

TITLE IX UPDATE

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TEXT

- “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” - 20 U.S.C.A. § 1681

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HISTORICAL BACKGROUND

- Enacted in 1972
- Enforcement transferred to Dept. of Ed. Office of Civil Rights
- 1992 - SCOTUS recognizes a right to money damages for sexual harassment



NEW REGULATIONS

Focus on how districts respond to reports and complaints of sexual harassment.

Require, among other things, that LEAs have a very detailed grievance process.

IMPORTANT NEW STANDARD

- “Actual knowledge” standard
- All employees should promptly report allegations to the Title IX Coordinator.
 - Per the U.S. Dept. of Ed., the new regulation "arguably broadens...an elementary or secondary school's obligation to respond to Title IX sexual harassment.”

KEY TERMS

Sexual
Harassment

Title IX
Coordinator

Complainant/
Respondent

Supportive
Measures

Investigator

Decision-
maker

SEXUAL HARASSMENT DEFINED



A school district employee conditioning an aid, benefit, or service of an education program or activity on an individual's participation in unwelcome sexual conduct;



Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the education program or activity; or



“Sexual assault” as defined in 20 USCA 1092(f)(6)(A)(v), “dating violence” as defined in 34 USCA 12291(a)(10), “domestic violence” as defined in 34 USCA 12291(a)(8), or “stalking” as defined in 34 USCA 12291(a)(30).

TITLE IX COORDINATOR

- Employee assigned to ensure compliance with Title IX must be referred to by this title.
 - This is a new requirement.
- Any person may report sex discrimination, including sexual harassment, 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. These reports may be made at any time, including during non-business hours.

COMPLAINANT & RESPONDENT

- “Complainant” is an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- “Respondent” is an individual who is reported to be the perpetrator of conduct that could constitute sexual harassment.



SUPPORTIVE MEASURES

- Must be offered:
 - to complainant AND respondent; and
 - before and after a complaint is filed
- Can include:
 - Counseling;
 - Extensions of deadlines;
 - Modification of class schedules;
 - Restrictions on contact between the parties;
 - Leaves of absence; OR
 - Other measures.



Title IX Coordinator



Investigator



Decision-maker



Appeals process

RECORD-KEEPING REQUIREMENTS

- A new recordkeeping requirement mandates that all records from sexual harassment investigations, appeals and results from appeals, and materials used to train Title IX coordinators must be maintained for seven years.



QUESTIONS?

TSBA Handouts

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

Issue	The Title IX Final Rule: Addressing Sexual Harassment in Schools
<p><i>1. Notice to the School, College, University (“Schools”): Actual Knowledge</i></p>	<p>The Final Rule requires a K-12 school to respond whenever <i>any</i> employee has notice of sexual harassment, including allegations of sexual harassment. Many State laws also require all K-12 employees to be mandatory reporters of child abuse. For postsecondary institutions, the Final Rule allows the institution to choose whether to have mandatory reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office.</p> <p>For all schools, notice to a Title IX Coordinator, or to an official with authority to institute corrective measures on the recipient’s behalf, charges a school with actual knowledge and triggers the school’s response obligations.</p>
<p><i>2. Definition of Sexual Harassment for Title IX Purposes</i></p>	<p>The Final Rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect: Any instance of <i>quid pro quo</i> harassment by a school’s 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 (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).</p> <ul style="list-style-type: none"> - The Final Rule prohibits sex-based misconduct in a manner consistent with the First Amendment. <i>Quid pro quo</i> harassment and Clery Act/VAWA offenses are <u>not</u> evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access, because such misconduct is sufficiently serious to deprive a person of equal access. - The Final Rule uses the Supreme Court’s <i>Davis</i> definition (<i>severe and pervasive and objectively offensive</i> conduct, effectively denying a person equal educational access) as one of the three categories of sexual harassment, so that where unwelcome sex-based conduct consists of speech or expressive conduct, schools balance Title IX enforcement with respect for free speech and academic freedom. - The Final Rule uses the Supreme Court’s Title IX-specific definition rather than the Supreme Court’s Title VII workplace standard (<i>severe or pervasive</i> conduct creating a hostile work environment). First Amendment concerns differ in educational environments and workplace environments, and the Title IX definition provides First Amendment protections appropriate for educational institutions where students are learning, and employees are teaching. Students, teachers, faculty, and others should enjoy free speech and academic freedom protections, even when speech or expression is offensive.

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<p><i>3. Sexual Harassment Occurring in a School’s “Education Program or Activity” and “in the United States”</i></p>	<p>The Title IX statute applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance. Under the Final Rule, schools must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States.</p> <ul style="list-style-type: none"> - The Title IX statute and existing regulations contain broad definitions of a school’s “program or activity” and the Department will continue to look to these definitions for the scope of a school’s education program or activity. Education 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, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house). - Title IX applies to all of a school’s education programs or activities, whether such programs or activities occur on-campus or off-campus. A school may address sexual harassment affecting its students or employees that falls outside Title IX’s jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.
<p><i>4. Accessible Reporting to Title IX Coordinator</i></p>	<p>The Final Rule expands a school’s obligations to ensure its educational community knows how to report to the Title IX Coordinator.</p> <ul style="list-style-type: none"> - The employee designated by a recipient to coordinate its efforts to comply with Title IX responsibilities must be referred to as the “Title IX Coordinator.” - Instead of notifying only students and employees of the Title IX Coordinator’s contact information, the school must also notify applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and all unions, of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator. - Schools must prominently display on their websites the required contact information for the Title IX Coordinator. - Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. - Such a report may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.
<p><i>5. School’s Mandatory Response Obligations: The Deliberate Indifference Standard</i></p>	<p>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. Schools have the following mandatory response obligations:</p> <ul style="list-style-type: none"> - Schools must offer supportive measures to the person alleged to be the victim (referred to as the “complainant”).

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

	<ul style="list-style-type: none"> - The Title IX Coordinator must promptly contact the complainant confidentially to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. - Schools must follow a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. - Schools must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX. - The Final Rule requires a school to investigate sexual harassment allegations in any formal complaint, which can be filed by a complainant, or signed by a Title IX Coordinator. - The Final Rule affirms that a complainant’s wishes with respect to whether the school investigates 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 allegations in a formal complaint do not meet the definition of sexual harassment in the Final Rule, or did not occur in the school’s education program or activity against a person in the United States, the Final Rule clarifies that the school must dismiss such allegations <i>for purposes of Title IX</i> but may still address the allegations in any manner the school deems appropriate under the school’s own code of conduct.
<p>6. School’s Mandatory Response Obligations: <i>Defining</i> <i>“Complainant,”</i> <i>“Respondent,”</i> <i>“Formal Complaint,”</i> <i>“Supportive Measures”</i></p>	<p>When responding to sexual harassment (e.g., by offering supportive measures to a complainant and refraining from disciplining a respondent without following a Title IX grievance process, which includes investigating formal complaints of sexual harassment), the Final Rule provides clear definitions of complainant, respondent, formal complaint, and supportive measures so that recipients, students, and employees clearly understand how a school must respond to sexual harassment incidents in a way that supports the alleged victim and treats both parties fairly.</p> <p>The Final Rule defines “complainant” as an individual <i>who is alleged to be the victim</i> of conduct that could constitute sexual harassment.</p> <ul style="list-style-type: none"> - This clarifies that any third party as well as the complainant may report sexual harassment. - While parents and guardians do not become complainants (or respondents), the Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters. <p>The Final Rule defines “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

