

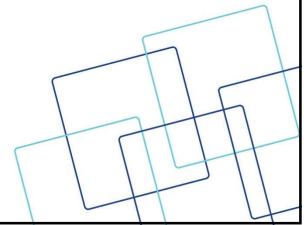


# Title IX Regulations: Implementation, Compliance and Investigations

Presented by: Monica D. Batanero & Kara Walton

Lozano Smith Training

December 8, 2022



1

## Presenter

### Monica D. Batanero

#### AT LOZANO SMITH

Monica D. Batanero is Senior Counsel in Lozano Smith's Los Angeles office. Ms. Batanero advises educational institutions on student, special education and personnel issues. Ms. Batanero provides legal counsel to community college districts and K-12 school districts on day-to-day issues involving Title IX compliance, sexual harassment, discrimination/harassment, Section 504, IDEA, governance, Public Records Act, and student discipline. She regularly conducts workplace and school investigations involving alleged misconduct in violation of board policy and/or law, including Title IX, sexual harassment, professional standards, and code of student conduct.



#### CONNECT

[mbatanero@lozanosmith.com](mailto:mbatanero@lozanosmith.com)  
213.929.1066



2

2

## Presenter

### Kara Walton

#### AT LOZANO SMITH

Kara Walton is Senior Counsel in Lozano Smith's San Diego office. She represents public agencies through various aspects of employment and governance issues. Ms. Walton advises clients on various investigations, including, but not limited to Title IX, Uniform Complaint Procedures, Employment Discrimination, and Complaints Against Employees. Additionally, Ms. Walton advises clients at all levels of progressive discipline for both certificated and classified employees and represents districts through the appeals process. Ms. Walton regularly provides trainings in areas of sexual harassment prevention, mandated reporter duties, Title IX, grievance and complaint procedures, and updates of labor laws.



#### CONNECT

kwalton@lozanosmith.com  
855.909.9002



3

3

# Title IX and the New Regulations

4

## The Plain Language

*“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 *et seq.*



5

5

## What Does Title IX Cover?

1. Education Programs or Activities
2. Sports
3. Employment
4. Equal Access to Facilities
5. Admissions and Recruitment
6. Sexual Harassment\*

(34 C.F.R. Part 106)

\*New regulations that have the full force and effect of law



6

6

# Sexual Misconduct in Schools

7

## Why Title IX is Important - Potential Impact of Sexual Misconduct on Students and Employees



Shame, humiliation, stress, anxiety, depression, loss of sleep

Impaired learning/poor work performance

Absenteeism/turnover

Culture of discrimination

Civil liability (monetary damages, attorney fees)

Negative media attention and public outcry

OCR Resolution Agreement

Loss of federal funds



8

8

## What's New Under the 2020 Title IX Regulations?

1. The definition of “sexual harassment”
2. “Actual knowledge” for notice
3. Procedural requirements for due process
  - a. Roles
4. “Deliberate indifference” standard:

*A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.*



9

9

## What Hasn't Changed Under Title IX?

Duty to identify and promptly investigate and address allegations of sexual harassment

Duty to adopt and publish clear policies on how to file complaints and how complaints will be promptly addressed

Notice to parties of the initiation of the investigation and the outcome of investigation and appeal rights

Duty to prevent recurrence and remedy effects

Obligation to have a Title IX Coordinator



10

10

## Title IX Definitions

### Actual Knowledge (K-12)

- When **any employee** has notice of sexual harassment or allegations of sexual harassment

### Formal Complaint

- A document filed by a **complainant** or signed by the **Title IX Coordinator** alleging sexual harassment against a respondent, and requesting that the recipient (District) investigate the allegation

### Complainant

- An individual who is alleged to be the **victim of the conduct** that could constitute sexual harassment

### Respondent

- An individual who has been reported to be the **perpetrator of conduct** that could constitute sexual harassment



11

11

## Title IX Definitions – Sexual Harassment

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

An **employee** conditioning the provision of an aid, benefit, or service of the district on the complainant's participation in unwelcome sexual conduct;

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

**"Sexual assault"** as defined in 20 U.S.C. 1092(f)(6)(A)(v), **"dating violence"** as defined in 34 U.S.C. 12291(a)(10), **"domestic violence"** as defined in 34 U.S.C. 12291(a)(8), or **"stalking"** as defined in 34 U.S.C. 12291(a)(30).



12

12

## Hostile Environment: Analyzing the “Severe, Pervasive and Objectively Offensive” Threshold

- All 3 elements required to trigger Title IX
- Pervasiveness is an indispensable element of a Title IX offense
  - Single incident often not enough to meet this element, even if severity and objective offense can be demonstrated
- Objectively offensive and severe are indispensable elements of a Title IX offense
  - Verbal conduct often not enough to meet these elements, unless the frequency and severity of these statements are objectively offensive and they hinder access to education



13

13

## Title IX Definitions – Sexual Harassment

### Sexual assault:

- An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation
  - i. Sex Offenses, Forcible—Any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.
    - 1. Forcible Rape—(Except Statutory Rape) The carnal knowledge of a person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity.
    - 2. Forcible Sodomy—Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.
    - 3. Sexual Assault With An Object—To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.



14

14

## Title IX Definitions – Sexual Harassment

### Sexual assault (continued):

4. Forcible Fondling—The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.
- ii. Sex Offenses, Nonforcible—(Except Prostitution Offenses) Unlawful, nonforcible sexual intercourse.
  1. Incest—Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
  2. Statutory Rape—Nonforcible sexual intercourse with a person who is under the statutory age of consent.

### Dating violence:

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- (34 U.S.C. 12291(a)(10).)



15

15

## Title IX Definitions – Sexual Harassment

### Domestic violence:

- Felony or misdemeanor crimes of violence committed by:
  - A current or former spouse or intimate partner of the complainant,
  - A person with whom the complainant shares a child in common,
  - A person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner,
  - A person similarly situated to a spouse of the complainant under the domestic or family violence laws of the jurisdiction receiving grant monies, or
  - Any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws.
- (34 U.S.C. 12291(a)(8).)



16

16



## “Red Flag” Conduct of Potential Sexual Harassment

- Flirtations or propositions
- Derogatory comments
- Sexual jokes or gestures
- Spreading sexual rumors
- Massaging, grabbing, or touching
- Comments on a student’s or employee’s body
- Sexual acts without consent or based on coercion
- Non-consensual “sexting”
- Sexploitation



17

17

## Title IX Definitions – Sexual Harassment

### Stalking:

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - Fear for their safety or the safety of others; or
  - Suffer substantial emotional distress.
- (34 U.S.C. 12291(a)(30).)



18

18

## GROUP ACTIVITY

A high school senior threatens to sabotage a sophomore's reputation unless she sends him nude photographs of herself.

She also tells you he forcibly kissed her, reached up her skirt and tried to pull down her panties.

Is this Title IX?



19

19

## Group Activity

Steven, a freshman, has come to you to tell you that Ellie, a junior, has been harassing him at school. Steven tells you that Ellie has started to grab and smack his buttocks while walking to class. He feels very uncomfortable, and no longer wants to come to school or walk alone.

Is this Title IX?



20

20

## Athletics (Equal Access)

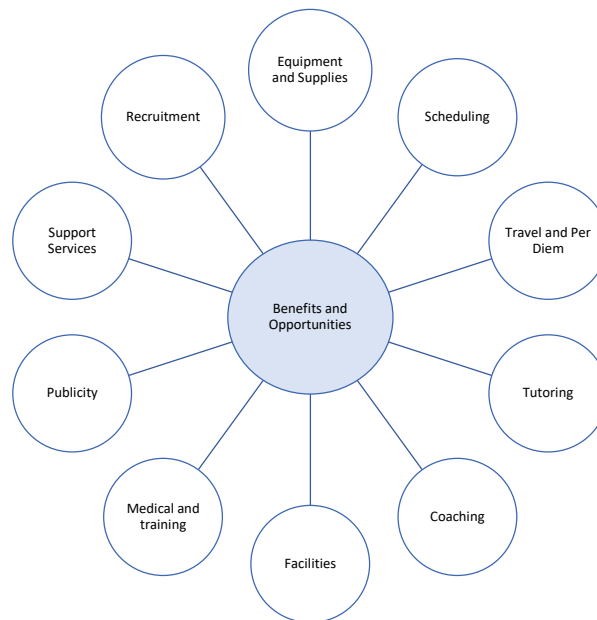
1. Opportunities for males and females substantially proportionate to their respective enrollments; or
2. Where one sex has been underrepresented, a history and continuing practice of program expansion responsive to the developing interests and abilities of that sex; or
3. Where one sex is underrepresented and cannot show a continuing practice of program expansion, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by that present program.



21

21

## Athletics (Benefits and Opportunities)



22

22

## Pregnant and Parenting Students



“A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.”

(34 C.F.R. 106.40)



23

23

## Pregnant and Parenting Students

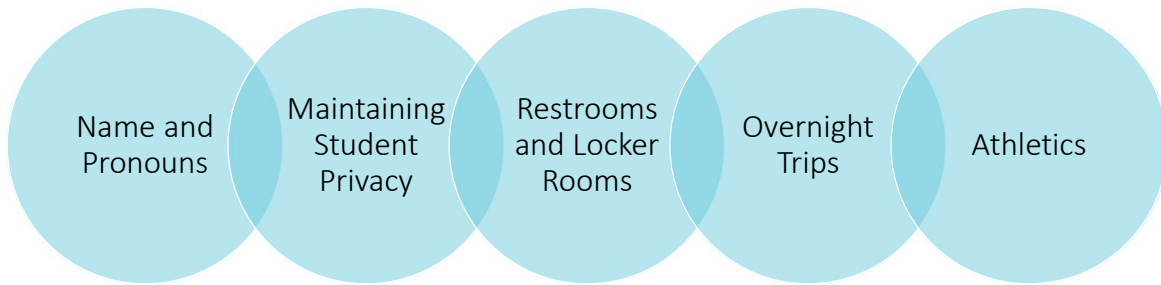
- Cannot require a pregnant student to participate in a separate school program
- Must provide same special services to pregnant students that you provide to student with other temporary medical conditions
- Must excuse a student's absences due to pregnancy or related conditions, including recovery from child birth or termination of pregnancy
- Harassment based on pregnancy or related conditions constitutes sex-based harassment



24

24

## LGBTQIA+ Students



25

25

## Balancing Title IX and the 1st Amendment (Free Speech)

- Title IX is intended to protect students from invidious discrimination, not to regulate content of speech
- The offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment.
- LEGAL STANDARD ¶ The “severe, pervasive and objectively offensive” conduct must effectively deny a person equal access to the district’s education program or activity to create a hostile environment
- Must balance a student’s 1<sup>st</sup> amendment rights with a student’s right to equal educational access



26

26

## GROUP ACTIVITY

- An 8<sup>th</sup> grade boy consistently tells his classmates that girls are inferior to boys and that they are only good for making babies.
- An 8<sup>th</sup> grade boy consistently tells his classmates that he thinks girls who get raped deserved it.
- An 8<sup>th</sup> grade boy was overheard telling his friend that he wanted to rape a 6<sup>th</sup> grade girl because she deserves it. The 6<sup>th</sup> grader did not hear the comment.
- An 8<sup>th</sup> grade boy tells a 6<sup>th</sup> grade girl he wants to rape her and he knows she will be too scared to fight him off.
- An 8<sup>th</sup> grade boy tells a 6<sup>th</sup> grade girl more than once that he wants to rape her. She tries to avoid him at school and dropped the cross-country team since they were both on the team.

