

# UNDERSTANDING AND IMPLEMENTING THE NEW TITLE IX REGULATIONS

*Day 1 of 2*

*November 5, 2020*

## WELCOME!

- We will begin the workshop at 1:30pm.
- I will be taking questions throughout the workshop via the Chat Box – and I will also be posting the links to the handouts and materials in the Chat Box once we begin.
- Participants must complete both Sessions to complete the required training.

# UNDERSTANDING AND IMPLEMENTING THE NEW TITLE IX REGULATIONS

ROLES, RESPONSIBILITIES, AND LEGAL COMPLIANCE

# SEXUAL HARASSMENT

## ■ *What does Title IX really mean?*



**It isn't just sports...**

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3

# TITLE IX

SEXUAL HARASSMENT, HISTORY OF TITLE IX, AND RECENT LITIGATION

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4

# TITLE IX

- Title IX Regulations (Published May 6, 2020; Effective August 14, 2020) regarding sex discrimination, sexual harassment, and sexual assault.
  - Both Employee and Student Complaints



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5

# SEXUAL HARASSMENT

- *What does Title IX really mean?*



**It isn't just sports...**

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6

# SEXUAL HARASSMENT

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Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance. Title IX states:

*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.*

# SEXUAL HARASSMENT

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## #MeToo

**The national movement to highlight sexual harassment, abuse, and misconduct.**

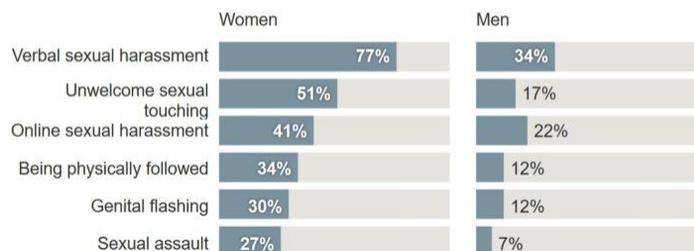
# SEXUAL HARASSMENT

- A 2018 Survey demonstrated that 81% of women and 43% of men had experienced some form of sexual harassment, including 38% of women who have experienced sexual harassment in the workplace.

# SEXUAL HARASSMENT

## What Happened, and to Whom

Percent who say they have experienced:



# SEXUAL HARASSMENT

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- ❖ Nearly 50% of grade 7-12 students reported experiencing sexual harassment since 2011.
- ❖ Yet, OCR noted in 2014 that 67% of school districts had zero records of allegations of sexual harassment.

# SEXUAL HARASSMENT

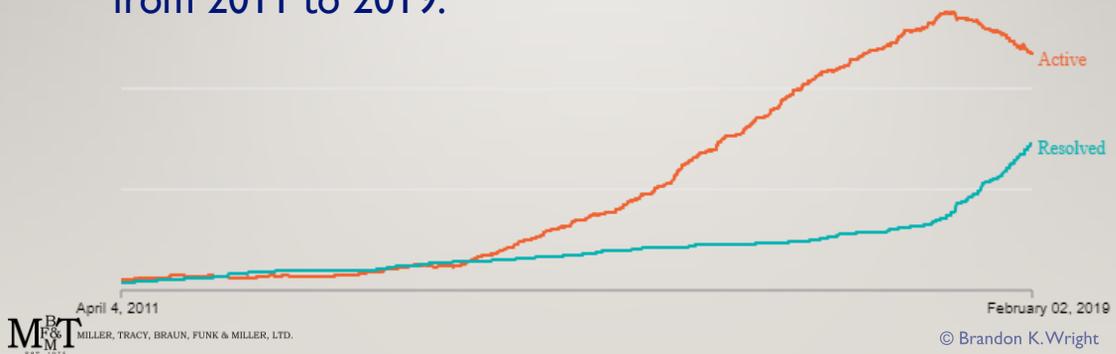
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## Why people don't report....

- Fear of retaliation
- Fear of humiliation
- Fear of being labeled a trouble-maker
- Advised: Ignore it and it will go away
- Denial: You're overreacting
- Told they should be flattered by it
- Blamed for victim's own behavior
- Fear of being ostracized
- Fear of reaction of spouse, significant other, or friends
- Fear of career damage
- Unaware of rights

# SEXUAL HARASSMENT

Increase in Ed Department Open Title IX Investigations from 2011 to 2019:



13

# SEXUAL HARASSMENT

K-12 Title IX sexual harassment is an emerging trend.

Colleges and universities have struggled with enforcing the Title IX requirements over the last decade.

*What lessons can we learn?*

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14

# TITLE IX IN THE #METOO ERA

COLLEGE FOOTBALL  
Report: FSU struggled with Title IX guidelines in Jameis Winston case

News | WFTU | wftu.com  
Lawsuit: IU Violated Title IX By Suspending Male Student Accused Of Rape  
By BECCA COSTELLO  
Posted December 11, 2018

University of Florida President W. Kent Fuchs. | University of Florida via YouTube  
**UF under federal Title IX investigation for alleged mishandling report of sexual violence**  
By JESSICA BAKEMAN | 01/26/2017 05:34 PM EST  
The University of Florida is now under

