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# TITLE IX TRAINING FOR COORDINATORS, INVESTIGATORS, AND DECISION-MAKERS

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## YOUR TITLE IX TOOLBOX



- Contains useful resources we will reference during the training.
- Contains checklists, templates and drafts to use as a starting point when processing a new case.
- Contains a pdf copy of this PowerPoint, which you must publish on your District website.

# AGENDA

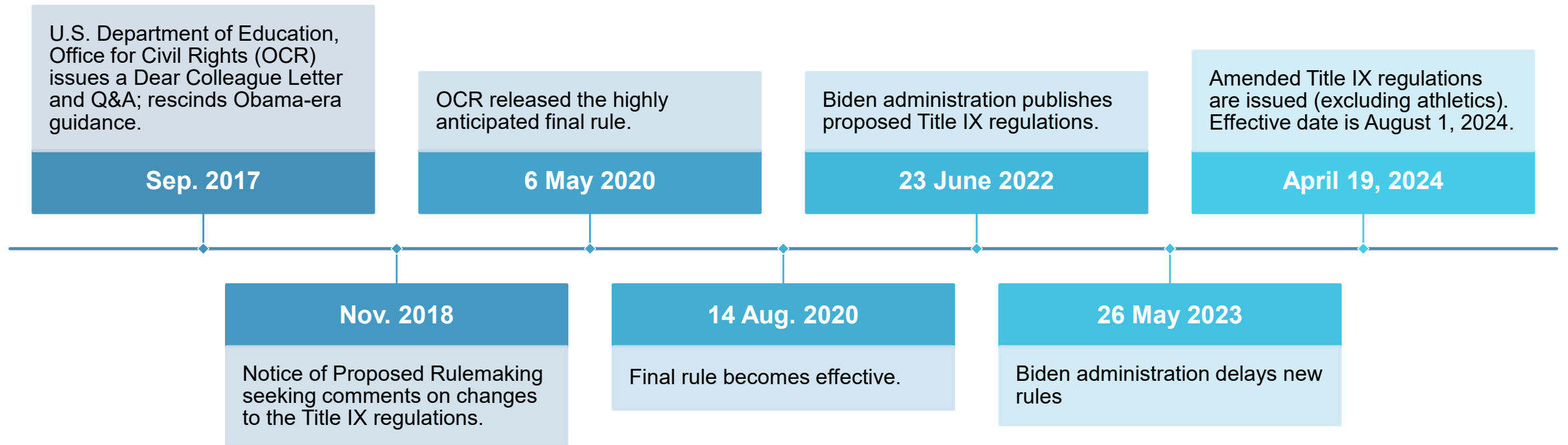
- Title IX Background and Legal Status of the Regulations
- Title IX Terms and Definitions
- The Role of the Title IX Coordinator
- Duty to Avoid Bias and Conflict of Interest
- Overview of Grievance Procedures
- Jurisdiction and Dismissals
- Informal Resolution
- The Role of the Investigator / The Investigation
- Determination of Responsibility
- Appeals
- Sanctions and Remedies
- Overview of the 2024 Title IX Regulations
- Athletics Update

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# TITLE IX BACKGROUND



# BACKGROUND ON TITLE IX REGULATIONS & UPCOMING CHANGES





# LITIGATION AND LEGISLATIVE UPDATE

# STATE OF TENNESSEE V. CARDONA



- On April 30, 2024, Ohio joined Tennessee, Kentucky, Indiana, Virginia, and West Virginia in a lawsuit challenging and seeking an injunction to stop implementation of the 2024 regulations.
- The lawsuit was filed in a federal court in Kentucky and challenges the inclusion of discrimination and harassment on the basis of gender identity and sexual orientation in the 2024 regulations.
- The lawsuit argues that the 2024 regulations:
  - Exceed the Department of Education's rule making authority;
  - Violate constitutional separation of powers, freedom of speech, and freedom of religion principles; and
  - Are arbitrary and capricious.

# STATE OF TENNESSEE V. CARDONA



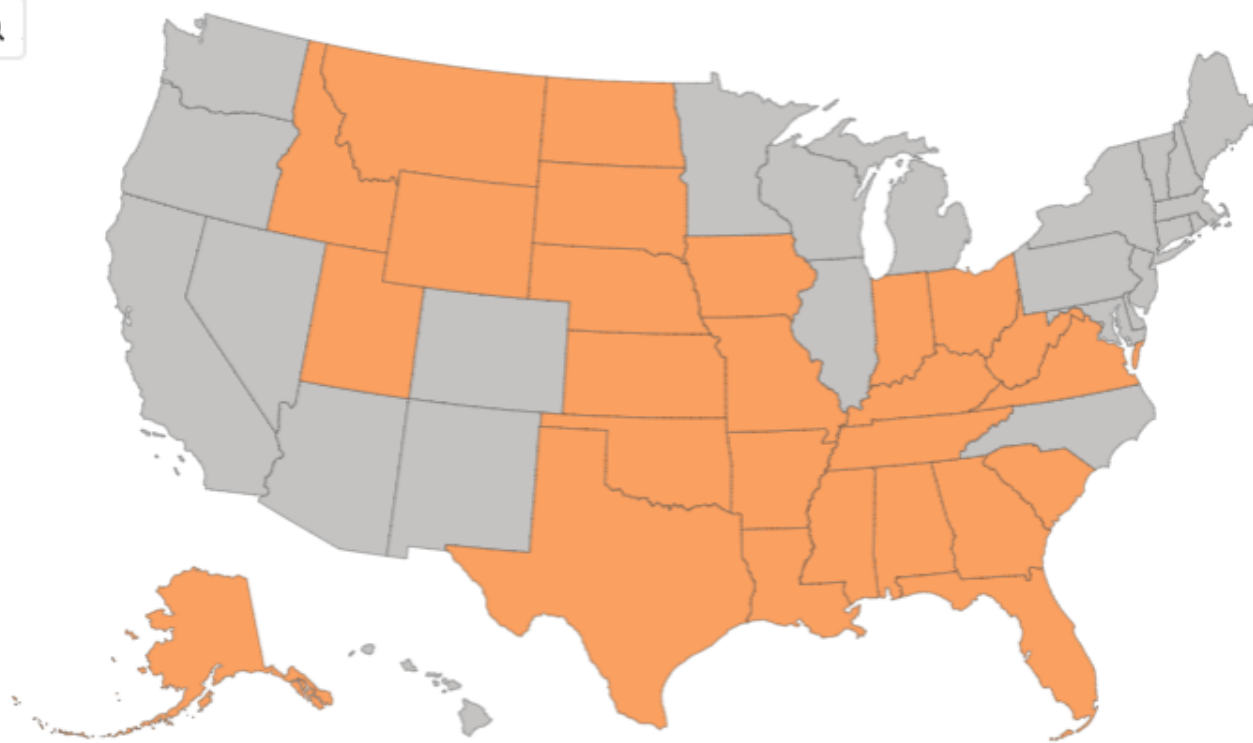
- A preliminary injunction in State of Tennessee v. Cardona was granted on June 17, 2024.
- As a result, the 2024 Title IX Regulations could not be implemented on August 1, 2024 in the states involved in the case.
- Districts have the following obligations:
  - Continue to follow current policies and procedures regarding sex discrimination and harassment, which correspond to the 2020 Title IX Regulations.
  - New Title IX team members must receive the required training under the 2020 Title IX Regulations.
  - Districts should consider policy revisions under the 2024 Title IX Regulations in the event the injunction is lifted.
  - Remember that the Sixth Circuit has held that sex discrimination based on sexual orientation and gender identity are protected under Title IX. See *Dodds v. U.S. Dept. of Educ.* (6th Cir. 2015)