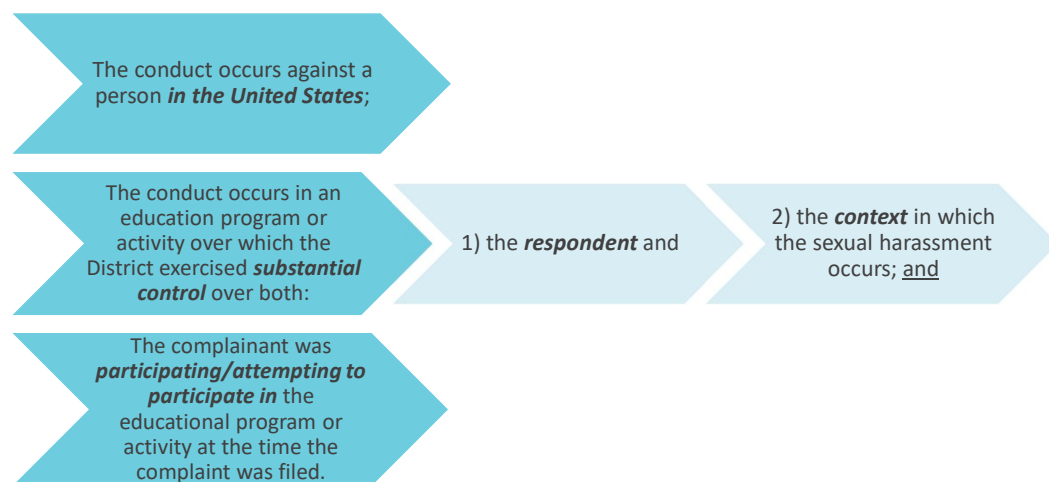


Is this Title IX?

27

27

## Title IX Jurisdiction



28

28

## The New Regulations Are NOT Retroactive



- The new regulations do NOT apply to any alleged sexual harassment that occurred prior to August 14, 2020
- The Federal Rule governs how schools must respond to sexual harassment that allegedly occurs ON or AFTER August 14, 2020



29

29

## GROUP ACTIVITY True or False



1. Under the new Title IX Regulations...

The District must conduct a formal investigation into an incident that occurred between two students over the weekend, at a student's home.

2. Under the new Title IX Regulations...

The District must conduct a formal investigation into an incident in which a coach communicated with a current student athlete via text message, multiple times over the course of three months, using personal cell phones, about subjects of a personal and sexual nature.

3. Under the new Title IX Regulations...

The District must conduct a formal investigation into a complaint submitted by a former student against a teacher regarding an incident that took place three years ago.

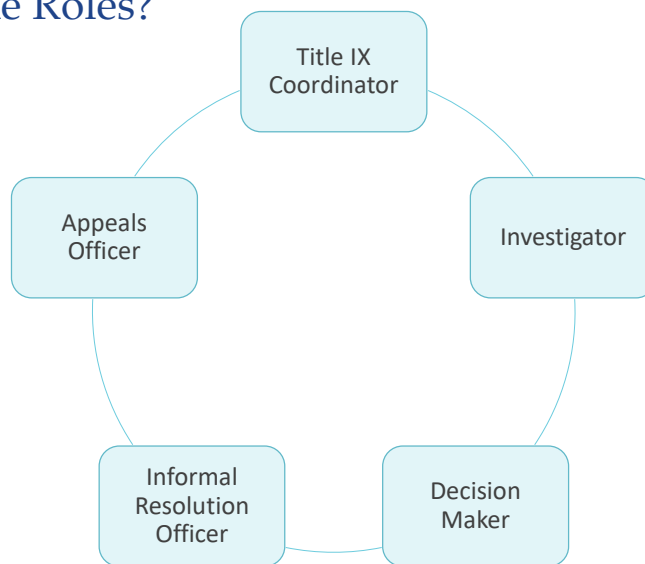
30

30

# The Roles and Responsibilities of District Administrators and Employees

31

## What are the Roles?

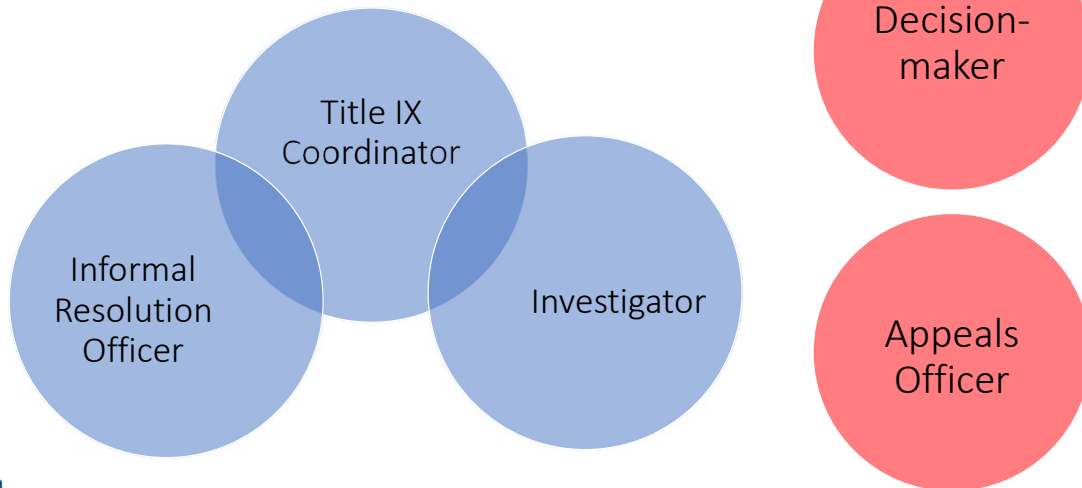


32

32



## What roles can overlap?

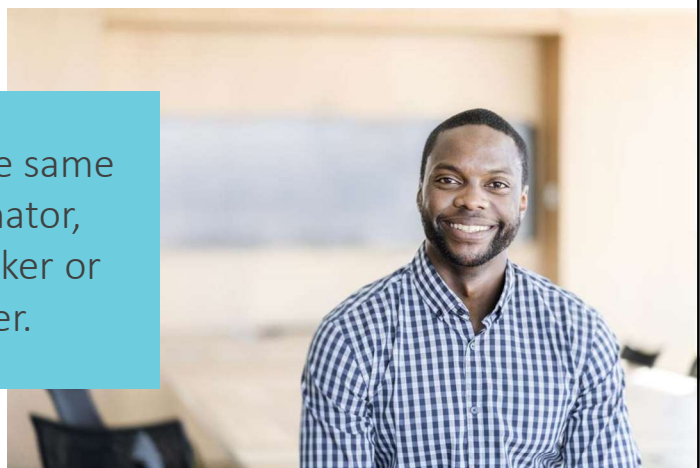


33

33

## What roles cannot overlap?

Appeals Officer cannot be same person as Title IX Coordinator, Investigator, Decision-Maker or Informal Resolution officer.



34

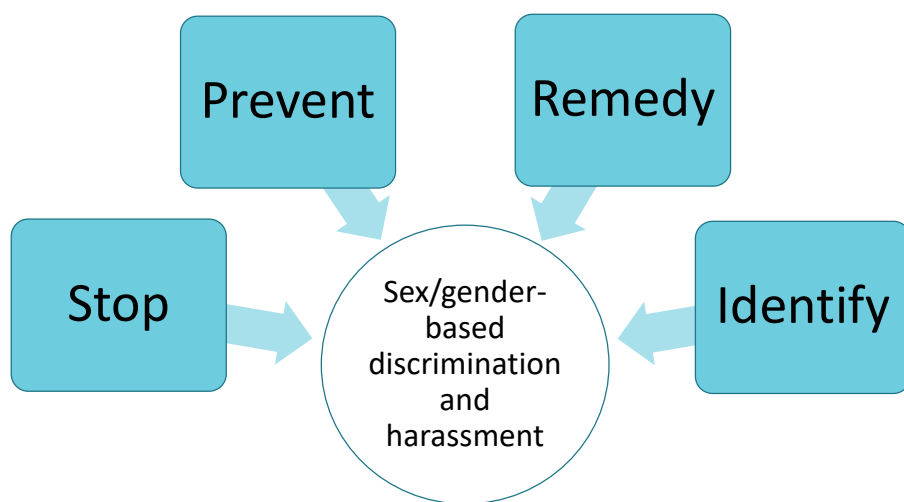
34

# Title IX Coordinator

35

35

## Title IX Coordinator duties



36

36

## Title IX Coordinator's Duties

- Receives complaints and oversees the complaint/grievance or informal resolution process
- Explains the complaint/grievance process to complainant
- Offers supportive measures to complainant and respondent
- Determines mandatory and discretionary dismissals
- Evaluates corrective actions and identifies systemic issues
- Ensures overall Title IX compliance, which includes trainings, policies, and notice requirements



37

37

## Title IX Coordinator - Complaints

### Receives Complaints

- Can come from anywhere
- Can be received by any employee
- Mandated reporter obligations
- Notify law enforcement
- Supportive Measures

### Oversees Complaints

- Keep a log
- Oversee Grievance Procedure
  - Send notices and communicate with parties
  - Timeline
- Oversee Informal Resolution



38

38

## Group Activity

You receive an anonymous note on your desk. It appears to be student handwriting and it says that B. Collins, in 7<sup>th</sup> grade is sexually harassing the other boys in Band. There is no name on the note, and no one saw who left it.

What do you do?

Is this a complaint?



39

39

## Title IX Coordinator and Signing a Formal Complaint

- Title IX Coordinator discretion
- Is signing a complaint necessary to not be deliberately indifferent?
- What to consider
  - Threats
  - Serial predation
  - Violence
  - Weapons



40

40

## Group Activity

A paraeducator who works in a class that supports students with autism comes to the Principal to complain that two of the students in her class have on multiple occasions touched her between the legs. The paraeducator does not want to file a formal Title IX complaint but would like the behavior to stop.

**Is it necessary for the Title IX Coordinator sign a Title IX formal complaint?**



41

41

## Group Activity: Part One

You are the Title IX Coordinator at a small K-8 district. Paige, a 7<sup>th</sup> grade student, comes to your office and informs you that one of her classmates, Mark, has been making “gross” comments to girls for a couple of weeks. She shows you Mark’s Instagram, which is mostly pictures of guns, scantily clad women, and misogynistic language. Paige says she and her friends are very uncomfortable around Mark, and do not want to be near him.

**Is this Title IX?**

**Do you investigate?**



42

42

## Group Activity: Part Two

Con't: One of Paige's friends, Kylie, tells you that Mark followed her into the girl's bathroom and tried to force her to perform oral sex on him. Kylie says Mark told her he would beat up her little brother if she refused. Kylie is very distraught and does not want to be around Mark ever again. Kylie does not want to file a formal Title IX complaint she just wants to transfer schools or go to independent study.

**Is it necessary to file a Title IX formal complaint on Kylie's behalf?**



43

43

## Title IX Coordinator - Contact the Victim/Complainant

Initial discussion with complainant/victim

- Gather facts
- Discuss supportive measures
- Explain options for filing a formal Title IX complaint
- Discuss the District's policy that prohibits retaliation

**Can be done by a designee**



44

44

## Establish a game plan for “discipline”

Title IX Regulations contemplate that the Title IX grievance procedure be completed prior to any discipline being imposed.

- Establish a game plan.
  - Emergency removal?
  - Administrative leave?
  - Are supportive services enough to separate the parties?
  - Is voluntary independent study a possibility?
- Document and communicate the plan.
- Be prepared to move quickly.



