

# Thrun Law Firm Webinar: Comprehensive Title IX Training



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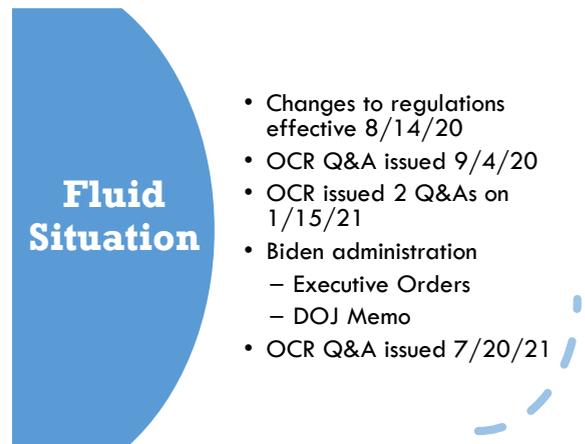
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## Next Steps

- NPRM issued June 23, 2022
- 60-day comment period
- Then what?
- Stay tuned!

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“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 USC 1681

## Title IX

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### Scope of 2020 Regulations

- Went into effect August 14, 2020
- Do not apply to sexual harassment that allegedly occurred before effective date
- Address sexual harassment as subset of sex-based discrimination
- Apply to staff-to-staff, staff-to-student, student-to-staff, and student-to-student sexual harassment occurring **against persons in the U.S.**

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### Broad Application

- Academics
- All Extracurricular activities, including athletics
- All school programs and activities, on school transportation, and in school-sponsored programs

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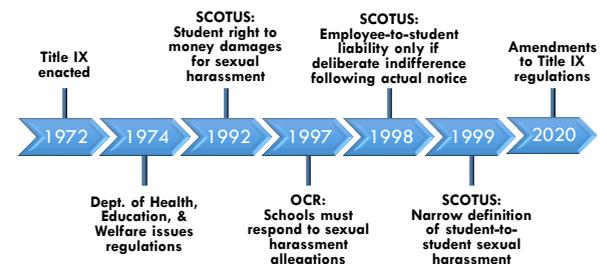
### Retroactivity

“With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school’s Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred. In other words, the Rule governs how schools must respond to sexual harassment that allegedly occurs on or after August 14, 2020.”

OCR, Question and Answers Regarding the Department’s Final Title IX Rule, September 4, 2020

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### Title IX Timeline



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## *Gebser v Lago Vista Ind Sch Dist (US, 1998)*

Schools may be liable for money damages for **employee-to-student** sexual harassment if a school official who has authority to institute corrective action:

- Has actual notice of the employee's misconduct; and
- Is deliberately indifferent to the employee's misconduct, i.e. school made "an official decision...not to remedy the violation"

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## *Davis v Monroe Cnty Bd of Ed (US, 1999)*

Schools may be liable for money damages for **student-to-student** sexual harassment if:

- School official who has authority to institute corrective action has actual notice of the misconduct and is deliberately indifferent to the misconduct;
- School has substantial control over both the harasser and "context" where the harassment occurs; and
- Harasser's conduct is "so severe, pervasive, and objectively offensive" that it "effectively denies equal access to an institution's resources or opportunities."

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## OCR 2001 Guidance

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **or** persistent, and to **interfere with or limit** a student's ability to participate in or benefit from school services, activities, or opportunities.

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## Overview of 2020 Regulations



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### Terminology in 2020 Regulations

Alleged Victim	➔	Complainant
Alleged Perpetrator/ Alleged Harasser	➔	Respondent
Complaint, Investigation, and Resolution	➔	Grievance Process
Educational Institution	➔	Recipient
Interim Measures	➔	Supportive Measures

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### Key Changes

- **All** staff have reporting obligation
- "Single investigator" model eliminated
- Grievance process includes many specific required steps
- Respondent presumed not responsible until responsibility determination is made
- Additional policy, training, documentation, and record retention requirements
- Due process emphasized

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## Key Title IX Roles

1. **Title IX Coordinator:** oversees school's Title IX compliance and is a school employee
  2. **Investigator:** Conducts investigation and issues investigation report
  3. **Decision-Maker:** Makes determination of responsibility
  4. **Appeals Officer:** Hears appeals
  5. **Informal Resolution Facilitator ("IRF"):** assists parties in reaching informal resolution, if applicable
- Investigator, IRF, Decision-Maker, and Appeals Officer must be different persons and appropriately trained
  - Title IX Coordinator may also serve as investigator or IRF