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15

## LITIGATION RELATED TO TITLE IX INVESTIGATIONS

- *Doe v. Oberlin College* (6<sup>th</sup> Cir. 2020):
- John Doe sued Oberlin College under Title IX after being expelled for sexual assault, and when his Title IX claim was dismissed by the trial court, he appealed to the Sixth Circuit. The Sixth Circuit reversed the trial court, holding that, “for any number of reasons,” Mr. Doe had adequately pled that his expulsion was due to unlawful gender discrimination.
- **The investigative procedure was unfair because the investigator was also the decision maker.**

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16

## LITIGATION RELATED TO TITLE IX INVESTIGATIONS

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- *Doe v. Purdue University* (7<sup>th</sup> Cir. 2019):
- After finding John Doe guilty of sexual violence against Jane Doe, Purdue University suspended him for an academic year and imposed conditions on his readmission. As a result of that decision, John was expelled from the Navy ROTC program, which terminated both his ROTC scholarship and plan to pursue a career in the Navy.
- **Procedures denied a fair process.**

## LITIGATION RELATED TO TITLE IX INVESTIGATIONS

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- *Doe v. Purdue University* (7<sup>th</sup> Cir. 2019):
- John sued the university and several of its officials, asserting two basic claims. First, he argued that they had violated the Fourteenth Amendment by using constitutionally flawed procedures to determine his guilt or innocence. Second, he argued that Purdue had violated Title IX by imposing a punishment infected by sex bias. The 7<sup>th</sup> Circuit held that John adequately alleged violations of both the Fourteenth Amendment and Title IX.
- **There were sufficient allegations of gender bias for John to proceed with his claims.**

## LEGAL FRAMEWORK

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- “The *Gebser/Davis* framework is the appropriate starting point for ensuring that the Department’s Title IX regulations recognize the conditions under which a school’s response to sexual harassment violates Title IX. Whether the available remedy is money damages (in private litigation) or termination of Federal financial assistance (in administrative enforcement), the Department’s regulations must acknowledge that when a school itself commits sex discrimination, the school has violated Title IX.”

## LEGAL FRAMEWORK

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- The regulations build on and modify the framework set out in Supreme Court decisions, *Gebser v. Lago Vista Independent School District* (1998) and *Davis v. Monroe County Board of Education* (1999), which together establish a three-part framework for analyzing when a school’s response to sexual harassment indicates that the school itself engaged in intentional discrimination (the “*Gebser/Davis* framework”).
- **Specifically, the *Gebser/Davis* framework considers:**
  - (1) the definition of actionable sexual harassment;
  - (2) the school’s “actual knowledge” of such harassment; and
  - (3) the school’s “deliberate indifference” to the report of harassment.

## THE BALANCING ACT

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- The Title IX regulations require school districts to balance the rights of students/employees who are victims of sexual harassment (to stop, prevent, and remedy the effects of harassment), with the rights of accused students/employees to ensure a fair process.

## DUE PROCESS

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- Due process concerns prompted these Title IX regulations, so it is important to note on a very basic level, due process requires:
  - Notice
  - Opportunity to present evidence
  - Opportunity to hear evidence against (and to cross-examine it)
  - Opportunity for representation
  - Requirement for unbiased decision to be based upon the record of evidence

## PRESS POLICY UPDATES

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- PRESS released policy updates on August 7, including:
- *New 2:265 – Title IX Sexual Harassment Grievance Procedure*
- *New 2:265-API – Title IX Sexual Harassment Response*
- *New 2:265-AP2 – Formal Complaint Grievance Process*
- *New 2:265-EI – Title IX Glossary*
- *Updates to 2:260, 5:20, 7:20*

## TERMS USED IN REGULATIONS

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- Respondent = Accused
- Complainant = Victim/Accuser
- Recipient = School receiving federal funds

## TERMS USED IN REGULATIONS

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- Actual Knowledge
- Formal Complaint
- Supportive Measures
- Informal Resolution
- Complaint Grievance Process



Much, much more on these as we proceed...

# TITLE IX

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## OVERVIEW OF THE ROLES OF TITLE IX PERSONNEL

## TITLE IX PERSONNEL

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- Title IX Coordinator
- Investigator(s)
- Initial Decision-Maker
- Appellate Decision-Maker
- Informal Resolution Facilitator

## TITLE IX PERSONNEL

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- **Title IX Coordinator**
- The Title IX Coordinator is the individual designated by the school district to coordinate compliance with Title IX, including overseeing all sex discrimination complaints and identifying and addressing any patterns or systematic problems that arise during the review of such complaints.

## TITLE IX PERSONNEL

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**Title IX Coordinator** is also responsible for:

- determining whether the complaint allegations are prohibited sexual misconduct, sexual assault, sexual violence, or stalking;
- appointing an investigator to conduct a formal investigation;
- ensuring reports and complaints are handled properly in a prompt and timely manner;
- informing students, employees, and witnesses of their rights during a formal investigation and what supportive measures are available to them;
- confirming that all parties have been notified of the investigation's conclusion and the right to, and procedures for, an appeal, if applicable;
- maintaining information and documentation related to the investigation in a secure manner.

## TITLE IX PERSONNEL

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**The Investigator** is the person that conducts the investigation once a formal complaint is filed.

- Conducts impartial interviews of the complainant, respondent, witnesses and other interested parties.
- Ensures the burden of proof is on the school and not the parties.
- Collects evidence such as, but not limited to, statements, documents, text messages, chats, video, audio and photographs.
- Prior to completion of the investigative report, sends to the Complainant, the Respondents and the Advisors the evidence collected so that they can inspect, review and provide comments.
- Prepares a written investigative report fairly summarizing the relevant evidence.
- Sends the investigative report to the Complainant, Respondent and the Decision-Maker.

