

# Sexual Harassment, Title IX, and Non-Discriminatory Enforcement of Dress Code

Nash Central High School

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Tharrington Smith, LLP

# Roadmap

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Sexual Harassment: A Discussion

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Responding to Reports or Complaints of Sexual Harassment

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Title IX & Sex Discrimination, Student Dress Code

Which one of these situations constitutes a report of sexual harassment?

Teacher tells you that an assistant principal told her she could only get out of bus duty tomorrow if she came to his house after work and “gave her a back rub.”

Student tells you her ex-boyfriend is posting compromising pictures of her on social media and sending her threatening texts at school.

Student tells you his girlfriend sexually abused him while in the car in the school parking lot.

Student tells you that her tennis coach “keeps looking at her butt” and is making her feel “totally uncomfortable.”

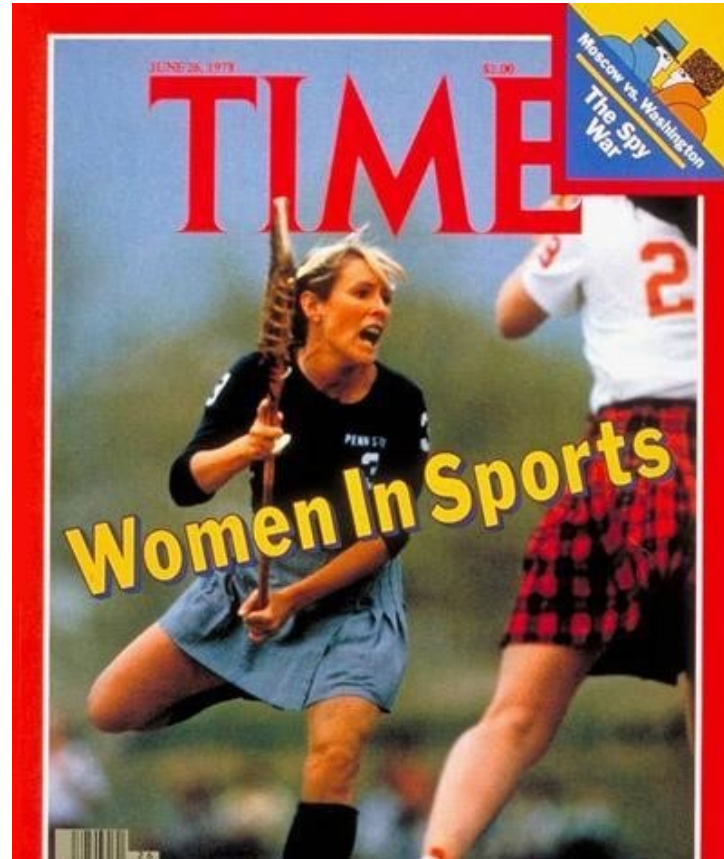
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# Common Misconceptions

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- It's only sexual harassment if physical contact or sexual overtures are involved.
  - FALSE!
- It's not sexual harassment if the perpetrator and victim are peers.
  - FALSE!
- Only the victim should report sexual harassment.
  - FALSE!
- If the victim waits to make a complaint, there's nothing that can be done.
  - FALSE!

# Title IX of the Education Amendments of 1972 20 U.S.C. § 1681, et seq.



“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...”

# Defining Sexual Harassment

## *Quid pro quo*

- When a supervisor demands sexual favors from a subordinate employee in exchange for employment benefits
- When a supervisor causes a subordinate employee to believe that employment decisions will be based on submission to unwelcome sexual contact

## Hostile environment

- Unwelcome conduct based on gender which is
  - So severe,
  - Pervasive, and
  - Objectively offensive
- That it effectively denies a person equal access to the school system's education program or activities and/or alters the conditions of employment

## VAWA Offenses

- Sexual assault
- Dating violence
- Domestic violence
- Stalking



Nash County Public Schools

## Relevant Policies

- NCPS Board policies prohibit all forms of sexual harassment:
  - Policy 1725/4035/7236 Title IX Sexual Harassment – Prohibited Conduct and Reporting Process
  - Policy 1726/4036/7237 Title IX Sexual Harassment Grievance Process
  - 1720/4030/7235 Title IX Nondiscrimination on the Basis of Sex
  - Policy Code: 1710/4020/7230 Discrimination and Harassment Prohibited by Federal Law



Nash County Public Schools

# Title IX Coordinators:

**For Students:** Dr. Leondus Farrow

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# Sexual Harassment: Definitions

## Title IX (Policy 1725):

1. an employee of the school system conditioning the provision of an aid, benefit, or service of the school system on an individual's participation in unwelcome sexual conduct;
2. unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school system's education program or activities. This determination requires consideration of all the facts and circumstances, including, but not limited to, the ages and disability statuses of the harasser and the victim and the number of individuals involved and their authority;
3. VAWA "big four": sexual assault including rape, statutory rape, fondling, and incest; dating violence; domestic violence; or stalking.