	<p>The Final Rule defines “formal complaint” as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment and states:</p> <ul style="list-style-type: none"> - 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. - A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method designated by the school. - The phrase “document filed by a complainant” means a document or electronic submission (such as by e-mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or a party during a grievance process, and must comply with requirements for Title IX personnel to be free from conflicts and bias. <p>The Final Rule defines “supportive measures” as individualized services reasonably available 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.</p> <ul style="list-style-type: none"> - The Final Rule evaluates a school’s selection of supportive measures and remedies based on what is not clearly unreasonable in light of the known circumstances, and does not second guess a school’s disciplinary decisions, but requires the school to offer supportive measures, and provide remedies to a complainant whenever a respondent is found responsible.
<p>7. <i>Grievance Process, General Requirements</i></p>	<p>The Final Rule prescribes a consistent, transparent grievance process for resolving formal complaints of sexual harassment. Aside from hearings (see Issue #9 below), the grievance process prescribed by the Final Rule applies to all schools equally including K-12 schools and postsecondary institutions. The Final Rule states that a school’s grievance process must:</p> <ul style="list-style-type: none"> - Treat complainants equitably by providing remedies any time a respondent is found responsible, and treat respondents equitably by not imposing disciplinary sanctions without following the grievance process prescribed in the Final Rule. - Remedies, which are required to be provided to a complainant when a respondent is found responsible, must be designed to maintain the complainant’s equal access to education and may include the same individualized services described in the Final Rule as supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. - Require objective evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person’s status as a complainant, respondent, or witness.

Summary of Major Provisions of the Department of Education's Title IX Final Rule

- Require Title IX personnel (Title IX Coordinators, investigators, decision-makers, people who facilitate any informal resolution process) to be free from conflicts of interest or bias for or against complainants or respondents.
- Training of Title IX personnel must include training on the definition of sexual harassment in the Final Rule, the scope of the school's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- A school must ensure that decision-makers receive training on any technology to be used at a live hearing.
- A school's decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants.
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Recipients must post materials used to train Title IX personnel on their websites, if any, or make materials available for members of the public to inspect.
- Include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frames.
- Describe the range, or list, the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility.
- State whether the school has chosen to use the preponderance of the evidence standard, or the clear and convincing evidence standard, for all formal complaints of sexual harassment (including where employees and faculty are respondents).
- Describe the school's appeal procedures, and the range of supportive measures available to complainants and respondents.
- A school's grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- Any provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complaints of sexual harassment, must apply equally to both parties.

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<p><i>8. Investigations</i></p>	<p>The Final Rule states that the school must investigate the allegations in any formal complaint and send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint. During the grievance process and when investigating:</p> <ul style="list-style-type: none"> - The burden of gathering evidence and burden of proof must remain on schools, not on the parties. - Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence. - Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no “gag orders”). - Parties must have the same opportunity to select an advisor of the party’s choice who may be, but need not be, an attorney. - Schools must send written notice of any investigative interviews, meetings, or hearings. - Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence. - Schools must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond. - Schools must dismiss allegations of conduct that do not meet the Final Rule’s definition of sexual harassment or did not occur in a school’s education program or activity against a person in the U.S. Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate. - Schools may, in their discretion, 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, 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. - Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal. - Schools may, in their discretion, consolidate formal complaints where the allegations arise out of the same facts. - The Final Rule protects the privacy of a party’s medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party’s voluntary, written consent to do so.
<p><i>9. Hearings:</i></p>	<p>The Final Rule adds provisions to the “live hearing with cross-examination” requirement for postsecondary institutions and clarifies that hearings are optional for K-12 schools (and any other recipient that is not a postsecondary institution).</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

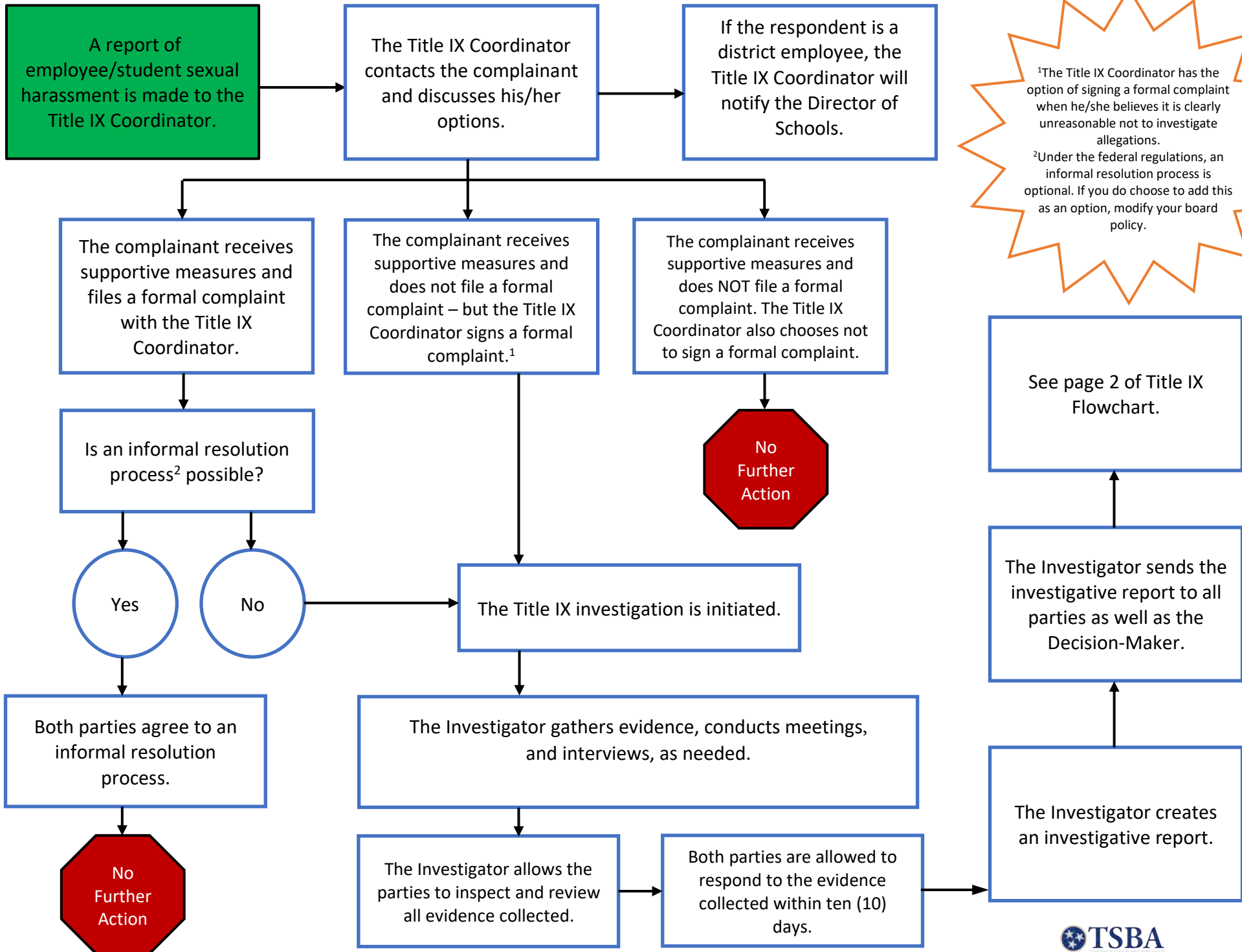
<p>(a) <i>Live Hearings & Cross-Examination (for Postsecondary Institutions)</i></p>	<p>(a) For postsecondary institutions, the school’s grievance process must provide for a live hearing:</p> <ul style="list-style-type: none"> - At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally. - At the request of either party, the recipient must provide for the entire live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other. - Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the party’s advisor asking cross-examination questions any decision to exclude a question as not relevant. - If a party does not have an advisor present at the live hearing, the school must provide, without fee or charge to that party, an advisor of the school’s choice who may be, but is not required to be, an attorney to conduct cross-examination on behalf of that party. - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions. - Live hearings may be conducted with all parties physically present in the same geographic location or, at the school’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually. - Schools must create an audio or audiovisual recording, or transcript, of any live hearing.
<p>(b) <i>Hearings are Optional, Written Questions Required (for K-12 Schools)</i></p>	<p>(b) For recipients that are K-12 schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, <i>but need not</i>, provide for a hearing:</p> <ul style="list-style-type: none"> - With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.
<p>(c) <i>Rape Shield Protections for Complainants</i></p>	<p>(c) The Final Rule provides rape shield protections for complainants (as to all recipients whether postsecondary institutions, K-12 schools, or others), deeming irrelevant questions and evidence about a complainant’s prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<p><i>10. Standard of Evidence & Written Determination</i></p>	<p>The Final Rule requires the school’s grievance process to state whether the standard of evidence to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard. The Final Rule makes each school’s grievance process consistent by requiring each school to apply the same standard of evidence for all formal complaints of sexual harassment whether the respondent is a student or an employee (including faculty member).</p> <ul style="list-style-type: none"> - The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant. - The written determination must be sent simultaneously to the parties along with information about how to file an appeal.
<p><i>11. Appeals</i></p>	<p>The Final Rule states that a school must offer both parties an appeal from a determination regarding responsibility, and from a school’s dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity that affected the outcome of the matter, newly discovered evidence that could affect the outcome of the matter, and/or Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter.</p> <ul style="list-style-type: none"> - A school may offer an appeal equally to both parties on additional bases.
<p><i>12. Informal Resolution</i></p>	<p>The Final Rule allows a school, in its discretion, to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal resolution. Any person who facilitates an informal resolution must be well trained. The Final Rule adds:</p> <ul style="list-style-type: none"> - A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment. Similarly, a school may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed. - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint. - Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Summary of Major Provisions of the Department of Education's Title IX Final Rule