45

45

## Corrective Action/Systemic Issues

Student- training/counseling,  
stay away order, schedule  
change, denial of privileges,  
discipline

Employee – training, schedule change,  
stay away order, discipline

Work  
with

Site admin

HR

Student Services

Education

Training

Policies

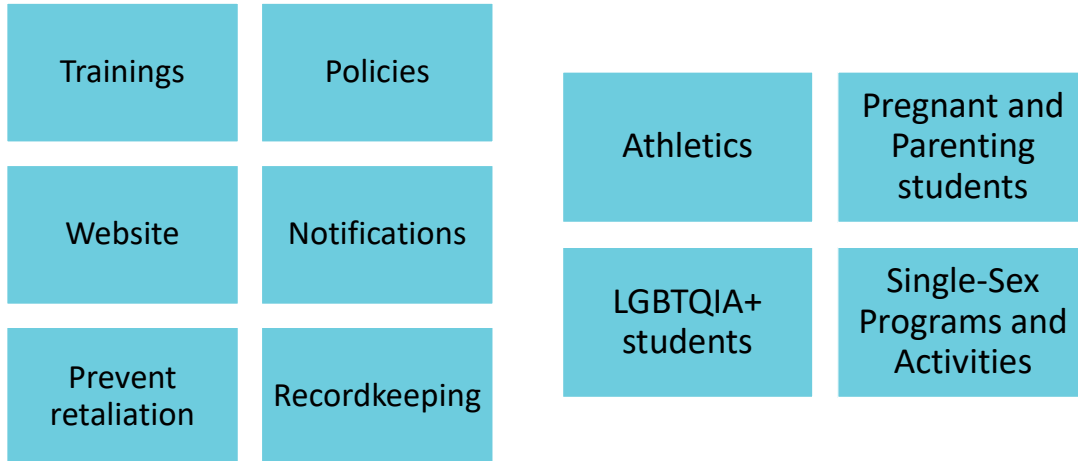
Continued monitoring



46

46

## Title IX Compliance



47

47

## Title IX Training Requirements

### Title IX Team

- The scope of the recipient's education program or activity
- The definition of sexual harassment
- How to conduct:
  - Investigations
  - Grievance process
  - Informal resolution process
  - Appeals
- How to serve impartially

### Investigator and Decision-maker

- Relevancy of questions and evidence
  - Including when the complainant's sexual predisposition or prior sexual behavior are not relevant



48

48



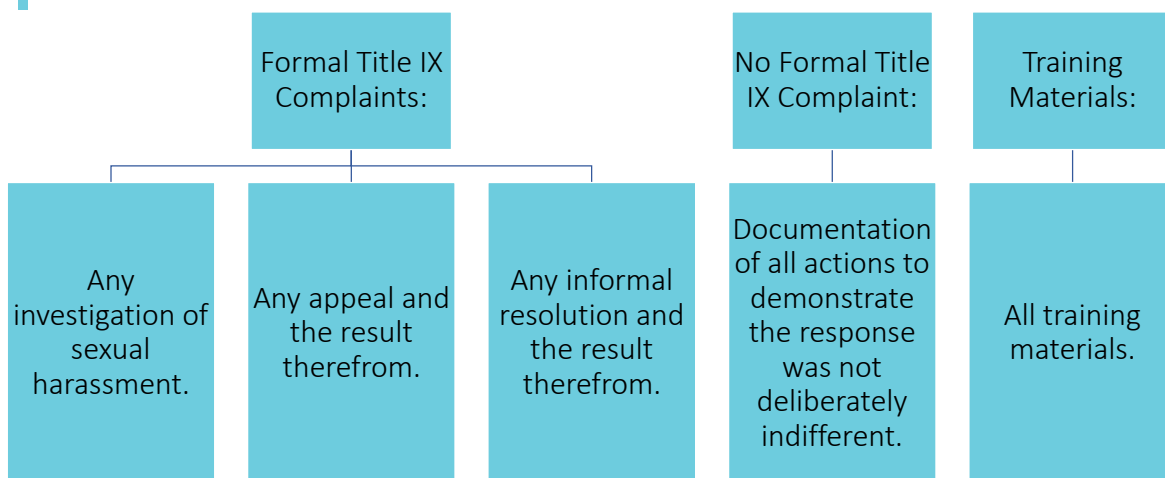
## Title IX Policies/Postings/Notifications



49

49

## Recordkeeping – Records Must Be Maintained for 7 Years



50

50

# Informal Resolution Officer

51

## Informal Resolution Officer's Duties

- Facilitates the informal resolution process
- Verifies a complaint meets the criteria for informal resolution, and that the parties have given voluntary, written consent
- Ensures the parties know their rights, including their right to withdraw at any time prior to a resolution being reached

May be the Title IX Coordinator



52

52

## Before you get started

It can only be offered when:

- A Title IX formal complaint is filed;
- The parties have been provided written notice about the allegations and the informal resolution process;
  - Including notice that either party can withdraw from the informal resolution process at any time
- A written determination has not yet been made; and
- Both parties have provided voluntary, written consent to the process.



53

53

## Informal Resolution

Cannot be used for allegations where an employee is alleged to have sexually harassed a student.



54

54

# Investigator

55

55

## Investigator's Duties

May be the Title IX Coordinator

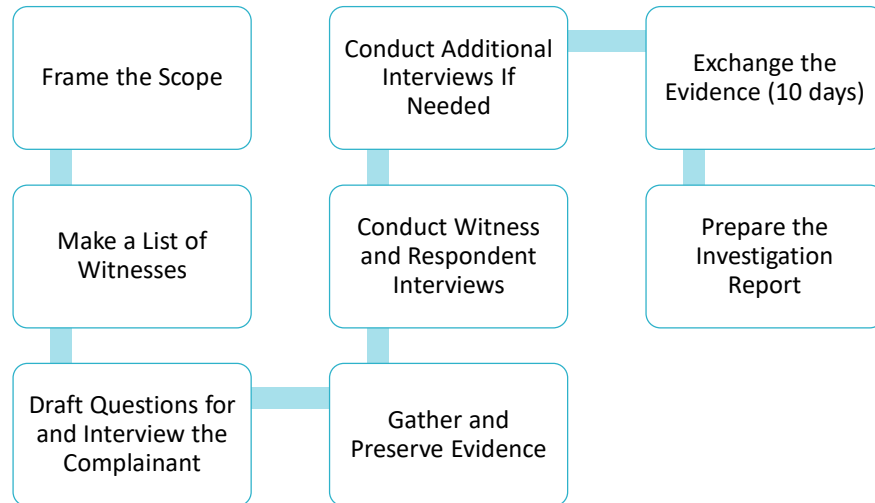
- Interviews parties and witnesses
- Gathers and reviews evidence
- Allows parties to inspect, review, and respond to all evidence directly related to the complaint
- Considers all parties' responses
- Prepares investigation report that summarizes relevant evidence



56

56

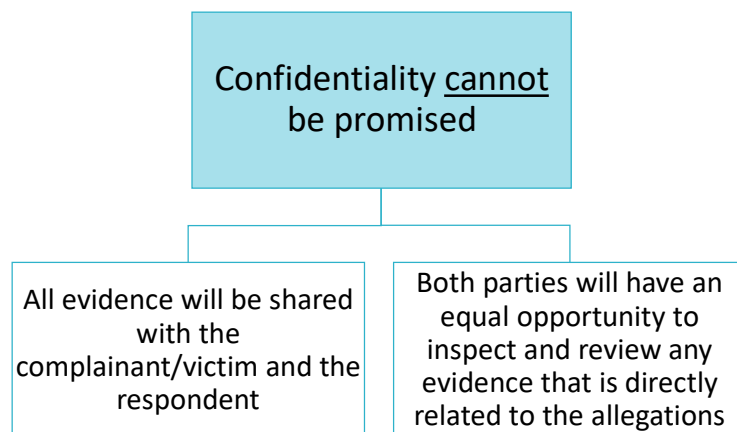
## How to Conduct an Effective Title IX Investigation



57

57

## Confidentiality & Preserving the Integrity of the Investigation



58

58

# Decision-Maker

59

59

## Decision-Maker's Duties

Cannot be the Title IX  
Coordinator

- Reviews investigation report
- Allows parties to submit relevant written questions
- Asks questions they deem relevant or provides an explanation as to why when a question is deemed irrelevant
- Makes determination about responsibility
- Prepares written determination
- May recommend sanctions and/or corrective actions



60

60

## Responsibilities of the Appeals Officer:

- Evaluates any appeal request made by the complainant or respondent
- Makes a decision on the appeal and issues a written decision

Cannot be the Title IX Coordinator, investigator, or decision-maker



61

61

## Responsibilities of All Employees:



Identify and Report

**This does not relieve an employee of their mandated reporter duties!**



62

62

# Appeals Officer

63

## Responsibilities of the Appeals Officer:

- Evaluates any appeal request made by the complainant or respondent
- Makes a decision on the appeal and issues a written decision

Cannot be the Title IX Coordinator,  
investigator, or decision-maker



64

64



## Appeal Rights for Both Parties at the District

Parties may appeal the written determination on the following bases:

Procedural irregularity;

New evidence that was not reasonably available earlier; or

Title IX personnel had a conflict of interest or bias.

Students/employees are also be afforded the right to file a complaint or an appeal with federal and/or state agencies (e.g. OCR, CDE, DFEH, EEOC)



65

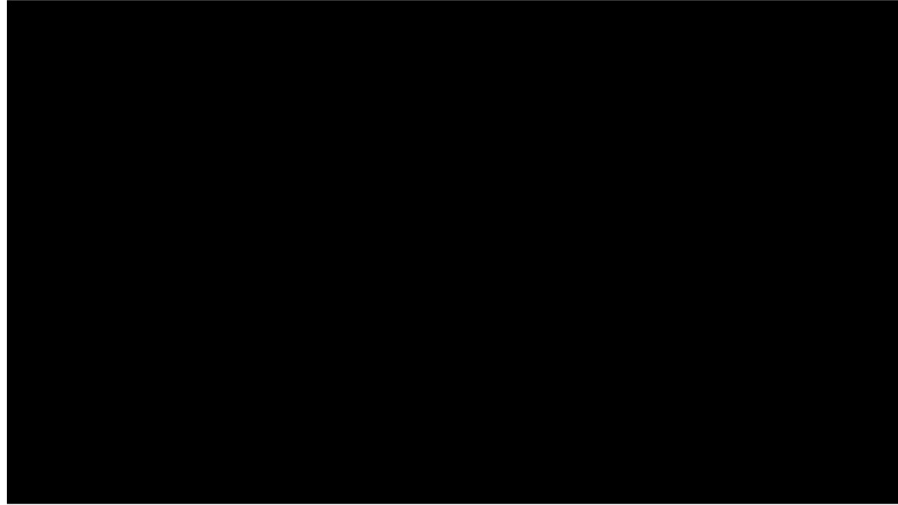
65

## Things to Consider

66

66

What do you think?



67

## Understanding Bias

### Implicit Bias

- Unconscious bias towards or against certain groups of people
- Often based on social stereotypes that have led to an association between a group and a trait
- Numerous studies have demonstrated that certain traditionally disadvantaged groups are treated differently, to their detriment
- Many (if not most) of the people treating others differently are unaware of doing so (e.g. microaggressions)

### Confirmation Bias

- Confirmation bias, or the selective collection of evidence, is our subconscious tendency to seek and interpret information and other evidence in ways that affirm our existing beliefs, ideas, expectations, and/or hypotheses.
- Therefore, confirmation bias is both affected by and feeds our implicit biases.



