

TITLE IX MANDATED TRAINING (20 U.S.C. 20 U.S.C. §§ 1681–1688; 34 C.F. R. part 106)

TITLE IX – THE LAW

A. Title IX Law (20 U.S.C. §§ 1681–1688)

No person in the U.S. 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.

B. Title IX Regulations ([34 C.F. R. part 106](#)). The following are the key sections of the regulations relating to sexual harassment that have been newly created or amended effective on August 14, 2020:

- [Section 106.8](#): Addressing the designation of a Title IX Coordinator, the adoption of a grievance procedure and grievance process, and notice/dissemination of policies
- [Section 106.30](#): Important new definitions added by the Final Rule
- [Section 106.44](#): Addressing the requirements for districts to respond to each report or complaint of sexual harassment of which the district has actual knowledge
- [Section 106.45](#): Requiring districts to establish and administer a grievance process for formal complaints of sexual harassment; also addressing training and recordkeeping requirements
- [Section 106.71](#): Non-retaliation and confidentiality requirements.

C. Enforced by Office for Civil Rights (OCR), U.S. Department of Education

MANDATORY TRAINING REQUIREMENTS

A. The individuals designated by the district as a Title IX Coordinator, investigator, decision-maker, or any person designated by a school district to facilitate an informal resolution process must receive training on the following:

- The definition of sexual harassment in § 106.30;
- The scope of the school district’s education program or activity;
- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable; and
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

B. Investigators must receive training on issues of relevance in connection with the investigator’s duty to create an investigative report that fairly summarizes relevant evidence.

- C. Decision-makers must receive training on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant. If live hearings are used/permitted under the local grievance process (which will not be common for school districts), decision-makers must also receive training on any technology to be used at any live hearing.
- D. Materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, will not rely on sex stereotypes and will promote impartial investigations and adjudications of formal complaints of sexual harassment.
- E. The district will maintain for seven years all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.
- F. The district will make these training materials publicly available on its website.

SEXUAL HARASSMENT IN GENERAL

- A. All school districts have local policies that prohibit unlawful harassment (including sexual harassment) and that provide procedures for reporting and responding to allegations of prohibited harassment.
- B. School districts also establish conduct expectations for employees, students, and others that regulate conduct connected to sex, gender, or sexual orientation that, even if not “unlawful” by itself, either:
 - Is considered inappropriate for the workplace setting or for the educational environment; or
 - Could contribute to a finding of sexual harassment if the conduct were combined with other related conduct or circumstances.
- C. School district employees need to be aware of all applicable conduct expectations, whether established by law or by school district policies, rules, or codes of conduct.
- D. The definition of sexual harassment is often not easy to determine. It is defined differently in state and federal law, sometimes one applies to students and another to employees, and sometimes more than one applies.
- E. While sexual harassment may be defined differently, there are some key concepts applicable to all definitions:
 - As a starting point, a necessary element of sexual harassment is that the conduct has to be based on sex. For school district purposes, this means that the conduct has to

have an identifiable connection to a person's sex or to the related concepts of gender, sexual orientation, or sex-based or gender-based stereotypes.

- The conduct also has to have a sufficient connection to district employment or to school district programs, activities, or services.
- Then, the next step involves looking at the specific context and the effects of the conduct.
- In the **employment** context, the conduct is unwelcome and is sufficiently frequent or severe such that it does either of the following:
 - Creates an **intimidating, hostile, or offensive** work environment.
 - Unreasonably **interferes with an employee's ability to perform their job** (or an applicant's opportunity to access employment).
- In the **student** context, the conduct is sufficiently frequent or serious such that it does either of the following:
 - Creates an **intimidating, hostile, or offensive environment** for a student's education or the student's participation in school activities.
 - Substantially **interferes with a student's school performance** or the student's opportunity to access school programs or activities.
- Submission to or rejection of unwelcome sexual conduct by an individual is used as the basis for employment/educational decisions or for granting (or withholding) a benefit or service. This is sometimes referred to as **quid pro quo sexual harassment**.
- The conduct involves criminal activity such as sexual assault, sexual abuse of a student/child, stalking, or domestic abuse.
- Any type of purported "romantic" relationship or sexual communications between an adult employee/agent of the school district and any student is highly likely to qualify as sexual harassment and would also violate other laws and district conduct expectations.

F. Examples of conduct that may constitute or contribute to a finding of sexual harassment.

- Unwelcome verbal, written, or physical conduct of a sexual nature, such as unwelcome (1) sexual or romantic advances; (2) requests for sexual favors; (3) lewd or sexually-suggestive comments (e.g., sexual innuendo); or (4) physical contact/touching of a sexual nature.
- Verbal or written comments that insult, degrade, or stereotype a person or group of people because of sex (including because of a person's gender or lack of conformity

to sex/gender stereotypes). This might include the use of slurs, epithets, name calling, ridicule, mockery, insults, or offensive jokes.

- The display or distribution of sexually-explicit content that lacks a sufficiently legitimate purpose.
- Offensive comments about women in general or men in general.
- Intimidation that occurs because of a person's sex.

G. Other Critical Considerations

- Employees can be sexually harassed by their own supervisor, a supervisor in another area, a co-worker, or another person who interacts with the employee in the work environment (e.g., a school volunteer, a parent of a student, etc.).
- Students can be sexually harassed by other students, school district employees, or another person who interacts with the student in the school's programs or activities.
- The circumstances matter. Flirtatious conduct as an indication of romantic interest between two high school students may be acceptable behavior, but the same conduct could be sexual harassment (and, at a minimum, would be a violation of district conduct expectations) if a school employee were to direct similar flirtatious comments/conduct toward a student.
- Sexual harassment may involve other issues:
 - Child abuse subject to mandatory reporting.
 - Threat of school violence.
 - Educator misconduct.

H. What to do Generally?

- Report it.
 - To a district Title IX Coordinator, either in person, by U.S. mail, by telephone, or by electronic mail, using the coordinator's district-provided contact information.
 - By any other means that results in a Title IX Coordinator actually receiving your verbal or written report.
 - As an alleged victim, you may also consider documenting and submitting a "formal complaint" of sexual harassment under Title IX, as further detailed in the school district's policies and/or Title IX notice.
- Know your rights. Review applicable district policies, employee handbook provisions, and workplace notices and posters.

- Ask questions. Refer questions and concerns about your situation to the school district's Title IX Coordinator, to a state or federal anti-discrimination agency, or to your own legal representative.

OVERVIEW OF THE 2020 TITLE IX REGULATIONS

The new Title IX regulations took effect on August 14, 2020. The regulations changed the Title IX process significantly:

- The new regulations create a **definition of sexual harassment** that is unique to Title IX.
- The new regulations change the way that **school districts are required to respond to alleged Title IX sexual harassment**, including changing the procedures that school districts will use to investigate and make decisions about such allegations.
- The new regulations are intended to promote **equitable treatment** and to protect the rights of **both** alleged victims of Title IX sexual harassment, as well as alleged perpetrators of Title IX sexual harassment.