## TITLE IX PERSONNEL

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- **Initial Decision-Maker**
- The Title IX Decision-Maker reviews the investigation report, provides parties with the opportunity to submit written questions to witnesses, and makes a determination and written decision of responsibility, remedies and discipline (if applicable).

## TITLE IX PERSONNEL

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- Under PRESS 2:265-AP2:
- “The Superintendent or designee acts as the **Initial Decision-Maker** for all Formal Title IX Sexual Harassment Complaints, unless it involves allegations against the Superintendent or designee or against a Board Member. In such cases, an outside consultant, e.g., an attorney or retired school administrator, acts as the Initial Decision-Maker.”

## TITLE IX PERSONNEL

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- **Appellate Decision-Maker**
- When an appeal is filed, the Appellate Decision-Maker reviews the investigation report, reviews the initial decision, and makes a determination and written decision of responsibility, remedies and discipline (if applicable).

## TITLE IX PERSONNEL

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- Under PRESS 2:265-AP2:
- **Appellate Decision-Maker** – An individual or group, e.g., a Board-appointed appeal examiner or the Board, which reviews an appeal of the Initial Decision-Maker's determination regarding responsibility or a dismissal of a Formal Title IX Sexual Harassment Complaint. The Appellate Decision-Maker cannot be the same person as the Initial Decision-Maker, the Investigator, or the Title IX Coordinator. The Appellate Decision-Maker must be free from conflicts of interest or bias against complainants and respondents generally or against an individual Complainant or Respondent, and must be trained to serve impartially.

## TITLE IX PERSONNEL

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- **Informal Resolution Facilitator**
- When the parties voluntarily agree in writing to participate in informal resolution, the facilitator works to resolve the allegations without the need for a full investigation and decision.

## TITLE IX PERSONNEL

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- **Deciding which role for which individual –**
- Can the Title IX Coordinator be an investigator?
  - *Yes, but not on a complaint where they facilitated informal resolution or have a conflict of interest.*
- Can the Title IX Coordinator be the Initial or Appellate Decision-Maker?
  - *No, and the Title IX Coordinator should be the subordinate of the decision-maker, and never the other way around.*

## TITLE IX PERSONNEL

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- **Deciding which role for which individual –**
- Can the Investigator facilitate informal resolution?
  - *No, not on the same complaint or where there may be a conflict of interest.*
- Can the Investigator be the Initial or Appellate Decision-Maker?
  - *No, and the Investigator must be the subordinate of the decision-maker, and never the other way around.*

## TITLE IX PERSONNEL

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- **Deciding which role for which individual –**
- Can the Decision-Maker facilitate informal resolution?
  - *No, not on the same complaint or where there may be a conflict of interest.*
- Can the Decision-Maker assist with the investigation?
  - *No, that is the separate responsibility of the Investigator.*

# TITLE IX PERSONNEL

- **Deciding which role for which individual –**
- **Who should be the Appellate Decision-Maker?**
  - *Will your board be prepared and trained?*



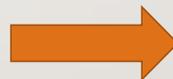
**More on appeals procedures later...**



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# TITLE IX PERSONNEL

- Title IX Coordinator
- Investigator(s)
- Initial Decision-Maker
- Appellate Decision-Maker
- Informal Resolution Facilitator



**Who will fill these roles in your school district?**



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## TITLE IX PERSONNEL IN A LARGE DISTRICT SETTING

- Title IX Coordinator → Principal or Assistant Supt
- Investigator(s) → Principal, AP or Assistant Supt
- Initial Decision-Maker → Superintendent 
- Appellate Decision-Maker → AP or AS not serving as investigator
- Informal Resolution Facilitator → Principal



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41

## TITLE IX PERSONNEL IN A SMALL DISTRICT SETTING

- Title IX Coordinator → Probably Principal
- Investigator(s) → Probably Principal
- Initial Decision-Maker → Superintendent
- Appellate Decision-Maker → Trained Board, Retired Administrator, or Neighboring District Administrator
- Informal Resolution Facilitator → 



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42

## TITLE IX COORDINATOR

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- The Title IX Coordinator is responsible for the overall coordination of compliance by the school district.

## TITLE IX COORDINATOR

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- Contact information for Title IX Coordinator (which includes: name or title, office address, e-mail address, and telephone number) must be provided to students, employees, applicants for admission and employment, parents or legal guardians of elementary and secondary school students, all unions.

## TITLE IX COORDINATOR

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- Contact information for Title IX Coordinator must also be prominently displayed on the school website.
- Schools should also publish the materials used to train Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions on the school's website or be prepared to make materials available upon request for inspection by members of the public.
  - Be aware of this when hiring outside consultants for this training—the school will need to secure permission from the consultant to publish the training materials.

## TITLE IX COORDINATOR

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- Receives reports and formal complaints of Title IX Sexual Harassment.

## TITLE IX COORDINATOR

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- May initiate an investigation under their own signature without a formal complaint from the Complainant.

## TITLE IX COORDINATOR

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- Provides information to the Complainant and/or Respondent about the process.

## TITLE IX COORDINATOR

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- Evaluates requests for confidentiality and/or requests by Complainant to not to proceed with an investigation.