## Where Title IX Regulations Are Blocked

Federal judges have temporarily put the Biden administration's new Title IX rule on hold in 26 states, as of July 31, preventing the Education Department from enforcing the changes.

Yes No



# OHIO LEGISLATION



- House Bill 68 – “SAFE Act” and "Save Women's Sports Act"
  - Passed by a supermajority of the Ohio General Assembly in January 2024. Was to become effective on April 24, 2024.
    - April 16, 2024: temporarily enjoined
    - August 6, 2024: injunction lifted; HB 68 is in effect now.
    - The ACLU filed an to the 10<sup>th</sup> District Court of Appeals. Oral Argument is set for September 11, 2024.
  - Prohibits mental health professionals, including school psychologists and social workers, from diagnosing or treating minors for gender-related conditions without first obtaining the consent of a parent or guardian, and requires mental health professional to conduct additional screenings where minors present with gender-related conditions.
  - Prohibits certain medical procedures and protects parents who decline to consent to medical transition from being penalized in custody disputes.
  - Requires separate sports teams for female sex participants and male sex participants, bans males from participating on female teams.

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# THE PREGNANT WORKERS FAIRNESS ACT



# THE PREGNANT WORKERS FAIRNESS ACT (PWFA)



- Covered employers must provide reasonable accommodations to qualified employees or applicants for known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship.
- Employers must engage in the interactive process to determine and provide reasonable accommodations.
- EEOC regulations effective June 18, 2024.

# THE PWFA: POSSIBLE REASONABLE ACCOMMODATIONS



- Reasonable accommodations might include:
  - Breaks to drink water, eat, rest, or use the restroom
  - Allowing a water bottle or food at work
  - Allowing a way to sit/stand while working
  - Changing a uniform or dress code policy
  - Shortened work hours, part-time work, or a later start time
  - Telework
  - Temporary reassignment
  - Temporary suspension of one or more essential functions of a job
  - Leave (but must not be required if other reasonable accommodations are available)
  - Light duty or help with lifting or other manual labor
  - Leave to recover from childbirth or other medical conditions related to pregnancy or childbirth
  - Modifications to facilitate pumping at work

## TITLE IX BACKGROUND

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. § 1681(a)

# TITLE IX BACKGROUND



- **Q: Whom does Title IX protect?**
- **A: Any person participating in an educational program in the United States that receives federal financial assistance.**
  - Students.
  - Staff.
  - Applicants for admission.
  - Visitors and community members.
  - Contractors, such as referees.



SEX  
DISCRIMINATION

VERSUS

SEX-BASED  
HARASSMENT



# EXAMPLES OF SEXUAL DISCRIMINATION IN EDUCATION

- Recruitment, Admissions & Counseling
- Financial Assistance
- **Sex-based Harassment**
- Athletics
- Pregnant and Parenting Students
- Discipline
- Single-Sex Education
- Employment
- Retaliation
- Treatment based upon Gender Identity

## TITLE IX BACKGROUND



- **Q: What does Title IX protect against?**
- **A: Exclusion from participation in, or denial of benefits of, any educational program or activity on the basis of sex.**

# ADULT SEXUAL MISCONDUCT

- According to estimates from the Government Accountability Office, 1 in 10 students will be subjected to adult sexual misconduct (ranging from inappropriate to criminal conduct) during their K-12 academic careers.
- Sexual harassment reporting, practices, policies and prevention efforts matter!



## A Training Guide for Administrators and Educators on Addressing Adult Sexual Misconduct in the School Setting



## TITLE IX ENFORCEMENT – REGULATORY



- United States Department of Education’s Office for Civil Rights (“OCR”) oversees Title IX compliance. OCR also enforces other federal civil rights laws that apply to schools.
- OCR issues regulations regarding Title IX. See 34 C.F.R. Part 106.
- OCR has the power to receive complaints alleging violations of Title IX, investigate complaints, issue remedial measures and sanctions, and even take away a school’s federal funding for violations of Title IX.

# TITLE IX ENFORCEMENT - LAWSUITS



- Individuals may file private lawsuits to seek awards of money damages.
- *Franklin v. Gwinnett Public Schools* (1992): Money damages are an available remedy in a private lawsuit alleging a school's intentional discrimination in violation of Title IX.
- *Gebser v. Lago Vista Independent School District* (1998): A school district is liable for failing to respond to a teacher's sexual harassment of a student if a school official who had authority to institute corrective measures on the district's behalf had **actual notice** of and was **deliberately indifferent** to the teacher's misconduct.
- *Davis v. Monroe County Board of Education* (1999): A school district is liable for failing to respond to a student's sexual harassment of another student if the district was **deliberately indifferent** to known acts of harassment in its programs or activities, and the harassment was **so severe, pervasive, and objectively offensive** that it effectively barred the victim's access to an educational opportunity or benefit.