68

68

## Intersectionality

- Intersectionality is the complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect, especially in the experience of marginalized individuals or groups
- Many cases involve complainant's word against respondent's word
- Intersectionality of categories to which complainant, respondent and witnesses belong may inadvertently affect Investigator's/Decision-maker's credibility assessments
- Bias check: Has the race/ethnicity/sexual orientation of complainant, respondent and/or witnesses influenced your assessment of credibility?



69

69

## Suggestions to Counteracting Bias

- Actively consider an alternative hypothesis or why a favored hypothesis could be wrong.
- The process of writing might challenge the investigator to assess a decision more carefully.
- Have findings peer-reviewed.
- Good investigative skills and practices.



70

70

# Title IX Complaint Procedures

71

## Criminal Investigation

A police investigation does *not* relieve a district of its obligations under Title IX or state laws

### Gathering evidence

- A brief delay is permissible, but it is not good cause to delay sending the written notice of the investigation
- Criminal reports may be useful for fact gathering
- Coordinate with local law enforcement



72

72

## Group Activity: Police Investigation

- Katie comes into your office and tells you she was sexually assaulted by Mason in the bathroom last week. She explains that she has been avoiding Mason, but that his friends are taunting her; asking her when she is “meeting him in the bathroom again.”
- Katie tells you she went to the police, and they are doing an investigation. You contact the police to coordinate, and they tell you they have not yet spoken to Respondent, and they ask that you NOT contact Respondent until they do.

What do you do?

What supportive measures do you offer Katie?



73

73

## Retaliation Prohibitions

- Retaliation is prohibited against anyone who has attempted to participate in the Title IX process.
- The District cannot use the student conduct process as a way to avoid the Title IX complaint/grievance process.
- Retaliation complaints must be filed under the same complaint/grievance process.
- The District must keep the identities of all involved parties confidential, unless disclosure is required by law or necessary to carry out Title IX proceedings.
- Exercising a First Amendment right is not retaliation.
- Charging an individual with making a false statement in bad faith during a Title IX process is not retaliation.



74

74

## Checklist for Effective Investigations

Receiving the Complaint

Urgent/Supportive Measures

Assessing the Nature of the Complaint

Send Notice of Investigation

Frame the Scope

Make a List of Witnesses

Draft Questions for and Interview the Complainant

Gather and Preserve Evidence

Conduct Witness and Respondent Interviews

Conduct Additional Interviews If Needed

Prepare the Report and Findings

Corrective Action and Tying up Loose Ends



75

75

## Group Activity

You are outside in the morning to greet students as they arrive to school. You see two 8<sup>th</sup> grade students, Casey and Julie, walking towards the school. Casey appears to be trying to hold Julie's hand, and Julie keeps pulling it away. Julie is looking down and appears upset.

Is this a complaint?

What do you do?



76

76

## Receiving Complaints (In General)

### WHERE COMPLAINTS COME FROM

Student

Parent

Employee

Member of Public

Anonymous Person

### FORM OF COMPLAINTS

Verbal

Written

No Complaint (Rumor or Observation)



77

77

## Group Activity

A bus driver asked an 8<sup>th</sup> grade student on the bus for her cell number and told her he needed her number in the event he was going to pick her up late. The bus driver began communicating with the student over the course of a few weeks and started asking her personal questions. The student did not think the questions were overtly sexual but when the bus driver texted “show me yours,” the student became scared. She approached her English teacher, and tells her about it, but asks that she not tell anyone because she was worried her mother would be angry that she gave out her cell number.

Can the English teacher keep the student’s secret?



78

78

## Reporting a Complaint under AR 5145.7 (Model AR)

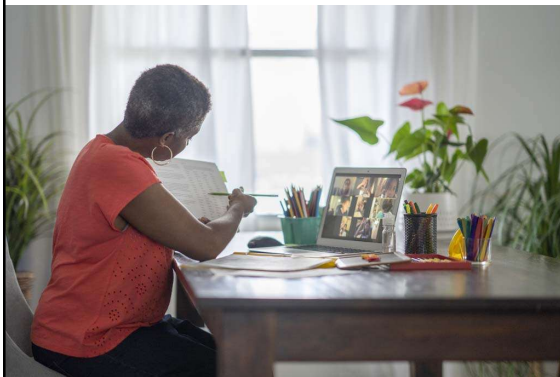
“A student or parent/guardian who believes that the student has been subjected to sexual harassment by another student, an employee, or a third party or who has witnessed sexual harassment is strongly encouraged to report the incident to a teacher, the principal, the district's Title IX Coordinator, or any other available school employee. Within one school day of receiving such a report, the principal or other school employee shall forward the report to the district's Title IX Coordinator. Any school employee who observes an incident of sexual harassment involving a student shall, within one school day, report the observation to the principal or Title IX Coordinator. The report shall be made regardless of whether the alleged victim files a formal complaint or requests confidentiality.



79

79

## Receiving a Complaint



- Notify the Title IX Coordinator
- Assess whether a CPS report should be filed (continue to reassess)
- Title IX Coordinator should promptly schedule a meeting with the victim



80

80



## Urgent Considerations



- Is there a threat of imminent harm to others?
- Was a crime potentially committed?
- Have mandated reporting obligations been triggered?



81

81

## Contact the Victim/Complainant

Conduct initial discussion with complainant/victim to better understand the complaint and if it rises to the level of sexual harassment under Title IX

Discuss supportive measures

- Ask what will support them
- Provide them options

Explain options for filing a formal complaint with the District and the Title IX grievance process

- Ensure they know supportive measures will be offered even if no formal Title IX complaint is filed

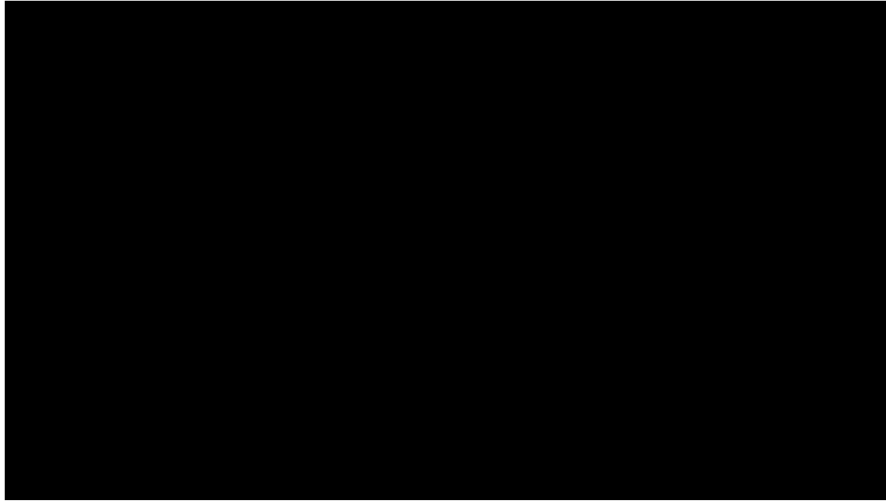
Discuss the District's policy that prohibits retaliation



82

82

What do you think?



83

Let's talk about...

Setting the stage.

Questions that were asked.

Title IX.



84

84

## Group Activity

An 8<sup>th</sup> grade student, Erica, comes and tells you that a 7<sup>th</sup> grade student, Natalie, has been making her feel uncomfortable at school. Erica tells you that Natalie has been staring at her in the locker room, and that one of her friends overheard Natalie call her “sexy” when she was changing in the locker room.

- Is this Title IX?
- What supportive measures do you offer?
- What do you do next?



85

85

## Initial Discussion With Victim/Complainant

- Ask open-ended questions
- Get complaint in writing or confirm allegations in writing if not already received
- Do not promise confidentiality
- Determine whether matter can be resolved informally
- Listen and “hear” the concern



86

86

## Supportive Measures

“Non-disciplinary, non-punitive individualized services offered [...] to the complainant or respondent before and after the filing of a formal complaint or where no formal complaint has been filed.”

- Designed to restore or preserve equal access to the educational program without unreasonably burdening either party
- Should be determined on a case-by-case basis
- Cannot be retaliatory



87

87

## Supportive Measures

Examples:

- Counseling
- Medical services
- Academic support
- No-contact orders
- Increased security
- Changed schedules

*Document the implemented supportive measures, but don't stop there!*



88

88

## Emergency Removals (Students)

School districts are prohibited from disciplining a student for alleged sexual harassment until a full Title IX investigation has been completed.

### EXCEPTION: An Emergency Removal

Respondent must be an immediate threat to the physical health or safety of any student or individual;

The immediate threat must arise from the allegations of sexual harassment; and

Respondent is provided with notice and an opportunity to challenge the decision immediately after removal.



89

89

## Administrative Leave

Placing an employee on Administrative Leave is not disciplinary



90

90

## Do You Have a “Formal” Title IX Complaint?

Document  
filed by  
Complainant

OR

Signed by  
Title IX  
Coordinator



91

91

## Does it Meet the Tests?

Definition of  
Title IX Sexual  
Harassment

AND

Title IX  
Jurisdiction



92

92

## Test 1: If the Alleged Conduct is True, Does it Rise to the Level of Sexual Harassment Under Title IX?

Any **employee** conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct;

Any unwelcome conduct that a reasonable person would find so **severe, pervasive, and objectively offensive** that it denies a person equal education access; OR

Any instance of sexual assault, dating violence, domestic violence or stalking.

**\*If the answer is no, you must dismiss the complaint or allegations therein. If yes, move to Test 2.**



93

93

## Test 2: Is there Title IX Jurisdiction Over the Conduct?

Education Program or Activity

- If the school exercises substantial control over the respondent; and
- The school exercises substantial control over the context in which the sexual harassment occurred.

Must be within the United States.

At the time of filing a formal complaint, complainant must be participating/attempting to participate in the educational program.

**\*If the answer is no, you must dismiss the complaint or allegations therein.**



94

94

## GROUP ACTIVITY

A coach communicated with a current student athlete via text message, multiple times over the course of three months, using personal cell phones, about subjects of a personal and sexual nature.

Is there Title IX Jurisdiction?

Does the school exercises substantial control over

- The respondent; and
- The context in which the sexual harassment occurred.

If it is determined there is no Title IX Jurisdiction, do you still investigate?



95

95

## Discretionary Dismissals

Districts *MAY* dismiss a formal complaint, or any allegations therein if:

- A complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegations therein;
- The respondent is no longer enrolled or employed by the district; or
- Specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.



96

96



## Mandatory Dismissal

Does not fall within  
Title IX Jurisdiction

OR

Does not meet  
definition of sexual  
harassment under  
Title IX



97

97

## Dismissals (Mandatory and Discretionary)

The decision to dismiss a complaint should be made in consultation with the Title IX Coordinator.

Notice of dismissal must be issued to both parties in writing.

Parties must be informed of their right to appeal the dismissal on the basis of:

- Procedural irregularity;
- New evidence that was not reasonably available earlier; or
- Involved personnel had a conflict of interest or bias.



98

98

Even if You Determine Title IX Is NOT Triggered or the Complaint Should Be Dismissed, Do NOT Stop There!