## TITLE IX COORDINATOR

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- Makes determination as to whether an allegation or complaint should be dismissed prior to investigation.

## TITLE IX COORDINATOR

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- Initiates and ensures that all formal complaints are investigated and adjudicated.

## TITLE IX COORDINATOR

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- Offers the Complainant and the Respondent the possibility of an informal resolution process (when applicable).

## TITLE IX COORDINATOR

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- Responsible for the effective implementation of supportive measures (in all cases) and remedies (after grievance process and determination by decision-maker).
  - “The Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements within the recipient/school’s own system does not fall on the student receiving the supportive measures”.

## TITLE IX COORDINATOR

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- **Document:** If a recipient/school does not provide a complainant with supportive measures, then they **must document the reasons why** such a response was not clearly unreasonable in light of the known circumstances. Thus, if a Title IX Coordinator determines that a particular supportive measure was not appropriate even though requested by a Complainant, the recipient must document why the recipient’s response to the complainant was not deliberately indifferent.

## TITLE IX COORDINATOR

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- Determines if emergency removal or administrative leave is appropriate.

## TITLE IX COORDINATOR

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- Ensures that the required written notifications are sent to the Complainant and the Respondent.

## TITLE IX COORDINATOR

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- Must receive Title IX training and ensure that Investigators, Decision-makers, and Facilitators of Informal Resolution receive Title IX training.
  - Maintain documentation of training

## TITLE IX COORDINATOR

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A recipient must maintain for a period of **seven years** records of –

- Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript . . . , any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant . . . ;
- Any appeal and the result therefrom;
- Any informal resolution and the result therefrom; and
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

## TITLE IX COORDINATOR

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- The Title IX Coordinator may also be an investigator, in certain cases.

## TITLE IX PERSONNEL

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- **Deciding which role for which individual –**
- Can the Title IX Coordinator be an investigator?
  - *Yes, but not on a complaint where they facilitated informal resolution or have a conflict of interest.*
- Can the Title IX Coordinator be the Initial or Appellate Decision-Maker?
  - *No, and the Title IX Coordinator should be the subordinate of the decision-maker, and never the other way around.*

# TITLE IX

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## PREVENTION AND RESPONSE

## PREVENTION AND RESPONSE

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- Without question, the most important solution to issues of sexual harassment is to make efforts to prevent it from happening in the first place.
- *Is there such a thing as a good sexual harassment training?*

## PREVENTION AND RESPONSE

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- Age-appropriate content related to sexual abuse awareness, teen dating violence, and student social/emotional development.
- Training for all school staff.
- Notification (as noted below) of policy and Title Coordinator contact information.

## PREVENTION AND RESPONSE

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### **PA 101-418 (Effective January 1, 2020):**

Sec. 10-20.69. *Policy on sexual harassment.* Each school district must create, maintain, and implement an age-appropriate policy on sexual harassment that must be posted on the school district's website and, if applicable, any other area where policies, rules, and standards of conduct are currently posted in each school and must also be included in the school district's student code of conduct handbook.

## PREVENTION AND RESPONSE

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One in seven teens report that they are sending sexts, and one in four are receiving sexts, according to a study of over 110,000 teens from around the world published in February 2018, in [JAMA Pediatrics](#).

## PREVENTION AND RESPONSE

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[www.thatshotcool.com](http://www.thatshotcool.com)

## PREVENTION AND RESPONSE

*C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1145 (9th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017):

“Because the harassment happened in such close proximity to the school, administrators could reasonably expect the harassment’s effects to spill over into the school environment. Simply seeing their harassers in the hallway could well be disruptive for affected students. Similarly, a student who is routinely subject to harassment while walking home from school may be distracted during school hours by the prospect of the impending harassment. A student’s ability to focus during the day could be impaired by intrusive worries about whether she or he would once again face uncomfortable and sexually intimidating comments immediately after school lets out...”

## PREVENTION AND RESPONSE

- K-12 schools must respond whenever ANY employee has notice of sexual harassment, including allegations of sexual harassment.
- The notice can come from the complainant themselves as well as any third party, including parents and guardians.

## PREVENTION AND RESPONSE

- A person may make a report to the Title IX Coordinator, Nondiscrimination Coordinator, Building Principal, Assistant Building Principal, Dean of Students, a Complaint Manager, or **any employee with whom the person is comfortable speaking**. A person who wishes to make a report may choose to report to a person of the same gender.
- School employees shall respond to incidents of sexual harassment by **promptly making or forwarding the report to the Title IX Coordinator**. An employee who fails to promptly make or forward a report may be disciplined, up to and including discharge.
- Using “or any employee with whom the Complainant is comfortable speaking” ensures Title IX compliance because Title IX deems “any employee” of an elementary or secondary school who has notice of sexual harassment or allegations of sexual harassment to have *actual knowledge*. Therefore, a report to any employee triggers a district’s duty to respond.

## SEXUAL HARASSMENT

**SB75, now PA-101-221, created multiple new requirements related to sexual harassment, the key provisions affecting school districts, include:**

- Creates the Workplace Transparency Act:
  - Limits employment agreements from restricting employees from reporting allegedly unlawful practices.

# SEXUAL HARASSMENT

**SB75, now PA-101-221, created multiple new requirements related to sexual harassment, the key provisions affecting school districts, include:**

- Extends the Illinois Human Rights Act to protect actual or perceived characteristics; extends the concept of working environment beyond physical location; adds an explicit definition of “harassment”; and makes harassment of employees and non-employees a civil rights violation (articulates standard regarding an “awareness of” and “failure to respond”).