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# THE ROLE OF THE TITLE IX COORDINATOR



## TITLE IX COORDINATOR



- All districts must designate at least one **employee** to coordinate their efforts to comply with and carry out their responsibilities under Title IX and provide notification of that employee's contact information.
- Consider multiple coordinators.

# TITLE IX COORDINATOR RESPONSIBILITIES



- Coordinate compliance.
- Have knowledge of the district's policies and procedures on sex discrimination and be involved in the drafting and revision of such policies and procedures to help ensure that they comply with the requirements of Title IX.
- Coordinate the district's response to all reports and complaints involving possible sex discrimination, including sexual harassment; monitor outcomes; identify patterns and assess effects on the school climate.
- Provide training and technical assistance on school policies and procedures related to sex discrimination and develop programs to train and educate the school community on their rights and obligations under Title IX.
- 2020 regulations focus: Case management and record-keeping.



# TITLE IX COORDINATOR RESPONSIBILITIES

## RECORD-KEEPING



The district maintains the following records for a period of seven years:

- Documentation of the district's response to a report or formal complaint of sexual harassment. Such documentation must include:
  - Any actions, including supportive measures, taken and designed to restore or preserve equal access to the district's education program or activity.
  - If supportive measures were not provided, documentation of the reasons why such a response was not clearly unreasonable in light of the known circumstances.
  - Documentation for the basis that its conclusion that its response to the report or complaint was not deliberately indifferent.
- Documentation of each sexual harassment investigation, including any determination regarding responsibility, any disciplinary sanctions imposed on the Respondent, and any remedies provided to the Complainant designed to restore or preserve equal access to the district's education program or activity.
- Any appeal and the appeal outcome.
- Any informal resolution and the outcome.
- All materials used to train Title IX Coordinators, investigators, decision makers, and any person who facilitates an informal resolution process.

# OSU / STRAUSS CASE HIGHLIGHTS IMPORTANCE OF DOCUMENTATION (SNYDER-HILL V. OSU)



- In general, the statute of limitations applicable to Title IX claims in Ohio is two years; however, federal standards govern when that period begins to run.
- The 6th Circuit held the “discovery rule” applies to Title IX cases. That means a claim accrues (i.e., the two-year window to sue starts to run) when a plaintiff knows or has reason to know that the defendant injured them.
- The Court held the plaintiffs’ allegations that their claims did not accrue until a private law firm investigated are plausible and, therefore, reversed the District Court’s dismissal of the cases based on the statute of limitations.
- Factors that led the Court to conclude the plaintiffs could pursue their claims against OSU despite the amount of time that had lapsed between the conduct and lawsuit were as follows:
  - OSU is a vast institution.
  - Even if the plaintiffs had enough “snippets” of information to cause them to investigate potential claims against OSU at the time, they would not have uncovered OSU’s knowledge.
  - Most of the plaintiffs plausibly alleged they did not know that they were abused.

## OSU / STRAUSS CASE HIGHLIGHTS IMPORTANCE OF DOCUMENTATION



- In addition, the statute of limitations does not begin to run for minors until they turn 18.
- Students could bring a Title IX claim decades after the investigation is complete.
- Witnesses may be unavailable when a lawsuit is filed so the documentation you create takes on even more importance.

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# TITLE IX TERMS AND DEFINITIONS



## TITLE IX LINGO (TERMS)



**Recipients:** School districts are now referred to as “recipients.”

**Complainant:** A person alleged to be the victim of conduct that could constitute sexual harassment.

**Respondent:** A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

**Supportive Measures:** These are your “interim measures.”

**Determination of Responsibility.** Finding whether a person is responsible for sexual harassment.

**Advisors:** Parties may have an advisor, who may be an attorney, participate in the process.

## TITLE IX LINGO (DEFINITIONS)



Sexual Harassment: Conduct on the basis of sex that satisfies one or more of the following:

- An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (i.e., *quid pro quo* sexual harassment);
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person equal access to the recipient's education program or activity; OR
- "Sexual assault," "dating violence," "domestic violence," or "stalking," as defined by federal law.

# EXAMPLES OF EFFECTIVE DENIAL OF EQUAL ACCESS



- Schools 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.
- Skipping class to avoid a harasser, 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.
- A high school wrestler who quits the team but carries on with other school activities following sexual harassment.
- A student need not have already suffered loss of education before being able to report sexual harassment.
- Effective denial of equal access to education does not require that a person's total or entire educational access has been denied.
- Complainants do not need to have dropped out of school, failed a class, had a panic attack, or otherwise reached a "breaking point" or exhibited specific trauma symptoms to be effectively denied equal access.

(From OCR Title IX Q&A Page)

## TITLE IX LINGO (DEFINITIONS)



### Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment **to any employee.**

### Obligation to Respond

- A school with **actual knowledge** of sexual harassment in a program or activity against a person in the U.S. must respond promptly and in a manner that is **not deliberately indifferent.**

### Note on Training

- How are you training employees to report?



## NEW TITLE IX LINGO (DEFINITIONS)



### Deliberate Indifference

- Failure to respond reasonably in light of known circumstances.
- (Old rule: The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.)

# TITLE IX TEAM MEMBERS



## **Title IX Coordinator**

Initially contacts and offers supportive measures. Assesses and sometimes files complaints. Documents and manages the process.



## **Investigator**

Person designated to investigate, gather evidence and compile an investigation report.

(May be Title IX Coordinator).



## **Decisionmaker**

Person who issues a written determination regarding responsibility.

Cannot be the same person as the Title IX Coordinator or the Investigator.



## **Appeals Designee**

Must offer both respondent and complainant an opportunity to appeal.

Cannot be the same person as the Title IX Coordinator, Investigator, or the Decisionmaker.