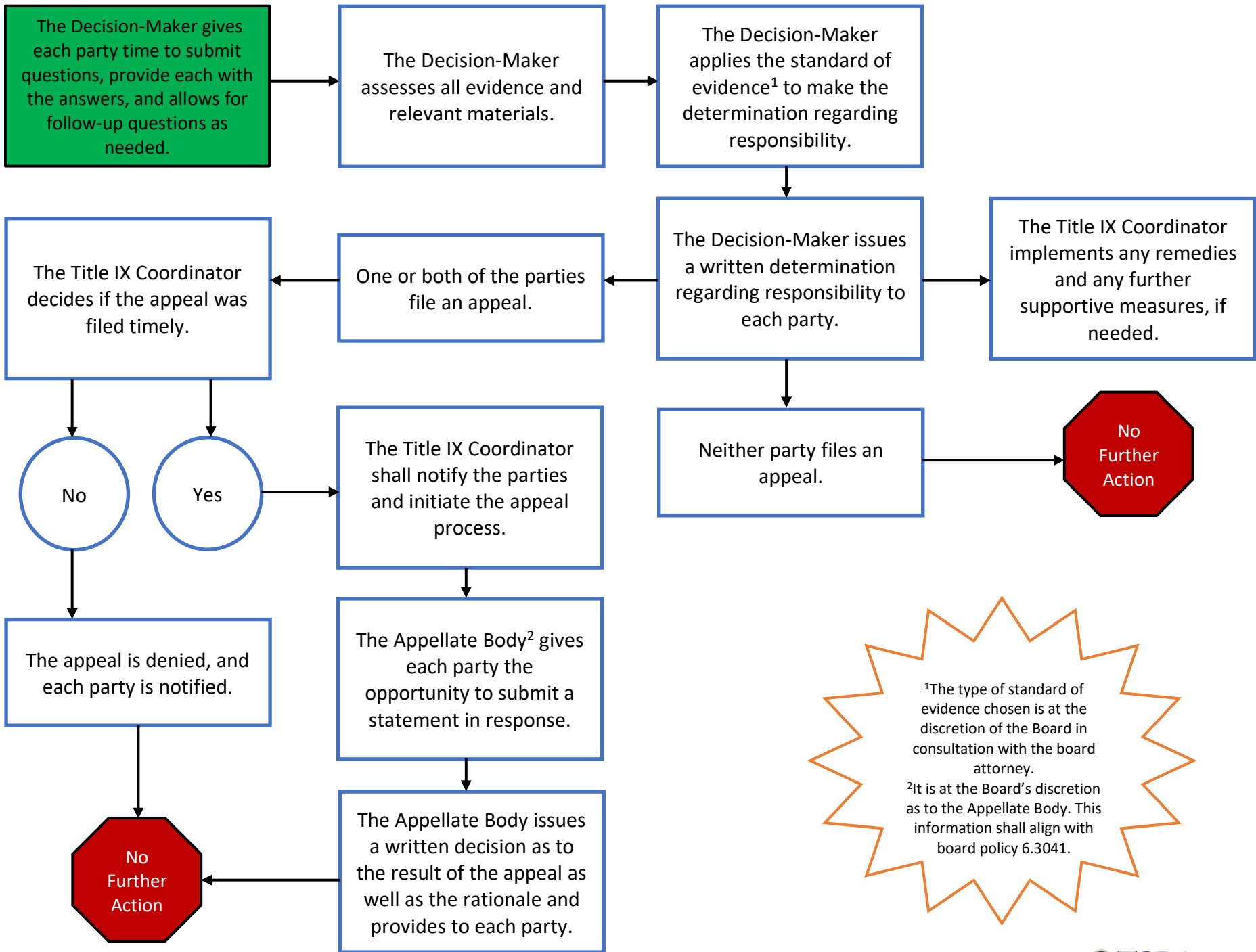
<p><i>13. Retaliation Prohibited</i></p>	<p>The Final Rule expressly prohibits retaliation.</p> <ul style="list-style-type: none">- Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.- Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures.- The exercise of rights protected under the First Amendment does not constitute retaliation.- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.
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¹The Title IX Coordinator has the option of signing a formal complaint when he/she believes it is clearly unreasonable not to investigate allegations.