The new Title IX regulations also require Districts to address the following:

- A. **Nondiscrimination policy statements** regarding sex discrimination under Title IX, including express identification of the **Title IX Coordinator**.
- B. A **grievance procedure** for receiving and responding to complaints of **sex discrimination** under Title IX.
- C. District responses when the district has **actual knowledge** of an incident or allegation of **sexual harassment** under Title IX—regardless of whether or not a formal complaint is filed.
- D. A **grievance process** for addressing **formal complaints** of **sexual harassment** under Title IX.
- E. **Notices** related to all of the above.
- F. Employee **training**.
- G. **Recordkeeping, confidentiality, and non-retaliation** in connection with all of the above.

THE ROLE OF THE TITLE IX COORDINATOR

- A. Every district must have at least one employee who is expressly designated and identified in relevant notices as the Title IX Coordinator. (“Title IX Coordinator” does not need to be the person’s only job title.)
- B. The Title IX Coordinator(s) must be authorized to coordinate the school district’s efforts to comply with all of the district’s responsibilities under the Title IX regulations. Those responsibilities encompass all forms of prohibited sex discrimination, including sexual harassment and including both student-related and employment-related matters.
- C. The Title IX Coordinator(s) must be authorized to receive reports and complaints of violations of Title IX from any person, including formal complaints of sexual harassment (see below). Further, local procedures should ensure that all other administrators and school employees are aware of the need to appropriately refer Title IX matters to the Title IX Coordinator.
- D. Title IX notices will inform students, parents, employees and others that inquiries about the application of Title IX and the Title IX regulations to the district may be referred to the designated Title IX Coordinator.
- E. The Title IX Coordinator has specific, mandatory duties in connection with a district’s response to reports, complaints, or other notices of Title IX sexual harassment, including important duties related to the identification and implementation of “supportive measures” and, in appropriate cases, the implementation of remedies.
- F. The Title IX Coordinator has discretion to sign a formal complaint of sexual harassment on behalf of the district for the purpose of initiating the Title IX grievance process in situations where the alleged victim of the conduct either is unwilling or unable to file a formal complaint.
- G. The Title IX Coordinator is prohibited from performing any decision-making role with respect to formal complaints of sexual harassment.
- H. The Title IX Coordinator must receive certain mandatory training. However, to perform the role competently, the scope of the training should exceed the minimum mandates.
- I. In many school districts the Title IX Coordinator is likely going to be responsible for ensuring that the district meets its obligations with respect to Title IX notices, staff training, and recordkeeping.

GRIEVANCE PROCEDURE V. GRIEVANCE PROCESS

A. **“Grievance Procedure”** refers to steps for responding to and resolving reports or complaints of possible unlawful discrimination based on sex under Title IX, *other than formal complaints of sexual harassment under Title IX.*

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1. For complaints under Title IX, the grievance procedure applies only to sex discrimination occurring in the district’s education program or activity against a person **in the United States.** (See §106.8(c) and (d))
2. An example of a Title IX complaint that would **not** be a sexual harassment complaint and that would be directed to the “grievance procedure” would be a complaint that the district provides unequal financial support and facilities in athletics based on sex.
3. Most districts will use the same “procedure” for receiving and responding to complaints of unlawful discrimination that are (1) based on protected classes other than sex, or (2) based on laws other than Title IX.
4. Most districts have an existing complaint procedure that, perhaps with some modifications, can be identified and used as the Title IX grievance procedure.
5. The Title IX regulations specify a district’s procedures must allow **any person at any time** to report sex discrimination, including sexual harassment (whether or not the person reporting is a person who is 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.

B. **“Grievance process”** refers to a highly structured process for investigating and resolving **formal complaints of sexual harassment** under Title IX. (See §106.45)

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1. School districts around the state have either recently adopted their Title IX grievance process or are currently in the process of doing so.
2. A district is only required to utilize its Title IX “grievance process” when a formal complaint of sexual harassment under Title IX is pending. However, as a very important caveat, **use of the Title IX grievance process is also generally a prerequisite to the imposition of any disciplinary measure or penalties for substantiated sexual harassment, as defined under the Title IX regulations.**

C. Key Points:

1. A report of sexual harassment requires an immediate response from the Title IX Coordinator but does not trigger the grievance process under Title IX.

2. Only a formal complaint of sexual harassment triggers the grievance process under Title IX.
3. A formal complaint must allege sexual harassment in an education program or activity of the district against a person in the U.S. to continue the grievance process.
4. The grievance process must treat complainants and respondents equitably by providing (1) remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and (2) by following a grievance process that complies with the Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.
 - a. The grievance process must be completed (i.e., the district must reach a final determination of the allegations, including completing any appeals) before the imposition of any disciplinary measure or penalties for substantiated sexual harassment, as defined under the Title IX regulations.
 - b. However, as covered later in these materials, there are two important situations in which a school district is permitted to take specific interim actions prior to the resolution of an allegation of sexual harassment. The following actions are expressly authorized by the Title IX regulations and will not violate the prohibition against imposing discipline/sanctions prior to the completion of the grievance process:
 - i. **Emergency removal**, which may be used as a response to a threat to the physical health or safety of any student or other individual. Additional limitations and procedural requirements apply to “emergency removals.”
 - ii. The Title IX regulations allow a school district to place an employee on **administrative leave**, but only during the pendency of the grievance process for a formal complaint of sexual harassment.

THE OBLIGATION TO RESPOND TO A NOTICE OF SEXUAL HARASSMENT

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

What is Sexual Harassment?

- A. As defined in section 106.30(a) of the Title IX regulations, “sexual harassment” under means conduct on the basis of sex that satisfies one or more of the following:
1. *An employee of the district conditioning the provision of an aid, benefit, or service of the school district on an individual's participation in unwelcome sexual conduct (quid pro quo);*
 2. *Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district’s education program or activity; or*
 3. *Any of the following, as defined under the Title IX regulations by reference to other federal statutes:*
 - a. *“sexual assault,” as defined in 20 U.S.C. 1092(f)(6)(A)(v),*
 - b. *“dating violence,” as defined in 34 U.S.C. 12291(a)(10),*
 - c. *“domestic violence,” as defined in 34 U.S.C. 12291(a)(8), or*
 - d. *“stalking,” as defined in 34 U.S.C. 12291(a)(30).*
- B. As is true of all allegations of sex discrimination under Title IX, an allegation of sexual harassment under Title IX must have occurred in the district’s education program or activity and in the United States.
- C. The Title IX definition of sexual harassment is generally understood to be narrower (i.e., cover less conduct) than the broader definitions of sexual harassment that apply under other laws:
1. The Wisconsin Fair Employment Act: Section 111.32(13) of the state statutes defines “sexual harassment” to mean “unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature.” Under the statute, “Unwelcome verbal or physical conduct of a sexual nature” includes but is not limited to “the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; the deliberate, repeated display of offensive sexually graphic materials which is not

necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee's work performance or to create an intimidating, hostile or offensive work environment.”