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# **DUTY TO AVOID BIAS AND CONFLICT OF INTEREST**



## DEFINING BIAS & CONFLICT



- The Title IX Team must not be biased or conflicted.
  - Black's Law Dictionary: “Bias” is a mental inclination or tendency; prejudice; predilection.
  - Black's Law Dictionary: “Conflict of interest” means a real or seeming incompatibility between one’s private interests and one’s public duties.
  - May not be biased for or against complainants or respondents generally.
  - May not be biased for or against the individual complainants or respondents involved in the formal complaint.

## DUTY TO AVOID BIAS AND CONFLICTS OF INTEREST



- Your focus is the integrity of the process. Never an outcome.
- Learn to recognize your biases so that you can put them aside.
- Consider this before every interview; remind yourself of your obligations to the process.

## SCENARIO



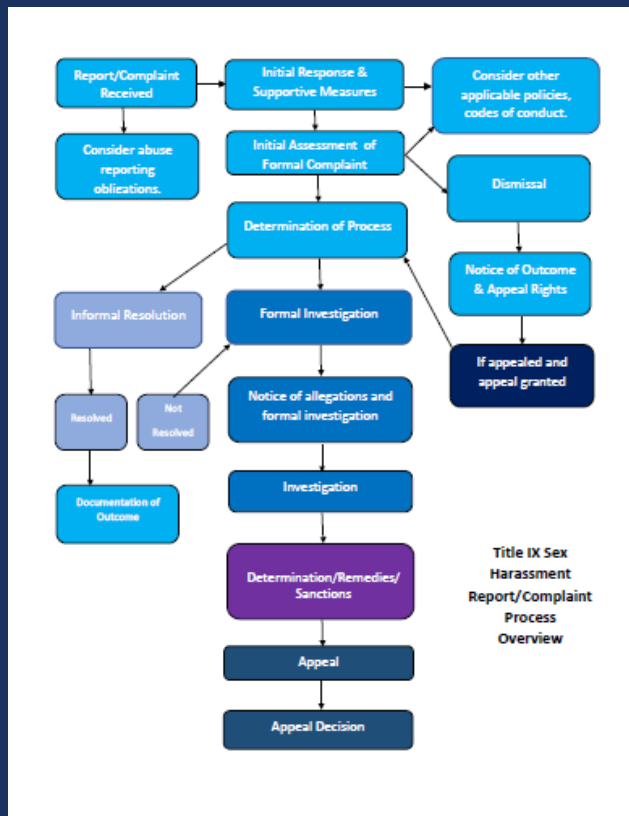
- Evan, a high school senior, confides in his PE teacher that his intervention specialist is “overly touchy.” He says that he feels like she has a crush on him and pays him way too much attention in class. He shared that she “creeps him out” and has gone out of her way to touch his arms and shoulders.
- Mr. Goodreporter, the PE teacher, reports the conversation to the Principal, who contacts you, the Title IX Coordinator.

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# OVERVIEW OF GRIEVANCE PROCEDURE



# OVERVIEW OF GRIEVANCE PROCEDURES



- Report
- Formal complaint
- Supportive measures
- Initial assessment/preliminary inquiry
  - Jurisdiction/dismissals
  - Other policies/duty to report/law enforcement
- Informal resolution
- Formal investigation
  - Interviews
  - Sharing evidence
  - Preparation of investigation report
- Written questions/answers
- Determination of Responsibility/Sanctions
- Appeals



# REPORT OF ALLEGED HARASSMENT



- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.
- School employees are mandatory reporters of alleged sex harassment.
- Districts must promptly respond to reports of sex harassment in a manner that is not deliberately indifferent.

**\*Don't forget about your obligation to report suspected child abuse and/or neglect.**

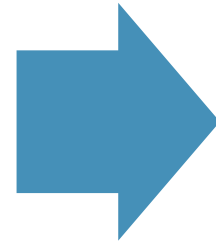
# FORMAL COMPLAINT OF ALLEGED HARASSMENT



- Document filed or signed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that district investigate the allegation of sexual harassment.
- At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.
- 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 recipient.
- As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
- Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under the regulations.

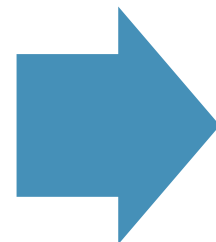


Report



Respond

Formal  
Complaint



Grievance  
Procedures

● When the Title IX Coordinator receives a report of sex harassment, they must contact the Complainant and provide specific information:

- ✓ 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.

**Contact  
Complainant  
Upon Receipt of  
a Report or  
Complaint**

# SUPPORTIVE MEASURES



- *Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.
- Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
- Must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

# TITLE IX COORDINATOR'S INITIAL ASSESSMENT / PRELIMINARY INQUIRY



- Consider involvement/coordination with law enforcement.
- Consider other applicable policies, codes of conduct involved.
- Consider jurisdiction and mandatory/permissive dismissal.
- Consider Complainant's wishes regarding a formal complaint.
- Consider Complainant's request for confidentiality or no action.
- Consider whether to initiate a formal complaint and investigation.
- Consider district safety and the obligation to promptly respond in a manner that is not deliberately indifferent.
- Consider whether informal resolution could be appropriate, if a formal complaint is filed.
- Consider emergency removal/administrative leave.
- Consider consolidation of complaints.

## SCENARIO



- Evan, a high school senior, confides in his PE teacher that his intervention specialist is “overly touchy.” He says that he feels like she has a crush on him and pays him way too much attention in class, He shared that she “creeps him out” and has gone out of her way to touch his arms and shoulders.
- Mr. Goodreporter, the PE teacher, reports the conversation to the Principal, who contacts you.
- What’s next?

- ✓ Notice of the grievance process, including any informal resolution process;
- ✓ Notice of the allegations, including sufficient detail (i.e., names of known parties, the conduct alleged to be sexual harassment, and the date and location of the conduct, if known) to allow the respondent to prepare a response before an initial interview;
- ✓ A 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 (who may be, but is not required to be, an attorney) and to inspect and review evidence; and
- ✓ Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process.

## Written Notice Upon Receipt of Formal Complaint



# **TITLE IX COORDINATOR- INITIATED COMPLAINT / INVESTIGATION**

When required by policy (i.e., where student alleges sexual harassment by an employee).

Where the conduct is an alleged crime.

