

# 2020 TITLE IX SEXUAL HARASSMENT REGULATIONS

KANNAPOLIS CITY SCHOOLS  
LEGAL WORKSHOP MAY 11, 2022

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# OVERVIEW

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Title IX Purpose & Definitions

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School District Obligations Under Title IX

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The Players: Title IX Personnel

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Title IX Process Initiation

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Informal Resolution

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Formal Complaint Process

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Appeals Process

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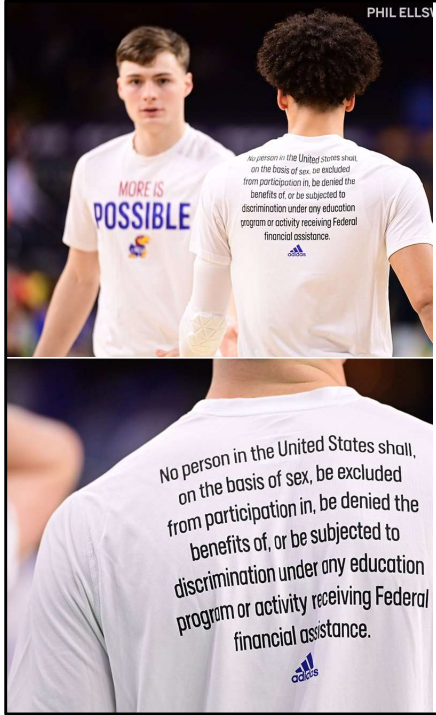
The Intersection of Title IX & Special Education

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Questions

# TITLE IX PURPOSE & DEFINITIONS

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# 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...” 20 U.S. Code §1681

ESPN [@espn]. (2022, April 2). Kansas wore these Title IX shirts before tonight's Final Four game ↓ [Tweet]. Twitter. <https://twitter.com/espn/status/1510392060142305284>

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## “ON THE BASIS OF SEX”

### Now Includes:

- Sexual orientation
- Gender identity

## WHAT'S NEW WITH TITLE IX?

On May 6, 2020, U.S. the Department of Education (DOE) issued final Title IX regulations, which went into effect on August 14, 2020.

1. These regulations made major changes from the Obama-era guidance.
2. New process for handling formal complaints of sexual harassment.
3. New notice, training, and record-keeping requirements.
4. New Board policies needed.
5. More closely align with the U.S. Supreme Court Decisions in *Gebser v. Lago Vista Independent School District* (1998) and *Davis v. Monroe County Board of Education*(1999).

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## SUPREME COURT CASES: WHEN IS A DISTRICT LIABLE FOR SEXUAL HARASSMENT?

### *Gebser v. Lago Vista Independent School District (1998)*

District is liable for harassment when it:

- **Has actual knowledge** of allegations by an “**appropriate person**”; and
- Responds to the allegations so deficiently that it amounts to “**deliberate indifference.**”

### *Davis v. Monroe County Board of Education (1999)*

District is liable for harassment when it:

- Has actual knowledge by an appropriate person;
- Responds with deliberate indifference; **AND**
- The harassing conduct was “**so severe, pervasive, and objectively offensive**” that it **denied the victim equal access to educational opportunities or benefits.**

# RECENT DEVELOPMENTS

Announced DOJ's interpretation that Title IX's prohibition on discrimination "on the basis of sex" includes discrimination on the basis of gender identity and sexual orientation

March 2021: Memorandum from DOJ

OCR stated that it will investigate allegations of discrimination on the basis of sexual orientation or gender identity in education programs or activities.

This includes "allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities."

June 2021: DOE Notice of Interpretation

April 2021: DOE Letter to Students, Educators, & Stakeholders

Outlines the steps DOE will take to carry out Exec. Order No. 14021, including: 1) immediate and comprehensive review of OCR guidance on LGBTQ+ issues; 2) plans for a public hearing to hear from interested parties of sexual harassment, including sexual violence, and discrimination based on sexual orientation and gender identity; 3) plans to issue a Q&A document about DOE's new Title IX Regulations; and 4) notice of anticipated rulemaking to amend those new Title IX Regulations

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**Policy Code: 1725/4035/7236 Title IX Sexual Harassment – Prohibited Conduct and Reporting Process**

The board acknowledges the dignity and worth of all students and employees and strives to create a safe, orderly, caring, and inviting school environment to facilitate student learning and achievement. The board will not tolerate discrimination on the basis of sex (including pregnancy, childbirth, sexual orientation, and gender identity), including any form of sexual harassment as that term is defined under Title IX, in any education program or activity of the school system. The board takes seriously all reports and formal complaints of sexual harassment. The school system does not discriminate on the basis of sex in its education programs or activities, including admission and employment, in accordance with Title IX of the Education Amendments Act of 1972 and federal regulations.

Sexual harassment, as that term is defined under Title IX, is prohibited. All incidents of conduct that could constitute sexual harassment under this policy are to be reported and treated in accordance with this policy, whether or not the incidents may also constitute violations of other board policies or standards of conduct.