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## Impartiality is Key

- Persons serving in key roles must not have a conflict of interest or bias for or against:
  - Complainants and respondents generally, or
  - An individual complainant or respondent
- Prejudgment of the facts must be avoided

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## Constitutional Concerns

Regulations emphasize protecting parties' constitutional rights:

- 1<sup>st</sup> Amendment (Freedom of Speech)
  - Exercising right doesn't constitute retaliation
  - Attempts to suppress free speech by school are not appropriate – No gag orders
- 14<sup>th</sup> Amendment (Equal Protection)

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## Due Process Concerns

- 5<sup>th</sup> Amendment (Due Process)
- Title IX can't be interpreted in a manner that denies any person due process
- Respondent presumed not responsible until determination made
- Grievance process must be "adequate, fair, and reliable" and "consistent with constitutional due process guarantees and conceptions of fundamental fairness"
- Due process is "critical part" of Title IX grievance process

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## What is sexual harassment?

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

- Employee *quid pro quo*;
- Sexual assault, dating violence, domestic violence, stalking (definitions from Violence Against Women Act); and
- Hostile environment (new stricter definition)

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## Quid Pro Quo

- Recipient's **employee** conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct.
- Only applicable to **employee** Respondents; not applicable to Respondent volunteer, student, etc.

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## Sexual Violence Definitions

- “Sexual assault”: an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- “Dating violence”: violence committed by a person who is or has been in a romantic or intimate relationship with the Complainant. The existence of such a relationship is based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

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## Sexual Violence - cont'd

- “Domestic violence”: felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the Complainant, person with whom the Complainant shares a child, person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner, person similarly situated to a spouse of the Complainant under the domestic or family violence laws of Michigan; or any other person against an adult or youth Complainant who is protected from that person’s acts under the domestic or family violence laws of Michigan.
- “Stalking”: engaging in a course of conduct directed at a specific person that would cause a reasonable person to (1) fear for the person’s safety or the safety of others; or (2) suffer substantial emotional distress.

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## Consent

- Term not defined in regulations
- District must define term in its policy
- How does your policy define consent?
  - Consider absence or negation of consent, and capacity to consent
- Persons in key Title IX roles must know how to apply your consent definition consistently, impartially, and in accordance with policy

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## Staff/Student Conduct

- Sexual conduct between a District employee and a student is **always** prohibited
- Consent is irrelevant
- Criminal charges may result

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## Hostile Environment

“Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person’s **equal access** to the recipient’s education program or activity.”

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## Hostile Environment

Unwelcome conduct determined by a reasonable person to be:

### Old Definition

Severe, pervasive, or persistent, and to interfere with or limit a student’s ability to participate in or benefit from school services, activities, or opportunities.

### New Definition

To be so severe, pervasive, **and objectively offensive** that it **effectively denies** a person’s **equal access** to the recipient’s education program or activity.

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## Denial of Equal Access

- Reactions to sexual harassment vary and should be assessed from perspective of a reasonable person in Complainant's position
- Denial may include skipping class to avoid harasser, grade decline, difficulty concentrating in class
- No concrete injury required
- Complainant need not drop out of school, fail a class, have a panic attack, or otherwise reach "breaking point"

OCR, *Question and Answers Regarding the Department's Final Title IX Rule*, September 4, 2020

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## "Education Program or Activity"

*"Includes locations, events or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs..."*

34 CFR 106.44(a)

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## Scope of Education Program or Activity

### Consider:

- Location of conduct?
- Relationship to school or school activity?
- Involvement of student, employee, volunteer, contractor?
- Policy/handbook language?
- If no jurisdiction under Title IX, may have jurisdiction to address alleged misconduct under another policy, rule, or law

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## Off-Campus Sexual Harassment

- Case-by-case analysis
- Investigate if school doesn't know where misconduct occurred
- Not during school activity? Consider effects of off-campus conduct at school!
- Consider applicable codes of conduct and Revised School Code provisions

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## OCR Guidance on Off-Campus Conduct

- School must make a fact-specific determination
  - Consider "whether the [school] funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred"
  - OCR Examples: Two students in a private hotel room as part of school-sponsored activity (field trip or athletic event) and teacher visiting student's home "ostensibly to give the student a book but in reality to instigate sexual activity with the student"
- No single factor is determinative

*"Questions and Answers on the Title IX Regulations on Sexual Harassment," U.S. Department of Education Office for Civil Rights, July 2021.*

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## Deliberate Indifference

Take complaints seriously.

Schools and school officials must not be **deliberately indifferent** to sexual harassment.