- *Consider whether the alleged conduct may otherwise violate District policy or employee/student conduct standards*



99

99

## What if the Complainant says “Do Nothing”?

The Title IX Coordinator must inform them of their options

- This includes supportive measures without filing a formal complaint

The Title IX Coordinator can sign a formal complaint on the complainant’s behalf

- Assess the conduct!
- If NOT filing a formal complaint would be deliberately indifferent, the Title IX Coordinator has the discretion to sign a formal complaint on the complainant’s behalf



100

100

## Deliberate Indifference

*A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.*

*Deliberate indifference may require the Title IX Coordinator to sign a formal complaint in situations involving threats, serial predation, violence, or weapons.*



101

101

## Title IX Grievance Procedure

Receive Complaint	Is it Title IX?	Formal Investigation & Report	Determination	Appeal & Corrective Action
<ul style="list-style-type: none"><li>• Complaint or notice to the Title IX Coordinator</li><li>• Intake</li><li>• Offer supportive measures to both parties</li><li>• Discuss options to file a formal complaint</li></ul>	<i>Following a formal complaint:</i> <ul style="list-style-type: none"><li>• Definition of sexual harassment?</li><li>• Title IX jurisdiction?</li><li>• Mandatory/discretionary dismissal<ul style="list-style-type: none"><li>◦ Consider UCP/4030 process</li></ul></li><li>• Emergency removal?</li><li>• Administrative leave?</li><li>• Determine if informal resolution is an option</li></ul>	<ul style="list-style-type: none"><li>• Identify timeline</li><li>• Notice to parties</li><li>• List of witnesses</li><li>• Plan interviews</li><li>• Gather evidence</li><li>• Draft investigation report</li><li>• Exchange evidence</li><li>• Investigation report finalized and shared</li></ul>	<ul style="list-style-type: none"><li>• Exchange of written questions and answers</li><li>• Determine if relevant</li><li>• Written determination</li></ul>	<ul style="list-style-type: none"><li>• Appeal decision and rationale drafted and shared</li><li>• Determine if discipline is appropriate once appeal window is closed</li><li>• Corrective action</li><li>• Systemic change</li></ul>



102

102

# Informal Resolution Process

103

## Informal Resolution

Informal resolution is a process that does not involve a full investigation and adjudication.

Either party can withdraw from the informal resolution process at any time, and should be notified of this right.

Cannot be used for allegations where an employee is alleged to have sexually harassed a student.

### It can only be offered when:

- A formal complaint is filed;
- The school district has sent a written notice about the allegations and the informal resolution process;
- A written determination has not yet been made; and
- Both parties have provided voluntary, written consent to the process.



104

104

## Conducting Informal Resolution

- Identify ground rules for the chosen resolution process
- Allow both parties to share their side of the story without interruption
  - Feel free to prompt the parties with open-ended questions (i.e., “How did this make you feel?,” “Help us understand...” etc.)
- Ask clarifying questions to fill in any details
- The facilitator should be able to objectively summarize what each party has shared
- Let the parties propose their own possible solutions first



105

105

## Informal Resolution Agreements

### Agreement

- Reduce agreement to writing
- May look like a summary of commitments, or a contract
- Can include discipline, supportive measures, etc.

### No Agreement

- Voluntary process: parties may withdraw at any point prior to reaching a determination of responsibility and resume a formal grievance process



106

106

## Group Activity

High school freshman, Tanner is talking to and flirting with multiple girls at school. One of the girls, Chelsea, believes she is in a monogamous relationship with Tanner. When she finds out he is flirting with other girls, she is upset, and stops talking to him. To try and get Chelsea back, Tanner texts her nude pictures of himself, and frequently invites her to hook up during lunch and after school. Chelsea is no longer interested and wants him to stop bothering her.

- Is this Title IX?
- Is this a good option for informal resolution?



107

107

## Group Activity

Kayla is a paraeducator, assigned to work in Peter's classroom. Kayla likes Peter and thinks Peter might like her back. Kayla starts flirting with Peter during class, which includes touching his back and shoulders while he's at his desk or working with students. Peter doesn't react. One day, after class, Kayla tries to kiss Peter. Peter, upset, pushes her away, and informs her that he's married.

- Is this Title IX?
- Is this a good option for informal resolution?



108

108

# How to Conduct an Effective Title IX Investigation

109

## Investigation Timelines



- Title IX - “reasonably prompt time frame”
- District policies



110

110

## Notice of Investigation

Identify complaint/investigation process, including informal resolution process;

Identify allegations with sufficient details;

Include a statement that respondent is presumed not responsible and that a determination is made at the conclusion of the process;

Explain that they may have an advisor of their choice inspect and review the evidence; and

Identify the District's code of conduct that prohibits knowingly making false statements or submitting false information.

Do not restrict either party's ability to discuss the allegations under investigation.



111

111

## Policies and Procedures for Investigating Title IX Complaints

BP/AR 1312.3 – Uniform Complaint Procedures

BP/AR 4030 – Nondiscrimination in Employment

AR 4031 – Complaints Concerning Discrimination in Employment

BP/AR 4119.11 – Sexual Harassment (Employee)

AR 4119.12 – Title IX Sexual Harassment Complaint Procedures (Employee)

BP/AR 5145.7 – Sexual Harassment (Students)

AR 5145.71 – Title IX Sexual Harassment Complaint Procedures (Student)



112

112



## Formal Grievance Procedure

- Investigator gathers evidence and interviews parties/witnesses
- Investigator shares evidence with the parties
- Parties have 10 days to respond to the evidence
- Investigator conducts any necessary follow up
- Investigator prepares Investigation Report
- Investigation Report is sent to the parties
- Parties have 10 days to respond to the Investigation Report and/or submit written, relevant questions to the other party or any witness
- Decision-maker facilitates the exchange of written questions
- Decision-maker makes decision and prepares a Written Determination
- Both parties have right to appeal



113

113

## Framing the Allegations

114

## Understand the Scope - Frame the Allegations

- Prepare clear and concise “yes or no” questions or statements that the investigation will answer or address.
- Do not include legal terms such as “discriminated,” “harassed,” or “retaliated.”
  - Bad example: Did Suzie discriminate against Joe?
  - Good example: Did Suzie issue Joe a letter of reprimand because of Joe’s race?



115

115

## Understand the Scope- Frame the Allegations

- Avoid ambiguous and subjective words such as “inappropriate” and “unfair.”
  - Bad example: Did Suzie act mean and unfairly toward Joe?
  - Good example: Did Suzie tell Joe “Go to Hell?”
- Make sure all relevant claims are included in the allegations. (Or, if you excluded something, be prepared to explain why.)



116

116

## Factual Findings v. Legal Conclusions

- Focus on whether or not the alleged conduct occurred.
- Avoid legal conclusions.
- Examples:
  - Bad Example: “Coach Ross sexually harassed Angela Smith.”
  - Good Example: “Coach Ross sent multiple text messages to Angela Smith over a three-month period, discussing the details of their personal relationships and various sexual acts.”



117

117

## Group Activity

Natasha, a senior, has made a complaint alleging that one of her classmates, Vanessa, groped her chest under her shirt in a hotel room during an overnight school field trip.

Is this Title IX?  
What else do you need to ask Natasha to  
frame the scope of your investigation?



118

118

## Group Activity

Recall the video you saw earlier.

What allegations do you think could be raised by the Complainant?

Is there any other information you need to help frame the scope of the investigation?



119

119

# Interviews and Gathering Evidence

120

120

## Legal Framework

### Preponderance of the Evidence



121

121

## Title IX Evidence Requirements

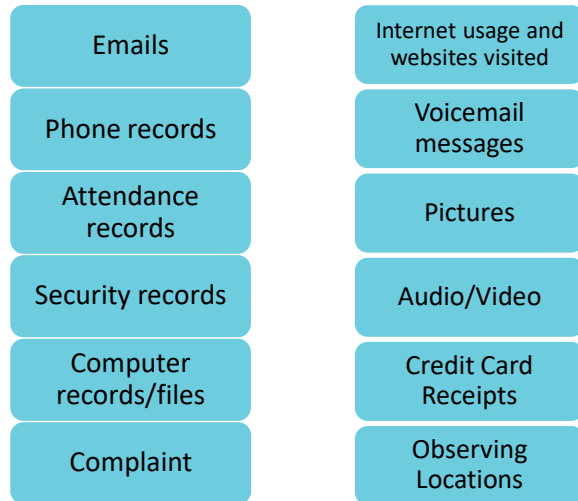
- District has the burden of gathering evidence.
- District cannot access or use a party's medical, psychological or other similar records unless they obtain the party's voluntary, written consent.
- District cannot restrict parties from discussing allegations or gathering and presenting relevant evidence.
- District must provide an opportunity for parties to present fact and expert witnesses and other exculpatory or inculpatory evidence.



122

122

## Where does Evidence Come From?



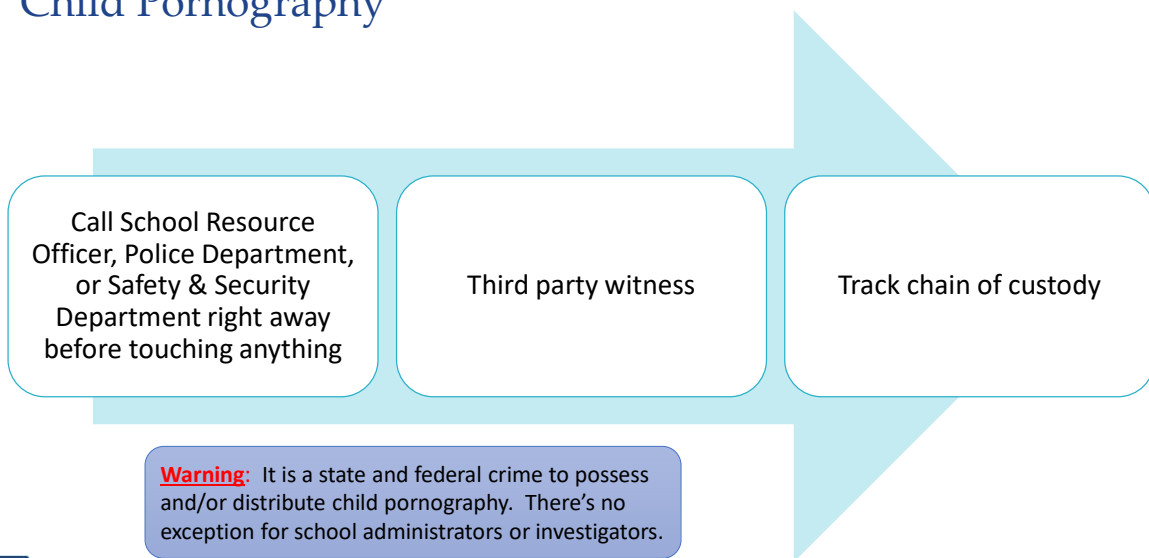
**\*Note:** If you receive a document from a witness, make sure you note who provided the document and how it was received.



123

123

## Child Pornography



124

124

## Preparing to Conduct Interviews

Consider potential conflicts of interest.

Consider location, timing, and order.

How to make initial contact

Age of the party being interviewed

As you conduct interviews, be sure to ask each witness if there are other witnesses you should speak with.



125

125

## Trauma-Informed Approach

Schedule interview at convenient time and place

Listen attentively and actively without interrupting

Save technical questions for the end of the interview once open-ended ones exhausted

Display compassion and sincerity

Interview without judgment or skepticism

*Use of trauma-informed techniques during the complainant's interview can facilitate rapport building, cooperation and complainant's emotional recovery.*

Do NOT Victim-Blame

Permit student/employee to control information flow

Suggest breaks as needed

Explain the need/context when asking sensitive questions



126

126

## Group Activity

Laura, a mother to 5<sup>th</sup> grade student, Paige, has filed a Title IX formal complaint on Paige's behalf, alleging that a teacher has touched Paige on the lower back and bottom on numerous occasions. When you go to talk to Paige about the incident, Paige is visibly upset and does not want to talk about the incident.

What can you do to make Paige feel more comfortable?