Individuals who believe they have been subjected to sexual harassment prohibited by this policy or who have witnessed or have reliable information that another person has been subjected to sexual harassment prohibited by this policy should use the process provided in Policy [1726/4036/7237](#), Title IX Sexual Harassment Grievance Process.

The board has also established grievance procedures for those who believe they have been victims of sexual harassment. Those grievance procedures are designed to achieve prompt and equitable resolution of formal complaints of sexual harassment through a formal investigation and adjudication of the allegations in the complaint or through informal resolution processes. The grievance process is provided in policy [1726/4036/7237](#), Title IX Sexual Harassment Grievance Process.

**A. Inquiries About Title IX**

The board has designated Title IX Coordinators to coordinate its efforts to comply with its responsibilities under Title IX and its implementing regulations. Inquiries about the application of Title IX and its implementing federal regulations may be referred to the Title IX Coordinator and/or the Assistant Secretary for Civil Rights in the Office for Civil Rights at the U.S. Department of Education.

The contact information for the Kannapolis City Schools Title IX Coordinator is:

Assistant Superintendent OR Director of Human Resources OR Director of CTE

# KANNAPOLIS CITY SCHOOLS TITLE IX POLICY

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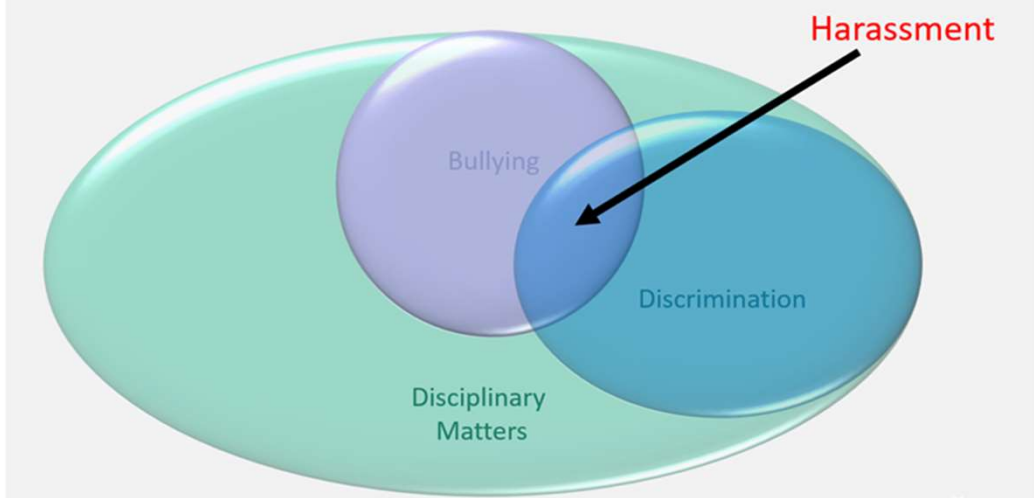
## TITLE IX SEXUAL HARASSMENT DEFINED

The final regulations made several changes intended to narrow the definition of “sexual harassment” and sync that definition with the holdings in *Gebser* and *Davis*.

3 types of prohibited sex-based conduct

1. Quid Pro Quo
2. Unwelcome Conduct
3. Clery Act and the Violence Against Women Act (“VAWA”) Components

# Harassment v. Discrimination v. Bullying v. Discipline



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## QUID PRO QUO

### Occurs when:

- 1) a school employee
- 2) conditions access to educational benefits
- 3) on unwelcome sexual conduct

Note: This provision only applies to employee conduct

## QUID PRO QUO

A teacher gives a student a low grade because the student failed to respond to his/her sexual advances.

A teacher gives a student the lead role in the school play with the expectation that the student will repay the favorable assignment with sexual favors.

A teacher says that he/she will only write letter of recommendation for the student if the student participates in sexual conduct with the teacher.





## UNWELCOME CONDUCT

- 1) Unwelcome conduct
- 2) Determined by a reasonable person
- 3) To be so severe **AND** pervasive **AND** objectively offensive
- 4) That it **effectively denies** a person equal access to an education program or activity.

**Note:** Severe conduct that constitutes sexual assault, dating violence, domestic violence, or stalking is covered by the third prong (Clery Act & VAWA Conduct) of the definition of sexual harassment.

## JULY 2021 QUESTION & ANSWER

Question 8: How can a school determine whether sexual harassment “effectively denies a person’s right to equal access to its education program or activity” under the “unwelcome conduct” category in the definition of sexual harassment in the 2020 amendments?

“[A] school must evaluate “whether a reasonable person in the complainant’s position would be effectively denied equal access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.” **“Effective denial of equal access to education does not require “that a person’s total or entire educational access has been denied.”**”

Examples include:

- Skipping class to avoid a harasser, a decline in a student’s grade point average, or having difficulty concentrating in class;
- A third grader who starts bed-wetting or crying at night due to sexual harassment; or
- A high school wrestler who quits the team but carries on with other school activities following sexual harassment.