### Old Definition

The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.

### New Definition

Failure to respond reasonably in light of known circumstances.

Must respond in **reasonably prompt** time frame.

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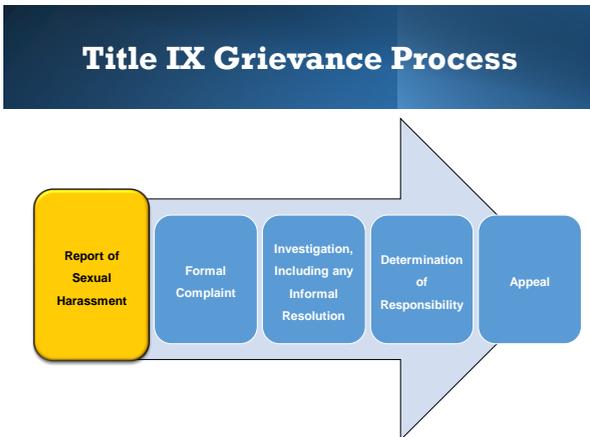
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A slide with a blue header "Making a Report" and a white body. It contains a bulleted list of points regarding reporting sexual harassment.

- Any person can make a sexual harassment report at any time
- Reports can be made verbally, in writing, or electronically at any time to **any school employee** or the Title IX Coordinator
- Anonymous reports are permissible
- Report of sexual harassment is **NOT** the same as a Formal Complaint

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A slide with a blue header "Actual Knowledge" and a white body. It contains a bulleted list of points regarding the school's obligation to respond to sexual harassment.

- School's obligation to respond to sexual harassment is triggered when it has "actual knowledge"
- "Actual knowledge" means notice of sexual harassment or allegations of sexual harassment to school's Title IX Coordinator **or any school employee**

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A slide with a blue header "Employee Reporting Obligation" and a white body. It contains a bulleted list of points regarding employee reporting obligations.

- Employees must convey reports to Title IX Coordinator **promptly**.
  - Check your policy for employee reporting steps and timelines!
  - TLF Policy requires any District employee who receives a report of sexual harassment or has actual knowledge of sexual harassment to convey that information to the Title IX Coordinator **by the end of the next business day**.
- Messages to all staff
  - If you see something, say something!
  - Noncompliance = discipline

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## Responding to Report

- Title IX Coordinator must, upon receipt of report:
  - Contact Complainant (alleged victim) to discuss “supportive measures”
  - Inform Complainant of “supportive measures” available
  - Explain process for filing Formal Complaint
- Failure to do the above = deliberate indifference

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## Supportive Measures



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## Supportive Measures

- Must be non-disciplinary, non-punitive, and individualized
- Offered as appropriate, as reasonably available, and without fee or charge to parties
- Available before, during, and after Formal Complaint is filed, or when no Formal Complaint is filed
- Designed to restore or preserve equal access to education program or activity without “unreasonably” burdening other party

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## Examples

- Counseling
- Work/class schedule changes
- Extensions of deadlines
- Increased supervision or escorts
- Mutual no-contact order
- **But**, school may not impose discipline or other actions that are not supportive measures against Respondent before completing the grievance process

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## Offering Supportive Measures

- No “one size fits all”
- Must be offered whether Complainant files Formal Complaint or not
- Document whether supportive measures were offered and which were taken, and retain documentation
- Modify, as necessary, to avoid deliberate indifference
- Keep confidential to extent possible except as may be required by law
- Coordinated by Title IX Coordinator

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## TLF Supportive Measures Form



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This form must be completed by the Title IX Coordinator.

**Documentation of Supportive Measures**

1. Supportive measures offered to Complainant (include description and date):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

2. Supportive measures offered to Respondent (include description and date):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

3. Supportive measures rejected by either party:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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## Respondent Removal



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### General Rule

Disciplinary sanctions may **NOT** be imposed against respondents before grievance process concludes except:

- Employee Respondents may be placed on nondisciplinary administrative leave pending completion of grievance process
- Student Respondents may be removed from school programs or activities on emergency basis only

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### Student Emergency Removal