“Based on  
Gender”

Conduct does not have  
to be explicitly sexual in  
nature

But the treatment must  
be based on the victim's  
gender

“Sufficiently  
severe or  
pervasive”

- “A single offensive utterance . . . generally will not create a hostile environment without significant repetition or an escalation in the harassment’s severity. . . . But an isolated incident that is physically threatening or humiliating will be closer . . . to the type of conduct actionable on its own because it is ‘extremely serious.’”
- The more severe the harassment, the less pervasive it needs to be, and vice versa.



# What is the standard for “hostility?”

- Conduct must be both subjectively and objectively hostile.
  - Subjectively hostile: the victim actually regards the conduct as abusive such that it alters the victim’s employment.
  - Objectively hostile: conduct that a reasonable person would find hostile under the circumstances.

Is there a  
hostile  
environment?

Factors to  
consider:

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Is the conduct based on sex or gender?

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How often does the behavior occur?

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How severe is the behavior?

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Would the conduct be offensive to the average person?

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Does the victim subjectively believe the conduct is hostile, abusive, or offensive?

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Is the conduct interfering with the victim's work or access to educational programs?

## Common Misconception:

- Sexual Harassment is an intentional act against another person
  - **FALSE:** Intent is not an element of sexual harassment. So while sexual harassment may be intentional, the harasser may be engaging in behavior that he or she doesn't intend to be harassing.




# Sexual Harassment in the Classroom

- With the Hostile Learning Environment Claim, we're talking about a student as the victim
  - Students can be harassed by a teacher, employee, or volunteer of the school district
  - Students can be harassed by another student


# Hostile Learning Environment


Similar to a hostile work environment.

A hostile learning environment occurs when a student experiences unwelcome conduct based on gender which is so severe, pervasive, and objectively offensive that it effectively denies the student equal access to the school system's education program or activities.

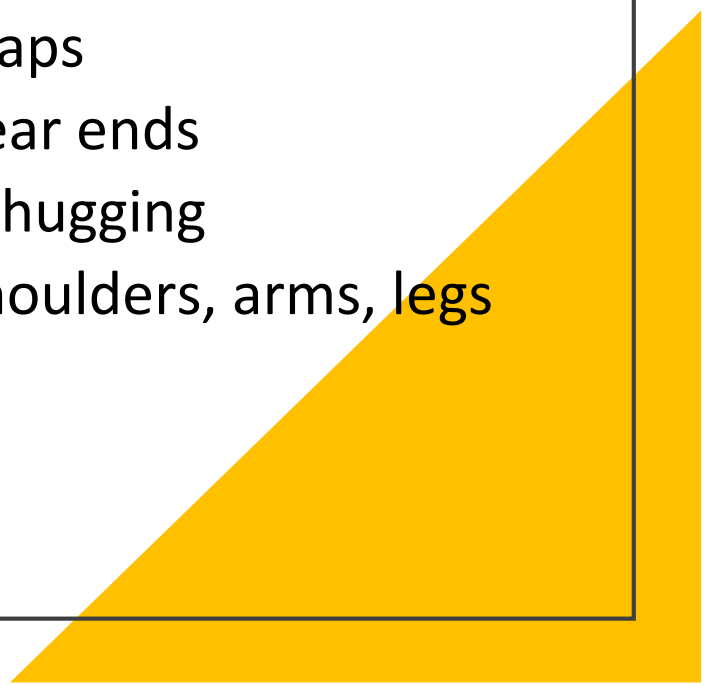


What *does*  
create a  
hostile  
learning  
environment?

- 
- That depends on a lot of factors:
    - How often does the behavior occur?
    - How severe is the behavior?
    - Is the conduct offensive to the average person?
    - Is the conduct based on sex or gender?
    - If the harasser and victim are both students, how old are they and is the behavior unusual for the age of the students?