2. Federal Title VII: Also in the employment context, conduct that is “severe **or** pervasive” can meet the applicable standard for a hostile work environment claim under Title VII.
3. The Pupil Nondiscrimination Statute and the DPI Rules in Chapter PI 9: “‘Pupil harassment’ means behavior towards pupils based, in whole or in part, on sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability which substantially interferes with a pupil’s school performance or creates an intimidating, hostile or offensive school environment.”
4. The District’s Code of Student Conduct and Employee Handbooks: Through local policy decisions, school districts generally assert an interest in intervening in certain inappropriate conduct before it reaches the level of conduct that is legally-actionable as sexual harassment.

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When Does the District Have Actual Knowledge?

- A. “Actual knowledge” means notice of sexual harassment or allegations of sexual harassment to: (1) the district’s Title IX Coordinator; (2) any official of the district who has authority to institute corrective measures on behalf of the district; or (3) **any employee** of the district.
- B. Anyone (victim, friend, parent, guardian, witness, other individual) may report sexual harassment.
- C. Examples of ways that a district could obtain actual knowledge of sexual harassment include:
 - Witnessing an incident (or a perhaps a series of incidents);
 - Receiving a verbal or written report about an incident or allegation from a student or other person;
 - Receiving multiple reports that, taken together, provide a different picture of a person’s conduct than each incident standing alone; or
 - The filing of a formal complaint or any report under the district’s Title IX grievance procedure or grievance process.

What is an “Education Program or Activity” of the School District?

- A. With respect to **all** aspects of sex discrimination under Title IX, the terms “*Program or activity*” and “*program*” include **all of the operations** of each recipient of federal funds that is covered by Title IX, including but not limited to a local education agency (as defined in 20 U.S.C. 8801). (See 34 C.F.R. 106.2(i))
- B. In connection with “sexual harassment” under the Title IX regulations and for purposes of determining when a school district has an obligation to respond and when a district may (and may not) address allegations under its “grievance process,” an “**education program or activity**” includes locations, events, or circumstances over which the school district exercised substantial control over **both** the respondent and the context in which the sexual harassment occurs.” (See 34 C.F.R. 106.44(a))
- C. A school district’s Title IX obligations extend to sexual harassment incidents that occur off campus (1) if the off-campus incident occurs as part of the school district’s “operations”; and (2) if the school district exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus.
- D. In situations where there is some uncertainty whether alleged harassment occurred in the school district’s “education program or activity,” the district may examine factors such as whether the district funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred. However, no single factor is determinative to conclude whether a school district exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of “all of the operations of” a district.
- E. Examples from the Preamble to the Regulations:
- “For example, in *Doe v. East Haven Board of Education*, the Second Circuit held that the plaintiff sufficiently alleged sexual harassment to which the district was deliberately indifferent where the harassment consisted of on-campus taunts and name-calling directed at the plaintiff after she had reported being raped off campus by two high-school boys. The final regulations would similarly analyze whether sexual harassment (i.e., unwelcome conduct on the basis of sex so severe, pervasive, and objectively offensive that it effectively deprives a complainant of equal access to education) *in the recipient’s program or activity* triggered a recipient’s response obligations regardless of whether such sexual harassment stemmed from the complainant’s allegations of having suffered sexual assault (e.g., rape) *outside* the recipient’s program or activity. Further, whether or not the off-campus rape in that case was in, or outside, the district’s education program or activity, would depend on the factual circumstances, because as explained above, not all off-campus sexual harassment is excluded from Title IX coverage.” (Preamble at 30200)

- “*Lapka v. Chertoff*, 517 F.3d 974, 982-83 (7th Cir. 2008) (the Seventh Circuit reasoned that the plaintiff sufficiently alleged workplace harassment even though the alleged rape occurred while the plaintiff and assailant were socializing after hours in a private hotel room, because the bar was part of the training facility where the plaintiff and assailant were required to attend work-related training sessions and thus were on “official duty” while at that facility, including the bar located in the facility, “so the event could be said to have grown out of the workplace environment” and the plaintiff and assailant were trainees expected to eat and drink at the facility and “return to dormitories and hotel rooms provided by” the employer such that “[e]mployees in these situations can be expected to band together for society and socialize as a matter of course” justifying the Court’s conclusion that the plaintiff had alleged sexual harassment (rape) that arose in the context of a workplace environment and to which the employer had an obligation to respond). Although *Lapka* was a case under Title VII, the final regulations would similarly analyze whether sexual harassment occurred in the school’s program or activity by inquiring whether the school exercised substantial control over the context of the harassment and the alleged harasser.” (Preamble at 30200, n. 877)

- F. As noted above, the statutory and regulatory definitions of “program or activity” encompass “all of the operations of” entities that are covered by Title IX, and such “operations” may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, a school district.
1. The factual circumstances of online sexual harassment must be analyzed to determine if it occurred in an **education program or activity**, under the “substantial control” standards identified above.
 2. For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the school district exercises substantial control.
- G. As previously mentioned, for purposes of the Title IX regulations, the sexual harassment must also have occurred in the United States.

HOW TO RESPOND TO A NOTICE OF SEXUAL HARASSMENT

When the Title IX Coordinator has notice, the Title IX Coordinator must promptly respond in a manner that is not “deliberately indifferent.”

- A. A district is “deliberately indifferent” if its response is “clearly unreasonable” in light of the circumstances. “Clearly unreasonable” is not defined but the regulations require that a district’s response treat complainants and respondents equitably by:
 1. Offering **supportive measures** (as defined in the regulations, see below) to a complainant, and
 2. Following a grievance process that complies with the regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures.
- B. The Title IX Coordinator must promptly contact the complainant (i.e., the individual alleged to be the victim of sexual harassment, who may or may not be the person who reported the sexual harassment) to:
 1. Discuss the availability of supportive measures;
 2. Consider the complainant’s wishes with respect to supportive measures;
 3. Inform the complainant of the availability of supportive measures with or without filing a formal complaint; and
 4. Explain to the complainant the process for filing a **formal complaint**, at least in circumstances where the original report did not take the form of a formal complaint. (See below for more information on formal complaints.).
- C. For each report of Title IX sexual harassment, the Title IX Coordinator must also:
 1. Determine appropriate supportive measures and coordinate with appropriate administrators to provide supportive measures to the complainant. (Note the confidentiality requirements applicable to supportive measures, as further identified below.)
 2. Ensure that the district documents the provision of supportive measures or if supportive measures are not provided, documents the reasons why such response was not clearly unreasonable in light of the known circumstances.