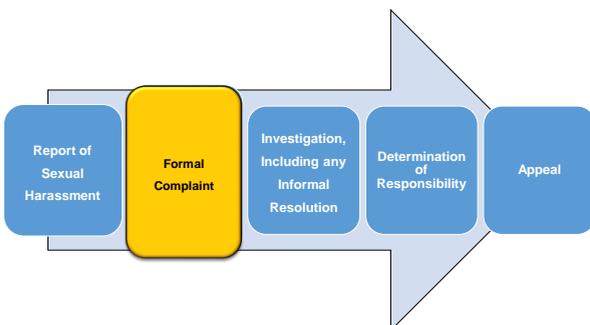
- Before removing student, school officials must:
  - Conduct individualized safety and risk analysis;
  - Determine that an immediate threat to **physical** health or safety of students or staff justifies removal; and
  - Provide removed student notice and opportunity to challenge removal immediately after being removed
- Consider IDEA and Section 504 requirements governing disciplinary removals of students with disabilities

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## How to Conduct a Grievance Process

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### Title IX Grievance Process



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### Formal Complaint

- A document filed and signed by a complainant or signed by Title IX Coordinator alleging sexual harassment against a Respondent and requesting that District investigate the sexual harassment allegation.

34 CFR §106.30

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## Complainant's Status

- Complainant must be participating in or attempting to participate in school's education program or activity at the time the Complainant files a Formal Complaint
- But, nothing in the regulations prohibits a Title IX Coordinator from signing a Formal Complaint when the Complainant is not currently participating or attempting to participate in the school's programs

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## Coordinator Signing Complaint

### Key Question:

Is it clearly unreasonable in light of the known circumstances for the Title IX Coordinator to sign or not sign a Formal Complaint?



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## TLF Formal Complaint Form

**TITLE IX SEXUAL HARASSMENT FORMAL COMPLAINT FORM**

This form is being submitted by:  
 Complainant     Title IX Coordinator

Complainant Name: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 Phone: \_\_\_\_\_ Email: \_\_\_\_\_

If the Complainant is a student:  
 School Building Attending: \_\_\_\_\_ Grade: \_\_\_\_\_ Birthdate: \_\_\_\_\_

If the Complainant is an employee:  
 Job Title: \_\_\_\_\_ Building: \_\_\_\_\_

Reporter's Name (if different than Complainant): \_\_\_\_\_  
 Relationship to Complainant: \_\_\_\_\_  
 Reporter Address: \_\_\_\_\_  
 Reporter Phone: \_\_\_\_\_ Reporter Email: \_\_\_\_\_

1. Describe the alleged violation of the District's Title IX Sexual Harassment Policy that you are reporting to the District investigator. Please be specific. Describe the specific incident(s) and identify the individuals and potential witnesses involved. Describe or attach any evidence you believe is relevant. Attach additional pages if needed.



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## Notice to Parties

Upon receipt of Formal Complaint, provide written notice to the parties (if known) that includes:

- Notice of grievance process, including any informal resolution process
- Notice of allegations
  - Must be detailed!
  - Include dates, locations, names, and other specifics alleged in complaint
- Statement that Respondent is presumed not responsible and that a determination of responsibility is made at conclusion of grievance process

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## Notice to Parties (cont'd)

- Right to have advisor of their choice, including an attorney
- Right to inspect and review evidence
- Notice of any code of conduct provision that prohibits knowingly making false statements or submitting false information

If, during the investigation, it is determined that additional allegations will be investigated, notice of additional allegations must be sent to the parties

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## Consolidation of Complaints

If there are multiple Formal Complaints arising out of the same facts and circumstances, for example several complaints alleging similar behavior by one Respondent, the Formal Complaints may be consolidated to streamline the grievance process.

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## Bifurcation of the Investigation

- New regulations *only* apply to Title IX sexual harassment
- If a report or Formal Complaint includes allegations implicating other harassment/discrimination policies, you can bifurcate the investigation
- BUT Title IX sexual harassment must be investigated pursuant to the new regulations

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## Formal Complaint Dismissal

### Mandatory

**Must** be dismissed if allegations, if proven:

- Would not constitute sexual harassment under new definition;
- Did not occur in recipient's (school) program or activity; or
- Did not occur against a person in the U.S.

### Permissive

**May** be dismissed if:

- Complainant requests withdrawal;
- Respondent's enrollment or employment ends; or
- Specific circumstances prevent the school from gathering evidence sufficient to reach a determination (e.g., Complainant not cooperating with investigation, many years between alleged misconduct and complaint filing)

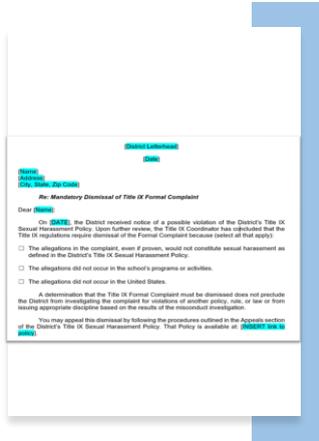
**REMEMBER:** Even if complaint is dismissed under Title IX, school may address complaint under another policy or code of conduct provision in some circumstances.