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## CLERY ACT & VAWA COMPONENTS



**The Clery Act** – Federal law requiring colleges and universities to disclose information about crime on and around campuses. Enforced by U.S. DOE. Does not apply to K-12.

**VAWA** = Violence Against Women Act. Federal law, enacted in 1994, administered by U.S. DOJ.

The following offenses, as defined in Clery and VAWA, are now specifically included as forms of sexual harassment:

1. Sexual Assault - 20 U.S.C. 1092(f)(6)(A)(v)
2. Dating Violence - 34 U.S.C. 12291(a)(10)
3. Domestic Violence - 34 U.S.C. 12291(a)(8)
4. Stalking - 34 U.S.C. 12291(a)(30)



## CLERY ACT & VAWA: SEXUAL ASSAULT

- Conduct on the basis of sex
- Qualifies as one of the following:

- Rape
- Sodomy
- Sexual Assault with an object
- Fondling
- Incest
- Statutory Rape

Either:

1. Without Consent **OR**
2. Victim was incapable of giving consent because of age or temporary/permanent mental or physical incapacity.

## CLERY ACT & VAWA: DATING VIOLENCE



- Conduct on the basis of sex
- Violence committed by a person who has been in a relationship of romantic/intimate nature with the victim

## CLERY ACT & VAWA: DOMESTIC VIOLENCE

- Conduct on the basis of sex
- Misdemeanor or felony crime of violence committed by:
  - Current/former spouse/intimate partner (or someone similarly situated to a spouse)
  - A person with whom the victim shares a child in common
  - A person who is cohabitating with or who has cohabitated with the victim as a spouse or intimate partner
  - 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



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## CLERY ACT & VAWA: STALKING

Conduct on the basis of sex

Course of conduct

Directed at a specific person

Would cause a reasonable person to either:

- Fear for his/her safety or the safety of others; or
- Suffer substantial emotional distress.

JULY 2021  
QUESTION &  
ANSWER

Question 7: May a school respond to alleged sexual misconduct that does not meet the definition of sexual harassment in the 2020 amendments?

Yes. “A school has discretion to respond appropriately to reports of sexual misconduct that do not fit within the scope of conduct covered by the Title IX grievance process.”

“Put simply, Title IX’s sexual harassment regulation need not replace a school’s more expansive code of conduct and does not prohibit a school from enforcing that code to address misconduct that does not constitute sexual harassment under the 2020 amendments.”

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# SCHOOL DISTRICT OBLIGATIONS UNDER TITLE IX

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## WHEN MUST SCHOOLS RESPOND TO SEXUAL HARASSMENT ALLEGATIONS?

School must respond when it has “**actual knowledge**” of sexual harassment that occurred/is occurring “**in the school's education program or activity.**”

- **Actual knowledge** means a mandated reporter has notice of “sexual harassment or allegations of sexual harassment.” Note: In the K-12 context, ALL employees are mandated reporters.
- **Education program or activity** includes “locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.” **Note:** Schools are only responsible for responding to allegations of discrimination/harassment that occur in the United States.

**NOTE:** In the K-12 context, ALL employees are mandated reporters.

## REPORTING SEXUAL HARASSMENT: WHO, HOW AND WHEN?

Reports of sexual harassment may be made by anyone, not just the alleged victim or a mandated reporter.

Reports can be made by phone, mail, email, letter, or by any means that result in the Title IX Coordinator receiving the report.

Reports can be made at any time, including non-business hours.



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## “**DELIBERATE INDIFFERENCE**”

An institution acts with deliberate indifference only if its response to sexual harassment is **clearly unreasonable** in light of the known circumstances.

1. Once a school has notice of an allegation that, if true, would constitute Title IX Sexual Harassment, it must respond in a manner that is not deliberately indifferent.
2. A school cannot be liable for failing to respond to known allegations of harassment unless it acts with “deliberate indifference”

## JULY 2021 QUESTION & ANSWER

Question 9: Which settings are covered by the 2020 amendments?

1. Buildings or other locations that are part of the school's operations, including remote learning platforms;
2. Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred (e.g., a school field trip to a museum).