- D. Screening of reports, complaints and allegations: Before initiating Title IX response procedures, as outlined above, the Title IX Coordinator may consider whether the allegations in the report (and any additional information that may be gathered), if true, would potentially meet the definition of sexual harassment under Title IX, occurred in the district's program or activity, and in the U.S. If not, Title IX coordinator may direct the complainant to non-Title IX response procedures.
- E. In connection with responding to allegations of Title IX sexual harassment, a school district may also decide to take either of the following steps in appropriate cases, and the Title IX Coordinator will often be in a position to recognize whether either of the actions should be considered:
1. **Emergency Removal:** The district may remove a respondent from the education program or activity on an emergency basis.
 - a. The district must undertake an individualized safety and risk analysis, 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 that justifies removal, and provide the respondent with notice and opportunity to challenge following the removal.
 - b. The allowance for emergency removal may not be construed to modify any rights under IDEA, Section 504, and ADA.
 - c. Implementing an emergency removal may sometimes require a school district to additionally follow certain non-Title IX procedures (e.g., if an emergency removal is structured such that a student is not permitted to attend school, then the removal may also constitute a suspension/expulsion, and the school would need to consider its obligations to also follow applicable legal procedures related to suspension/expulsion).
 2. **Administrative Leave:** The Title IX regulations allow a school district to place an employee on administrative leave if a formal complaint is pending and the district is using its grievance process to resolve the complaint.
 - a. It is likely that the regulations assume that the administrative leave is paid leave.
 - b. The allowance for administrative leave may not be construed to modify any rights under Section 504 or the ADA.

What are Supportive Measures?

- A. 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.
- B. Such measures are designed to restore or preserve equal access to the district's education program or activity without unreasonably burdening the other party, while protecting the safety of all parties and the district's educational environment; and deterring sexual harassment. Supportive measures may be provided to a respondent, but it is not required.
- C. 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.
- D. In some situations, a district may determine that it would be necessary or appropriate to provide supportive measures to a respondent, or to provide supportive measures for the benefit of a complainant that directly affect a respondent. However, there is not an obligation to provide supportive measures to the respondent in every case, and the regulations do not require equality or parity with respect to the supportive measures that are provided to complainants and respondents.
- E. A district 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 district to provide the supportive measures.
- F. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- G. In general, the identification, offering, and monitoring of supportive measures should be an ongoing and continuous part of responding to any incident, report, or complaint of sexual harassment or alleged sexual harassment under Title IX, including but not limited to the period of time when a formal complaint is pending.
- H. If the district determines that the allegations of inappropriate conduct, even if proven, would not constitute sexual harassment that is covered by Title IX, then there is no obligation under the regulations to provide (or continue to provide) supportive measures. However, even in non-Title IX cases or in harassment/bullying cases that are not related to a legally-protected status, a district may elect to offer or provide an individual with interventions or supports that are substantially similar to Title IX "supportive measures."

What is a Formal Complaint?

- A. “Formal complaint” means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the district investigate the allegation of sexual harassment.
1. A “complainant” means an individual who is alleged to be the victim of conduct that could constitute sexual harassment. (Note: A guardian who is acting on behalf of a child complainant may also file a formal complaint.) The “respondent” is the alleged perpetrator of the conduct.
 2. At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the relevant education program or activity of the district.
 3. As used in the definition, 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 district) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
- B. The Title IX regulations specify that a district’s procedures must, at a minimum, allow a complainant to file a formal complaint with the district’s Title IX Coordinator by submitting the document or electronic submission in person, by mail, or by electronic mail, using the contact information that the district has established for the district’s Title IX Coordinator. (See §106.30(a))
1. A district may designate other methods of filing a formal complaint of sexual harassment, and it is very important for the Title IX Coordinator and other relevant administrators to be aware of the specific local procedures.
 2. *Should a district designate additional methods of filing a formal complaint?* The answer to this this question is likely to vary among districts. For example, a district with a single Title IX Coordinator may need to account for situations where the Title IX Coordinator is temporarily unavailable or is the person accused of sexual harassment. However, as a general premise, districts will want to maintain reasonable control over how formal complaints can be filed because it is so important to be able to recognize when you have a formal complaint.
- C. The existence or non-existence of a formal complaint is highly relevant for determining *how* a district responds to a particular incident or allegation of sexual harassment, but it does not resolve *whether* a district should or must respond. As covered above, **notice** of conduct that could constitute Title IX sexual harassment is sufficient to trigger obligations to respond.



D. The authority of the Title IX Coordinator to sign a formal complaint and trigger the district's Title IX grievance process may be used, for example, when:

1. The complainant is not eligible to file a formal complaint for purposes of Title IX (e.g., the complainant is a past graduate of the district and is no longer attempting to participate in a district's program or activity);
2. The complainant declines to file a formal complaint, but the Title IX Coordinator determines that the district's interest in the matter is substantial enough that the matter should be investigated and resolved through the grievance process without the complainant's direct cooperation.

E. In developing their local grievance process, some districts may establish general guidelines or standards for the Title IX Coordinator to follow in circumstances where the regulations permit the Title IX Coordinator to sign (and thereby initiate) a formal complaint. (See §106.30) However, Title IX Coordinators and other school officials should be aware of the following:

1. The preamble to the final regulations suggests that Title IX Coordinators should have a degree of autonomy to determine whether to sign a formal complaint. At the same time, the preamble suggests that it would not be improper for the Title IX Coordinator to obtain input from other district officials (or potentially from the district's legal counsel) regarding whether a formal complaint and investigation under the grievance process are warranted. (Preamble, at pp. 30134-30135)
2. The preamble also states that the Title IX Coordinator's evaluation of whether to sign a formal complaint in the absence of the complainant electing to file a formal complaint should be evaluated in terms of whether signing a formal complaint (or not signing a complaint) would be a "clearly unreasonable" response. (Preamble, at p. 30045)

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RESPONDING TO A FORMAL COMPLAINT OF SEXUAL HARASSMENT

In responding to a formal complaint, the district must treat complainants and respondents equitably by (1) following a grievance process that complies with the Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures as against a respondent, and (2) providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent.

A. Screening Formal Complaints for Possible Dismissal: Before beginning the grievance process and even during the process, the Title IX Coordinator and other agents of the district must consider whether there is a basis for dismissal of the complaint or any of the specific allegations.

1. Two ways a formal complaint could be dismissed.

Mandatory Dismissal. The district **must** dismiss a formal complaint if the conduct alleged in the complaint:

- a. Would not constitute sexual harassment as defined under Title IX even if proved;
- b. Did not occur within the district's education program or activity; or
- c. Did not occur against a person in the U.S.

Permissive Dismissal. The district **may** dismiss if:

- a. Complainant notifies of withdrawal of complaint or allegations;
- b. Respondent is no longer enrolled or employed by the district; or
- c. Specific circumstances prevent the district from gathering evidence sufficient to reach a determination.