Examples of  
problematic behaviors  
between teachers (or  
other employees /  
volunteers) and  
students

- Any physical contact of a sexual nature between teacher/employee/volunteer and a student, including some touching that could be interpreted as sexual, even if not intended as such:
    - Sitting on laps
    - Slapping rear ends
    - Prolonged hugging
    - Rubbing shoulders, arms, legs
- 

# Common Misconception

- If my conduct doesn't constitute sexual harassment, then I have nothing to worry about
  - **FALSE.** All employees with the NCPS have a duty to behave in a professional and harmonious fashion. Failing to abide by this high standard may subject you to disciplinary action.

# Hostile Learning Environment: Student Against Student

In general, any conduct that could be a problem for teacher-on-student harassment could also be a problem for student-on-student harassment

Student harassment violates multiple board policies (Policies 1710 and 1720, Policy 4304, Student Code of Conduct, Sections F.10, F.16, F.17, F.18)

The Student Code of Conduct prohibits verbal abuse or disrespect toward other students, certain peer relations, hazing and bullying, and harassment



## Where student-on-student harassment occurs

- Students have access to one another beyond the four walls of school.
  - Harassment could be confined to school
  - Could be occurring both on school grounds and away from school and school activities
  - Could be occurring exclusively off-campus or online

# Types of Student Online/Electronic Communications

E-mails

Text messages

Instant messages (IMs)

Social media (Facebook, Instagram, SnapChat, TikTok, etc.)

Blogs

Personal Websites

When  
harassment  
is entirely  
off-campus

REMEMBER THE FIRST AMENDMENT!

Schools may discipline students for “targeted, defamatory” online attacks on other students, even if purely off-campus, if it is foreseeable that the speech would “reach the school” and “cause a substantial disruption.”

*Kowalski v. Berkley County Schools*, 652 F.3d 565 (4<sup>th</sup> Cir. 2011).

# When in Doubt, Report it Out

- Know the reporting requirements of your policies
- The policies, if followed, are your best protection
  - But if you have a good policy and you fail to follow it, there is no defense.

Policy  
1720/4030/7235

“Any employee or member of the board of education who has actual knowledge of sexual harassment or allegations of sexual harassment occurring in the education program or any activity of the school system must report that information immediately to the Title IX coordinator.”

# Responding to complaints of sexual harassment

To prevail on a Title IX claim, a plaintiff must show that the district knew about the harassment *and* failed to respond appropriately.



**DID YOU  
KNOW?**

## What are the district's obligations?

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.

# “Actual Knowledge”

Notice of sexual harassment or allegations of sexual harassment to Title IX Coordinator, an official who has authority to institute corrective measures, or any employee of an elementary or secondary school.

*Note: Prior guidance triggered the obligation if the recipient “knew or should have known.”*

# “Deliberate Indifference”

Failure to respond reasonably in light of known circumstances.

District must take *some* steps to inquire about any report or allegation.

What triggers  
the obligation?

... a report or  
allegation of sexual  
harassment made to  
any employee.

What  
should I do  
if I receive a  
report?

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Any report or allegation should be **immediately** brought to the attention of the Title IX Coordinator.

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Staff should not attempt to address issues informally without consulting with administrators and Title IX Coordinator.

# Employee Reporting Obligations (Policy 1725)

An employee **MUST IMMEDIATELY** make a report to the Title IX coordinator when:

- The employee receives a report of sexual harassment from a student or other person
- The employee witnesses conduct that is or reasonably could be sexual harassment
- The employee discovers evidence of sexual harassment or has reason to believe someone may have been sexually harassed (even if not reported)

So You've  
Received a  
Report of  
Sexual  
Harassment...



# Reports of sexual harassment vs. formal complaints

- A **report** of alleged sexual harassment may be made by anyone, and it can be oral, telephonic, written, or email.
- A **report** triggers the obligation for the district to not be deliberately indifferent.
- A **Formal Complaint** must be in writing, and can only be made by the complainant (the person alleged to be the victim), or by the Title IX Coordinator.
- A **Formal Complaint** triggers a defined process, with certain requirements prescribed by the regulations.

# Initial response

- Title IX Coordinator must contact the complainant upon receipt of a report.
  - Discuss availability of supportive measures
  - Consider Complainant's wishes with respect to supportive measures
  - Inform the Complainant of the availability of supportive measures
  - Explain the process for filing a Formal Complaint
- Must treat parties equitably, including with respect to provision of supportive measures.
- Must follow grievance process before imposing discipline or sanction on respondent.