²Under the federal regulations, an informal resolution process is optional. If you do choose to add this as an option, modify your board policy.





¹The type of standard of evidence chosen is at the discretion of the Board in consultation with the board attorney.

²It is at the Board's discretion as to the Appellate Body. This information shall align with board policy 6.3041.



The District's Response to
Sexual Harassment:
New Federal Requirements
Under Title IX

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INTRODUCTION

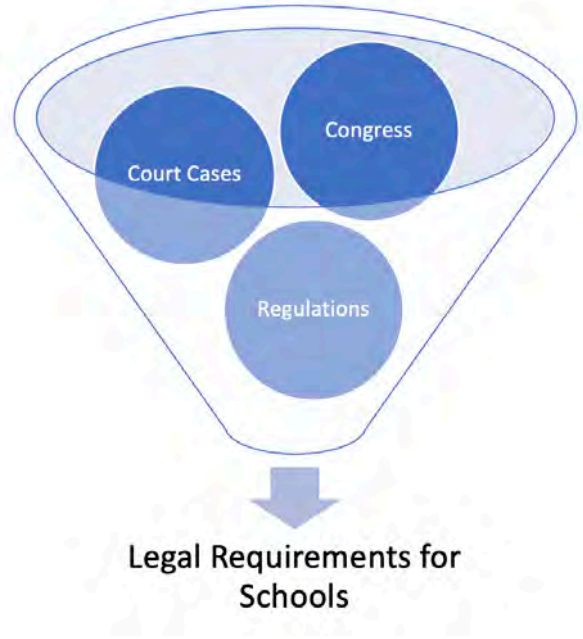
Title IX is a federal law that applies to all public schools. It states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” While this language is brief, federal regulations and case law have expanded the ways in which this applies to school districts. Title IX covers many things including: (1) requiring equity in athletics; (2) prohibiting discrimination in the educational program; and (3) establishing a framework for addressing grievances related to sexual harassment. Recently released federal regulations are focused on this third aspect. Fully complying with the new regulations will require a combination of reviewing and updating current policies and procedures, training staff, and ensuring that appropriate notification of these changes are publicized to the community.



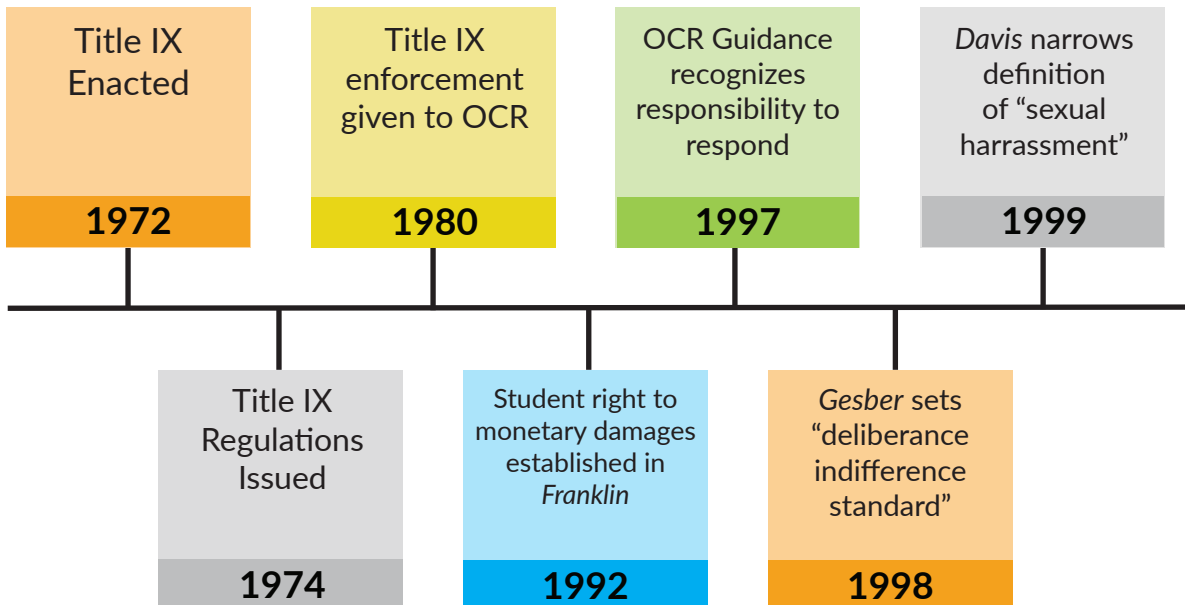
Historical Context of Title IX

How does the legal landscape change?

The primary ways that the legal landscape can change in the education law context are: (1) Congress passing legislation; (2) courts deciding cases by applying the law to a certain set of facts; and (3) the Dept. of Education issuing regulations. Though agencies are part of the executive branch of government and are charged with enforcement and implementation of new laws, they also have the authority to create a type of law known as a regulation. When the Dept. of Education creates regulations, they are essentially acting like a legislative body by enforcing the laws that Congress has passed. To help understand how these different types of legal requirements, let's look at the timeline of Title IX and how regulations and case law have shaped school district obligations across the country.



Title IX Timeline



Key Title IX Cases

Franklin v. Gwinnett County Public Schools

This Supreme Court case was unanimously decided in 1992. The case arose out of claims of sexual harassment and abuse by a teacher against a student. Christine Franklin was the plaintiff who accused a teacher of sexually abusing her as well as other students. She alleged that not only did school administrators refuse to take action regarding her complaint, but they discouraged her from pressing charges. Franklin is particularly significant as it established that students have the right to sue for monetary damages if their rights are violated under Title IX.

Gesber v. Lago Vista Independent School District

In the 1998 *Gesber* case, the Supreme Court was faced with the question of whether a student was entitled to receive damages based on the school district's lack of response to sexual harassment. Here, a student and a teacher were engaged in a sexual relationship that was not known to other staff members. Because school authorities did not know of the inappropriate relationship, the Court held that the district could not be held responsible. Further, the Court established a two-part test in order for liability to rest on a school district. First, a plaintiff must establish that an official of the school district who at a minimum has authority to institute corrective measures on the student's behalf was aware of the teacher's misconduct. Second, in light of that knowledge, a plaintiff would have to prove that the school official was deliberately indifferent to the teacher's misconduct.

Davis v. Monroe County Board of Education

Just one year later in 1999, the Supreme Court was again tasked with answering another Title IX question – can a school board be held liable for student-on-student harassment? In this case, a fifth grader's mother sued on her daughter's behalf. The claim centered around sexual harassment that was alleged to be so severe that the fifth grader was effectively denied the benefits of a public education that were provided for under Title IX. Based on the district's lack of appropriate response and failure to adequately address the harassment, the Court held that the plaintiff was entitled to damages. In doing so, the Court established a new standard. Under the *Davis* standard, a school board can be held liable for student-on-student harassment if:

1. the *Gesber* standards of notice and deliberate indifference are met;
2. the school has substantial control over the “context” in which the harassment occurs and over the harasser; and
3. the conduct is “sexual harassment”, which is conduct “so severe, pervasive, and objectively offensive” that it “effectively denie[s] equal access to an institution’s resources or opportunities”.