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## Dismissal Notice

Prompt, simultaneous written notice to both parties that includes:

- Reasons for mandatory or discretionary dismissal, and
- Right to appeal



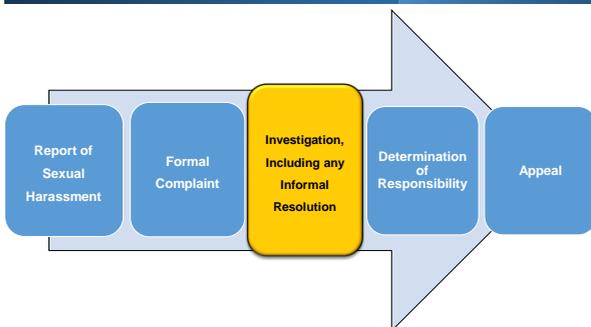
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## Questions?



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## Title IX Grievance Process



## Informal Resolution Process



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## What is Informal Resolution?

- After Formal Complaint is filed but before determination of responsibility is made, school may offer parties the opportunity to informally resolve the complaint without a full investigation
- May encompass a broad range of conflict resolution strategies, including arbitration, mediation, or restorative justice - direct interaction between the parties is not required
- Not available for Formal Complaints alleging an employee sexually harassed a student

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## School's Discretion

- School is not required to offer informal resolution
- If offered, school has discretion to determine what process will be used
- Consider:
  - What conduct has been alleged?
  - What resolution is sought?

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## Voluntary Process

- Neither party should be pressured to participate
- Schools cannot require parties to participate or otherwise waive their right to an investigation and adjudication of the Formal Complaint
- Parties may withdraw from the informal resolution process and resume the investigation at any time before resolution is reached

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## Notice and Consent Required

Title IX Coordinator or Investigator must:

- Provide both parties written notice of their informal resolution rights; and
- Obtain written, voluntary consent from both parties to enter into the informal resolution process.

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## Informal Resolution Notice

The written notice must include:

- Allegations being investigated;
- Informal resolution requirements, including when informal resolution would preclude resuming a formal complaint arising from same allegations;
- Right to withdraw from informal resolution and resume the grievance process; and
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

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## How to Conduct a Title IX Investigation

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## General Considerations

- School has burden of proof and burden to “gather evidence sufficient to reach a determination of responsibility”
- Parties must be treated equally
- Standard of evidence must be same for all complaints (employee and student)
- Reasonably prompt timeline
- Respondent presumed not responsible
- Consult your policy for specific procedures!

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## Initial Steps

- If students are involved – contact parents/guardians
- Consider Mandatory Reporting Requirement and report to law enforcement
- Don't promise confidentiality!
- Secure evidence
  - Physical
  - Documentary
  - Electronic & Video

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## CAUTION:

### Photos and Videos of Students

- If allegation involves sexting or other photos or videos of students that could possibly be considered child pornography, **CALL LAW ENFORCEMENT**
- Do not view, save, copy, disseminate, handle or maintain photos and videos of students that could be considered child pornography
- Legal exposure for employee & school

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## Law Enforcement Involvement

- Does *not* relieve school of Title IX obligation to investigate
- Do *not* use police involvement as excuse not to investigate
- Do *not* wait for criminal conclusion
- Can **briefly** delay Title IX investigation for concurrent criminal investigation

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## OCR: Law Enforcement

*“Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.”*

*LaPorte Comm Sch Corp (OCR, 2015)*

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## Delays and Time Extensions

- Temporary delays for “good cause” are permitted with written notice to parties
- “Good cause” examples:
  - Complexity of investigation
  - Concurrent law enforcement investigation with time-dependent release of evidence
  - Absence of parties or witnesses
  - Need to provide accommodations for party or witness with a disability
- **Delay for administrative convenience is not “good cause”**

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## Advisors

- Parties may be accompanied by an advisor of their choice in any meeting or grievance process proceeding
- Advisors can be parents, staff members, attorneys, friends, or other persons -- the party is in the best position to decide who serves in this role
- School may not restrict who serves as advisor

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## Investigation Tips

- Create investigation plan based on what you know from Formal Complaint
- Interview Complainant first to gather more information about the allegations
- Use information from Formal Complaint and Complainant's interview to determine who to interview next and what evidence to secure
- Conduct site visits, if applicable
- Usually interview Respondent last