# “Supportive Measures”

- **Non-disciplinary, non-punitive**, individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent.
- Designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party.
- **Examples:**
  - Counseling
  - Course modifications
  - Schedule changes
  - Increased monitoring or supervision



Discipline may not  
be imposed  
without going  
through the formal  
grievance process.

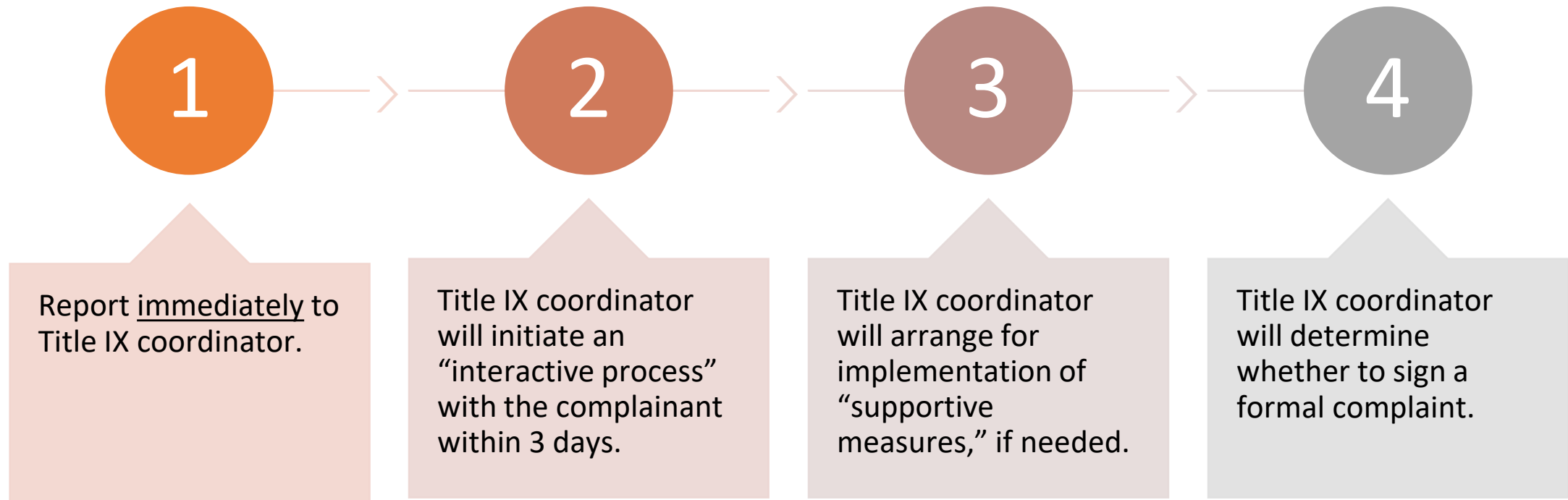
# Discipline Exceptions

“Emergency Removal”

Discipline for violations  
of other school board  
policies

# Process After Receiving a Report

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So a Formal  
Complaint Has  
Been Filed...