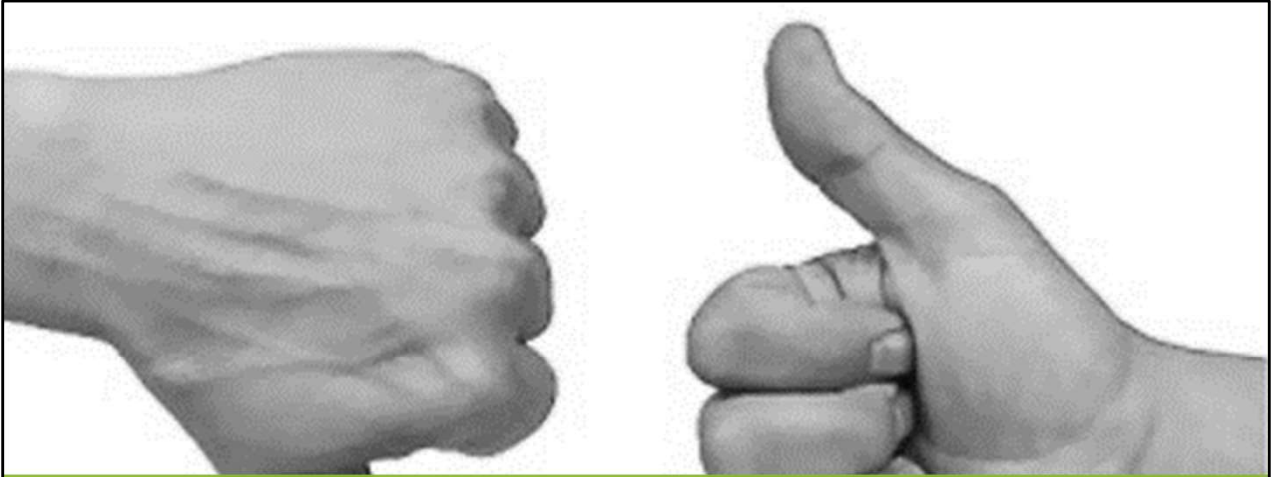
Question 11: How do the 2020 amendments apply to alleged sexual harassment that takes place electronically or on an online platform used by the school?

1. The operations of a school "may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the [school]."
2. "[T]he factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity."

Question 12: How do the 2020 amendments apply to alleged sexual harassment that is perpetrated by a student using a personal electronic device during class?

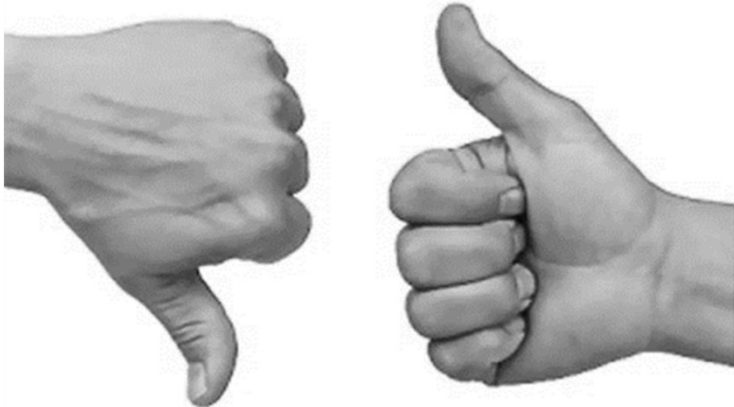
1. The preamble explains that "a student using a personal device to perpetrate
2. online sexual harassment during class time may constitute a circumstance over which the [school] exercises substantial control."
3. As with in-person harassment, "the factual circumstances of online harassment must be analyzed to determine if it occurred" in circumstances "over which a school exercised substantial control over the respondent and the context."

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**DOES THE SCHOOL HAVE ACTUAL  
KNOWLEDGE?**

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DOES THE SCHOOL HAVE ACTUAL  
KNOWLEDGE?

A teacher overhears two students talking in the hallway. One student says that while she was walking to her locker after soccer practice yesterday, another student pushed her against a locker and tried to kiss her against her will.

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DOES THE SCHOOL HAVE ACTUAL  
KNOWLEDGE?

The school receives a Gaggle notification of an email between two students. Student 1 said she was sexually assaulted at a party last weekend.

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## DOES THE SCHOOL HAVE ACTUAL KNOWLEDGE?

Over the past several months, the school custodian hears the young, popular history teacher make comments and jokes to several students about their bodies and dating life.

The history teacher frequently comments on how "lovely" several of the girls' legs are and has told a football player, "if I had abs like you, the girls would be all over me!"

The custodian notices that students are avoiding the history teacher's classroom when walking through the hallways.

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# THE PLAYERS

Title IX Personnel

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Title	Responsibilities	Who?
<b>Complainant</b>	<p>A person who is alleged to be the victim of conduct that could constitute sexual harassment</p> <ul style="list-style-type: none"> <li>• <b>NOT</b> a third party who reports alleged sexual harassment perpetrated against someone else</li> <li>• <b>NOT</b> the Title IX Coordinator, even if the TIXC “signs” a formal complaint</li> </ul>	<ul style="list-style-type: none"> <li>• Student, Staff, Third Party</li> </ul>
<b>Respondent</b>	<p>A person who has been reported to be a perpetrator of conduct that could constitute sexual harassment</p>	<ul style="list-style-type: none"> <li>• Student, Staff, Third Party</li> </ul>
<b>Title IX Coordinator</b>	<ul style="list-style-type: none"> <li>• Oversees and coordinates <b>all</b> Title IX responsibilities for district</li> <li>• Oversees district’s response to Title IX reports and complaints</li> <li>• Implements supportive measures and remedies</li> <li>• Identifies and addresses any pattern or systemic problem revealed by reports and complaints</li> <li>• Evaluates an alleged victim’s confidentiality request, if one is made</li> <li>• Files a formal complaint on behalf of a student/employee, if necessary</li> </ul>	<ul style="list-style-type: none"> <li>• Must be employee;</li> <li>• May not serve as decision-maker</li> </ul>