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## Notice of Interviews

- Must provide date/time/location, participants, and purpose of all hearings (if any), investigative interviews, and meetings, to party whose participation is invited or expected, *in writing*
- Notice must be given a sufficient time in advance so that a party may prepare for interview

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## Establish Ground Rules

- May set ground rules for interviews so long as rules apply equally to both parties
- Examples:
  - Be honest and forthright
  - Abusive, disruptive behavior or language will not be tolerated
  - Advisor may not interrupt the interview but will be given an opportunity to provide additional information at end of interview
- Cannot restrict parties from discussing allegations or gathering/presenting relevant evidence

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## Interview Tips

- Establish rapport
- Inform party or witness, if possible, that interview summary with their name will be provided to parties
- Ask simple, straightforward questions
- Ask who else may have useful information and whether there is anything you didn't ask that interviewee thinks you should know
- Re-interview parties or witnesses if needed
- For Respondent:
  - Explain allegations, as appropriate
  - Ask awareness of applicable policies, rules, codes of conduct
- Be cognizant of bias or conflicts of interest!

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## Do's and Don'ts

- ✓ **DO:** Give parties equal opportunity to present witnesses, evidence
- ✗ **DON'T:** Use questions or evidence that constitute, or seek disclosure of, legally-privileged information
- ✗ **DON'T:** access, consider, disclose, or otherwise use a party's medical records, including mental health records without voluntary, written consent to do so

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## Notice of Additional Allegations

- If investigation reveals additional allegations not in original notice to parties and investigator decides to investigate those allegations, must provide notice of additional allegations to both parties
- Additional notice must:
  - Identify date notice of the additional allegations given to the parties, and
  - Describe additional allegations
- If additional allegations will not be investigated, investigator must state basis for decision not to investigate in investigation report

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## Evidence Review

- Before the investigation report is completed, the investigator must send (in electronic or hard copy) the parties and their advisors all evidence obtained in the investigation so that they can respond to the evidence before the investigator finalizes the report
- Parties must be given **at least 10 calendar days** to submit a written response to the evidence
- Investigator must consider any responses received before completing the report

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## What Evidence?

- **ALL** evidence submitted to parties, including:
  - Evidence upon which the District does not intend to rely in reaching a determination regarding responsibility; and
  - Inculpatory or exculpatory evidence obtained from any source.
- Consider reminder to parties that redisclosure of evidence outside of Title IX grievance process is prohibited

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## What to Include in an Investigation Report



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## Parties' Information

- Name of Party
- Name of advisor (if any)
- If student: age, grade level, and building
- If employee: job title and building

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## Investigator's Information

- Investigator name and title
- Training verification
- Statement that investigator does not have conflict of interest or bias against either party, generally or individually, that affected the investigation

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## Relevant Chronology

- Date of Formal Complaint
- Date notice letters sent
- Date Complainant(s) and Respondent(s) were notified of interviews
- Dates interviews conducted
- Date evidence submitted to parties/advisors for review
- Date each party's response was due and whether response received
- Date investigation report submitted to Decision-Maker

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## Nature of Allegations

- Describe each allegation, including date, time, place, and nature of the incident(s)
- Additional allegations?
  - If not in original notice to parties and investigator decides to investigate those allegations, identify date notice of additional allegations was given and describe the additional allegations
  - If the additional allegations won't be investigated, state basis for decision

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## Fact Finding Activities

- Summarize Complainant's and Respondent's interviews, noting date and who attended
- Identify any other contacts with Complainant, Respondent, or their advisors, noting date, contact method, purpose
- Summarize all other witness interviews, noting date and who attended
- Identify and describe any relevant evidence, including who submitted it or how obtained
- Describe any other fact-finding activities (e.g., site visits, record review, or video review)

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## Findings of Fact

- Investigator may:
- Make specific findings of fact for review by the Decision-Maker
  - Make credibility determinations
- But, may **NOT** make the determination of responsibility

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## Final Tips

- Report must fairly summarize relevant evidence
- Use witness quotes, specific dates, times, and locations in the report when possible
- Check for correct spelling of names
- Cite other applicable Board policies, code of conduct provisions, RSC Sections
- Ensure report is clear, concise, and complete
- Assume either party may release report

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## Transmittal of Final Report

- Investigator, Coordinator, or Decisionmaker must send (electronic or hard copy) investigation report to the parties and any advisors for review and response
- Report also should be sent to:
  - Title IX Coordinator
  - Decision-Maker
- Receipt of the report by the parties starts the Decision-Maker's timelines
- Parties must have **10 calendar days** to review report