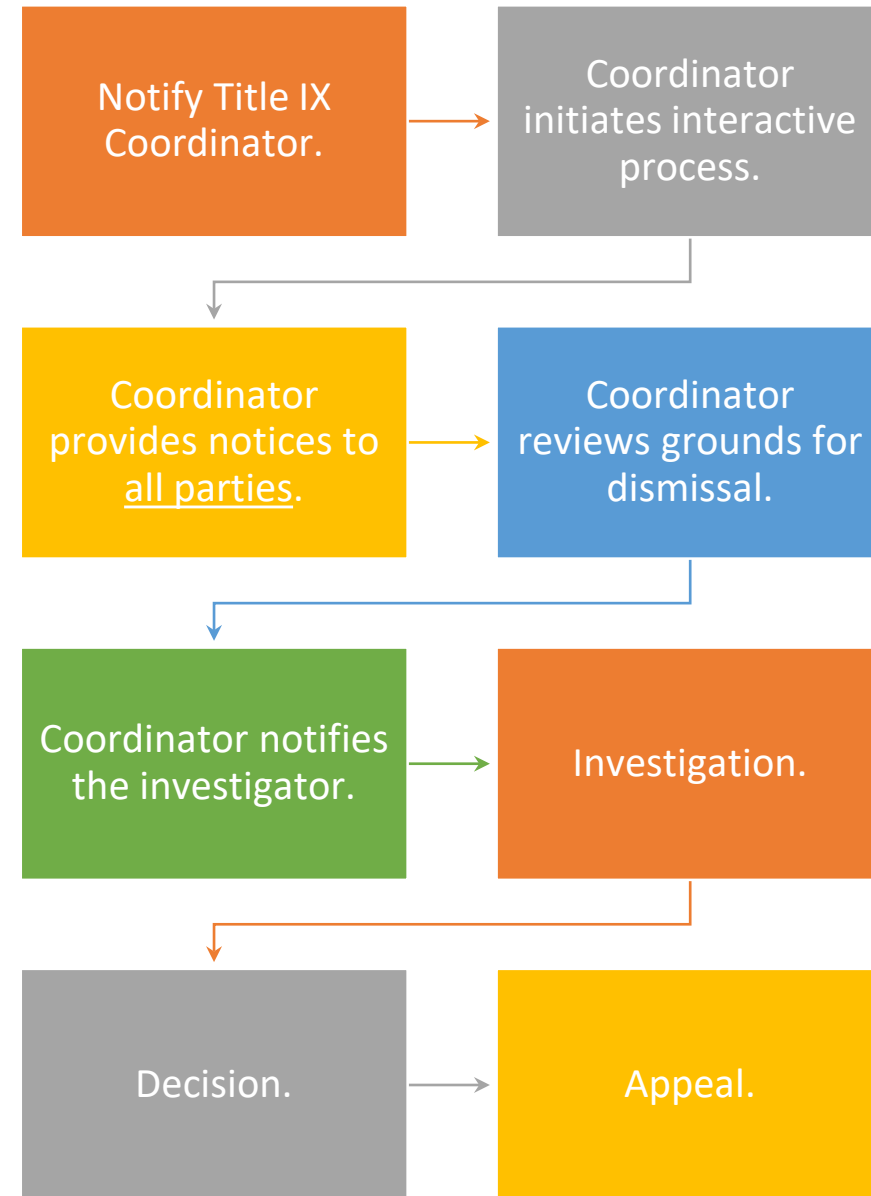


# Overview of Formal Complaint Process

- Regulations prescribe specific procedures with respect to the initial steps taken upon receipt of a Formal Complaint, the investigation, the determination of responsibility, and any appeal rights.
- Title IX Coordinator will receive Formal Complaint and oversee process from beginning to end.
- Several areas where procedures may differ from existing practice.
- Areas where procedure must be harmonized with state law and other school policies.
- Defined procedures apply **only** to investigation and adjudication of alleged sexual harassment.
  - Schools may take disciplinary action against students/employees if their conduct violates other board policy or Code of Student Conduct.
  - Important to be clear about alleged violations and procedure



# Overview of Formal Complaint Process



**NOTE**

**The Title IX Grievance Process ONLY  
applies to formal complaints of sexual  
harassment.**

# Who is the investigator?

- If the Respondent is a student, the investigator is the student's Principal.
- If the Respondent is an employee, the investigator is the Human Resources Official (or designee).
- If neither, the investigator is the Complainant's Principal.





# Investigation Toolkit

## A 5-Step Framework For Investigating a Formal Complaint of Sexual Harassment

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Step 1: Read the Grievance Procedure (Policy 1726)

Step 2: Communicate with Parties/Witnesses

Step 3: Conduct Interviews

Step 4: Write the Report

Step 5: Submit the Report

# Step 1: Read the Procedures! (Again!) (And again!)

- Required notices?
- Required interviews?
- Contents of investigative report?
- Any relevant timelines?



## Step 2: Communicate with the parties and witnesses

Explain the process to both parties.

Provide written notice to anyone whose participation is invited or expected for any interview in order to give them sufficient time to prepare.

Provide copies of evidence to both parties prior to finalizing your report.

## Step 3: Conduct Interviews

- Complainant
- Respondent
- Witnesses identified by both parties
- Other individuals with relevant information



# Sample Questions for Complainant Interview

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Can you describe the interaction? Were any comments made?

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What did you say/do? How did you feel?

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Any similar experiences previously?

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Any witnesses?

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Where and when did this happen?

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Did you tell anyone? Who? When? What did you say?

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Have you had any subsequent contact with the accused perpetrator?

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***Is there anything else I need to know?***

## A Note About Confidentiality

When interviewing witnesses, instruct them to keep your conversations confidential.

What if a witness asks if what they tell you is confidential?

# Create a Record



Gather appropriate documents



Take notes during interviews



Copies of original complaint, interview notes, and correspondence



Documentation should “tell the story” of how you investigated reported misconduct

Clean Up

Any other questions or interviews?