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Title	Responsibilities	Who?
<b>Investigator</b>	<ul style="list-style-type: none"> <li>• Conducts a fair, objective, &amp; impartial investigation</li> <li>• Differentiates b/w related &amp; relevant evidence &amp; privilege</li> </ul>	<ul style="list-style-type: none"> <li>• Staff or External Person</li> <li>• May not serve as decision-maker</li> </ul>
<b>Decision-Makers</b>	<ul style="list-style-type: none"> <li>• Evaluates evidence, makes, and writes decision</li> <li>• “Rules” on relevancy during cross examination</li> </ul>	<ul style="list-style-type: none"> <li>• Staff or External Person</li> <li>• Cannot serve in any other capacity</li> </ul>
<b>Advisor(s)</b>	<ul style="list-style-type: none"> <li>• Advises party they represent (not required)</li> </ul>	<ul style="list-style-type: none"> <li>• Staff or External Person</li> </ul>
<b>Informal Resolution Facilitator</b>	<ul style="list-style-type: none"> <li>• Conducts informal resolution process</li> </ul>	<ul style="list-style-type: none"> <li>• Staff or External Person</li> </ul>

# TITLE IX PROCESS INITIATION

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**Policy Code: 1726/4036/7237 Title IX Sexual Harassment Grievance Process**

The process provided in this policy is designed for those who believe that they have been sexually harassed in violation of policy [1725/4035/7236](#), Title IX Sexual Harassment – Prohibited Conduct and Reporting Process, and wish to file a formal complaint. School officials shall follow the grievance process established in this policy when responding to all formal complaints of sexual harassment.

The superintendent is responsible for notifying students and their parents or legal guardians, employees, and applicants for employment of this policy and ensuring that each principal or site supervisor provides a copy of this policy to these persons.

**A. Definitions**

All definitions in policy [1725/4035/7236](#), Title IX Sexual Harassment – Prohibited Conduct and Reporting Process, are incorporated by reference and have the same meaning when used in this policy, including all references to “sexual harassment” in this policy.

The following additional definitions apply in this policy.

1. Investigator

The investigator is the school official responsible for investigating and responding to a formal complaint.

2. Decision-Maker

The decision-maker is the school official responsible for making a determination regarding responsibility in response to an investigation of sexual harassment triggered by a formal complaint.

3. Investigative Report

# KANNAPOLIS CITY SCHOOLS TITLE IX POLICY

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## REPORT OF SEXUAL HARASSMENT

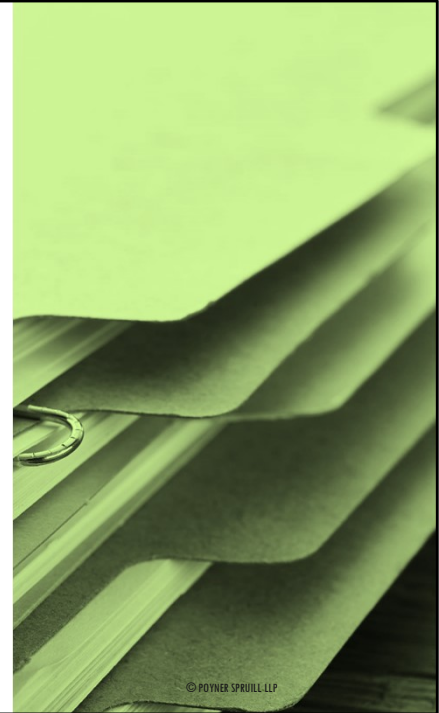
**Report** is an allegation of sex discrimination (including sexual harassment) made by any person, at any time, and by any means (in person, phone, mail or email) that results in the Title IX Coordinator receiving the person's verbal or written report.

Not limited to a school's campus community and may come from others, such as on-campus visitors.

School employees **shall immediately** notify the school's Title IX Coordinator of any report of sex discrimination.

**Note: This applies to any and all school employees.**

**DO NOT HANDLE REPORTS OF SEX DISCRIMINATION THROUGH YOUR SCHOOL'S NORMAL DISCIPLINE PROCEDURES!**



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## UPON RECEIPT OF A REPORT OF SEXUAL HARASSMENT

The Title IX Coordinator must:

### Contact

- the alleged victim (i.e., Complainant) if that person can be identified;

### Offer

- the complainant supportive measures;

### Explain

- the process of filing a formal complaint;

### Explain

- that supportive measures can be available with or without a formal complaint;

### Consider

- the complainant's wishes regarding supportive measures;

### Contact

- the respondent (i.e., alleged perpetrator), who must also be offered supportive measures; and

### Document

- If supportive measures are not provided to a complainant, the school must document why it did not provide a complainant with supportive measures and why not providing such measures is not deliberately indifferent.