# SEXUAL HARASSMENT

**SB75, now PA-101-221, created multiple new requirements related to sexual harassment, the key provisions affecting school districts, include:**

- *"Harassment" means any unwelcome conduct on the basis of an individual's actual or perceived race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, unfavorable discharge from military service, or citizenship status that has the purpose or effect of substantially interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment. For purposes of this definition, the phrase "working environment" is not limited to a physical location an employee is assigned to perform his or her duties.*

# SEXUAL HARASSMENT

**SB75, now PA-101-221, created multiple new requirements related to sexual harassment, the key provisions affecting school districts, include:**

- Creates new requirements for mandatory training:
  - The Act requires the Illinois Department of Human Rights to adopt a new model sexual harassment prevention training program; requires all employers must use the model or establish a training program that equals or exceeds the minimum standards provided by the model; and employers are subject to civil penalties for violations.
  - The Act provides for civil penalties to be assessed against employers for failure to provide mandatory training or mandatory disclosures, to be assessed following an opportunity to comply with an Order to Show Cause, with penalties in escalating amounts from \$500 to \$5,000 per offense.

# SEXUAL HARASSMENT

**SB75, now PA-101-221, created multiple new requirements related to sexual harassment, the key provisions affecting school districts, include:**

- Creates the Sexual Harassment Victim Representation Act (for Unions) to prohibit dual representation. The intent of the Act is to require unions to designate separate union representatives for an alleged victim and an alleged perpetrator who is a “member of the same union” as the victim.

# SEXUAL HARASSMENT

**SB75, now PA-101-221, created multiple new requirements related to sexual harassment, the key provisions affecting school districts, include:**

- Amends the Victims' Economic Security and Safety Act (VESSA) to add “gender violence” as grounds for VESSA protection and leave; also updates list of ‘electronic communication’ to include online platforms and social networks; and defines gender violence.

# PREVENTION AND RESPONSE

- Every employer in the State of Illinois is required to provide employees with annual sexual harassment prevention training that complies with section 2-109 of the Illinois Human Rights Act (“IHRA”).
- All employees regardless of their status (i.e. short-term, part-time, or intern) must be trained.
- If an employer has an independent contractor working on-site with the employer’s staff, the independent contractor should receive sexual harassment prevention training.

## PREVENTION AND RESPONSE

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1. Develop, implement and regularly communicate the employer's sexual harassment policy.
2. Provide training for administrators, employees, and students on sexual harassment prevention.
3. Ensure clear communication on how to report incidents of sexual harassment or conduct of a sexual nature.

## PREVENTION AND RESPONSE

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4. Administrators should monitor their environment to ensure the school is free of sexual harassment – both employee and student.
5. Administrators must lead by example and model appropriate conduct – refrain from engaging in conduct of a sexual nature.

## PREVENTION AND RESPONSE

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6. Administrators should conduct a sexual harassment climate check throughout the year -discuss the topic at a team or staff meeting, in-service day or as part of structured communication.

7. Ensure that all school employees (all means all) are aware of what to do when they have knowledge of an allegation of sexual harassment.

## MANDATED REPORTER

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- Don't overlook the potential mandated report to DCFS and/or law enforcement in many of these situations!
  - If there is suspected abuse or neglect → DCFS
  - If there is criminal activity → law enforcement

# PREVENTION AND RESPONSE

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Effective August 14, 2020, every school that has a website must post important information about the school's Title IX policies and procedures on their website.

The new Title IX regulations specifically require schools to post on their websites:

1. The contact information for the school's Title IX Coordinator(s)
2. The school's non-discrimination policy
3. All training materials used to train the school's Title IX personnel

# TITLE IX

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## THE DEFINITION OF SEXUAL HARASSMENT AND THE SCOPE OF EDUCATIONAL PROGRAMS AND ACTIVITIES

# WHAT IS SEXUAL HARASSMENT?



- All of these elements must be present for the Title IX Regulations to apply. Let's talk about each of them...

# SEXUAL HARASSMENT



*Within the USA?*



## WHAT IS ACTUAL KNOWLEDGE?

Actual  
Knowledge

- “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s **Title IX Coordinator** or any official of the recipient who has the **authority to institute corrective measures** on behalf of the recipient . . . .”

## WHAT IS ACTUAL KNOWLEDGE?

Actual  
Knowledge

- **Per PRESS: Actual Knowledge** – Notice of sexual harassment or allegations of sexual harassment to any District employee or to the District’s Title IX Coordinator. Assumption of knowledge based solely on the District’s status as an employer or other presumption under law does not constitute actual knowledge. This standard is not met when the only official of the District with actual knowledge is the Respondent. *Notice* as used here includes, but is not limited to, a report or complaint of sexual harassment to the Title IX Coordinator in person, by mail, by telephone, or by email 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.

## WHAT IS SEXUAL HARASSMENT?

Sexual  
Harassment

- Any instance of *quid pro quo* harassment by a school employee;
- Any unwelcome conduct that a reasonable person would find so severe, pervasive, AND objectively offensive that it denies a person equal educational access;
- Any instance of sexual assault (Clery Act), dating violence, domestic violence, or stalking (defined by VAWA).

