Investigation: General Guidelines for Interviews

- Start with open-ended questions to obtain what the interviewee knows
  - Follow up with specific questions about what was stated by the Complainant, Respondent, and witnesses
- Obtain sufficient details for each relevant incident, including:
  - Date and time
  - Location
  - Who was present
  - A detailed description of what occurred
  - Reaction(s) to the incident
- Follow up with Complainant, Respondent, or other witnesses, if necessary

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Conducting Investigation: Interviewing the Complainant

- This should be the first interview the district conducts
- Provide written notice of date, time, location, participants, and purpose of interview
- Provide the Complainant with a copy of applicable Board of Education policies/procedures
- Complainant may have any other person s/he wishes present during interview, including attorney/advisor

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Conducting Investigation: Interviewing the Complainant

- Ask the Complainant why s/he is reporting the incident, specifics regarding the incident
- Consider whether any precautions need to be taken during the investigation; if any additional supportive measures put in place
- Advise the Complainant to contact Title IX Coordinator if any further incidents occur

Conducting Investigation: Interviewing Other Witnesses

- Provide written notice of date, time, location, participants, and purpose of interview
- Let the witness know he/she is not the target of the investigation

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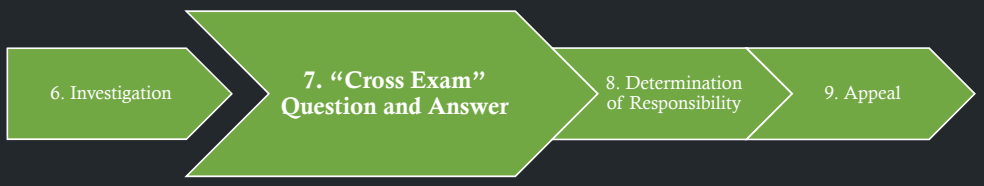
Conducting Investigation: Interviewing the Respondent

- Provide written notice of date, time, location, participants, and purpose of interview
- Provide Respondent with a copy of applicable Board of Education policies/procedures
- Respondent may have any other person s/he wishes present during interview, including attorney/advisor

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Step 7



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Initial Decision-Maker

- **Cannot** be the Investigator or the Title IX Coordinator
- Reviews from Investigator:
  - Formal Complaint;
  - All evidence gathered during the investigation that is directly related to the Formal Complaint's allegations (including evidence the district does not intend to rely on in reaching a determination regarding responsibility, and inculpatory or exculpatory evidence); and
  - Investigation report, with any written response received from the parties
- Facilitates "cross examination" question and answer among parties
- Issues a written determination to the parties

34 C.F.R. § 106.45(b)(7)

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Hearings

- Districts are **not** required to conduct live hearings
- Instead, districts must provide each party the opportunity, after the completion of the investigation report, 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

34 C.F.R. § 106.45(b)(6)

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"Cross Examination" Question & Answer

The Initial Decision-Maker:

- Provides the parties with **written notice** of the opportunity to submit written, relevant questions that a party wants asked of any party or witness; include description of the process and timelines
- Determines which questions to forward to any party or witness for answers
- If any proposed questions are excluded as not relevant, provides the proposing party with a written explanation of the decision to exclude a question as not relevant
    - Questions regarding a Complainant's prior sexual behavior or sexual predisposition are not relevant, unless such questions and evidence are offered to establish that another person committed alleged conduct or that conduct was consensual