## Step 4: Write the Report

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# Content of Report



Summary of relevant evidence



Description of procedural steps taken



Recommendation on question of responsibility



Recommended discipline

## Step 5: Submit the Report

### To the parties:

- A copy of the report
- Notice of the opportunity to submit written questions to the other party and witnesses

*Note: Parties have 10 days to submit a written response and any questions.*

### To the decision-maker:

- A copy of the report
- Relevant evidence
- Parties' written responses and written questions



What happens  
after the  
investigation?

# “Adjudication”

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- “Decision-maker” is superintendent or designee.
- Student has ability to request a hearing.
- Both parties have the ability to submit written questions and follow-up questions.




# Written decision

- Superintendent or designee determines whether the respondent is responsible for sexual harassment in violation of board policy and, if so, what disciplinary sanction will be imposed.
- Written decision must include allegations, procedural steps, findings of facts, conclusions, determination of responsibility, disciplinary sanctions.
- Written decision must be provided to both parties.



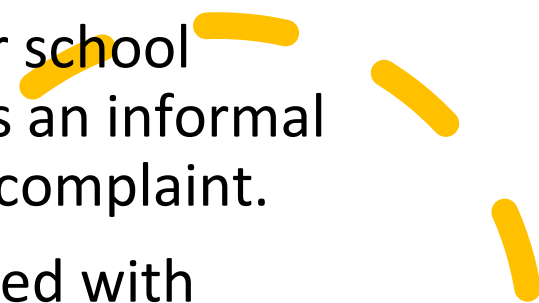
# Appeal

Either party can appeal the superintendent's decision to the board of education.





# Informal Resolution

- Title IX Coordinator or other school official may offer the parties an informal process to resolve a formal complaint.
  - Both parties must be provided with notice and provide informed consent to the process.
  - Agreement may include punitive or disciplinary measures.
  - Parties may withdraw from informal process at any time prior to reaching a resolution agreement and proceed with the grievance process.
  - May **not** be used for alleged sexual harassment of a student by an employee.
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# Recordkeeping

- Records must be maintained for a minimum of 7 years, including investigative records, disciplinary sanctions, remedies, appeals, and any actions taken, including supportive measures
- Must document why response was not deliberately indifferent
  - If supportive measures were not provided to complainant, must document why that was not clearly unreasonable
- Requirements apply to **both** reports and Formal Complaints
- Title IX Coordinator must also maintain all training materials for 7 years, and must make them publicly available

# True or False?

Title IX generally prohibits activities that separate students on the basis of sex.

# Which of these are acceptable?

- Separating male and female students for wrestling unit in P.E.
- Separating male and female students for sexuality portion of health curriculum lesson
- Separating male and female students for reading competition.
- Separating male and female students for scholarship presentations and only including presentation on military scholarships for male students



# Title IX and Non-Discrimination

# Separating Students by Sex

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- Title IX generally prohibits activities that separate students on the basis of sex or require or refuse participation on the basis of sex, including, health, physical education, industrial, business, vocational, technical, home economics, music, and education courses.
- Exceptions:
  - physical education classes during participation in sports the purpose or major activity of which involves bodily contact
  - portions of classes in elementary and secondary schools which deal exclusively with human sexuality; remedial or affirmative action.



Does Title IX apply to  
dress code?



Do any of these create a problem under Title IX?

- Requiring female students to wear certain clothes that males are not required to wear.
- Enforcing the dress code for male students but not female students.
- Saying “Daaaang that skirt is short and tight. I can see your whole backside! Go and change your clothes” to a female student.



# Nondiscrimination in Dress Code Enforcement

- Title IX applies to sex-based dress codes
- *Peltier v. Charter Day School, Inc.* U.S. Court of Appeals for the Fourth Circuit
- NC Charter School had dress code requiring female students to wear a “skirt,” “jumper,” or “skort.” Male students could wear shorts or pants.
- Parents of female students sued, claiming violated students’ rights under equal protection and Title IX

# Nondiscrimination in Dress Code Enforcement

- Fourth Circuit held that Title IX did apply to public school dress codes AND that a dress code could violate Title IX anti-discrimination provision if it
  - operates to exclude the students from participation in their education, to deny them its benefits based on sex, or
  - otherwise discriminated against them based on their sex

# Nash County Board of Education Policy 4316 – Revised

## **Policy Code: 4316 Student Dress Code**

### **A. General Dress Code**

The board believes that the dress and personal appearance of students greatly affect their academic performance and their interaction with other students. Students are expected to adhere to standards of dress that are compatible with the educational process and facilitates the operations of the school and fosters an environment focused on learning. The board requests that parents outfit their children in clothing that is conducive to learning, and asks that parents assist the district in monitoring student attire to help adhere to the requirements in this policy.