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## JULY 2021 QUESTION & ANSWER

Question 16: May a school accept reports of sexual harassment from individuals who are not associated with the school in any way?

1. Yes. A school may receive actual knowledge of sexual harassment from any person. There is no requirement that the person be participating in or attempting to participate in a school program or activity to report sexual harassment.

Question 18: Is a school required to respond if it has notice of alleged misconduct that could meet the definition of sexual harassment but is not certain whether the harassment has occurred?

1. Yes. At any school level—elementary, secondary, or postsecondary—actual knowledge refers to notice of conduct that could constitute sexual harassment.
2. A school must respond promptly and appropriately when it receives notice of alleged facts that, if true, could be considered sexual harassment under the 2020 amendments.

# FORMAL COMPLAINT OF SEXUAL HARASSMENT



- A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment
- Only individuals participating in or attempting to participate in the education program or activity of the school may file a “Formal Complaint”
- May be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator and by any additional method designated by the school
- Must contain the complainant’s physical or digital signature, or otherwise indicate that the complainant is the person filing the formal complaint
- Triggers the school’s duty to initiate the grievance process

## JULY 2021 QUESTION & ANSWER

Question 22: What is a “formal complaint” under the 2020 amendments?

1. A “formal complaint” is a document filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
2. It may be a hard copy document or an electronic document submitted via email or an online portal.
3. Whether it is a hard copy document or an electronic document, it must contain the complainant’s physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint. For example, an email from a student to the Title IX Coordinator that ends with the student signing their name would suffice.

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## SUPPORTIVE MEASURES

Offered to both alleged victim and alleged perpetrator

Individualized services

Reasonably available

Nonpunitive, non-disciplinary, and not unreasonably burdensome to the other party

Designed to ensure equal educational access, protect safety, or deter sexual harassment

Supportive measures must be offered regardless of whether the district is informed via a "Formal Complaint" or a "Report"

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## EXAMPLES OF SUPPORTIVE MEASURES

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Security and monitoring of certain areas of campus
- Other similar measures

**Note:** A supportive measure that completely removes a Respondent from an activity (except for “emergency removals” for students and “administrative leave” for employees) would likely be considered punitive.



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# EMERGENCY REMOVAL

## Students

- An accused student can be removed from the education program or activity on an **emergency basis**.
- School must conduct an individualized safety and risk assessment and determine that there is:
  - An **immediate threat** to the **physical health or safety** of any student or other individual arising from the allegations of sexual harassment; and
  - This immediate threat justifies removal from the education program/activity.
- The accused student must be provided with **notice** and an **opportunity to challenge** the decision “immediately” following the removal.

## Employees

- The final regulations do not limit an institution’s ability to place an employee on administrative leave during the pendency of a complaint.
- Whether such leave is paid or unpaid is at the institution’s discretion.

**NOTE:** Title IX does not modify rights under IDEA (e.g., “change in placement”), §504, or the Americans with Disabilities Act.

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# INFORMAL RESOLUTION

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# INFORMAL RESOLUTION

1. If a formal complaint has been filed, an informal resolution process (e.g., mediation) may be used, but only if all parties agree to participate in an informal resolution process that does not involve a full investigation and adjudication.
2. The Title IX Coordinator will appoint a facilitator who is free from conflicts of interest or bias and who has received special training for the role.
3. Any party may decline or terminate an informal resolution process at any time prior to agreeing to a resolution, without penalty.

**NOTE:** The informal resolution process may not be used to resolve allegations that an employee sexually harassed a student.





# FORMAL COMPLAINT PROCESS

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## DISMISSAL OF FORMAL COMPLAINTS

An institution must dismiss a complaint if the conduct alleged in the formal complaint:

1. Would not constitute sexual harassment even if proven;
2. Did not occur in the institution's education program or activity; or
3. Did not occur against a person in the United States.

Additionally, an institution may dismiss a complaint where:

1. The complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or allegations;
2. The respondent is no longer enrolled or employed by the institution; or
3. Specific circumstances prevent an institution from gathering evidence sufficient to reach a determination regarding responsibility.

Institutions must provide the parties with written notice of a dismissal, whether mandatory or discretionary, and the reasons for the dismissal.

Dismissal of the formal complaint under Title IX does not preclude action under another policy or code of conduct.

Dismissals may be appealed.