127

127

## Recognize Trauma-related Dissociation

- Some complainants may express fears and concerns
- Some complainants may exhibit signs of detachment and disconnection (dissociation)
- Triggering past trauma can result in severe forms of dissociation include losing time, forgetting who/where you are, going blank
- Signs of dissociation include:
  - glazed/fixated gaze
  - no eye contact
  - crying
  - confusion
  - rapid speech
  - sudden mood changes
  - flat affect
  - change in tone
  - monotonous voice
  - silence for long periods of time
  - loss of time
  - "I'm so ashamed..."
  - "This is all my fault..."
  - "People won't believe me..."
  - "How can I trust anyone again..."
  - "I'm overwhelmed and afraid..."
  - "What are my parents/teachers/supervisors/friends going to think..."

Reporting students/employees need to be heard without skepticism or judgment



128

128



## Helping Complainant Regain Control

Remind the person that their feelings and their experience right now are normal and that it is not unusual to have different types of strong feelings arise during an interview of this kind

Pause interview and check in: “We have covered a lot of ground over the past half-hour. How are you feeling now?”

Engage and restore control by using grounding techniques like providing a glass of water or suggesting a break and standing up

Inform the reporting party about next steps in the process and that they can reach out at any time to talk



129

129

## Order of Interviews

Begin interviews of key witnesses and then broaden as needed.

- Complainant
- Witnesses
- Respondent
- Complainant



130

130

## Interviews

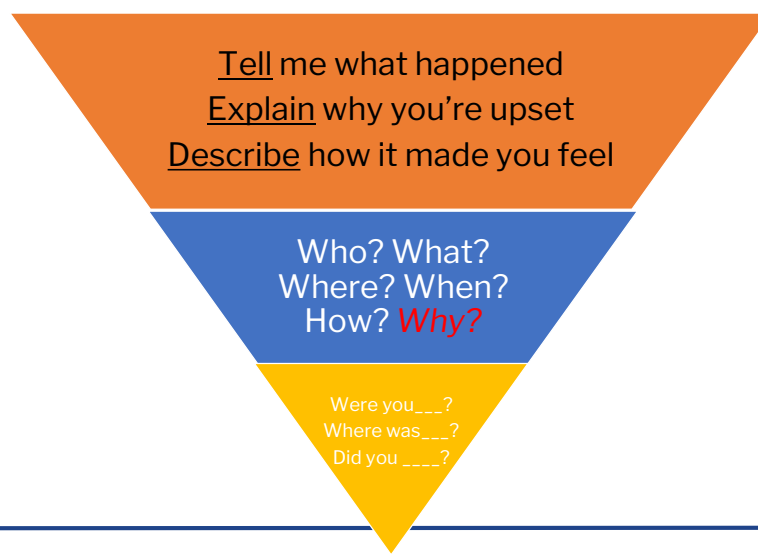
- Start with an outline of questions but be flexible!
- Use the outline as more of a roadmap for issues you need to touch on with each witness.
- If there are a series of incidents, consider a linear roadmap.
- Keep in mind big picture goals.
- At the end, ask: “Is there anyone/anything else?”



131

131

## Questioning Techniques



132

132

## Interview Relevant Witnesses and the Accused

### Conduct Further Interviews

- Ask open-ended questions to understand what happened
  - Use 5 W's
- Ask more specific questions to fill in gaps or address statements that don't add up or are contradictory
- Ask if there are additional witnesses
- Ask if they are aware of any evidence, e.g., video, photo, text, social media posting
- Identify relation of witness to the complainant and/or accused
- Discuss the District's policy that prohibits retaliation



133

133

## Statements/Questions to Avoid

### Questions to avoid:

- Why did you...?
- Why didn't you...?
- Didn't you consider...?

### Questions that may be helpful:

- How did that make you feel?
- What was your thought process at that time?
- Do you remember smelling/hearing anything?

**Don't** insert your opinion into the victim's experience

**Don't** make assumptions about what the victim needs or wants

**Avoid** questions that can be answered with one-word or short responses

**Avoid** leading questions

"And then you did this..." v. "What happened next?"



134

134

## Framing the Questions

- **Funnel Approach** – Start broad and then follow up with specific questions.
  - Tell me what happened on May 5, 2021.
    - Who was present?
    - Any documentation of this incident (text messages, emails, videos, pictures)?
    - You said he “attacked” you. Can you explain that further? What does “attack” mean to you?
- **Avoid Leading Questions**
  - PROBLEMATIC: On May 5, 2021, you were alone in a room with Mr. Smith, correct?
  - PROBLEMATIC: Did you engage in any inappropriate behavior?
  - PROBLEMATIC: Do you consider yourself a racist?



135

135

## Activity: Good or Bad questions

- |   |   |
|---|---|
| 1) “So, you were drunk, right?”   | 5) “What time did you arrive?” and “How long did you stay there?” |
| 2) “Did you see Jeff on April 2” [If answer is yes] “Tell me about that.” | 6) “What was your thought process at that time?”                  |
| 3) “Tell me how that made you feel.”                                      | 7) “What time did you arrive, and who else was there?”            |
| 4) “That must have made you feel scared, didn’t it?”                      | 8) “Why didn’t you just say ‘No’?”                                |



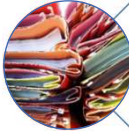
136

136

## Conduct Additional Interviews



Review your witness summaries and evidence and ask yourself if there are any holes.



Do you have all the information you need to thoroughly address each allegation?



It is OK to conduct follow-up interviews of witnesses if needed.



137

137

## Credibility and Corroboration Considerations

13  
8

138

## Common Questions and Issues

What if the witness is under age?

What if the witness is biased or lies?

Do all witnesses get a union representative or support person?

What if the witness refuses to be interviewed or wants their identity to remain confidential?

What if the police are investigating?



139

139

## Common Challenges to Complainant's Credibility



Incomplete, inconsistent and untrue statements

Lack of physical resistance

Delayed reporting



140

140

## Credibility Challenge: Incomplete, Inconsistent and Untrue Statements

Common neurobiological effects of trauma: perceptual narrowing, loss of cognitive and motor skills

Discomfort providing sexual or other personal details during interview

Having to describe sexual assault to many different people

Fear of being blamed and/or doubted

Fear of punishment for illegal behavior e.g. underage drinking, drug-use



141

141

## Credibility Challenge: Lack of Physical Resistance

Majority of sexual assaults are committed by someone known to the complainant

Most common response is not physical resistance but often feelings of betrayal, confusion, disorientation, shame and self-blame

Never ask complainant:

- Did you fight back?
- Why didn't you try to get away?
- Did you yell for help?

Instead ask questions like:

- What did you do next?
- Can you tell me what you were thinking at that time?
- Can you tell me what you were feeling when they did that?



142

142

## Credibility Challenge: Delayed Reporting



Victims need time to process what has happened to them

Perpetrators of sexual assault are often known to victims

Fear

Self-blame



143

143

## Credibility Factors

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?



144

144



## Credibility Factors (continued)

- **Past record:** Did the alleged harasser have a history of similar behavior in the past?
- **Opportunity and capacity to observe/actual knowledge:** Did the person see it themselves, or are they recounting what someone else told them?
- **Consistent or inconsistent statements:** Is the person changing their story? Did the person say the same thing to three other witnesses?
- **Reputation for veracity or deceit:** Does this person have a reputation of lying, cheating, etc.?
- **Bias:** Is this person the Complainant's best friend? Does the person have their own complaint against Respondent?



145

145



146

146

## Take Notes

- Take detailed notes and/or have a second administrator or confidential employee involved to take notes.
- Consider signed witness statement summaries.

# Exchange of Evidence

14  
7

147

## Exchange of Evidence (Draft Investigation Report)

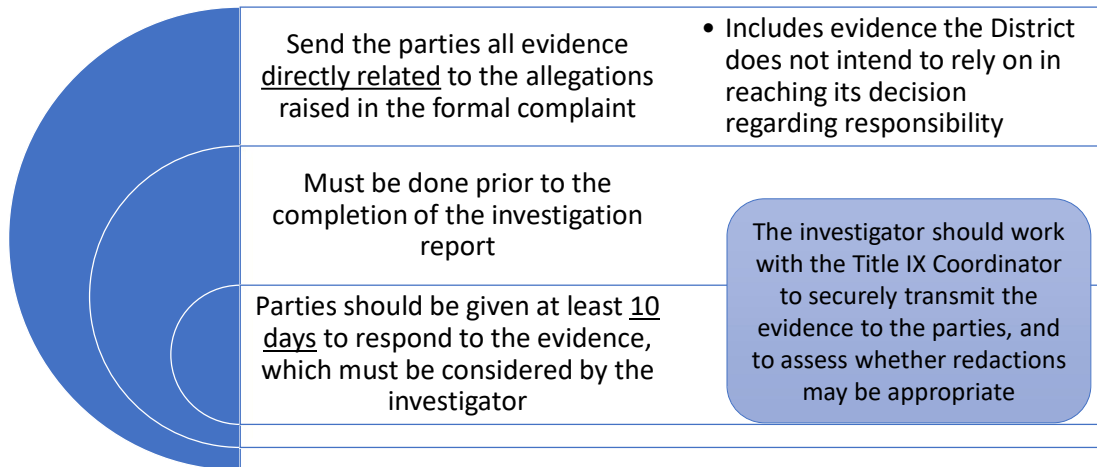
- Provide the parties with a summary of all directly related evidence to the allegations related in the formal complaint
- This should include an explanation of the process:
  - Parties have at least 10 days to review and respond to the evidence.
  - Parties must send their responses to the investigator.
- This may include:
  - Interview Summaries (Parties and Witnesses)
  - Documentary Evidence (Text messages, emails, social media, etc.)
  - Photos/Videos
  - Anything else directly related to the allegations



148

148

## Exchange of Evidence



149

149

## Where Relevancy Comes Into Play...

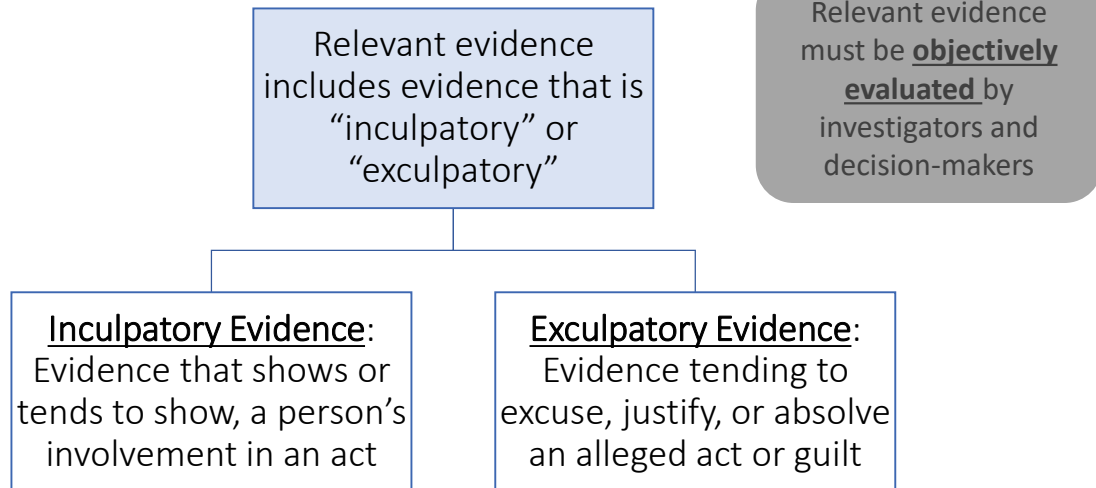
- The investigator is tasked with ensuring both parties have an equal opportunity to present, inspect and review any evidence obtained as part of the investigation. Ultimately, they create an Investigation Report that fairly summarizes relevant evidence.
- The decision-maker is tasked with making factual findings and a final determination as to whether policies have been violated. As part of this process, they provide the parties the opportunity to ask relevant questions of each other and witnesses.