34 C.F.R. § 106.45(b)(6)

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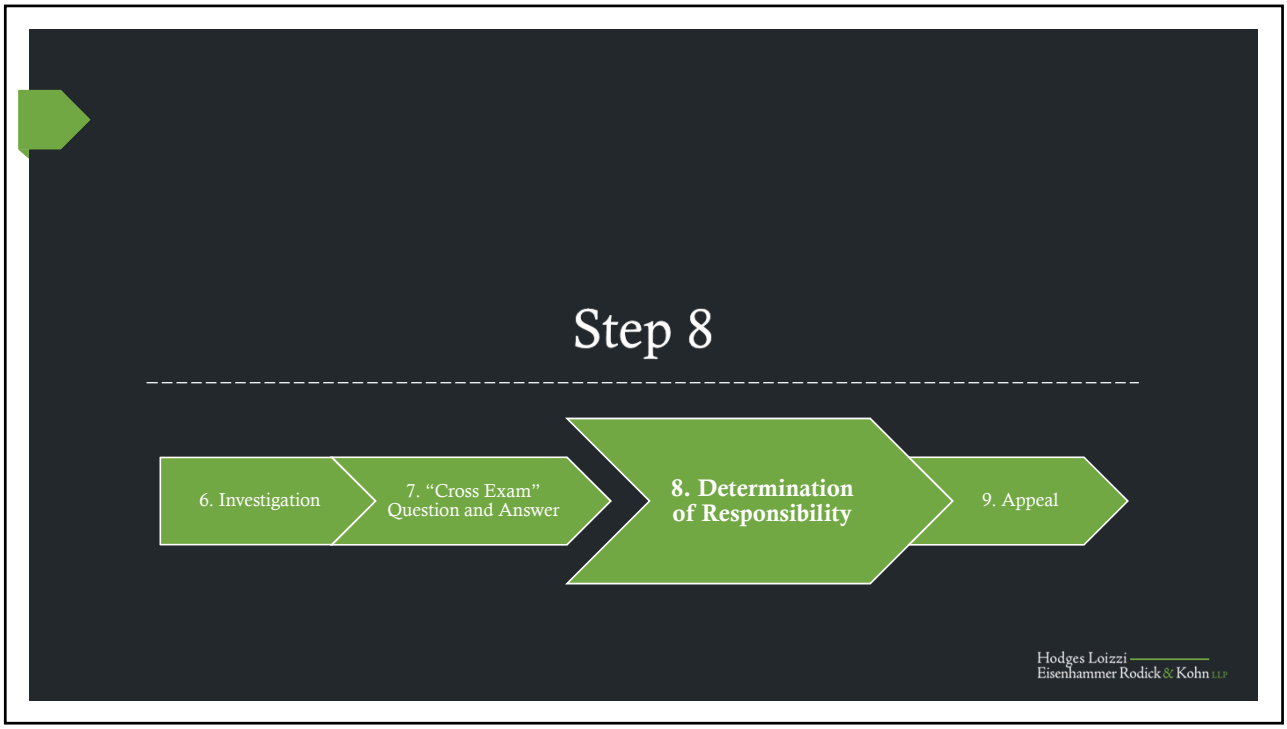
"Cross Examination" Question & Answer