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## RESPONDING TO FORMAL COMPLAINTS: WRITTEN NOTICE

Upon receipt of a Title IX Formal Complaint, the Title IX Coordinator must:

Provide written notice of the allegations to the known parties that:

- Has sufficient details to permit parties to prepare for an initial interview;
- Is provided in advance of any meeting, interview, or hearing conducted as part of the investigation or adjudication;
- Includes a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process;
- Informs the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney;
- Notifies the parties that they may inspect and review evidence; and
- Informs the parties of any provision in the district's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Investigate and adjudicate the complaint using a [grievance process](#) that complies with the final regulations

**NOTE: AN INSTITUTION MAY NOT IMPOSE DISCIPLINE ON A RESPONDENT WITHOUT GOING THROUGH ITS GRIEVANCE PROCESS.**

# GRIEVANCE PROCESS

The district must ensure its grievance process is consistent, transparent and:

1. Treats complainants and respondents equitably;
2. Does not make credibility determinations based on/because of a person's status as a respondent or complainant;
3. Requires objective evaluation of all relevant evidence, both inculpatory and exculpatory;
4. Requires Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions to be free from conflicts of interest and bias and trained to serve impartially without prejudging the facts at issue;
5. Presumes the non-responsibility of respondents until conclusion of the grievance process;
6. Includes reasonably prompt time frames for the grievance process;
7. Informs all parties of critical information about the district's procedures including the range of remedies and disciplinary sanctions a district may impose, the standard of evidence applied, the district's appeal procedures, and the range of supportive measures available to both parties; and
8. Protects any legally recognized privilege from being pierced during a grievance process.

**DO WE STILL HAVE TO FOLLOW THE GRIEVANCE PROCESS IF.....**

We have it on video?

**YES**

We questioned the  
accused student/teacher  
and he/she admitted to it?

**YES**

The potential complainant  
does not wish to file a  
formal complaint?

**MAYBE**

## INVESTIGATING FORMAL COMPLAINTS

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

1. Ensure that the burden of proof and the burden of gathering evidence is on the district, not the parties;
2. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other evidence;
3. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
4. Provide the parties with the same opportunities to have others present during any grievance proceeding;
5. Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;
6. Provide both parties an equal opportunity to inspect and review any evidence obtained;
7. Prior to completion of the investigative report, the district must send to each party and the party's advisor, if any, the evidence subject to inspection and review, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report; and
8. Create an investigative report that fairly summarizes relevant evidence and provide a copy to each party at least 10 days prior to the hearing for their written response.

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## INVESTIGATION PROCEDURES



The investigator should gather information by interviewing both parties and other witnesses and by collecting additional evidence.



The investigator should gather all evidence, inculpatory and exculpatory, directly related to the allegations.



The investigator should provide written notice in advance to parties who will be interviewed or requested to attend a meeting with sufficient time for the parties to prepare to participate.

## DETERMINING RESPONSIBILITY

With or without a hearing, after the district has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must:

- 1) Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness;
- 2) Provide each party with the answers; and
- 3) Allow for additional, limited follow-up questions from each party.
- 4) Allow questions about a complainant's prior sexual behavior or sexual predispositions only to establish that another person committed the alleged conduct, or if they concern specific incidents of complainant's prior sexual behavior with respondent and are offered to prove consent.

\*But keep in mind other statutes require hearings for students (e.g., long-term suspensions, expulsions) or employees (suspension without pay, dismissal, change in terms or conditions of employment or employment status).



## DETERMINING RESPONSIBILITY

The decision-maker(s) **cannot** be the same person(s) as the Title IX Coordinator or the investigator(s).

The decision-maker(s) must issue a written determination regarding responsibility.

**NOTE:** The burden of proof is on the school.

The written determination must be provided to both parties simultaneously and must include:

1. Identification of the allegations;
2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;



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## DETERMINING RESPONSIBILITY

3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the district's code of conduct to the facts; and
5. A statement of, and rationale for, the result **as to each allegation**, including:
  - A determination regarding responsibility;
  - Any disciplinary sanctions the district imposes on the respondent; and
  - Whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided; and
  - The district's procedures and permissible bases for the complainant and respondent to appeal.



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# APPEALS PROCESS

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## APPEALS PROCESS

A school must offer both parties the opportunity for an appeal from a determination regarding responsibility, and from a school's dismissal of a formal complaint or any allegations therein, on the following bases:

1. procedural irregularity that affected the outcome of the matter;
2. newly discovered evidence that could affect the outcome of the matter; and/or
3. Title IX personnel (i.e., Title IX Coordinator, investigator or decision-maker) had a conflict of interest or bias, that affected the outcome of the matter.

**NOTE:** A school may add additional bases for appeals, offered equally to both parties.

## APPEALS PROCESS

For any appeal filed, the district must:

1. Notify the other party;
2. Ensure that the decision-maker(s) for the appeal is not the same person who made the initial determination;
3. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
4. Issue a written decision describing the result of the appeal and the rationale for the result; and
5. Provide the written decision simultaneously to both parties.

# APPEALS PROCESS

For any appeal filed, the district must:

1. Notify the other party;
2. Ensure that the decision-maker(s) for the appeal is not the same person who made the initial determination;
3. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
4. Issue a written decision describing the result of the appeal and the rationale for the result; and
5. Provide the written decision simultaneously to both parties.



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## RETALIATION

No district or other person may intimidate, threaten, coerce, or discriminate against any person because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.