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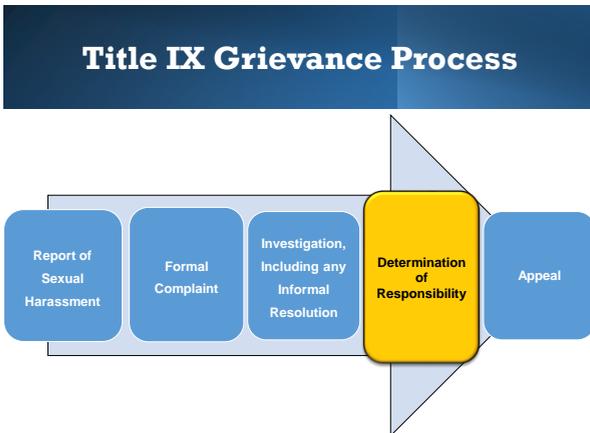
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- ### Decision-Maker's Role
- Has independent obligation to:
    - Evaluate relevance of available evidence including evidence summarized in investigation report, and
    - Consider all relevant evidence
  - Make determination of responsibility

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### Right to Submit Questions

After the parties receive the investigation report but before the Decision-Maker makes the responsibility determination, the Decision-Maker must:

- Allow each party **the opportunity** to submit written, relevant questions for any party or witness to answer;
- Provide each party the answers to the questions; and
- Allow for limited follow-up questions from each party
- Explain to party submitting question basis for excluding any questions

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### Complainant's Sexual History

Questions and evidence about Complainant's sexual predisposition or prior sexual behavior **are not relevant** unless:

- Offered to prove that someone other than the Respondent committed the alleged misconduct; or
- The questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

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## Assessing Relevance

- Not defined in the regulations; use ordinary meaning of the word
- Relevant – does it deal with the issue of concern? Does the evidence impact the facts?
- Duplicative or repetitive questions may be excluded as not relevant
- BUT relevancy does not determine weight, credibility, or persuasiveness
- Weigh evidence based on credibility and other circumstances

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## Consider Witness Credibility

- Monitor consistency
- Consider corroboration either from other witnesses or physical evidence
- Consider whether there is a motivation to lie
- Previous consent does not imply future consent

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## Evidence Standard

- Decision-Maker makes finding(s) based on policy's standard of evidence or proof
  - District may select the standard, but must use same standard for *all* Title IX sexual harassment investigations
  - Recommend: “preponderance of evidence”
    - More likely than not
    - 51%

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## Determination of Responsibility

Must be in writing and address:

- Allegations
- Procedural steps taken
- Findings of fact
- Student code of conduct or Board policy implications
- Conclusion for each allegation and rationale
- Disciplinary sanctions imposed and whether remedies provided
- Appeal rights

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## Disciplinary Sanctions

- Determination of Responsibility letter must include any disciplinary action taken against the Respondent
- Sanctions should be consistent with applicable codes of conduct, policies, law
- If Board approval is required for discipline (e.g., tenure hearing, expulsion hearing), the Determination of Responsibility will include a recommendation that the Superintendent prepare and present tenure charges, or that an appropriate Administrator prepare and present a recommendation for long-term suspension or expulsion, to the Board

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## Remedies

- Determination of responsibility must include *whether* Complainant will receive remedial measures
- Title IX Coordinator should directly communicate with Complainant about specifics
- Remedies should be designed to restore and preserve equal access to the District's education program or activity

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## Remedy Examples

- Provide escort to ensure that the Complainant and Respondent can safely work or attend classes and school activities
- Offer parties school-based counseling
- Provide parties with academic support
- Rearrange course or work schedules to minimize contact between Complainant and Respondent
- Move Complainant's or Respondent's locker or work space
- Issue "no contact" directive between Complainant and Respondent

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## Remember!