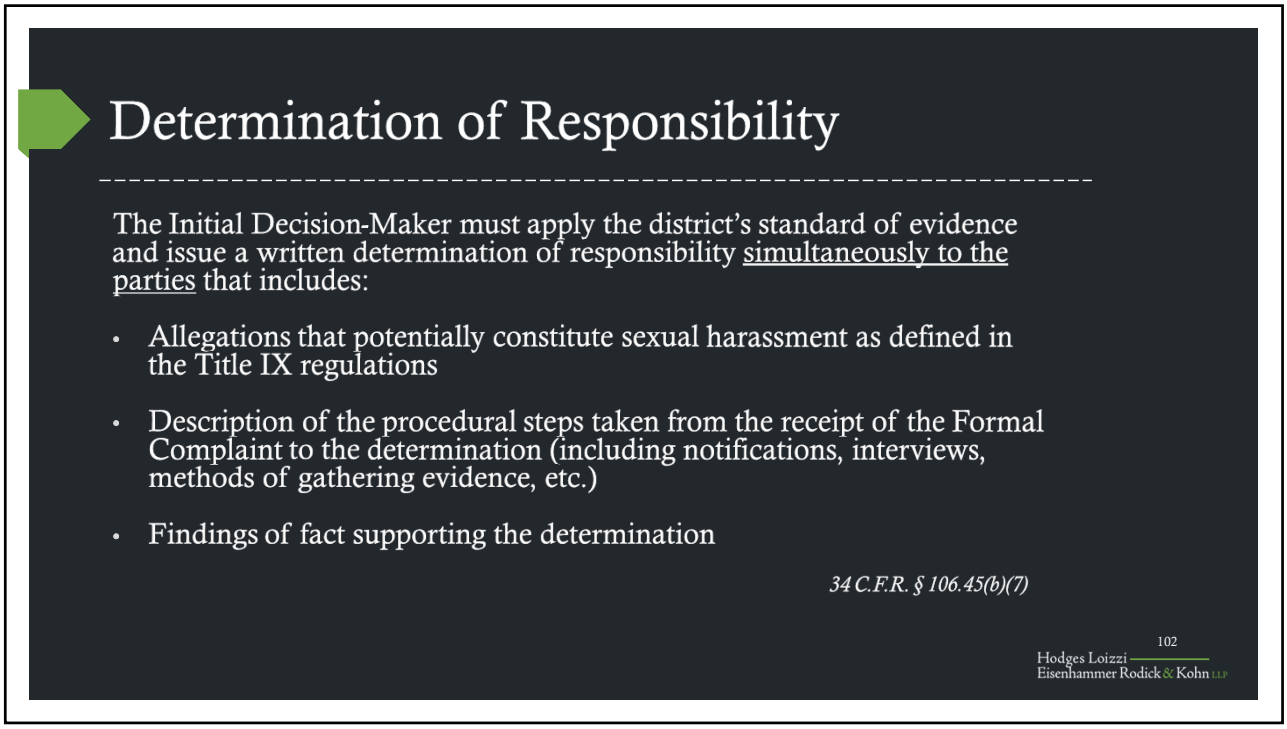
- Forwards relevant questions to any party or witness with instructions to submit answers to the Initial Decision-Maker
- Upon receipt of answers to questions, provides each party with copies of the answers
- Follows the same process for the additional, limited follow-up questions from each party
- Timelines are not specified in the Title IX regulations; PRESS 2:265-AP2 uses 5 school business days for each step

34 C.F.R. § 106.45(b)(6)

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Determination of Responsibility

Written Determination, continued:

- Conclusions regarding application of the code of conduct to the facts
- Statement of, and a rationale for, the result as to each allegation, including:
  - A determination of responsibility;
  - Any disciplinary sanctions imposed on 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
- Procedures and permissible bases for the Complainant or Respondent to appeal

34 C.F.R. § 106.45(b)(7)

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Evaluating Evidence

- Review all evidence from investigation, including the investigation report and responses from the parties, as well as additional information from the "cross examination" question and answer process
- Is there a pattern of conduct that would tend to support the allegations?
- Do not end the inquiry simply because no corroborating evidence can be found
- Make reasoned conclusions as to the evidence, including making reasoned judgments as to the parties' credibility

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Reporting Determination of Responsibility

- Depending on the severity of the allegation(s), the determination of responsibility report should be prepared with the help of legal counsel
- Be aware that the report may become discoverable in subsequent litigation
- Keep the report, investigation file, and related documents as confidential as much as possible
- Disclose the report on a need-to-know basis; but must be sent to all parties simultaneously
- Title IX Coordinator is responsible for effective implementation of any remedies

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Step 9

6. Investigation → 7. "Cross Exam" Question and Answer → 8. Determination of Responsibility → **9. Appeal**

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Appeal

- Must offer to both parties for dismissal of Formal Complaint, or allegations therein, and determinations of responsibility in specified circumstances:
  - Procedural irregularity
  - New evidence now available that could affect the outcome and was not reasonably available at the time of the determination
  - Conflict of interest or bias of the Title IX Coordinator, Investigator, or Decision-Maker
- District may offer other bases for appeal

Appeal

Title IX Coordinator, upon receipt of an appeal:

- Issues written notice to both parties:
  - Informing the parties that an appeal has been filed
  - Provides both parties a specified amount of time to submit a written statement in support of, or challenging, the outcome
- Promptly forwards all materials relevant to the appeal to the Appellate Decision-Maker

34 C.F.R. § 106.45(b)(8)(3)

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Appeal

- Appellate Decision-Maker: Board of Education or Board-appointed examiner (individual or group)
  - Must be different from Title IX Coordinator, Investigator, and Initial Decision-Maker
- Decides whether to affirm, reverse, or amend the Initial Decision-Maker's written determination regarding responsibility or the dismissal
- Issues written decision describing the result of the appeal and the rationale for the result
- Written decision must be provided simultaneously to both parties

34 C.F.R. § 106.45(b)(8)(3)

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Appeal

- Timelines are not specified in the Title IX regulations
- PRESS 2:265-AP2 uses:
  - 10 school business days as the deadline for filing an appeal, in writing, with the Title IX Coordinator by the Complainant or Respondent after receipt of the Initial Decision-Maker's written determination or the notice of dismissal
  - 30 school business days for the Appellate Decision-Maker to make its decision
  - 5 school business days after the Appellate Decision-Maker's decision to send the written decision to both parties

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Appeal

Previous OCR Guidance	Amended Title IX Regulations

• Not required
• If provided, must be available to both parties
	• Must offer to both parties for dismissal and determinations of responsibility in specified circumstances:
	  ◦ Procedural irregularity
	  ◦ New evidence now available that could affect the outcome and was not reasonably available at the time of the determination
	  ◦ Conflict of interest or bias of the Title IX Coordinator, Investigator, or Decision-Maker
	• District may offer other bases for appeal
	• Appellate Decision-Maker must be different from Title IX Coordinator, Investigator, or Decision-Maker
	• Written notice to both parties required
	• Written decision required

34 C.F.R. § 106.45(b)(8)

Other Requirements

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Retaliation

- Prohibits retaliation by district or any other person against any person for the purpose of interfering with Title IX rights or because the person has participated or refused to participate in any manner in a proceeding under Title IX regulations
- Complaints of retaliation may be addressed under Title IX grievance process (*not* the Title IX sexual harassment grievance procedures; see PRESS Policy 2:260)
- District must keep confidential the identity of a person who made a report or complaint of sexual harassment, including parties and witnesses

34 C.F.R. § 106.71

Retaliation

Does **not** include:

- The exercise of rights protected under the First Amendment
- 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
  - Note: A determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith

34 C.F.R. § 106.71

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Recordkeeping

Must keep records for a minimum of **7 years**:

- Investigation records
- Written determination of responsibility
- Disciplinary sanctions
- Appeal records and written decision
- Any informal resolution records and the result
- All Title IX training materials (posted on website)

34 C.F.R. § 106.45(b)(10)

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Recordkeeping

- Must document district's response to each report of sexual harassment and keep for **7 years**:
  - Records of any actions, including supportive measures, taken in response to a report or Formal Complaint of sexual harassment
  - Why the district's response was not deliberately indifferent
  - That measures were taken to restore or preserve equal access to the district's educational program or activity
  - If no supportive measures provided, why that was not clearly unreasonable under the known circumstances
- Remember student and personnel record requirements under State and federal law

34 C.F.R. § 106.45(b)(10)

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Training

- ***All*** district employees: on the definition of sexual harassment, the scope of the district's education program or activity, all relevant district policies and procedures, and the necessity to promptly forward all reports of sexual harassment to the Nondiscrimination/Title IX Coordinator
- Title IX Coordinator(s), Investigator(s), Decision-Maker(s), or Informal Resolution Process Facilitator(s): same as all district employees **plus** how to conduct an investigation and grievance process, and how to serve impartially
- Investigators: on issues of relevance to create an investigation report that fairly summarizes relevant evidence
- Decision-Makers: 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
- All training materials must be posted on the district's website, if any, or otherwise made available upon request for inspection by members of the public

34 C.F.R. § 106.45(b)(1)

Questions?

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