Other Ways the Dept. of Education of Education Communicates About Title IX

School districts should be aware that there are other documents that could modify their responsibilities under Title IX besides laws, regulations, and court cases. Since the Dept. of Education is tasked with enforcing Title IX, it often releases guidance documents that cover how it intends to enforce its regulations. These guidance documents encompass not only those documents referred to specifically as guidance, but also, “dear colleague letters” and agreements with the Office of Civil Rights (OCR). Below are some examples of each type of document.

Guidance documents from the U.S. Dept. of Education

These often take the form of field manuals or documents that expand on the logistics of handling certain Title IX situations broadly. Examples of guidance documents that have been issued:

- Title IX Resource Guide (2015)

- Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities

Dear Colleague Letters

These letters are typically issued in response to specific questions about how to implement federal law in a given situation. However, they are also sometimes a way the Department communicates directly to the public about changes in policy. Examples of Dear Colleague Letters:

- A 2017 Dear Colleague Letter was used to withdraw the 2016 statement of policy on transgender students.

- A 2015 Dear Colleague Letter was used to respond to local school district questions about cooperating with outside organizations that provide single-sex program and how this relates to a district’s Title IX obligations.

OCR Letters and Agreements

If OCR investigates an allegation of a Title IX violation, sometimes the result of this will be OCR entering into a resolution agreement with the school district. These agreements are then made available to the public. These can be helpful for school districts to review as they essentially provide case studies in how OCR applies federal regulations in a fact-specific situation.

Examples of things OCR Letters and Agreements address:

- OCR letters often address the set of facts that lead to their investigation of a particular school district.

- OCR resolution agreements outline how the school district has agreed to resolve the problems that lead to the investigation. These often include increased staff training and

changes to how complaints of sexual harassment are addressed within a school system.

While these documents do not necessarily carry the force of law, it is important to be aware of them as they indicate how the Department will apply the law in a given situation. It is also essential to be aware that guidance documents can be withdrawn and changed more quickly and easily than laws can be amended. Due in part to this fact, it is not uncommon for guidance to change significantly when a new President is elected and/or a new Secretary of Education is appointed.

Key Terms and Standards in the New Title IX Regulations

One of the main differences between the old Title IX regulations and the new regulations, involves the definitions of key terms. Below is a brief comparison of some of the fundamental terms.

“Actual Knowledge”

Old Definition (from OCR Guidance): A school has a responsibility to respond promptly and effectively if a school **knows or should have known** about sexual harassment.

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

“Sexual Harassment” Standard

Old Definition (from OCR Guidance):

Unwelcome conduct

Determined by a reasonable person

To be 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:

Unwelcome conduct

Determined by a reasonable person

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

New Definitions Included in Definition of “Sexual Harassment”

“Sexual assault” as defined in 20 USCA 1092(f)(6)(A)(v), “dating violence” as defined in 34 USCA 12291(a)(10), “domestic violence” as defined in 34 USCA 12291(a)(8), or “stalking” as defined in 34 USCA 12291(a)(30).

This is new to Title IX. These definitions come from the Violence Against Women Act, which was passed by Congress in 1994.

“Deliberate Indifference”

Old Definition (from OCR Guidance): 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.



Complaint / Grievance / Investigative Process

Complaints

Anyone with knowledge of the relevant actions/behaviors may report those issues and trigger the district's responsibility to respond appropriately under federal law.

Who is the Complainant?

The complainant is the individual who is eligible to file a complaint to report a violation of Title IX. It also includes any person who is reported to have experienced a violation in cases where some other person made the first report on that person's behalf.

Receiving a Formal Complaint

Upon receiving a formal complaint:

- Provide written notice of the allegations, and the grievance process to all known parties to give the respondent time to prepare a response before an initial interview;
- Inform the parties of the prohibition against making a false statement or knowingly submitting false information;
- Inform the parties that they may have an advisor present during any subsequent meetings; AND
- Offer supportive measures* in an equitable manner to both parties.

*Non-punitive, individualized, and offered as appropriate and without charge to a complainant or a respondent. Examples include, but are not limited to:

- schedule changes;
- student counseling;
- actual monitoring; and
- academic accommodations.

Investigations

After a formal complaint has been filed, an investigator needs to be assigned. It is important for all investigators to be thoroughly trained and to understand their legal responsibilities.

All investigations must:

- Provide an equal opportunity for all parties to present/identify witnesses and evidence.
- Provide the parties with the freedom to discuss the allegations and/or gather relevant evidence.
- Provide for the parties to have others – parents, advisors, attorneys – present during the grievance process.

- Provide for the parties to have dates, times, locations, etc. related to investigative interviews, and with time to prepare for the same.
- Provide for the parties to have equal access to inspect/review evidence directly related to the complaint.
- Provide the parties with a draft of the investigative report with 10 days to submit a written response, which must be taken into account by the decider.

NOTE: Under new federal recordkeeping requirements, all of the documentation from the complaint/grievance process will need to be maintained for seven years.



Decision / Appellate Process

Throughout the investigation process, the respondent is presumed not responsible for the alleged conduct. This determination is not reached until the decision-maker issues a formal written document as to the result. The written document is referred to as the determination of responsibility. Importantly, the district’s grievance process must include: (1) who will act as the decision-maker; (2) what evidentiary standard this person will apply; and (3) who will be in charge of hearing any appeals.

Evidentiary Standards

It is vital that everyone involved in the resolution of a Title IX complaint understand the evidentiary standard that will be used. Below is a chart outlining the two options available.

Evidentiary Standards

Evidentiary Standard = the amount of proof required

The 2020 Title IX Regulations require LEAs to select the evidentiary standard – either “clear and convincing” or “preponderance of the evidence” – that will be used in the grievance process. Below is an overview of these standards. We encourage all Boards to work with their attorneys in determining which standard should be utilized for their specific district.

Beyond a reasonable doubt

↓

Clear and convincing

↓

Preponderance of the evidence

Clear & Convincing

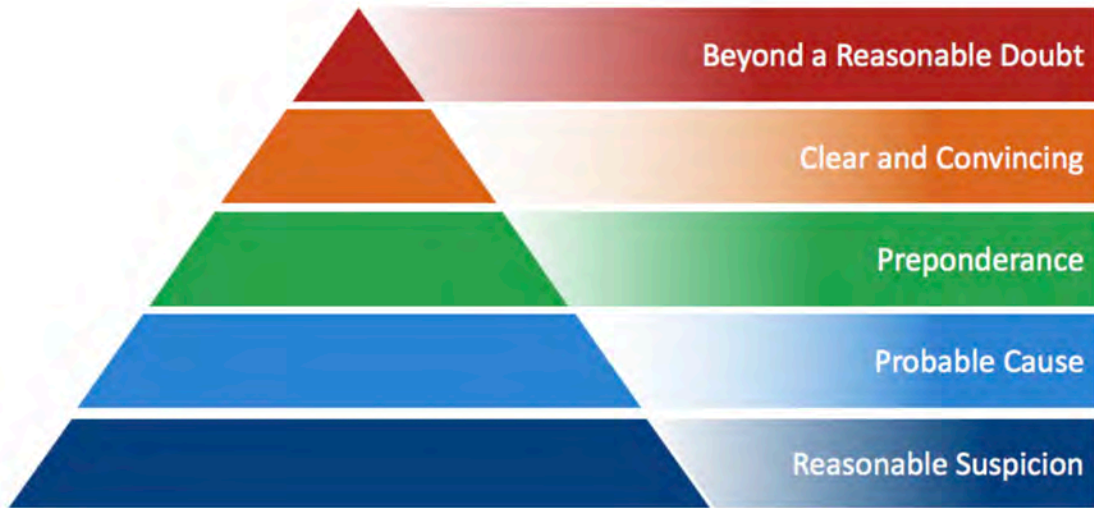
“Clear and convincing’ means the evidence is highly and substantially more likely to be true than untrue; the trier of fact must have an abiding conviction that the truth of the factual contention is highly probable.” [Colorado v. New Mexico](#), 467 U.S. 310 (1984).