# Nash County Board of Education Policy 4316 – Revised

## **Policy Code: 4316 Student Dress Code**

To promote these goals, students may not wear or carry clothing, jewelry, bags, or other personal articles that:

1. violate a reasonable, nondiscriminatory dress code adopted and publicized by the school;
2. are prohibited by policy 4328, Gang-Related Activity or any other provision of the Board's student behavior policies;
3. depict profanity, vulgarity, obscenity, or violence;
4. are reasonably likely to create a substantial disruption of the educational process or operations of the school;
5. promote the use or abuse of alcohol, tobacco, or illegal drugs;
6. could be perceived as or used as a weapon, such as chains or spikes; or
7. endanger the health or safety of the student or others.

# Nash County Board of Education Policy 4316 – Revised Cont.

Specifically:

- a. Students must wear clothing that covers their skin from upper chest to mid-thigh with opaque (non-see-through) fabric in front, back, and on the sides. Breasts, genitals and buttocks must be covered with opaque (non-see-through) fabric.
- b. Students must wear shoes at all times except when changing for physical education or athletic practices or events or when specifically directed otherwise by a teacher or administrator.
- c. Clothing must cover undergarments (including waistbands and straps).
- d. Clothing must be suitable for all scheduled classroom activities including physical education, science labs, wood shop, and other activities where unique hazards exist.
- e. Specialized courses may require specialized attire, such as sports uniforms, special programs or safety gear.
- f. Head coverings (including hats, hoods, sweatbands, and bandanas) are generally prohibited in the school building. However, students may wear head coverings in the school building as an expression of sincerely held religious belief (e.g., hijabs or yarmulkes) or cultural expression (e.g., geds) or to reasonably accommodate medical or disability-related issues (e.g., protective helmets).

# Nash County Board of Education Policy 4316 – Revised Cont.

## **C. Enforcement**

The Board does not discriminate on the basis of sex in the administration of this dress code. This policy should be applied fairly and consistently without regard to race, sex, color, national origin, religion, or disability. Accommodations will be provided as needed based on a student's religious belief, medical condition, or disability. If a student or parent believes the dress code has been administered in a discriminatory manner, they may submit a complaint pursuant to Policy 1710, Discrimination and Harassment Prohibited by Federal Law. Complaints regarding discrimination based on sex should also be sent to the board's Title IX Coordinator.

# Nash County Board of Education Policy 4316 – Revised Cont.

## **D. Applicability**

This policy is to be applied fairly and consistently without regard to race, gender, or other inherent traits or characteristics. Principals or their designees shall make reasonable accommodations for religious, educational, medical, or disability-related reasons and for cultural celebrations.

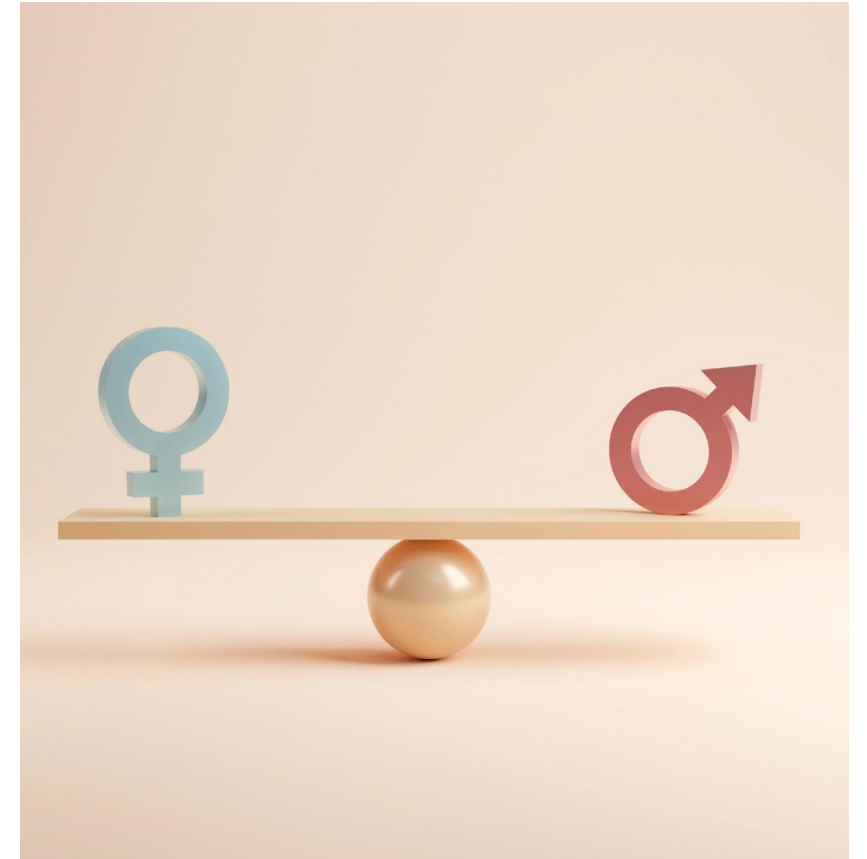
This policy does not apply to school-sanctioned uniforms and costumes approved for athletics, choral, band, dance, or dramatic performances. Except as specifically noted in this policy based on an exception or accommodation, this policy applies at all times when students are present on school property or in attendance at official, school-sponsored events.