Where disciplinary action against the employee or student would result if the allegations are true.

Where district safety or the obligation to promptly respond in a manner that is not deliberately indifferent are implicated by failure to pursue a formal complaint/investigation.

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# JURISDICTION & DISMISSALS



# JURISDICTION



- To file a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient.
- “Education program or activity” includes locations, events, or circumstances over which the recipient exercised **substantial control** over both the **respondent and the context** in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

# JURISDICTION



- What about off campus conduct?
  - Jurisdiction may still lie if there is control over the Respondent and the context, even if it occurs off campus.
- For off-campus misconduct outside the jurisdiction of the district, there may be in-program effects.
- Even if no jurisdiction under Title IX, a non-disciplinary remedial response would be best practice.
- May also want to look to other policies and code of conduct.

# MANDATORY DISMISSAL OF FORMAL COMPLAINT



- Must dismiss a formal complaint if:
  - The conduct alleged in the formal complaint would not constitute sexual harassment as defined in the law/policy, even if proved;
  - If the conduct alleged did not occur in the recipient's education program or activity;
  - If the conduct alleged did not occur against a person in the United States.
- Such dismissal does not preclude other action under the District's code of conduct or other policies.

# DISCRETIONARY DISMISSAL OF FORMAL COMPLAINT



- The District may dismiss a formal complaint or any allegations in the complaint if:
  - Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations;
  - The Respondent is no longer enrolled or employed by the District;
  - Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint or allegations.
- Upon dismissal, must promptly send written notice of the dismissal and the reasons to the parties.
- Dismissal may be appealed to the appeals decision-maker.

# EMERGENCY REMOVALS



- A school can remove a student from the school's education program or activities on an emergency basis if the Respondent poses an immediate threat to anyone's physical health or safety.
- The district must undertake an individualized safety and risk analysis, determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- A school may place an employee on administrative leave during an investigation.

## SCENARIO - EVAN



- In your meeting with Evan, he describes that his intervention specialist has been paying extra attention to him in class all year. He says that she calls him “honey” and “sweetie” and she doesn’t talk like that to any other boys in the class that he has noticed.
- He said the touching on his arms and shoulders happens on average, once per week. She will be behind him and put both her hands on his shoulders. Or she will reach out and stroke his arm when he is doing one on one work with her.
- He mentions that she has commented on his strong muscles and his physique at least three times. He reports that she said he “was such a strong boy for his age,” he “was going to bust out of his t-shirt his muscles were getting so big” and he “must have worked out really hard that day.”
- Evan feels like he is being singled out with this attention and he wants it to stop. He is very embarrassed and has not said anything to anyone before. He has avoided going to the intervention room for help a couple of times because he did not want to be alone with this teacher.



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# INFORMAL RESOLUTION



# INFORMAL RESOLUTION CONDITIONS



- Districts may not offer an informal resolution process unless a formal complaint is filed.
- Districts may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment.
- Districts may not require the parties to participate in an informal resolution process.
- However, at any time prior to reaching a determination regarding responsibility the district may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient provides written notice disclosing certain items (next slide).
- Prior to informal resolution, the district must obtain the parties' voluntary, written consent to the informal resolution process.
- **Districts cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.**

Notice to the parties must include:

- ✓ the allegations,
- ✓ the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and
- ✓ any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

## Written Notice Prior to Informal Resolution

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# THE ROLE OF THE INVESTIGATOR



# INVESTIGATIONS



- Mandatory separation between the investigation function and decision-making.
- Respondent is not just “innocent until proven guilty,” but must be presumed not responsible for the conduct throughout the entire investigation process.
- Parties are entitled to view all evidence directly related to the allegations of sexual harassment.

# HOW MANY HATS CAN AN INVESTIGATOR WEAR?



## Investigator

Person designated to investigate, gather evidence and compile an investigation report.

Investigator may also be the Title IX Coordinator.



## Decisionmaker

Person who issues a written determination regarding responsibility.

Cannot be the same person as the Title IX Coordinator or the Investigator.



## Appeals Designee

Must offer both respondent and complainant an opportunity to appeal.

Cannot be the same person as the Title IX Coordinator, Investigator, or the Decisionmaker.

# CONFIDENTIALITY - COMPETING OBLIGATIONS

- Recipients cannot restrict either party's ability to discuss the allegations or gather and present evidence. (No more gag orders.)
- Recipients must keep confidential the identity of a person who complains or reports sexual harassment, including parties and witnesses, except as permitted by law **or to carry out the purpose of the Title IX regulations.**
- Districts continue to have FERPA obligations.
- New regulations REQUIRE sharing evidence with both parties.

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# **INVESTIGATION STEP ONE: PREPARING TO INVESTIGATE**





- ✓ Notice of the grievance process, including any informal resolution process;
- ✓ Notice of the allegations, including sufficient detail (i.e., names of known parties, the conduct alleged to be sexual harassment, and the date and location of the conduct, if known) to allow the respondent to prepare a response before an initial interview;
- ✓ A 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 (who may be, but is not required to be, an attorney) and to inspect and review evidence; and
- ✓ Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process.

## Written Notice Start of Formal Complaint

# MANAGING AN ADVISOR'S INVOLVEMENT



- Both parties have an equal opportunity to have others present during any grievance proceeding, including the opportunity to be accompanied by an advisor who may be, but is not required to be, an attorney.
- Employees will typically have a union representative and/or an attorney represent them.
- Students may bring a parent or advisor.
- Parties should designate their advisor in writing, in advance of interviews.
- Make sure to have a pre-interview discussion with representatives/advisors about the limitations of what they can do/say in the interview.
- You may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

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# **INVESTIGATION STEP TWO: GATHERING EVIDENCE**



# GATHERING EVIDENCE – COMPLYING WITH THE REGULATIONS



- Burden of proof rests on the Recipient at all times.
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Cannot restrict the parties from discussing the allegations under investigation or from gathering and presenting relevant evidence.
- Must provide to any 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.