This standard is met if the decision-maker is substantially certain that the respondent is responsible. In other words, the question is “based on the evidence, are you more than 75% certain that this individual is responsible?”

Preponderance of the Evidence

Burden of showing something by a preponderance of evidence simply requires the decision-maker to believe that existence of a fact is more probable than its nonexistence. [Metro. Stevedore Co. v. Rambo](#), 521 U.S. 121(1997).

This standard is met if the decision-maker believes that the respondent is more likely than not responsible. In other words, the question is “are you more than 50% certain that this individual is responsible?”



Who acts as decision-maker?

Who is chosen for this role will vary from district to district. The new federal regulations prohibit the decision-maker from being the same individual as the Title IX Coordinator or the investigator. This is to ensure that this decision-maker is separated from the investigation process. His/her role is to review the investigative report and apply the evidentiary standard to the facts that have been established. The decision-maker will also allow each party to submit written questions that they want asked of any witness. After reviewing all of the information, the decision-maker will issue the determination of responsibility.

What is a determination of responsibility?

The determination of responsibility is a written document that states the outcome of the formal complaint. It must include:

- Allegations;
- Procedural steps taken;
- Findings of fact;
- Application of code of conduct to facts;
- Statement of and rationale for results as to each allegation; and
- This includes a determination of responsibility as to each specific allegation, any disciplinary sanctions associated with each determination, and whether remedies to restore or preserve equal access to the education program will be provided to the complainant.

The determination regarding responsibility becomes final: (1) when the result of any appeal is released; or (2) if an appeal is not filed, on the date on which the right to an appeal expires.

What are the grounds for appeals?

Either party could appeal for the following reasons:

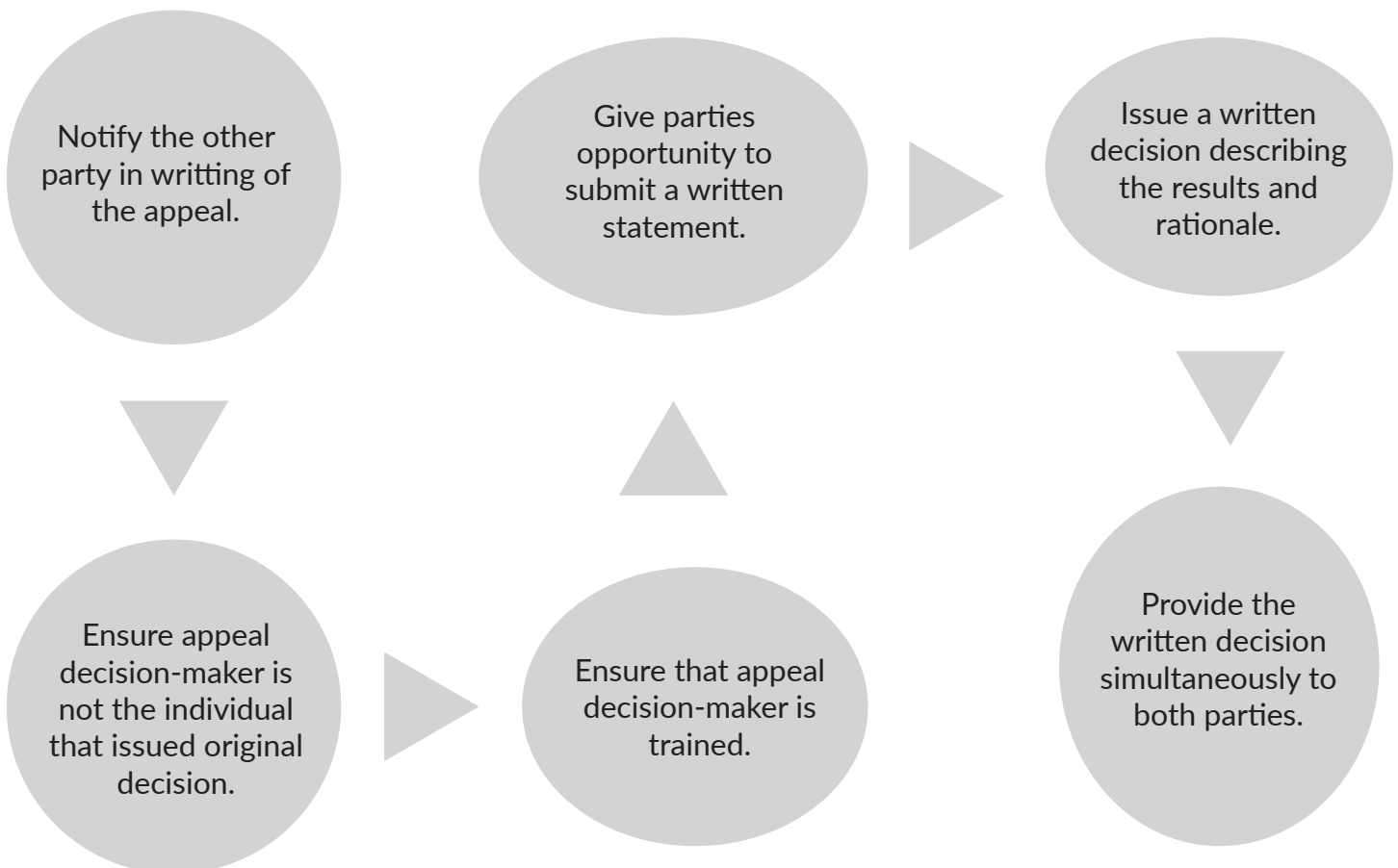
1. Procedural irregularity that affected the outcome;
2. New evidence that was not reasonably available at the time of the determination of responsibility has come to light; or
3. Title IX Coordinator, investigator, or decision-makers had a conflict of interest or bias for or against the complainant or respondent that affected the outcome of the matter.

Who handles appeals?

Federal law does not get into specifics. It is recommended that this information be placed in the local board policy. Options include, but are not limited to, the Board, an impartial hearing officer, or the Director of Schools.