2. If dismissed, the district must promptly send written notice of the dismissal and reasons for dismissal.

3. Dismissal decisions are appealable (see below).

4. If the formal complaint is not dismissed upon receipt, the Title IX Coordinator must initiate the grievance process.

B. Basic Requirements Applicable to the Grievance Process. Each local Title IX grievance process must:

1. Treat complainants and respondents equitably, as described above (see the beginning of this section).

2. Require an objective evaluation of all relevant evidence, including an expectation that all individuals involved in the grievance process on behalf of the district must avoid prejudgment of the facts and allegations.
3. Provide that credibility determinations may not be based on person's status as a complainant, respondent, or witness.
4. Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
5. Require that any individual designated by a district as a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process not have a conflict of interest or a bias for or against complainants or respondents generally or an individual complainant or respondent..
6. Disallow any person from performing more than one role as investigator, decision-maker, appeal decision-maker or facilitator of informal resolution in the same case. In addition, the Title IX Coordinator cannot serve as the decision-maker or appeal authority.
7. Include a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility is made at the conclusion of the grievance process.
8. Provide for investigations, determinations of responsibility, and appeal procedures that are consistent with the Title IX regulations.
9. State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, and then apply the same standard of evidence to all formal complaints and to all allegations of Title IX sexual harassment. P
10. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school district and its agents, and not on the parties.
11. Include reasonably prompt time frames for the conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and conducting any informal resolution processes. There must also be a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause. P
12. Include the procedures and permissible bases for the complainant and respondent to appeal. P

13. Describe the range of supportive measures available to complainants and respondents
14. Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the school district may implement following any determination of responsibility.

C. Initial Notice to the Parties. Upon receipt of a formal complaint, the school district must provide a detailed notice to complainant and respondent. *(Note: An example of a sample notice is provided in the training materials.)*

1. Upon receipt of formal complaint, a district must provide written notice to parties who are known.
2. Written notice must include:
 - a. Notice of the school district’s grievance process.
 - b. Notice of allegations of sexual harassment, including sufficient details known at that time (i.e., identities of the parties involved in the incident if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident).
 - c. 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.
 - d. Information that the parties may have an advisor of their choice who may be an attorney and that they may inspect and review evidence.
 - e. Inform 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.
3. Written notice must be provided with sufficient time to prepare a response before any initial interview.
4. If other allegations are identified for investigation after the initial written notice has been issued, notice of the additional allegations must be provided to the parties whose identities are known.
5. NOTE: All written notices, reports and other materials provided to parties throughout the Title IX grievance process for formal complaints are also provided to a party’s advisor if any, and normally also to parents or guardians if any party is a minor.

SCENARIOS

Scenario 1:

A female employee who was recently disciplined by her supervisor has gone to the HR director to report what she says is sexual harassment that occurred prior to the discipline. After a long discussion, the allegations come down to the following:

- She overheard the supervisor, on one occasion, make an off-hand remark that there is sometimes a little too much estrogen in the front office where two other women share a workspace. The comment did not refer to the complainant, and he doesn't supervise the other two women.
- The supervisor, when confronting this employee about her performance problems and her difficulty getting along with her co-workers, reacted to her crying by saying, "I know women can be emotional, but you've got to address this calmly and professionally."

She feels like the recent discipline was retaliation for her telling the supervisor that he shouldn't say things like that estrogen comment.

Scenario 2:

In the school hallway, two boys pass two girls and a staff member sees and overhears the following exchange:

Jason: Oh my, there is hottest thing in this hallway. Looking good as always! Mmmm. Luscious Lisa!

Lisa: Shutup Jason.

Jason: All right. But, just so you know, I'm a great kisser. If you ever want to practice, hit me up on Insta.

Lisa: You are such a creep.

Lisa rolls her eyes and goes back to talking to her friend.

Scenario 3:

A female student arrives in her advisor's office and is clearly upset. She explains that she broke up with her ex-boyfriend about a month ago and he has been giving her a hard time ever since, saying how bad he wants to get back together. Just a few minutes ago, he cornered her in an isolated stairwell and said that he's been watching her all the time during and after school and he knows that she has been hanging out with another guy, and he's even seen them exchange hugs and holding hands.

He said he can't stand the thought of her dating someone else, and that if she doesn't stop hanging out with this new guy, someone is going to end up hurt. She asked what he meant by that and he said, "I don't know. Maybe I'll hurt myself, maybe I'll hurt him. Just someone." He then reached into his pocket and flashed a butterfly knife that she knows he usually keeps in his car "for protection." Then he said, "I'm sorry. I've been really messed up about this. I just wanted you back and now I know that isn't going to happen." Then he walked away. The student says she's very scared.

INVESTIGATING

SELECTING AN INVESTIGATOR

- A. The Title IX Coordinator may serve as the investigator, but the Title IX Coordinator is not required to serve in this capacity.
- B. If possible, it may be beneficial to have another person serve in this capacity, so that the Title IX Coordinator can continue to be available for other matters or consultation on the investigation.
- C. The Title IX Coordinator can consult on various issues that may arise during the investigation, including the possibility of dismissal or seeking an informal resolution.
- D. The district shall require that any individual designated by a district as an investigator not have a conflict of interest or a bias for or against complainants or respondents generally or an individual complainant or respondent.
- E. The investigator must have received Title IX training.
- F. The district must review its policy to determine whether the policy requires another individual to be identified as the investigator and the qualifications of any such investigator in policy.
- G. In addition to any requirements in policy, the district should consider various qualities in an investigator.
 - 1. The legal complexities of the investigation
 - 2. The potential cost of the investigation
 - 3. The competency and training of the investigator
 - 4. The political aspects of who conducts the investigation
 - 5. The potential of the investigator serving as a witness in a future proceeding (arbitration, court, etc.).

IMPORTANT CONSIDERATIONS BEFORE THE INVESTIGATION

- A. An investigator must follow Title IX requirements.
 - 1. The investigator must ensure that the burden of proof and the burden of gather evidence sufficient to reach a determination regarding responsibility rests on the district and not on the parties.
 - 2. The investigation process instituted by the district shall treat complainants and respondents equitably.
 - 3. The investigation must include a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility is made at the conclusion of the grievance process.
 - 4. The investigation must consider the standard of evidence (the preponderance of the evidence standard or the clear and convincing evidence standard).
 - 5. The investigator must follow all time frames for the conclusion of the grievance process.

- B. The investigator must review and consider all relevant materials.
 - 1. Relevant board policies and handbook provisions on student conduct, including code of conduct and pupil nondiscrimination
 - 2. Relevant board policies, contracts, and handbook provisions on employee conduct, including teacher contracts, employee grievance procedure, employee code of conduct, and staff discipline and nonrenewal procedures.

- C. The investigator must consider any interim action.
 - 1. Emergency removal for students.
 - 2. Administrative leave for employees.

- D. The investigator must consider whether to involve law enforcement.
 - 1. Delay process for good cause.
 - 2. Garrity warning.
 - 3. Different standards for criminal conduct.

THE INVESTIGATION

- A. The investigator must gather all relevant evidence.
 - 1. Videos, text messages, emails, attendance records/timesheets, computer files social media posts, surveillance records, phone logs, physical searches, etc.
 - 2. The investigator must not restrict the ability of either party to gather and present relevant evidence.
 - 3. The investigator must provide equal opportunity for the parties to present inculpatory and exculpatory evidence.

- B. The investigator must consider possible witnesses and order of which to interview witnesses.
 - 1. The investigator must provide equal opportunity for the parties to present witnesses.
 - 2. Title IX does not require the investigator to interview character witnesses who do not have personal knowledge of the facts.