# Recommendations to Prevent Discriminatory Dress Code Enforcement

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DO:

- Treat students fairly and consistently
- Enforce the dress code equally for male and female students
- Stick to the plain language of the dress code policy
- Provide accommodations if needed for a religious belief, medical condition, or disability

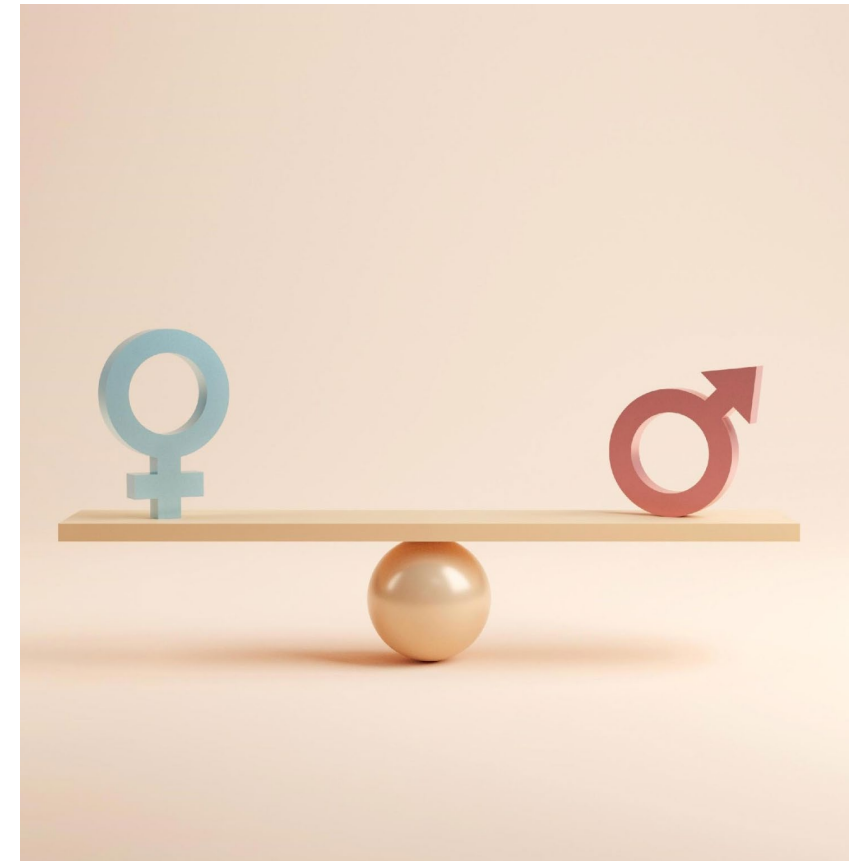


# Recommendations to Prevent Discriminatory Dress Code Enforcement

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## DON'T

- Separate male and female students
- Require students to stand for a physical inspection
- Make comments about students' physical appearance or bodies
- Apply different standards to female vs. male students



- If a student or parent believes the dress code has been administered in a discriminatory manner, they may submit a complaint pursuant to Nash Board of Education Policy 1710, Discrimination and Harassment Prohibited by Federal Law.
- Complaints regarding discrimination based on sex should also be sent to the District's Title IX Coordinator.



Questions?