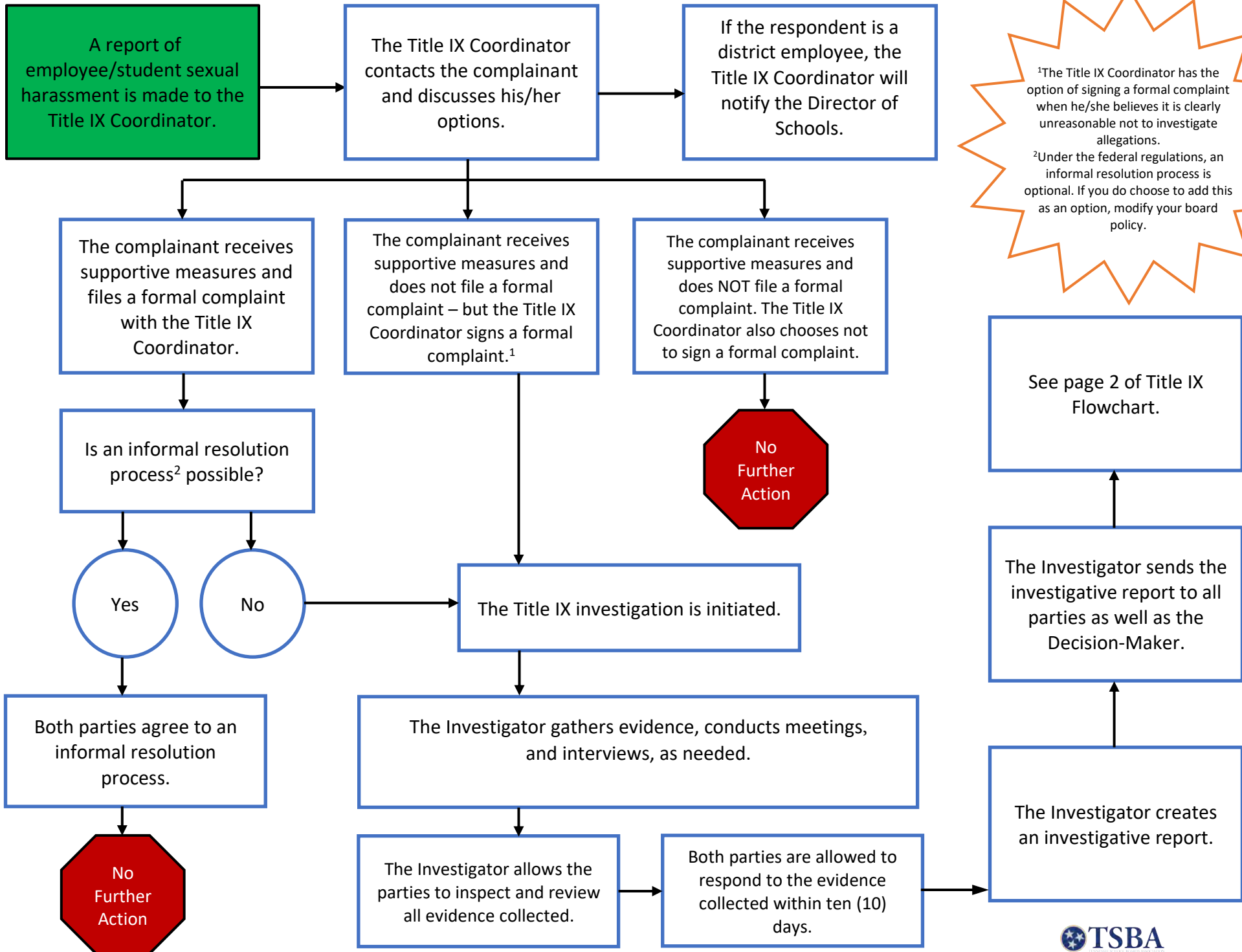
What steps are involved in an appeal?

For all appeals the district must ensure that the process below is followed.





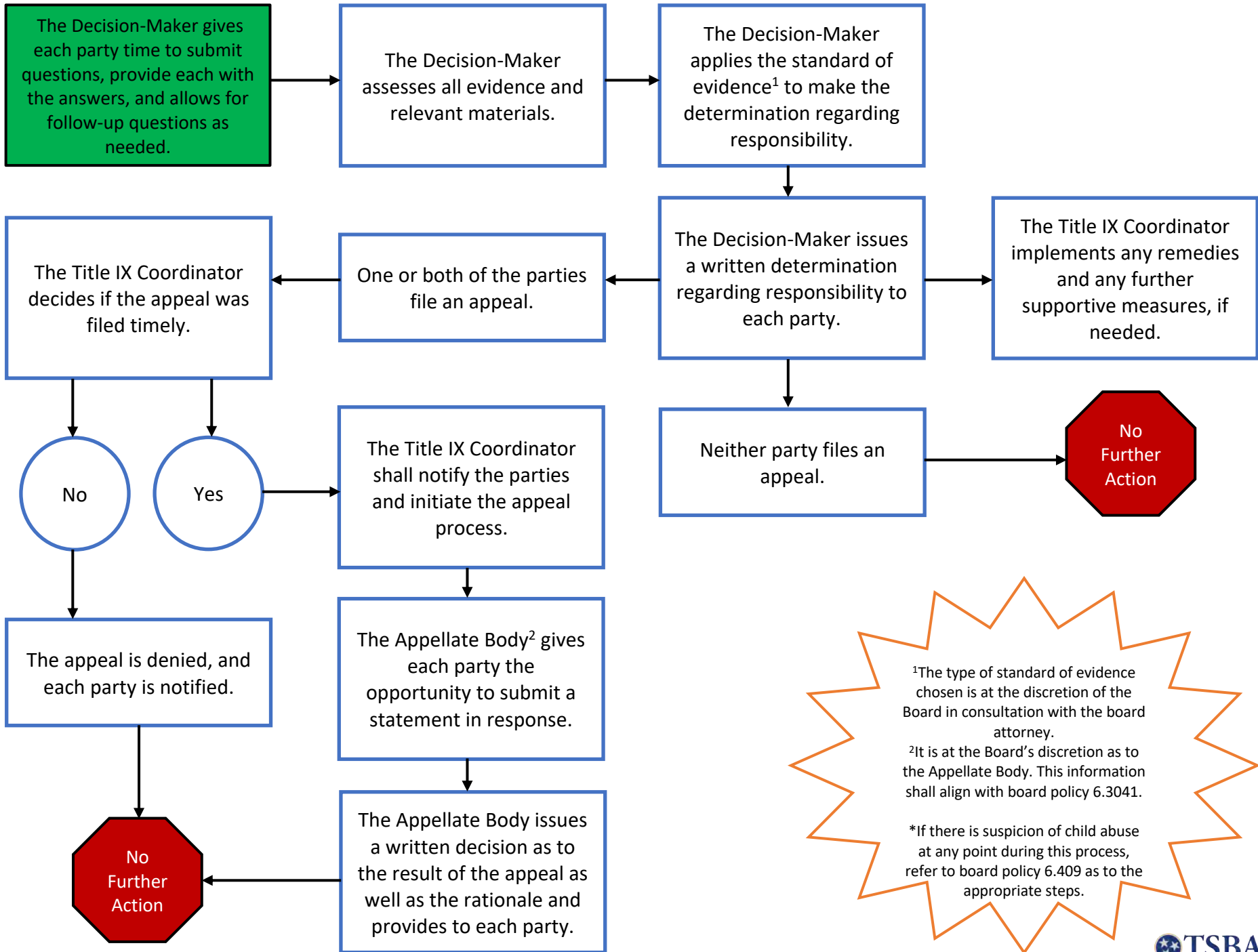
Appendix



¹The Title IX Coordinator has the option of signing a formal complaint when he/she believes it is clearly unreasonable not to investigate allegations.