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## NOTICE REQUIREMENTS

Each district must designate at least one employee to coordinate its efforts to comply with Title IX, and that employee must be referred to as the “Title IX Coordinator.”

The district must notify all applicants for admission and employment; students, parents or legal guardians of elementary and secondary school students; and employees of the “name or title, office address, electronic mail address, and telephone number of the employee or employees” designated as the Title IX Coordinator.

The district also must provide notice to the above-listed persons that the district does not discriminate on the basis of sex in education programs or activities that it operates, including admission or employment, and that inquiries may be referred to the Title IX Coordinator or the U.S. DOE’s Assistant Secretary for Civil Rights, or both. This non-discrimination statement and the contact information for the Title IX Coordinator must be prominently displayed on the district’s website and in each handbook and catalog.



# TRAINING

Training required for all staff on how to identify and report sexual harassment

Training required for all Title IX investigators, decision-makers, coordinators, and facilitators of an informal resolution to instruct on how to be:

- ◀ impartial and unbiased;
- ◀ objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence



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## RECORD KEEPING

Maintain for seven years every **report** and **formal complaint** of sexual harassment. Records to be maintained include:

- Investigative records;
- Disciplinary sanctions;
- Remedies;
- Appeals;
- Actions taken; and
- Supportive measures.

If complainant is not provided supportive measures, then the reasons why must be documented.

Document the basis for the school system's conclusion that its response was not deliberately indifferent.

Document that it has taken measures designed to restore or preserve equal access to the education program or activity.

A record of all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must also be maintained and published on the website.

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# THE INTERSECTION OF TITLE IX & SPECIAL EDUCATION

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## IDEA/504/TITLE IX

The Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 and Title IX are all **federal law**.

While Title IX prohibits sex discrimination in educational institutions that receive federal funding, Section 504 prohibits discrimination on the basis of a student's disability. The IDEA was enacted to ensure students with disabilities receive a free and appropriate public education.

Importantly, the IDEA and 504 both afford students with disabilities with protections before they can be **removed** from school for disciplinary reasons.

Those involved in the investigation process should not be analyzing which law takes precedence, but rather should be reading these laws together.

## INVOLVEMENT OF IEP/504 TEAMS IN THE TITLE IX PROCESS

- If a student at the center of a Title IX investigation (whether the student is the Complainant or the Respondent), is a student eligible for special education and related services under the IDEA, or receives accommodation under Section 504, the student's IEP or 504 team should be involved in the Title IX process from the beginning.
- EC/504 personnel should have an understanding of the Title IX process and what conduct constitutes sexual harassment under the new regulations.



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## **SUPPORTIVE MEASURES**

- If an alleged perpetrator or victim is a student with a disability, Title IX personnel should consult with the student's IEP or 504 team to discuss what supports might be appropriate based on the student's needs in the context of the Title IX process as there may be IDEA/504 implications.
  - Two examples of supportive measures set forth in 34 CFR § 106.30 include "changes in work or housing locations [and] leaves of absence." These measures might be considered a change in the student's placement and should be discussed with the student's IEP or 504 team.

## MANIFESTATION DETERMINATION

Title IX's Emergency Removal provision **may not** be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

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## MANIFESTATION DETERMINATION

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An MDR must occur "Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct" 34 CFR § 300.530.

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If a student's IEP or 504 team determines that the conduct that the student engaged in was a manifestation of his/her disability, then the student **must** be returned to their regular placement.

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Potential board exposure: If the conduct was a manifestation of the student's disability, the LEA is prohibited from utilizing the emergency removal provision under Title IX, which may result in additional concerns from the Complainant.



## MANIFESTATION DETERMINATION

1. Mitigation of board exposure if the conduct is a manifestation of the student's disability;
2. If the conduct is a manifestation of the student's disability, it opens the door to the student's team discussing whether the student's current placement is appropriate;
3. The student's parent and team could agree that the student needs a different placement or other additional supports that might help to mitigate risk to other students in the classroom.
4. If the student's conduct resulted in **serious bodily injury**, then the student can be removed for up to 45 days regardless of the outcome of an MDR. 34 CFR § 300.530(g)(3).
  - Note that the standard for serious bodily injury is high: "the term 'serious bodily injury' means bodily injury which involves—(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty" 18 USC § 1365(h)(3).

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## INDIVIDUALIZED SAFETY & RISK ANALYSIS

1. If the student's conduct is determined not to be a manifestation of his/her disability, then emergency removal is an option where necessary.
2. Emergency removal requires an individualized safety and risk analysis, 34 CFR 106.44(c).
3. This analysis considers whether the Respondent is an immediate threat to the physical health or safety of others, and considers the specific circumstances surrounding the alleged sexual harassment .
4. The regulations do not put specific parameters on what information can be considered as part of this analysis; however, it's clear that it must be **individualized**.
5. This would certainly suggest that input from a student's IEP or 504 team would be appropriate to consider when conducting such a risk analysis, as well as information regarding the student's diagnoses and current supports.

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**QUESTIONS?**