150

150

## Relevant Evidence

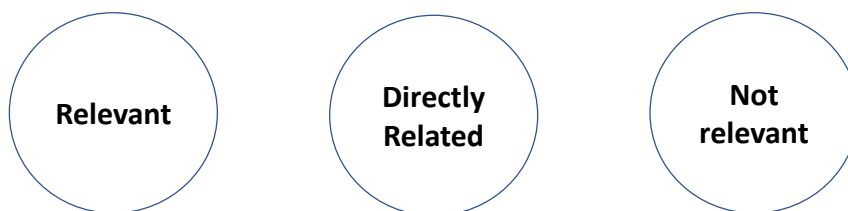


151

151

## Activity

The respondent, a teacher, provides the investigator with evidence that the complainant, a student, was failing all her classes and was using a baseless sexual harassment allegation against respondent to obtain supportive measures as an excuse for her poor academic performance.



152

152

## Limitations on Relevance

- Information protected by any legally recognized privilege cannot be used; no party's treatment records may be used without that party's voluntary, written consent
- When evidence is duplicative of other evidence, it may be deemed not relevant
- A complainant's predisposition is never relevant



153

153

## Limitations on Relevance

A complainant's prior sexual behavior is **irrelevant** unless used:

To prove that someone other than the respondent committed the conduct alleged by the complainant, or

To prove consent, if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent



154

## Prior Sexual History

Rape shield protection does not pertain to the sexual predisposition or sexual behavior of Respondents, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence

Scenarios where respondent might try to prove complainant had motive to fabricate or conceal a sexual interaction do not require admission or consideration of the complainant's sexual behavior



155

155

## Prior or Subsequent Misconduct



Regulations do not prohibit the use of prior or subsequent misconduct

- Evidence of a pattern of inappropriate behavior by an alleged harasser is permitted if relevant



156

156

## Activity

**RECALL:** The scenario with the two students in the back of the SUV after the soccer game. Respondent, Jeff, wants to introduce evidence that the Complainant engaged in oral sex with a friend of his, the weekend prior.

**Relevant**

**Directly  
Related**

**Not  
relevant**



157

157

## Activity

**RECALL:** The scenario with the two students in the back of the SUV after the soccer game. Respondent, Jeff, wants to introduce evidence that he and Complainant engaged in oral sex the day prior.

**Relevant**

**Directly  
Related**

**Not  
relevant**



158

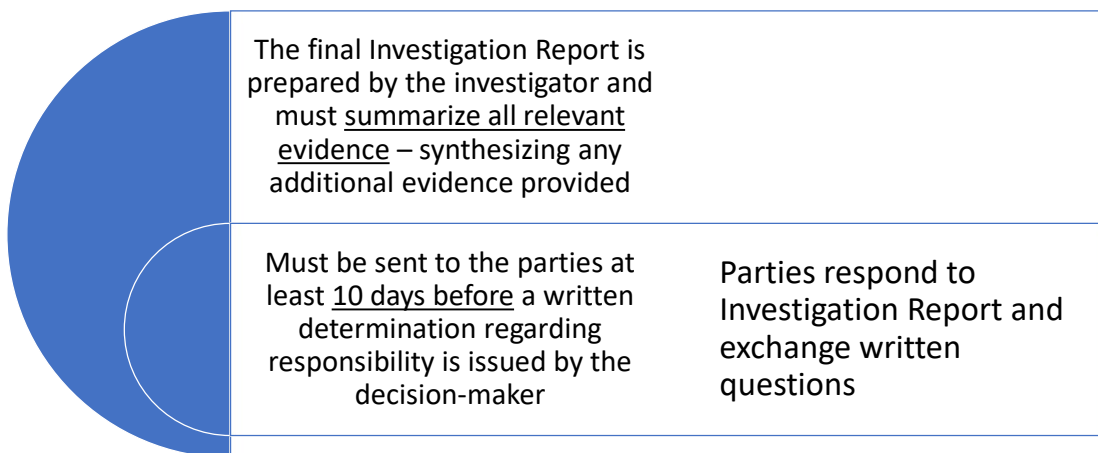
158

# Finalizing the Report

15  
9

159

## Investigation Report



160

160



## Investigation Report (Recommended Content)

Identify the date the investigation commenced

Identify the investigator

Identify supportive measures offered to and accepted by the parties

Summary of the investigation process

Identify the legal standard of review applied to the review of evidence/applicable policies

Identify number of/identity of witnesses

Summary of evidence – documents and witness statements

\* You may be asked to make recommended, non-binding findings of fact and responsibility under District policies and codes of conduct.



161

161

## Recommended Findings

- Topic sentence
- Discuss how Complainant described the allegation
- Discuss how Respondent responded
- Independent evidence and how it plays into the analysis (witness statements, documents, etc.)
- Summarize



162

162

## Drafting Recommended Findings – Sample Language

**Allegation 1:** Respondent made inappropriate comments to Complainant during the 2021-2022 school year.

**Finding 1:** Sustained.

There is no dispute that Respondent said, “hit me up” to Complainant. Respondent said that meant he wanted Complainant to call or send him a text message. Respondent denied saying, “come over to my house tonight,” “let’s grab drinks,” “u wanna hang,” “Daddy needs a kiss,” or “get on your hands and knees.” Complainant said he interpreted the comments to mean that Respondent wanted to engage in sexual acts with Complainant. Witness testimony includes statements that Complainant had complained about Respondent “being creepy.”

The investigator finds Complainant’s version of events to be more credible because they are supported by consistent witness testimony.



163

163

## Drafting Recommended Findings – Sample Language

**Allegation 1:** On September 12, 2022, Respondent forcibly grabbed Complainant’s breast underneath her shirt.

**Finding 1:** *Sustained.* Complainant alleges Respondent reached his hand up underneath her shirt, and forcibly grabbed her right breast. Respondent denied the allegation and there were no witnesses. There were no witnesses to the alleged incident. One witness observed Complainant welling up with tears following the incident, when the parties returned into the classroom.

The preponderance of the evidence supports the allegation that Respondent forcibly grabbed Complainant’s breast underneath her shirt and the allegation is sustained.



164

164

## Drafting Recommended Findings – Molly and Jeff

**RECALL:** In the video, Molly reported being sexually assaulted by Jeff at a high school tailgate.

- Molly alleged that Jeff took her skirt and underwear off and touched her genital area. She was crying and told him she didn't want to right now. Jeff continued to kiss her while she cried.
- Jeff said Molly went back to the SUV with him and was "into it the whole time." He didn't see her crying or notice that she was upset. He doesn't remember her saying she didn't want to, and that she kept kissing him.
- Molly's friend, Charlotte, said Molly was really quiet on the ride home, and didn't come to school the next day.
- Molly's friend, Jane, said that Jeff's friend, Brian, told her that Jeff was "getting some" at the tailgate. Jane saw Molly leave Jeff's car in tears, but she was with the other guys so she didn't come check on Molly.
- Brian said that Molly was hanging all over Jeff at the tailgate.
- Jeff's friend, Sean, said this wasn't the first time he has seen Jeff and Molly together.
- Molly provided screenshots of text messages Jeff sent her after the incident. This included a picture of Molly's underwear, which she left in the back of his SUV, and a comment saying, "I'll give these back to you when we finish what we started (winky face emoji)"
- Molly's grades have dropped since the incident. She recently quit the track team.



165

165

## Drafting Recommended Findings – Molly and Jeff

**Allegation 1:** Did Jeff reach up Molly's skirt, touching her genital area without her consent?

**Finding 1: Sustained.** A preponderance of the evidence supports a finding that Jeff reached up Molly's skirt to touch her genital area without her consent.

Molly alleged that Jeff reached up her skirt to touch her genital area in the back of his SUV at a tailgate. Molly further alleged Jeff removed her underwear without her consent. Jeff denies this allegation, saying that Molly had consented to the touching.

Four witnesses said Molly and Jeff went to his SUV. Documentary evidence demonstrates that Molly's underwear was left in Jeff's SUV. Two witnesses stated that Molly was upset after the incident, with one witness noticing that she was crying when she left Jeff's car. One witness stated that prior to the incident, Molly was hanging all over Jeff. One witness said they saw Jeff and Molly hanging out before but did not see Molly after the incident.

While Molly and Jeff may have been friendly prior to the incident, it does not prove that the incident at the tailgate was consensual. The evidence demonstrates that Molly's grades and social life have suffered since the incident, including a drop in her grades, and she quit the track team.

A preponderance of the evidence demonstrates that Jeff reached up Molly's skirt to touch her genital area without her consent.



166

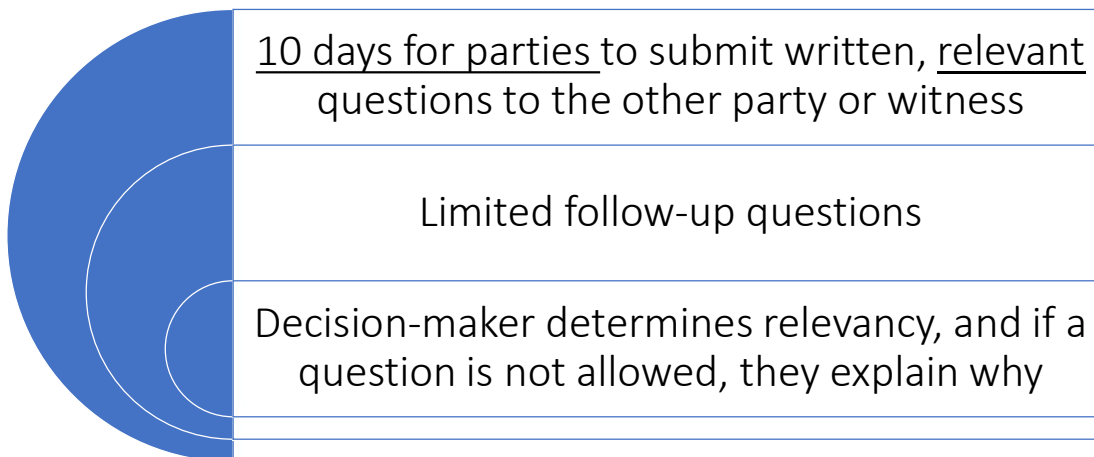
166

# Written Determination

16  
7

167

## Exchange of Written Questions



168

168

## Group Activity

RECALL: Molly alleged Jeff sexually assaulted her at a high school tailgate.

Jeff submits the following written question for Molly:

*“Did you respond to texts from Jeff after the tailgate about making plans to hangout the weekend after?”*

Relevant

Not  
relevant



169

169

## Writing the Analysis

---

Topic sentence

---

Summarize Complainant's version of events (address credibility)

---

Summarize Respondent's version of events (address credibility)

---

Summarize independent evidence (witness statements, documents, etc.) and explain how it corroborates or contradicts the parties' version of events

---

Factual Finding (i.e., sustained, not sustained, partially sustained)



170

170

## Decision-Maker Prepares the Written Determination Regarding Responsibility

- Identification of the **allegations** potentially constituting sexual harassment
- A **description of the procedural steps** taken from formal complaint through the determination of responsibility
- **Findings of Fact** supporting the determination
- **Conclusions** regarding the application of the recipient's code of conduct to the facts
- **Rationale** for each finding and conclusion, including a **determination of responsibility** for each allegation
- Statement of **potential disciplinary sanctions**
- **Appeal rights**



171

171

# Title IX and Student Discipline

172

## Is This Title IX ?

Over winter break, a freshman in high school, Ryder, begins sending his classmate, Audrey snapchat messages. He sends her a picture of himself coming out of the shower and a picture of his genitalia. When the students return after break, Ryder moves to an open seat next to Audrey in U.S. History. Ryder begins touching Audrey's thigh; she pushes his hand away, but he continues. This goes on for a few weeks. Ryder places his hand inside the cargo pocket of Audrey's pants, and she reports the conduct.