## WHAT IS SEXUAL HARASSMENT?

Sexual  
Harassment

- Any instance of *quid pro quo* harassment by a school employee:
- PRESS 2:265:  
“A District employee conditions the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct.”

## WHAT IS SEXUAL HARASSMENT?

Sexual  
Harassment

- Any unwelcome conduct that a reasonable person would find so severe, pervasive, AND objectively offensive that it denies a person equal educational access:
- PRESS 2:265:  
“Examples of sexual harassment include, but are not limited to, touching, crude jokes or pictures, discussions of sexual experiences, teasing related to sexual characteristics, spreading rumors related to a person’s alleged sexual activities, rape, sexual battery, sexual abuse, and sexual coercion.”

## SEXUAL HARASSMENT

Sexual  
Harassment

### What is “unwelcome”?

- Put yourself in the position of the alleged harasser and ask:
  - Would you want your behavior to appear on the evening news?
  - Is there a difference in status or power between the two?
  - Would you behave the same way if a family member were standing next to you?
  - Would you want someone else to act this way toward your spouse or significant other?

## SEXUAL HARASSMENT OCCURRING IN A SCHOOL'S "EDUCATION PROGRAM OR ACTIVITY"

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- Title IX applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance.
- "Program or activity" includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred.

## SEXUAL HARASSMENT OCCURRING IN A SCHOOL'S "EDUCATION PROGRAM OR ACTIVITY"

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- "Substantial control" → while factors "such as whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred . . . may be helpful or useful for recipients to consider . . . to determine the scope of a recipient's program or activity, no single factor is determinative."
- "a recipient's Title IX obligations extend to incidents of sexual harassment that occur off campus if any of three conditions are met:
  - the off-campus incident occurs as part of the recipient's 'operations' pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
  - the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a);

# SEXUAL HARASSMENT

*A high school girl reports to a teacher that her ex-boyfriend is spreading rumors about her sexual activity on social media.*



**Is this a Title IX issue?**

# SEXUAL HARASSMENT

*A high school girl reports to a teacher that her ex-boyfriend is spreading rumors about her sexual activity on social media, **and other students are teasing her at school about it.***



**Is this a Title IX issue?**

# SEXUAL HARASSMENT

*A male student has an iPhone case with a photo of a bikini model on it, which makes other students uncomfortable.*



**Is this a Title IX issue?**

# SEXUAL HARASSMENT

*A girl goes on a date after a school basketball game off-campus/after-hours with a male high school classmate and reports to the guidance counselor that she was touched in an unwelcome manner.*



**Is this a Title IX issue?**

# SEXUAL HARASSMENT

*A girl goes on a date after a school basketball game off-campus/after-hours with a male high school classmate and reports to the guidance counselor that she was touched in an unwelcome manner, **and she is now uncomfortable in class with him.***



**Is this a Title IX issue?**



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# SEXUAL HARASSMENT

*A 15 year-old girl agrees to meet up with a 19-year-old in the bathroom to have sex.*



**Is this a Title IX issue?**



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# SEXUAL HARASSMENT

*A 15 year-old girl agrees to meet up with a 19-year-old in the bathroom to have sex, **and the male student has done this to 2 other girls and the school knows about the prior instances?***



**Is this a Title IX issue?**

# SEXUAL HARASSMENT

*A student reports to a teacher that two other students (both age 16) are engaged in sexual activity in a storage room at school. The teacher stops the activity, and when both students reports that the activity was “consensual”, the teacher warns them to never do it again at school.*



**Is this a Title IX issue? AK + SH + EP + US?**

# SEXUAL HARASSMENT

*A transgender student is complaining to the guidance counselor about teasing and social media comments about their desire to use a particular restroom.*



**Is this a Title IX issue?**



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101

# SEXUAL HARASSMENT

*A male bus driver asks a female bus driver on a date. She says no. He brings her flowers and asks again the next day. She says no. He corners her in the break room before the morning route to ask her why she won't date him and won't let her leave until she says yes.*



**Is this a Title IX issue?**



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102

# SEXUAL HARASSMENT

*A well-loved teacher frequently comments on how pretty his female students look. A female student (his “helper” who comes to his room during fourth period class to grade papers) and her mother bring you text messages that the teacher has been sending to the student (not sexual in nature).*



**Is this a Title IX issue?**



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103

# SEXUAL HARASSMENT

*You’re a custodian in the school district. While working in the boys’ locker room one evening, you overhear a student complaining to his friend about the annual “hazing ritual” that happens in the locker room. The student tells his friends that he’s “dreading the towel on his privates...”*



**Is this a Title IX issue?**



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104

# WHAT IS SEXUAL HARASSMENT?



- All of these elements must be present for the Title IX Regulations to apply.
- If it does not meet the Title IX threshold, it does not mean we ignore it or don't deal with it.

# TITLE IX

## NOTICE OF A COMPLAINT AND SUPPORTIVE MEASURES

## NOTICE

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- K-12 schools must respond whenever ANY employee has notice of sexual harassment, including allegations of sexual harassment.
- The notice can come from the complainant themselves as well as any third party, including parents and guardians.