- C. The investigator must provide notice to any party before any interview or meeting.
 - 1. The regulations require the investigator to provide to the party whose participation is invited or expected written notice of the date, time, location, participants and purpose of the investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.
 - 2. The investigator should consider having a note-taker present at each meeting for the district.
 - 3. The notice should also include an expectation of cooperation and an expectation of no retaliation.
 - 4. The investigator must not restrict the ability of either party to discuss the allegations under investigation.

- D. The investigator must allow parties to have someone accompany them.
 - 1. The investigator must provide the parties with the same opportunities to have others present during any complaint proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.

2. The district 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.
 3. For employees, consider Weingarten rights. Weingarten rights are based in Section 7 of the National Labor Relations Act (NLRA). Even though the NLRA does not apply to public employees, the Wisconsin Employment Relations Commission referenced it in interpreting Wisconsin's similar statutory protections for municipal employees under Wis. Stats. 111.70(2)
 4. For students, consider parental involvement. Review policies and procedures to determine if they discuss the role of, and notification to, the parent.
 5. Additional issues arise if law enforcement is going to be in the interview. This includes the situation of a School Liaison Officer being involved.
- E. The investigator should consider and plan any interview.
1. The investigator should prepare an outline of questions.
 2. The investigator cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
 - a. Attorney-client: A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.
 - b. Physician-patient: A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's podiatrist, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, podiatrist, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.
 - c. Religious: A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a

member of the clergy in the member's professional character as a spiritual adviser.

- d. Marital: A person has a privilege to prevent the person's spouse or former spouse or domestic partner or former domestic partner from testifying against the person as to any private communication by one to the other made during their marriage or domestic partnership.
 - e. Other statutory privileges. For example, s. 118.126 requires, subject to exceptions, psychologists, counselors, social workers, and nurses to keep confidential any information received from student relating to drug usage.
3. Consider the physical location and timing of the interview. For example, hold the interview during a non-course period in a "neutral" location.

F. The Interview

1. Explain the purpose of the interview and refer to the notice that had been provided prior to the interview.
2. The investigator should start the interview meeting by stating that it is fact-finding in nature and no conclusions will be made by the investigator.
3. These General Guidelines should be the parameters during your questioning, including but not limited to:
 - a. Open ended questions. The investigator should ask open-ended questions. Ask open-ended questions because it gives individuals a full opportunity to explain what they saw or what happened; and the opportunity to provide a complete response addresses due process concerns.
 - b. Start with broad questions and become more focused.
 - c. Allow the accused to answer each allegation in detail.
 - d. Avoid leading questions (which suggest the answer to the question) and accusatory questions.
 - e. Avoid compound questions.
 - f. Note the witness' source of knowledge – personal observation or hearsay (gossip, rumors or conjecture).
 - g. The investigator should only disclose facts to witnesses that are necessary to question them and what information is required to be disclosed by law.

- h. Ask repetitive questions. Repeating a question may verify the initial answer, reveal inconsistencies, or provide the witness with the opportunity to give you more information if he/she was avoiding the first question.
- i. Periodically summarize and review what is said. It helps assure that you have been hearing the witness accurately, as well as assures the witness that you have been listening. Can also be used as a tool to close a particular topic or keep a discussion on track.
- j. Assess credibility. Note eye contact, facial expressions and body language when individuals are answering questions. Make note when you have an uncooperative witness.
- k. Use silence. People are often uncomfortable with silence and it may prompt a nervous witness to provide you with relevant information.
- l. End by asking the witness if he/she has anything else he/she would like to share.

4. Compelling Testimony from Employees

- a. An employee can be compelled to testify about his/her employment performance and can be disciplined or discharged for failing to respond. *Oddsens v. Board of Fire and Police Commissioners*, 108 Wis. 2d 143 (1982).
- b. However, courts and arbitrators have held that there must be additional evidence, cannot solely discipline based upon a refusal to testify. Also see, *Hoover v. Knight*, 678 F.2d 578 (5th Cir. 1982); *Shell Lake School District*, Dec. No. 20024-A, B (WERC, 1983).
- c. Garrity Rights
 - i. The Fifth Amendment protects against criminal self-incrimination, not employment self-incrimination.
 - ii. A school district can compel an employee to answer questions about their conduct provided they grant the employee immunity from criminal prosecution.
 - iii. Thus, the Fifth Amendment is not violated when a school district asks an employee, without threat of criminal prosecution, for information regarding an incident upon which discharge from the district may be predicated.
 - iv. If no Garrity warning is given, the Seventh Circuit believes due process is not met. *Franklin v. Evanston*, No. 03-2127 (Sept. 27, 2004).
 - v. In [Garrity vs. New Jersey](#), 385 U.S. 493 (1967) the U.S. Supreme Court held the following:

- 1) Statements obtained after *Garrity* warning has been provided: Statements obtained in the course of an investigatory interview under threat of termination from public employment could not be used as evidence against the employee in a subsequent criminal proceeding(s).
 - 2) However, while the statements the employee makes may not be used against him/her in a subsequent criminal proceeding, they can still form the basis for discipline on the underlying work-related charge.
- vi. Refusal to answer after *Garrity* warning has been provided: If, however, the employee refuses to answer questions after he/she been assured that his/her statements cannot be used against him/her in a subsequent criminal proceeding, the refusal to answer questions thereafter may lead to the imposition of discipline for insubordination.
- vii. Adverse Inference
A school district may draw an adverse inference from an employee's failure or refusal to answer questions which are properly posed. Advise the employee of this fact, and ask the question again.
5. The investigator should consider creating a record of all interviews.

G. Investigation Analysis

1. Evaluate credibility
2. Evaluate the demeanor of witnesses
3. Review the consistency of the testimony in light of other evidence.
4. Internally consistent testimony by one individual
5. Consistent with other witnesses' testimony
6. Consistent with physical evidence
7. Apply policy and handbook standards and expectations
8. Confer with other administrators involved in the investigation

H. Review Reporting Requirements: Public authorities/agencies will be informed if required by law or otherwise appropriate.

1. Child abuse: [Wis. Stats. 48.981](#)
2. Corporal punishment: [Wis. Stats. 118.31](#); applicable criminal statutes; etc.
3. Seclusion and restraint reports [Wis. Stats. 118.305\(4\)](#)

4. Immoral Conduct: The teacher is dismissed or has contract non-renewed by the employer based in whole or in part on evidence that the person engaged in *immoral conduct*. Wis. Stats. [115.31](#)(1)(c). “115.31(1)(c) "Immoral conduct" means conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare or education of any pupil.”; See *Cedarburg Educ. Ass’n. v. Cedarburg Bd. of Educ.*, 2007AP852 Wis. Ct. App. 2008. (In an unpublished decision, the Wisconsin Court of Appeals ruled that a teacher who viewed adult images on his school computer when no students were present had engaged in immoral conduct).
 5. Resignation: The teacher resigns and the administrator has a reasonable suspicion that the resignation relates to the person having engaged in immoral conduct.
- I. The investigator must provide the parties with an opportunity to review evidence during the investigation.
1. The regulations state that the investigator must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.
 2. This right includes the ability to review evidence upon which the district does not intend to rely in reaching a determination regarding responsibility, as well as inculpatory and exculpatory evidence, whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation;
- J. The investigator must provide all evidence to the parties prior to the completion of the investigation report.
1. Prior to completion of the investigative report, the investigator must send to each party and the party’s advisor, if any, the evidence subject to inspection and review, in an electronic format or a hard copy.
 2. The parties shall have at least ten (10) days to submit a written response, which the investigator will consider prior to completion of the investigative report.
- K. After receiving responses from both parties, the investigator must prepare an investigation report.
1. The investigator creates an investigative report that fairly summarizes relevant evidence and, at least ten (10) days prior to the time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or hard copy, for their review and written response;

2. The investigator must conduct an objective evaluation of all relevant evidence, including an expectation that all investigator must avoid prejudgment of the facts and allegations.
3. The investigator must make credibility determinations may not be based on person's status as a complainant, respondent, or witness.