Is this Title IX?



173

173

## STOP Before You Discipline



A . . . response must treat complainants and respondents equitably ... by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.



174

174

## Title IX ?

4<sup>th</sup> grade transgender student Charlie, alleges that while in the restroom, another student crawled under the stall, forced Charlie to take his pants down and the student rubbed their penis against Charlie's buttocks.

Is this Title IX?

Would you implement  
Emergency Removal?



175

175

## Formal Investigation and Student Discipline

### Emergency Removal

- Respondent must be an immediate threat to the physical health or safety of any student or individual;
- The immediate threat must arise from the allegations of sexual harassment; and
- Respondent must be provided with notice and an opportunity to challenge the decision immediately after removal.

### Supportive Measures

- Changing seating chart
- Changing class schedule
- No contact orders



176

176



## Student Discipline

After the Formal Grievance procedure is complete, the student discipline timeline begins, and discipline can be imposed.



177

177

## Site Admin/Manager Plan

### Sexual Harassment Complaint Intake and Title IX Assessment



I, \_\_\_\_\_, as a District administrator performed a preliminary assessment of the attached/below complaint. In doing so, I ascertained the following information:

Name of Complaining Party and Victim (if different): \_\_\_\_\_

Complainant/Victim is a: ☐ Student ☐ Employee

Date of Complaint: \_\_\_\_\_ Date of Incident: \_\_\_\_\_

Name of Respondent(s): \_\_\_\_\_

Respondent is a: ☐ Student ☐ Employee ☐ Other (specify): \_\_\_\_\_

I offered Complainant the following supportive measures<sup>1</sup>: \_\_\_\_\_

The following supportive measures were implemented: \_\_\_\_\_



178

178

**Step 1: Definition of Sexual Harassment under Title IX**

- ☐ The alleged conduct *may* meet the definition of sexual harassment under Title IX. If this box is checked, move to **Step 2: Jurisdiction**.
- Only one box below needs to be checked, but check all that apply.
- ☐ A District employee conditioning the provision of a District aid, benefit, or service on a person's participation in unwelcome sexual conduct.
  - ☐ 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.
  - ☐ **Sexual assault:** Any sexual act including Rape<sup>2</sup>, Sodomy<sup>3</sup>, Sexual Assault with an Object<sup>4</sup>, or Fondling<sup>5</sup> directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent; also unlawful sexual intercourse. 20 U.S.C. § 1092(f)(6)(A)(v)

<sup>1</sup> Schedule change, no contact order, counseling, academic support, voluntary home instruction, voluntary transfer, campus safety escort, increased security, and monitoring of certain areas on campus.

<sup>2</sup> Rape is the carnal knowledge of a person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity.

<sup>3</sup> Sodomy is oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

<sup>4</sup> Sexual Assault with an Object is to use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

<sup>5</sup> Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.



Lozano Smith

179

179

- ☐ **Dating violence:** Violence committed by an individual who is or has been in a social relationship of a romantic or intimate nature with the victim. 34 U.S.C. § 12291(a)(10)
  - ☐ **Domestic violence:** Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by an individual with whom the victim shares a child in common, by an individual who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by an individual similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other individual against an adult or youth victim who is protected from that individual's acts under the domestic or family violence laws. 34 U.S.C. § 12291(a)(8)
  - ☐ **Stalking:** Engaging in a course of conduct directed at a specific individual that would cause a reasonable individual to: (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress. 34 U.S.C. § 12291(a)(30)
- ☐ The alleged conduct **does not** meet any of the above definitions of sexual harassment under Title IX. (If this box is checked move to **Step 3b**, proceed under appropriate BP/AR and you may proceed with discipline.)



180

180

#### Step 2: Jurisdiction under Title IX

Check all that apply.

- If all boxes are checked, move to Step 3a.
- If not all boxes are checked, move to Step 3b.
- ☐ The District had substantial control over the respondent at the time of the alleged harassment.
- ☐ The District had substantial control over the context in which the alleged harassment occurred.
- ☐ The conduct occurred against a person in the United States.
- ☐ The complainant was participating/attempting to participate in the educational program at the time the complaint was filed.

#### Step 3a: Moving Forward under Title IX

If the accused is a student, do NOT suspend the student until you have spoken to the Title IX Coordinator or designee.

Call and e-mail the District's Title IX Coordinator and let them know you have a potential Title IX matter.

Complete this form, and attach all notes, statements and evidence you have gathered regarding the incident. Provide a copy of this form and all attachments to the District's Title IX Coordinator.

#### Step 3b: Non-Title IX Sexual Harassment

If the alleged conduct does not meet the definition of sexual harassment or the jurisdictional requirements, the school site can move forward with discipline, and an investigation under the appropriate BP/AR.



181

181

# Proposed Title IX Regulations

182

## Major Changes Proposed

Definition of  
Sexual Harassment

Title IX Jurisdiction

Responding to Sex  
Discrimination

Ensuring  
Recipients Learn of  
Possible Sex  
Discrimination

Title IX Grievance  
Procedures

Discrimination  
Based on  
Pregnancy and  
Related Conditions



183

183

## Proposed Change - Definition of Sexual Harassment

A hostile environment is created when  
"any sex-based conduct that is  
sufficiently *severe or pervasive* that,  
based on the totality of the  
circumstances and evaluated  
subjectively and objectively, it denies or  
limits a person's ability to participate in  
or benefit from the recipient's  
education program or activity."

Protections apply against  
discrimination based on sex  
stereotypes, sex  
characteristics, sexual  
orientation, and gender  
identity



184

184

## Proposed Change - Title IX Jurisdiction

Title IX would require educational agencies to address all sex discrimination in their education programs or activities, including *off-campus conduct* when the respondent is a representative of the educational agency, or they are otherwise engaged in conduct for which the educational agency has disciplinary authority



185

185

## Proposed Change – Responding to Sex Discrimination

The proposed regulations would require a recipient to take prompt and effective action to end *any* prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.



186

186

## Proposed Change – Ensuring Recipients Learn of Possible Sex Discrimination

Any employee at an elementary school or secondary school **who is not a confidential employee** would be obligated to notify the Title IX Coordinator.

An employee at a postsecondary institution or other recipient who has **authority to take corrective action** or, for incidents involving students, **has responsibility for administrative leadership, teaching, or advising** in the recipient's education program or activity, would be obligated to notify the Title IX Coordinator.

All other employees at a postsecondary institution or other recipient would be obligated to notify the Title IX Coordinator or provide an individual with the Title IX Coordinator's contact information and information about reporting, **except confidential employees** would be obligated only to provide an individual with the Title IX Coordinator's contact information and information about reporting.



187

187

## Proposed Change - Title IX Grievance Procedures

Would **no longer** be required in K-12 districts:

Title IX complaint to be in writing	Written notice of allegations to the parties	The Decision-Maker to be a different person from the Title IX Coordinator or Investigator	Written investigation reports	Two separate ten-day periods for exchange of evidence and exchange of written questions
-------------------------------------	--	---	-------------------------------	---



188

188

## Proposed Change – Discrimination Based on Pregnancy and Related Conditions

No discrimination against a student based on their current, potential, or past pregnancy or related conditions

- May provide reasonable modifications within the education program or activity based on a student's pregnancy or related conditions, which include:
  - The offer to participate in a separate program that is comparable to the program offered to students who are not pregnant and do not have related conditions, and
  - A voluntary leave of absence that covers the period of time deemed medically necessary for students who are pregnant or have related conditions or the length of time prescribed in the agency's leave policy, whichever is longer.

Must provide pregnant employees with comparable treatment to that provided to employees with temporary disabilities or conditions

- Must provide a voluntary leave of absence without pay for a reasonable period of time if an educational agency does not have a leave policy or an employee does not have sufficient or accrued leave, and
- Must provide reasonable break time and lactation space for employees.



189

189

## The 2020 Title IX Regulations remain in effect!

- *New Title IX regulations are undergoing the rulemaking process; however, these new regulations are NOT finalized and are NOT in effect at this time.*



190

190



## Questions



191

191



Subscribe on your  
favorite app or device.



*Stay informed on your time.*

## Lozano Smith Podcast

[lozanosmith.com/podcast](https://lozanosmith.com/podcast)

192

192





## Thank you from Lozano Smith.

Together with you, we're impacting  
communities and lives through:

- Professional development
- Volunteer projects
- Sponsorships and award programs
- Scholarships

#BlueHatProject

#LozanoSmithFoundation

193

193

*For more information, questions and comments about  
the presentation, please feel free to contact:*

### Monica D. Batanero

*Senior Counsel*

**Tel: 213.929.1066**

**[mbatanero@lozanosmith.com](mailto:mbatanero@lozanosmith.com)**

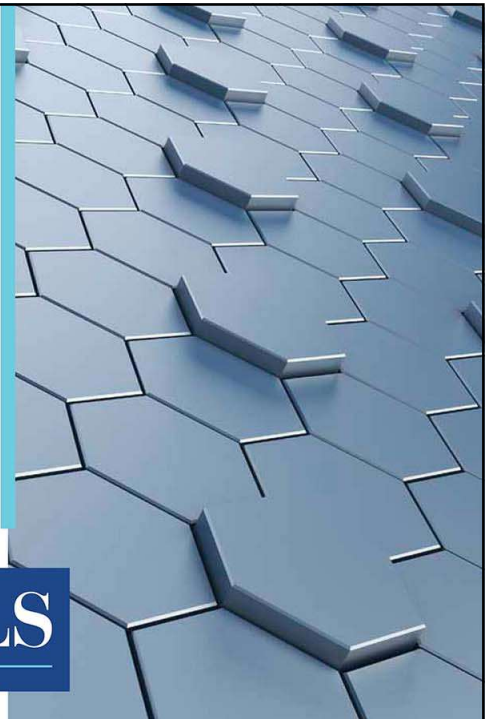
### Kara Walton

*Senior Counsel*

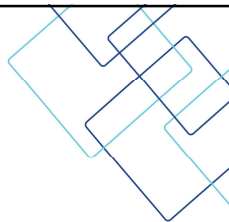
**Tel: 855.909.9002**

**[kw Walton@lozanosmith.com](mailto:kw Walton@lozanosmith.com)**

*Or any of the attorneys in one of our 8 offices.*



194



# @LozanoSmith

Disclaimer: These materials and all discussions of these materials are for instructional purposes only and do not constitute legal advice. If you need legal advice, you should contact your local counsel or an attorney at Lozano Smith. If you are interested in having other in-service programs presented, please contact [clientservices@lozanosmith.com](mailto:clientservices@lozanosmith.com) or call (559) 431-5600.

Copyright © 2022 Lozano Smith

All rights reserved. No portion of this work may be copied, distributed, sold or used for any commercial advantage or private gain, nor any derivative work prepared therefrom, nor shall any sub-license be granted, without the express prior written permission of Lozano Smith through its Managing Partner. The Managing Partner of Lozano Smith hereby grants permission to any client of Lozano Smith to whom Lozano Smith provides a copy to use such copy intact and solely for the internal purposes of such client. By accepting this product, recipient agrees it shall not use the work except consistent with the terms of this limited license.



195