107

## NOTICE

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- A person may make a report to the Title IX Coordinator, Nondiscrimination Coordinator, Building Principal, Assistant Building Principal, Dean of Students, a Complaint Manager, or any employee with whom the person is comfortable speaking. A person who wishes to make a report may choose to report to a person of the same gender.
- **School employees shall respond to incidents of sexual harassment by promptly making or forwarding the report to the Title IX Coordinator. An employee who fails to promptly make or forward a report may be disciplined, up to and including discharge.**
- Using “or any employee with whom the Complainant is comfortable speaking” ensures Title IX compliance because Title IX deems “any employee” of an elementary or secondary school who has notice of sexual harassment or allegations of sexual harassment to have *actual knowledge*. Therefore, a report to any employee triggers a district’s duty to respond. 34 C.F.R. §106.30.

108

## RESPONSE REQUIREMENT STANDARD

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- Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means “a response that is not clearly unreasonable in light of the known circumstances.”
  - PRESS Procedure indicates 90 school business days (a significant change from prior 30 school day time frame)

## RESPONSE REQUIREMENTS

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- Schools must offer supportive measures to the complainant.
- Title IX Coordinator must promptly contact the complainant confidentially to discuss supportive measures whether the complainant chooses to file a formal complaint or not and must explain the process for filing a formal complaint.

## FIRST STEPS



## SUPPORTIVE MEASURES



- Supportive measures are individualized services provided that are **non-punitive, non-disciplinary, and not unreasonably burdensome to the other party** while designed to ensure equal educational access, protect safety, or deter sexual harassment.
- A school’s selection of supportive measures and remedies will be evaluated based on what is not clearly unreasonable in light of the known circumstances.

## SUPPORTIVE MEASURES

- Examples in PRESS:
  - The District may provide
    - 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 locations,
  - leaves of absence,
  - increased security and monitoring of certain areas of the campus, and
  - other similar measures to Complainants and/or Respondents.

113

## COMPLAINANT CHOICE

- A complainant's wishes with respect to whether the school investigates (choosing not to file a formal complaint) should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.
  - If the Title IX Coordinator decides to sign a formal complaint against the wishes of a complainant, the school needs to document the reasons why that decision was not clearly unreasonable and how the recipient believes that it met its responsibility to provide that complainant with a non-deliberately indifferent response.

114

# TITLE IX COORDINATOR CHOICE



- There are some circumstances when a Title IX Coordinator signing a formal complaint under their own signature is very clearly not unreasonable in light of the known circumstances:
  - DCFS involvement
  - Law enforcement involvement
  - Serious teacher on student allegations



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115

# COMPLAINANT CHOICE

Yes, the Complainant filed a formal complaint.

- Must not respond with deliberate indifference.
- Must offer supportive measures.
- Must follow required grievance process.

No, the Complainant did not file a formal complaint.

- Must not respond with deliberate indifference.
- Must offer supportive measures.
- Title IX Coordinator determines whether to file formal complaint under their own signature: If YES, then follow required grievance process. If NO, supportive measures remain in place, but no further remedy or discipline.



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116

## EMERGENCY REMOVAL OF RESPONDENT (STUDENT)

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- Before removing a Respondent-student on an emergency basis, conducts an individualized safety and risk analysis to determine whether removal is justified by an immediate threat to the physical health or safety of any student or other individual arising from the sexual harassment allegations. See 4:190-AP2, *Threat Assessment Team (TAT)*.
- If the Respondent-student is removed on an emergency basis:
  - Provides the Respondent-student with written notice and an opportunity to challenge the decision immediately following the removal; and
  - Follows requirements set forth in 105 ILCS 5/10-22.6.

## EMERGENCY REMOVAL OF RESPONDENT (EMPLOYEE)

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- If the Respondent is identified and is a non-student employee, the Title IX Coordinator (in conjunction with Human Resources personnel, to the extent permitted to avoid bias or conflict of interest with the decision-maker), considers whether the Respondent-employee should be placed on administrative leave in accordance with 34 C.F.R. §106.44(d), relevant District policies and procedures, and any applicable collective bargaining agreements.

## DISMISSING FORMAL COMPLAINTS

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- If the allegations in the formal complaint do not meet the definition of sexual harassment or did not occur in the school's education program or the activity was not against a person in the United States, the school must dismiss the allegations under Title IX, but the school can still address the allegations in any manner appropriate under the school's own code of conduct.
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.
  - Graduates?

## DISMISSING FORMAL COMPLAINTS

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- Schools have the discretion to dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein.
- Schools also have the discretion to dismiss if the respondent is no longer enrolled or employed by the school or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination.
- **A school must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal.**

## DISMISSING FORMAL COMPLAINTS



### **Mandatory –must dismiss if the conduct alleged in the formal complaint:**

1. Would not constitute sexual harassment as defined even if proved,
2. Did not occur in the school's education program or activity, or
3. Did not occur against a person in the United States



### **Permissive –may dismiss at any time if:**

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

**Upon dismissal, school must promptly and simultaneously send written notice of the dismissal and reason(s) for the dismissal to the parties.**

121

## NEXT STEPS

### **Is the conduct within the scope of Title IX?**

- 1. If no, the Title IX regulations do not apply and the school can dismiss the complaint.
- 2. If yes, the school must respond in a manner that is not deliberately indifferent.
  - By providing supportive measures in all cases.
  - And, if a formal complaint was filed, by following the specific grievance process requirements.

122

## NEXT STEPS

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- A school must investigate the allegations in any formal complaint and send written notice to both the complainant and respondent of the allegations upon receipt of a formal complaint.
- Schools must send written notice of any investigative interviews, meetings, or hearings.