# GATHERING EVIDENCE – BEGIN WITH AN ORGANIZED FILE AND GATHERING RECORDS



- What records should you be asking for?
- Binders are great. Set up an automatic protocol for each investigation. A binder with pre-determined tabs and a Table of Contents that you can fill in as you go.
- Tabs: Notice of Allegations, Advisor Forms, Complainant Interview, Respondent Interview, Witness Interviews, Text Messages and Social Media, Evidence from Complainant, Evidence from Respondent, Draft Report, Final Report, Correspondence with Complainant and/or Advisor, Correspondence with Respondent and/or Advisor, Notes, etc.
- Start a Timeline and a Witness List to use throughout your investigation.
- Remember that all evidence directly related to the allegations must be provided to the parties eventually, and so keep original copies of things clean.

# GATHERING EVIDENCE – PLANNING FOR INTERVIEWS



- Whom do you interview?
  - Balance thoroughness and disruptiveness.
  - Consider the nature of the allegations, ages and backgrounds of parties and witnesses, other available evidence, trustworthiness/credibility of witnesses.
  - What witnesses have the Complainant and Respondent asked you to interview?
- Begin the interview process as soon as possible.

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# TAKING STATEMENTS

- 
- Never promise confidentiality, but explain the safety precautions the District will take (e.g., no disclosure of personally identifiable information in public records).
  - Get their story in their own words, first in general, then more specifically.
  - Follow up to get specific facts, not generalities.
  - Don't forget "anything else?"

# INTERVIEWING CHILDREN



- Consider who will interview the child. Consider inviting parents to attend.
- Interview Structure:
  - Introductory--set general ground rules regarding discussion.
    - Agreement to tell the truth.
    - Reminder they should not guess.
    - Correct you if you are wrong.
  - Rapport-Building--talk about things other than the target incident.
  - Free-Recall—ask open-ended questions.
- Open-ended questions provide higher quality information.
  - Ex: “Where were the other students?” v. “Were the other students in the hallway?”
- Young students – look for the core of the story to be true; minor inconsistencies are common and do not speak to the larger credibility of the narrative.



## SPECIAL WITNESS CONSIDERATIONS: DIFFICULT WITNESSES



- What if a witness refuses to cooperate? Student? Employee?
- Press witnesses or parties on ambiguous, general answers, or nonresponsive answers.
- Make sure you have the “who, what, where, when, why, how” from each witness for each issue you investigate.

# SPECIAL WITNESS CONSIDERATIONS: CONDUCTING A TRAUMA-INFORMED INTERVIEW



Trauma-informed investigating and interviewing include the following key components:

- 1) understanding the impact of trauma on a neurological, physical, and emotional level;
- 2) promoting safety and support;
- 3) knowing positive ways to respond that avoid re-traumatization; and
- 4) providing choice with a goal of empowerment.

## SPECIAL CONSIDERATIONS – DELAYS



- Grievance process allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.
- Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

## SCENARIO - EVAN



- In your meeting with Evan, he describes that his intervention specialist has been paying extra attention to him in class all year. He says that she calls him “honey” and “sweetie” and she doesn’t talk like that to any other boys in the class that he has noticed.
- He said the touching on his arms and shoulders happens on average, once per week. She will be behind him and put both her hands on his shoulders. Or she will reach out and stroke his arm when he is doing one on one work with her.
- He mentions that she has commented on his strong muscles and his physique at least three times. He reports that she said he “was such a strong boy for his age,” he “was going to bust out of his t-shirt his muscles were getting so big” and he “must have worked out really hard that day.”
- Evan feels like he is being singled out with this attention and he wants it to stop. He is very embarrassed and has not said anything to anyone before. He has avoided going to the intervention room for help a couple of times because he did not want to be alone with this teacher.

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# **INVESTIGATION STEP THREE: PROVIDING THE PARTIES WITH EVIDENCE**



## OBLIGATION TO PROVIDE EVIDENCE



- Must provide both parties an equal opportunity to inspect and review any evidence obtained as a part of the investigation that is **directly related to the allegations raised in a formal complaint**, including the evidence upon which the recipient does not intend to rely in reaching a determination.
- Must do this at this time so that each party can “meaningfully respond to the evidence prior to the conclusion of the investigation.”
- You must provide the evidence in an electronic format or hard copy and give the parties at least 10 days to submit a written response. If a written response is provided, consider it in completing your final report.

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# **INVESTIGATION STEP FOUR: TURNING EVIDENCE INTO THE FINAL INVESTIGATIVE REPORT**



- ✓ Fairly summarize relevant evidence.
- ✓ Evaluate all relevant evidence objectively, including both inculpatory and exculpatory evidence.
- ✓ Make credibility determinations that are not based on a person's status as a Complainant, Respondent, or Witness.
- ✓ "Show your work" for all of the above in order to have a complete report.

## Written Investigation Report



# FAIRLY SUMMARIZING RELEVANT EVIDENCE



## Do...

- Be specific.
- Memorialize witnesses interviewed, records reviewed/created.
- Document the District's efforts (e.g., if a witness would not cooperate/be interviewed).
- Provide information to allow the decision maker to make factual conclusions about what happened and make credibility determinations.

## Don't...

- Make determinations of responsibility.
- Be too general.
- Refer to conversations with legal counsel.
- Refer to conversations with insurers.
- Make conclusions to make someone happy. This is our one chance to get it right.

# FAIRLY SUMMARIZING RELEVANT EVIDENCE



DON'T	DO
<p data-bbox="275 668 642 753">“He has the party classroom.”</p>	<p data-bbox="912 639 2313 782">“Mr. Jones stays after school every day for at least 1.5 hours and allows students to come to his classroom to listen to music and socialize with the classroom door shut.”</p>
<p data-bbox="173 925 744 953">“He stalked her every day.”</p>	<p data-bbox="861 868 2364 1011">“Michael left his last period class every day last week in order to be at Melinda’s class when it ended. He then followed her to her locker and out to her car.”</p>
<p data-bbox="208 1125 718 1210">“The coach used sexual innuendo as jokes.”</p>	<p data-bbox="896 1125 2323 1210">“The coach made the comment that No. 6 and No. 9 were standing right next to each other.”</p>

# TURNING EVIDENCE INTO A REPORT

## ASSESSING CREDIBILITY



- Credibility is the process of weighing the accuracy and veracity of evidence.
- Evaluate the source, content, and plausibility of testimony in light of other evidence.
  - Provide facts establishing whether the witness had the opportunity and ability to see or hear or know the things the witness shared.
  - Provide facts describing the quality of the witness's memory.
  - Provide facts describing the witness's demeanor.
  - Provide facts establishing whether the witness has an interest in the outcome of the investigation?
  - Provide facts establishing any bias or prejudice that the witness may have
- Assessment of credibility does not include making conclusions about whether a witness or evidence is credible or judging the comparative credibility of evidence or witnesses. It stops just short of that, pointing to discrepancies without deciding them.