DECISION-MAKING

SELECTING A DECISION-MAKER ON RESPONSIBILITY

- A. Neither the Title IX Coordinator nor the investigator may serve as the decision-maker on responsibility.
- B. The district shall require that any individual designated by a district as a decision-maker not have a conflict of interest or a bias for or against complainants or respondents generally or an individual complainant or respondent.
- C. The decision-maker must have received Title IX training.
- D. The district must review its policy to determine whether the policy requires an individual to be identified as the decision-maker and the qualifications of any such decision-maker in policy.
- E. In addition to any requirements in policy, the district should consider various qualities in a decision-maker.
 1. The legal complexities of the decision-making process.
 2. The competency and training of the decision-maker.
 3. The political aspects of who makes the decision on responsibility.
 4. The potential of the decision-maker serving as a witness in a future proceeding (arbitration, court, etc.).

IMPORTANT CONSIDERATIONS BEFORE THE DECISION-MAKING PROCESS

- A A decision-maker must follow Title IX requirements.
1. The decision-maker must ensure that the burden of proof and the burden of gather evidence sufficient to reach a determination regarding responsibility rests on the district and not on the parties.
 2. The decision-making process instituted by the district shall treat complainants and respondents equitably.
 3. The decision-maker must include a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility is made at the conclusion of the grievance process.
 4. The decision-making process must consider the standard of evidence (the preponderance of the evidence standard or the clear and convincing evidence standard). Many districts adopt a preponderance of the evidence standard.
 - a. The preponderance of the evidence requires a determination that it is **more likely than not** that the respondent engaged in the alleged sexual harassment.
 - b. The clear and convincing standard requires a determination that sufficient evidence has been presented to make it **highly probable to be true** that the respondent engaged in the alleged sexual harassment.
 5. The decision-maker must follow all time frames for the conclusion of the grievance process.
- B. The decision-maker must review and consider all relevant materials.
1. Relevant board policies and handbook provisions on student conduct, including code of conduct and pupil nondiscrimination.
 2. Relevant board policies, contracts, and handbook provisions on employee conduct, including teacher contracts, employee grievance procedure, employee code of conduct, and staff discipline and nonrenewal procedures.

THE DECISION-MAKING ON RESPONSIBILITY

- A. The decision-maker must receive and review the investigation report.
1. The decision-maker is not required to rely on factual conclusions or credibility determinations reached by the investigator.
 2. The decision-maker must follow the steps in the process before reaching any conclusions on matters contained in the investigation report.
- B. Although Title IX regulations permit K-12 school districts to include a **live hearing** that involves the participation of all the parties as part of the decision-making procedures, very few school districts will opt to permit or require live hearings in their Title IX grievance process. The steps discussed below involving submitting questions (which is mandatory) essentially replaces any live hearing.
- C. After receipt of the investigative report and before reaching a determination regarding 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.
1. The decision-maker must decide whether a question submitted by a party to another party or witness is relevant.
 2. The decision-maker may deny any question that is not relevant. The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant.
 3. The decision-maker may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege. (See above in Investigation)
 4. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such evidence about the complainant's prior sexual behavior is offered to prove (1) that someone other than the respondent committed the conduct alleged by the complainant or (2) if the questions and evidence concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and is offered to prove consent.
- D. If relevant, the decision-maker must allow time for the other party to answer the questions and must provide each party with the answer.
1. The decision-maker must also allow for limited follow-up questions from each party.

2. The decision-maker must consider any questions and answers within the scope of the decision-maker's determination.
- E. Once the question-answer process is complete, the decision-maker must make an objective evaluation of all relevant evidence.
1. The decision-maker must consider both inculpatory (evidence that tends to establish a Respondent's responsibility for alleged sexual harassment) and exculpatory (evidence that tends to clear or excuse a Respondent from allegations of sexual harassment).
 2. The decision-maker must not make credibility determinations based on a person's status as a complainant, respondent, or witness.
- F. Based on the process above, the decision-maker must then issue a written determination. The written determination must include the following:
1. Identification of the allegations potentially constituting sexual harassment;
 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;
 3. Findings of fact supporting the determination;
 4. Conclusions regarding the application of the district's code of the conduct to the facts;
 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 by the district to the complainant; and
 6. The district's procedures and permissible bases for the complainant and respondent to appeal, including (when applicable) notice of the right of a student complainant to appeal a final determination to the state superintendent of public instruction and notice of the procedures for making that non-Title IX appeal.
- G. The written determination may reach different conclusions, including a finding that the respondent was not responsible for any alleged violation of Title IX sexual harassment.
1. If a determination is made that a respondent violated the policy, the decision-makers will determine appropriate **sanctions** for the respondent.

2. If a determination is made that a respondent violated the policy, the district will provide **remedies** to the complainant.
3. In some circumstances, the decision-maker may conclude that additional investigation may be necessary, resulting in a requirement that the investigator conduct additional investigation on a particular issue.

APPEAL

SELECTING A DECISION-MAKER ON APPEAL

- A. Neither the Title IX Coordinator, the investigator, nor the responsibility decision-maker may serve as the appeal decision-maker.
- B. The district shall require that any individual designated by a district as an appeal decision-maker not have a conflict of interest or a bias for or against complainants or respondents generally or an individual complainant or respondent.
- C. The district must review its policy to determine whether the policy requires an individual to be identified as the appeal decision-maker and the qualifications of any such decision-maker in policy.
- D. In addition to any requirements in policy, the district should consider various qualities in an appeal decision-maker.
 - 1. The legal complexities of the appeal decision-making
 - 2. The competency and training of the appeal decision-maker
 - 3. The political aspects of who makes the decision on appeal
 - 4. The potential of the appeal decision-maker serving as a witness in a future proceeding (arbitration, court, etc.).