# TITLE IX

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## THE INVESTIGATION

## WHO SHOULD INVESTIGATE? AND OTHER PRE-INVESTIGATION CONSIDERATIONS

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- The investigator, as already mentioned, needs to have adequate training to conduct the investigation and should be free of bias or conflicts of interest.
  - Title IX Coordinator = Dispatch when you call 911
  - Investigator = Detective investigating the case
  - Decision-maker = Judge

## INVESTIGATOR

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The Investigator is the person that conducts the investigation once a formal complaint is filed.

- Conducts interviews of the complainant, respondent, witnesses and other interested parties.
- Collects evidence such as, but not limited to, statements, documents, text messages, chats, video, audio and photographs.
- Prior to completion of the investigative report, sends to the Complainant, the Respondents and the Advisors the evidence collected so that they can inspect, review and provide comments.
- Prepares a written investigative report fairly summarizing the relevant evidence.
- Sends the investigative report to the Complainant, Respondent and the Decision-Maker.

## INVESTIGATION

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- Ensure that the burden of proof and burden of gathering evidence rest on the District and not the parties involved.

## INVESTIGATION

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- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

## INVESTIGATION

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- Provide the parties the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice (who may, but is not required to, be an attorney).

## INVESTIGATION

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- Understand and use trauma-informed investigations and questioning:
  1. Understand the impact of trauma on a neurobiological, physical, and emotional level.
  2. Promote safety and support. – *Supportive measures!*
  3. Know positive ways to respond that avoid retraumatization.
  4. Provide choice with a goal of empowerment: “What can you tell me about what happened?” “Can you tell me more?” “Can you help me understand?”

## INVESTIGATION

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- Considerations: Potential Responses to Trauma
  - Delayed reporting
  - Difficulty remembering specifics (could also be due to drugs/alcohol)
  - Reluctant reporting
  - Remaining in a relationship or living arrangement with the respondent
  - Being calm and composed after an assault
  - Failing to identify the accused

## INVESTIGATION

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- Do **not** assume that because there are signs of trauma that the respondent caused the trauma and violated the policy.
- Do **not** assume that because there are no signs of trauma nothing bad happened.

## INVESTIGATION

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- Provide both of the parties with an equal opportunity to inspect and review any evidence obtained during the investigation that is directly related to the Formal Title IX Sexual Harassment Complaint's allegations (including evidence the District does not intend to rely on in reaching a determination regarding responsibility, and inculpatory or exculpatory evidence).

133

## INVESTIGATION

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- Prior to the completion of the investigative report, 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 and provide each party with 10 school business days to submit a written response.

134

## INVESTIGATION

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- Upon receipt of a party's written response to the evidence, review the response and send a copy to the other party in an electronic format or a hard copy.

## INVESTIGATION

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- Prepare an investigative report summarizing all relevant evidence.
- 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 (at least 10 days before the decision).

## INVESTIGATION

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- **Investigative Report should include:**

- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses interviewed
- Witnesses not interviewed (and why)
- Any procedural anomalies that need explained?

## INVESTIGATION

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- **Investigative Report should include:**

- Applicable Policy Provisions
  - Definition of prohibited conduct alleged
    - Related definitions as appropriate
    - Include verbatim, in entirety (handbook, contract, etc.)

## INVESTIGATION

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- **Investigative Report should be arranged in a manner that is not difficult to read:**
  - Ways to arrange:
    - Chronologically
    - By witness summary
    - By allegation/topic

## INVESTIGATION

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- Include the evidence you don't intend to rely on (must include all evidence "related to" the allegations, not just information relied upon).
- Include inculpatory or exculpatory evidence whether obtained from a party or other source.
- **Purpose:** allow each party to meaningfully respond to the evidence prior to conclusion of the investigation.

## INVESTIGATION

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- Include screenshots and other reference material directly in summary when possible.
- Don't paraphrase a document when you can use direct quotes.

141

## INVESTIGATION

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- Maintain a non-judgmental tone.
- Stay away from charged words of advocacy:
  - *Clearly/obviously*
  - *Innocent/guilty*
  - *Victim/perpetrator*
- Watch your adjectives and adverbs – unless they are in a quote.

142

## INVESTIGATION



- At the conclusion of the investigation, send to the Initial Decision-Maker in an electronic format or hard copy:
  - ✓ The Formal Title IX Sexual Harassment Complaint;
  - ✓ All evidence gathered during the investigation that is directly related to the Formal Title IX Sexual Harassment Complaint's allegations (including evidence the District does not intend to rely on in reaching a determination regarding responsibility, and inculpatory or exculpatory evidence); and
  - ✓ The investigative report.

## INVESTIGATION

- The key reminders for the Investigator:
  - Do not assume the truth of the allegations or the guilt/responsibility of an individual prior to the completion of the investigation.
  - Conduct the investigation in a manner that is (and appears) fair and impartial.
  - Follow applicable District Policies and Administrative Procedures.
  - Treat those involved with dignity and respect.
  - The goal of the Investigator is to determine what happened – not to merely confirm pre-existing suspicions.

## UNDERSTANDING AND IMPLEMENTING THE NEW TITLE IX REGULATIONS

**Day 1 of 2**

**November 5, 2020**

- We will reconvene tomorrow at 1:30pm.
- Participants must complete both Sessions to complete the required training.



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145

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146