# TURNING EVIDENCE INTO A REPORT

## AVOIDING BIAS



- Distinguish undisputed evidence from contested evidence.
- Let the evidence lead to a conclusion – do not interpret the evidence with a goal to reach a particular conclusion.
- Consider any risk of bias you might have towards a party or witness (positive or negative).
- Avoid “first impression bias.”
- There will be gaps in evidence – if you cannot fill those gaps, do not use your assumptions or speculation.

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# DETERMINATION OF RESPONSIBILITY



## NEXT STEPS – AFTER INVESTIGATION



- Must give the final investigative report to both parties at least 10 days prior to a hearing, or determination, for their review and written response.
- The decision-maker either conducts a hearing or a question exchange.
- **Question Exchange:** After receiving the investigation report and before reaching a determination of responsibility, the decision maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.
  - **Tip:** Include information about how to submit questions in the final investigative report.
- Career centers must conduct live hearings in lieu of a written question exchange.

## DECISION MAKING PROCESS – ALLOWING QUESTIONING



- The decision maker may only allow relevant questions.
- What is a relevant question?
  - “Relevance” is not generally defined in the regulations.
  - Under the Federal Rules of Evidence, evidence is relevant if:
    - It has any tendency to make a fact more or less probable than it would be without the evidence; and
    - The fact is of consequence in determining the action.

## NEXT STEPS – AFTER INVESTIGATION



- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that **someone other than the respondent committed the conduct** alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are **offered to prove consent**.
- Questions seeking information that is protected by a legally recognized privilege are not relevant, unless the person being asked the question has waived the privilege.
  - Examples: Attorney-client privilege, counselor-patient privilege, doctor-patient privilege.



# INVESTIGATIVE REPORT VS. DETERMINATION OF RESPONSIBILITY

## Investigative Report

- The investigator should be a **fact finder**.
  - Gather the facts.
  - Provide sufficient details to provide context and information on the importance of specific evidence.
  - Explain what questions were asked, what evidence was reviewed, and why the investigator made the choices to ask those questions and review that evidence.
  - Explain what evidence the investigator believes is most important and why. Explain what evidence the investigator believes is unimportant and why.
  - Explain why the investigator thinks certain evidence or statements are more or less credible.

## Determination of Responsibility

- The decision maker should be a **decision maker**.
  - Make credibility determinations, including whether parties and witnesses were telling the truth.
  - Make determinations about what happened and when.
  - Make determinations about the relative importance of facts and evidence.
  - ***Make a determination regarding whether the Respondent sexually harassed the Complainant that is supported by the facts, as presented by the investigative report and reviewed by the decision maker.***
  - ***Make determinations regarding appropriate sanctions and remedies.***

# WHAT RULES APPLY TO THE DECISION MAKER'S CONSIDERATION OF THE EVIDENCE?



- Objectively evaluate all relevant evidence, both inculpatory and exculpatory.
  - “Inculpatory evidence” is evidence that shows, or tends to show, a person’s involvement in an act, or evidence that can establish responsibility.
  - “Exculpatory evidence” is evidence that tends to excuse, justify, or absolve the alleged fault or responsibility as a Respondent.
- Make credibility determinations that are not based on a person’s status as a complainant, respondent, or witness.
- Continue to presume that the Respondent is not responsible for the alleged conduct until a **final** determination regarding responsibility is made.
- Remember that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the **District**, not the Complainant or Respondent.
- Apply the standard of evidence stated in the District’s sexual harassment policy (preponderance of the evidence).

## The Written Determination of Responsibility Must Include:

- ✓ Allegations potentially constituting sexual harassment;
- ✓ Description of 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;
- ✓ **Findings of fact supporting the determination;**
- ✓ **Conclusions regarding the application of the district's code of conduct to the facts;**
- ✓ **A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, disciplinary sanctions for the Respondent, and remedies designed to restore or preserve equal access to the district's education program or activity to be provided to the Complainant.**
- ✓ Procedures and permissible bases for the Complainant and the Respondent to appeal.

# Written Determination of Responsibility

# PROVIDING THE WRITTEN DETERMINATION TO THE PARTIES



- The District must provide the written determination simultaneously to the parties.
  - Must actually give the written determination to the parties, either electronically or physically.
  - Cannot just show them the report, as was often the practice in the past.
- The written determination becomes final on either:
  - The date that the District provides the parties with the written determination of the result of an appeal, if an appeal is filed; or
  - If an appeal is not filed, the date on which an appeal would no longer be considered timely.

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# APPEALS



## GROUNDS FOR APPEAL



Both parties have the right to appeal a determination of responsibility or a dismissal for the following reasons:

1. A procedural irregularity affected the outcome;
2. New evidence that was not reasonably available at the time of the determination and could affect the outcome;
3. Conflict of interest on the part of the Title IX Coordinator, Investigator, or Decisionmaker that affected the outcome; or
4. Other reasons as permitted by the recipient.

## PROCEDURES FOR APPEALS – NOTICE OF APPEAL



- Appeal procedures, including deadlines, are included in the District's grievance process.
- Notify both parties of the appeal.
- Give both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the outcome of the determination of responsibility.
  - Tip: Ok to ask both parties if they plan to appeal.

- ✓ When an appeal is received, notify the other party(ies) in writing of the appeal, and implement appeal procedures equally for both parties.
- ✓ Notify parties of their opportunity to submit a written statement in support of, or challenging, the determination of responsibility.
  - ✓ Must be submitted by the deadline identified in the grievance process.
  - ✓ The notice should specify any other requirements for this statement.
  - ✓ Deadlines and other requirements must apply equally to the parties.