- Supportive measures are available to more than just Complainant
- Also consider systemic remedies, such as training
- For students with disabilities, convene IEP or Section 504 meetings as necessary

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## Final Reminders

- Determination of responsibility should:
- Provide evidence-based rationales
- Be clear and precise
- Be nearly identical for both Complainant and Respondent
- Sent to parties simultaneously
- Title IX Coordinator is responsible for effective implementation of any remedies

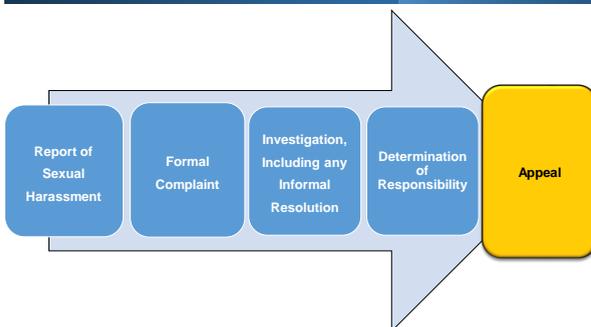
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## How to Process Appeals



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## Title IX Grievance Process



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## Appeal Bases

1. Procedural irregularity that affected the outcome;
2. New evidence that was not reasonably available at the time of the determination and could affect the outcome;
3. Title IX Coordinator, Investigator, or Decision-Maker had a conflict of interest that affected the outcome

Schools can create additional bases for appeal- check your policy!

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## General Considerations

- Both parties may appeal a dismissal or determination of responsibility
- Check your policy for time frames to file and decide appeal
- Appeals Officer cannot be same person as Title IX Coordinator, Investigator, Informal Resolution Facilitator, or Decision-Maker, and must not have a conflict or bias

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## Appeal Process

- Determination of responsibility or dismissal includes parties' appeal rights
- Party submits appeal to Appeals Officer or Title IX Coordinator as applicable
- Appeals Officer provides written notice to both parties that appeal filed
- Parties may submit written statement to Appeals Officer in support of, or challenging, determination
- Appeals Officer issues written decision to parties simultaneously

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## Hearings



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## Hearings

- Live hearing and cross-examination **NOT** required for K-12 (unless your policy provides otherwise)
- Hearing is opportunity for parties to tell their side of the story through witness testimony, documentation, recordings, video, audio, photos, and any other relevant evidence

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## Hearing Location

- Create space for all parties to view testimony and evidence equally
- Ensure student privacy
- At request of either party, hearing must occur with parties in separate rooms with use of technology so all can see and hear live testimony
- If using any technology, this training is **not sufficient**
  - Get training from IT Director or other person on use of technology
  - Post those training materials on website

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## Opening the Hearing

- Introduction of Decision-Maker, parties, advisors and anyone else present
- Decision-Maker describes previous steps of grievance process (notice provided to parties, opportunity to review evidence etc.)
- Describe allegations
- Explain evidentiary standard
- Both parties have opportunity to present testimony and evidence
- No strict rules of evidence, but Decision-Maker determines relevancy of testimony and evidence
- Statement that Decision-Maker has no bias or conflict of interest and can be impartial

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## Hearing Format

- District determines hearing format
- Typical hearing format includes:
  - Opening statements
  - Presentation of evidence by Complainant, with cross examination
  - Presentation of evidence by Respondent, with cross examination
  - Rebuttal, if any
  - Closing statements

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## Hearing Rules

- Each party's advisor must be permitted to ask the other party and witnesses relevant questions and follow-up questions
  - Including questions challenging credibility
  - Questions related to Complainant's prior sexual history are not relevant except in very limited circumstances

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## Hearing Rules – cont'd

- Cross examination must be conducted directly, orally, and in real time by party's advisor and never by party personally
- Decision-Maker/Hearing Officer determines relevance and must explain decision to exclude any question

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## Retaliation

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## Retaliation Prohibited

*No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.*

34 CFR 106.71(a)

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## Clarifying the Definition

- Retaliation includes threats, intimidation, coercion against person who makes a report, files a Formal Complaint, participates in, or refuses to participate in a Title IX proceeding
- Exercise of First Amendment rights does not constitute retaliation prohibited by Title IX
- Charges for "collateral misconduct" may be retaliation (e.g., charging Complainant with underage drinking to interfere with Complainant reporting sexual harassment)

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## Student Privacy



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## Confidentiality

- Schools must keep confidential the identity of reporter, person who files Formal Complaint, and the parties and witnesses except as permitted or required by law or to carry out any provision of Title IX
- Supportive measures must also be kept confidential

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## Confidentiality of Evidence

*“Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint.”*

85 Fed Reg 30297-30298 (May 19, 2020)

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## Record Keeping

- Records relating to Title IX reports must be maintained for at least seven years
  - Applies to investigation records, disciplinary sanctions, remedies, appeals, and records of any action taken (i.e. supportive measures)
- Must retain any materials used to train Title IX Coordinators, Investigators, Decision-Makers, Appeals Officers, and Informal Resolution Facilitator
  - This PowerPoint!

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## Questions?



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## #TeamThrun Title IX Attorneys



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