THE DECISION-MAKING ON APPEAL

- A. The district must offer **both** parties an appeal (1) from a determination regarding responsibility or (2) from a dismissal of a formal complaint.
- B. An appeal must be filed within any deadline specified in the local grievance process. An appeal that is not filed by the deadline may be dismissed.
- C. To the extent required by the Title IX regulations, disciplinary sanctions for Title IX sexual harassment and any remedies that could not be offered as supportive measures shall not be enforced until the determination of the complaint becomes final. The determination regarding responsibility becomes final either:
 - 1. If no appeal is filed, on the date on which an appeal would no longer be considered timely; or

2. If an appeal is filed, on the date that the district provides the parties with the written determination of the result of the appeal.
- D. An appeal may be based upon any of the following:
1. A procedural irregularity that affected the outcome of the matter;
 2. New evidence that was not reasonably available at the time the determination regarding responsibility was made, that could affect the outcome of the matter; and,
 3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent, that affected the outcome of the matter.
 4. Any other grounds for appeal that are specified in the local Title IX grievance process at the discretion of the school district. P
- E. As to all appeals, a school district must notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties.
- F. The district must give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
- G. After allowing both parties to submit a written statement, the appeal decision-maker must issue a written decision describing (1) the result of the appeal and (2) the rationale for the result. P
1. The written decision must be issued within any timeline specified in the local Title IX grievance process, unless the appeal decision-maker notifies the parties that additional time is needed.
 2. The appeal decision-maker must provide the written decision on appeal simultaneously to both parties.
- H. What happens if the appeal decision-maker determines one of the above grounds for appeal is satisfied? Under most local grievance processes, the likely options include the following:
1. The appeal-decision maker may adjust the determination directly.
 2. If the error or other basis for granting the appeal related only to the decision-making step, the matter may be returned for further review of the investigative report by a new decision-maker(s).

3. If the grounds for appeal relate to the investigation, or warrant additional investigation, the appeal decision-maker(s) may either re-open the record or refer the matter for further investigation before proceeding.

INFORMAL RESOLUTION



If permitted under the local grievance process, the Title IX Coordinator and other relevant district officials may consider offering an “informal resolution process.”

1. An informal resolution process is any process, such as mediation, that does not involve a full investigation and adjudication of the complaint as delineated in the local grievance process.
2. Informal resolution may never be used if the formal complaint includes allegations that an employee sexually harassed a student.
3. If permitted, informal resolution may be offered at any point after a formal complaint has been filed and prior to reaching a determination of responsibility under the full grievance process.
4. If such a process is utilized, the district must:
 - a. Provide to the parties a written notice disclosing: 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 that could be shared; and
 - b. Obtain the parties’ voluntary, written consent to the informal resolution process.
5. If an informal resolution is attempted but is not successful, the district must complete a full investigation and adjudication of the complaint using the local grievance process.

ADDITIONAL REQUIREMENTS AND CONSIDERATIONS.

A. Required Notices.

1. School districts must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school district of all of the following:
 - a. The name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator.
 - b. That the school district does not discriminate on the basis of sex in the education program or activity that it operates, and that the school district is required by Title IX and Part 106 of Title 34 of the Code of Federal Regulations not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission and employment, and that inquiries about the application of Title IX and Part 106 to the school district may be referred to the school district's Title IX Coordinator, to the Assistant Secretary at the U.S. Department of Education, or both.
 - c. The school district's Title IX grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school district will respond.
2. In addition, each school district must prominently display the contact information for the Title IX Coordinator (as identified above) and the district's Title IX nondiscrimination policy on its website, if any, and in each handbook or catalog that it makes available to the persons who are entitled to receive the notifications listed above.
3. Many school districts will elect to coordinate the above-identified notice requirements with other nondiscrimination notice requirements established under state or federal law.

B. Retaliation.

1. Under the Title IX regulations, no school district or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or the Title IX regulations, or 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 under the regulations.

- a. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or the Title IX regulations, constitutes retaliation.
 - b. The exercise of rights protected under the First Amendment does not constitute prohibited retaliation.
 - c. Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.
2. Complaints alleging retaliation may be filed according to the **grievance procedure** for general sex discrimination claims that the school district has adopted.

C. Confidentiality.

1. Under section 106.71(a) of the Title IX regulations, a school district must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, **except:**
 - a. As may be permitted by the FERPA statute, 20 U.S.C. 1232g, or the FERPA regulations, 34 CFR part 99; or
 - b. As required by law; or
 - c. To carry out the purposes of the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.
2. As mentioned above, school districts 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 school district to provide the supportive measures. (This provision appears in the definition of “supportive measures” within section 106.30(a) of the Title IX regulations.)
3. A school district cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the

school district obtains that party's voluntary, written consent to do so for a Title IX grievance process. If a party is not an "eligible student," as defined under FERPA (e.g., the party is a minor), then the school district must obtain the voluntary, written consent of a parent or authorized guardian. (See section 106.45(b)(5)(i)).

D. Recordkeeping.

1. School districts must maintain the following records for a period of seven years (e.g., measured from the conclusion of the proceedings and the implementation of any sanctions and/or remedies):
 - a. In connection with a school district response to any report or formal complaint of sexual harassment, the district must create and maintain a record of any actions, including any supportive measures, that the district takes in response to the report or complaint. In each instance:
 - i. The district must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the school district's education program or activity.
 - ii. If a district does not provide a complainant with supportive measures, then the district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
 - b. In connection with each formal complaint of sexual harassment that is filed, a school district must maintain a record of:
 - i. 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;
 - ii. Any audio or audiovisual recording or transcript from a hearing (*Note: A district will have these records only if hearings are permitted under the local grievance process. Most school districts will not provide for hearings*);
 - iii. Any appeal and the result of an appeal; and
 - iv. Any informal resolution and the result therefrom.
 - c. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. (As mentioned above, a school district must also make these training materials publicly available on its website.)
2. In a case that involves a complainant or respondent who is a minor, a school district may, with advice of counsel, wish to consider retaining the relevant records longer

than the seven years required by the regulations. For example, legal counsel may advise retaining the records until the expiration of the longest statute of limitations for filing a civil suit that is applicable to any of the allegations.

E. Harmonization with Other Laws and Local Policies.

1. Consider First Amendment issues. In cases of alleged harassment, the First Amendment must be considered if issues of speech or expression are involved. First Amendment rights may apply to the rights of complainants, respondents, or third parties.
2. Consider FERPA. There will need to be a balance between confidentiality of student records and due process considerations. Schools may need to disclose evidence as part of the process which may bring concerns with disclosure of confidential student records.
3. Consider interplay with other laws. Interaction when claims also involve other protected classes (e.g., race, disability, etc.), other state laws, or interaction with overlapping federal laws (e.g., Title VII).
4. Consider interplay with other related local policies/codes. School districts typically have (for example) multiple nondiscrimination policies, student bullying policies, workplace violence policies, and staff-student relations policies that could all be relevant to a complaint or report of sexual harassment. Rules established in student codes of conducts, extracurricular codes, and employee handbooks could likewise be relevant and require harmonization with Title IX policies and procedures.

P

NOTICE: These training materials, including the comments of all speakers who present the materials, do not constitute legal advice and should not be relied upon or used as legal advice. The materials will present information and commentary to facilitate a general understanding of the topics that are addressed but are not necessarily an exhaustive treatment of any legal or policy issues. If a school district requires legal advice regarding any topic, issue, situation or incident, the advice should be obtained from the school district's designated legal counsel.