## Written Notification of Appeal



# THE WRITTEN APPEAL DECISION



- What are possible results of the appeal?
  - The Determination of Responsibility is “affirmed” or “reversed” without any further investigation necessary.
  - The complaint is “remanded” to the Investigator for limited further investigation in accordance with specific instructions from the Appeal Decision.
  - The complaint is “remanded” to be assigned to a new investigator or decisionmaker due to bias/conflict.

## DECIDING THE APPEAL



- The Appeal is not a Re-Do, but a Review.
  - Confine the review of the Determination of Responsibility to the specific issue raised in the Appeal and the statements the parties submitted in the Appeal.
  - The Appeals Decision Maker should not substitute his/her judgment for that of the Decision Maker, especially regarding factual determinations.

## PROCEDURES FOR APPEALS – NOTIFYING PARTIES OF THE RESULT



- Issue a written appeal decision describing the result of the appeal and the rationale for the result.
- Simultaneously provide the written appeal decision to both parties within the timeline provided in the grievance process.

Recommended to include:

- ✓ Identify the basis/bases for appeal.
- ✓ Describe the relevant procedural steps taken from the receipt of the formal complaint to the issuance of the Determination of Responsibility.
- ✓ Describe the relevant findings of fact and relevant conclusions in the Determination of Responsibility.
- ✓ Include a statement of, and rationale for, the result as to each basis for appeal.
- ✓ Describe the result of the appeal.

## Appeal Decision

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# SANCTIONS & REMEDIES



# SANCTIONS



- The district may not impose any disciplinary sanctions or other actions that are not supportive measures against a Respondent until the grievance process has concluded (check your grievance process).
- Sanctions may be imposed immediately after the Determination of Responsibility is issued (unless your grievance process says otherwise)
- The sanctions must be among those listed or described in the grievance process as within the range of possible disciplinary sanctions and remedies.
- The Title IX Coordinator is responsible for effectively implementing any sanctions and/or remedies.

## REMEDIES



- The Determination of Responsibility must include a statement of whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the Complainant.
- Remedies may be the same as supportive measures, but after the Determination of Responsibility becomes final, need not be non-disciplinary or non-punitive, and need not avoid burdening the Respondent.

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# 2024 REGULATIONS – WHAT’S NEXT? (MAYBE)





## WHEN THE REGULATIONS TAKE EFFECT



- Final regulations were published on April 19, 2024 and were set to become effective in all States on August 1, 2024.
- Pending litigation has resulted in the regulations being enjoined (stopped) in more than half of the country as of today's presentation.

## PENDING COMPLAINTS



- OCR has advised that the 2024 regulations will apply to conduct that occurs after their effective date on August 1, 2024. So, if a complaint is filed after August 1, 2024, but the conduct in question occurred on July 30, 2024 or earlier, the 2020 regulations will apply.
- Under this guidance, complaints that are pending when the new regulations go into effect will continue to be subject to the 2020 regulations.
- Consult with counsel on specific situations.

## 2024 REGULATIONS: HIGHLIGHTS



- Establishes that discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- Prohibits discrimination against any person on the basis of current, potential, or past pregnancy or related conditions, or establishing or following any policy, practice, or procedure that so discriminates.
- New anti-discrimination standard: Must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.

# 2024 REGULATIONS: HIGHLIGHTS



## New definition of Sexual Harassment:

- **Quid pro quo harassment:** An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;

# 2024 REGULATIONS: HIGHLIGHTS



## New definition of Sexual Harassment:

- **Hostile environment harassment:** Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).

## 2024 REGULATIONS: HIGHLIGHTS



- Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
  - The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
  - The type, frequency, and duration of the conduct;
  - The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
  - The location of the conduct, the context in which the conduct occurred; and
  - Other sex-based harassment in the recipient's education program or activity.

# 2024 REGULATIONS: HIGHLIGHTS



## New definition of Sexual Harassment

- Sexual assault: Meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- Dating violence: Meaning violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- Domestic violence: Meaning felony or misdemeanor crimes committed by a person who: (A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim; (B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; (C) Shares a child in common with the victim; or (D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.
- Stalking meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to: (A) Fear for the person's safety or the safety of others; or (B) Suffer substantial emotional distress.

## 2024 REGULATIONS: CHANGES



- Creates obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.
- Changes supportive measures to permit measures that burden a respondent during the pendency of the grievance procedures, as long as that burden is not "unreasonable," and creates a process for parties to seek changes to decisions about supportive measures.
- Decisionmaker can be the Title IX Coordinator and/or Investigator. Appeals Decisionmaker remains uninvolved in the investigation/initial decision.
- Much of the rigid sex-harassment grievance procedure is only applicable to postsecondary education complaints by students.



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# TITLE IX PROPOSED ATHLETICS REGULATIONS



## ATHLETICS



- **April 13, 2023:** Department of Education released Notice of Proposed Rulemaking (NPRM) on athletic eligibility under Title IX.
- **Early 2024:** Anticipated publishing date for proposed Athletics regulations.
- **Current Status:** Postponed with no new proposed publishing date.

# PROPOSED TITLE IX ATHLETIC REGULATION CHANGES



- Policies that categorically ban transgender students from participating on athletic teams consistent with their gender identity will violate Title IX.
- Schools may adopt policies that limit transgender students' participation in instances of competitive high school and college athletic environments.
- Schools will have flexibility in adopting a policy for participation depending on age of students and competitive nature of sports.

# PROPOSED TITLE IX ATHLETIC REGULATION CHANGES



- If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

# SEXUAL HARASSMENT TOP TIPS FOR 2024 - 2025



- Do train all employees at the beginning of the school year on the definition(s) of sexual harassment and their obligation to report and address sex discrimination and harassment.
- Do ensure all new members of the Title IX team receive training specific to their roles.
- Do have your policy committee consider the discretionary options for the 2024 regulations so that your district is not caught off guard.
- Don't discipline for sexual harassment without following the grievance procedure.
- Don't use other policies/procedures to investigate allegations of sexual harassment.
- Do collaborate on whether conduct meets the definitions of sexual harassment in policy.

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**THANK YOU!**