²Under the federal regulations, an informal resolution process is optional. If you do choose to add this as an option, modify your board policy.





¹The type of standard of evidence chosen is at the discretion of the Board in consultation with the board attorney.

²It is at the Board’s discretion as to the Appellate Body. This information shall align with board policy 6.3041.

*If there is suspicion of child abuse at any point during this process, refer to board policy 6.409 as to the appropriate steps.

Click here to choose a school board.

Monitoring: Review: Annually, in March	Descriptor Term: Title IX & Sexual Harassment	Descriptor Code: 6.3041	Issued Date:
		Rescinds:	Issued:

1 *General*

2 In order to maintain a safe, civil, and supportive learning environment, all forms of sexual harassment
3 and discrimination on the basis of sex are prohibited.¹ This policy shall cover employees, employees'
4 behaviors, students, and students' behaviors while on school property, at any school-sponsored activity,
5 on school-provided equipment or transportation, or at any official school bus stop in accordance with
6 federal law. This policy shall be disseminated annually to all school staff, students, and
7 parent(s)/guardian(s).² The Title IX Coordinator as well as any personnel chosen to facilitate the
8 grievance process shall not have a conflict of interest against any party of the complaint.³ These
9 individuals shall receive training as to how to promptly and equitably resolve student and employee
10 complaints.³

11 All employees shall receive training on complying with this policy and federal law.⁴

12 **TITLE IX COORDINATOR**⁵

13 The Title IX Coordinator shall respond promptly to all general reports as well as formal complaints of
14 sexual harassment. He/she shall be kept informed by school-level personnel of all investigations and
15 shall provide input on an ongoing basis as appropriate.

16 Any individual may contact the Title IX Coordinator at any time using the information below:

17 **Title:**

18 **Mailing address:**

19 **Phone number:**

20 **Email:**

21 **DEFINITIONS**⁴

22 “Complainant” is an individual who is alleged to be the victim of conduct that could constitute sexual
23 harassment.

24 “Respondent” is an individual who is reported to be the perpetrator of conduct that could constitute
25 sexual harassment.

26 “Sexual harassment” is conduct on the basis of sex that satisfies one or more of the following:³

- 1 1. A school district employee conditioning an aid, benefit, or service of an education program or
2 activity on an individual's participation in unwelcome sexual conduct;
3
- 4 2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and
5 objectively offensive that it effectively denies a person equal access to the education program
6 or activity; or
- 7 3. Sexual assault,⁶ dating violence,⁷ domestic violence,⁸ or stalking⁹ as defined in state and federal
8 law.

9 Behaviors that constitute sexual harassment may include, but are not limited to:

- 10 1. Sexually suggestive remarks;
11
- 12 2. Verbal harassment or abuse;
13
- 14 3. Sexually suggestive pictures;
15
- 16 4. Sexually suggestive gesturing;
17
- 18 5. Harassing or sexually suggestive or offensive messages that are written or electronic;
19
- 20 6. Subtle or direct propositions for sexual favors; and
21
- 22 7. Touching of a sexual nature.

23 Sexual harassment may be directed against a particular person or persons, or a group, whether of the
24 opposite sex or the same sex.

25 "Supportive measures" are non-disciplinary, non-punitive, individualized services and shall be offered
26 to the complainant and the respondent, as appropriate. These measures may include, but are not limited
27 to, the following:

- 28 1. Counseling;
29
- 30 2. Course modifications;
31
- 32 3. Schedule changes; and
33
- 34 4. Increased monitoring or supervision.

35 The measures offered to the complainant and the respondent shall remain confidential to the extent that
36 maintaining such confidentiality would not impair the ability of the school district to provide the
37 supportive measures.

38 **GRIEVANCE PROCESS**

1 Upon learning of an instance of alleged sexual harassment, even if no formal complaint is filed, the
2 Title IX Coordinator shall:

- 3 1. Promptly contact the complainant to discuss the availability of supportive measures;
- 4
- 5 2. Consider the complainant's wishes with respect to supportive measures;
- 6
- 7 3. Inform the complainant of the availability of supportive measures; and
- 8
- 9 4. Explain the process for filing a formal complaint.¹⁰

10 While the school district will respect the confidentiality of the complainant and the respondent as much
11 as possible, some information may need to be disclosed to appropriate individuals. All disclosures shall
12 be consistent with the school district's legal obligations and the necessity to investigate allegations of
13 harassment and take disciplinary action.

14 Disciplinary consequences or sanctions shall not be initiated against the respondent until the grievance
15 process has been completed. Unless there is an immediate threat to the physical health or safety of any
16 student arising from the allegation of sexual harassment that justifies removal, the respondent's
17 placement shall not be changed.¹¹ If the respondent is an employee, he/she may be placed on
18 administrative leave during the pendency of the grievance process.¹² The Title IX Coordinator shall
19 keep the Director of Schools informed of any employee respondents so that he/she can make any
20 necessary reports to the State Board of Education in compliance with state law.¹³

21 **Complaints**

22 Any individual who has knowledge of behaviors that may constitute a violation of this policy shall
23 immediately report such information to the Title IX Coordinator, however, nothing in this policy requires
24 a complainant to either report or file a formal complaint within a certain timeframe. If the complaint
25 involves the Title IX Coordinator, the complaint shall be filed with the Director of Schools.

26 If a complaint involves allegations of child abuse, including child abuse on school grounds, appropriate
27 notification shall be made per the board policy on reporting child abuse.

28 Upon receipt of a formal complaint, the Title IX Coordinator shall promptly:¹⁴

- 29 1. Provide written notice of the allegations, and the grievance process to all known parties to give
30 the respondent time to prepare a response before an initial interview;
- 31
- 32 2. Inform the parties of the prohibition against making false statement or knowingly submitting
33 false information;
- 34
- 35 3. Inform the parties that they may have an advisor present during any subsequent meetings; and
- 36
- 37 4. Offer supportive measures in an equitable manner to both parties.

1 If the Title IX Coordinator dismisses a complaint, written notice, including the reasons for dismissal,
2 shall be provided to both parties simultaneously.¹⁵

3 **Investigations¹⁶**

4 **[NOTE: While the Title IX Coordinator may serve as the investigator, the investigator, decision-**
5 **maker, and the entity that hears appeals must all be separate persons/entities. If the Title IX**
6 **Coordinator serves as the investigator in your district, modify the language accordingly.]**

7 The **[insert title of employee]** shall serve as the investigator and be responsible for investigating
8 complaints in an equitable manner that involves an objective evaluation of all relevant evidence. The
9 burden for obtaining evidence sufficient to reach a determination regarding responsibility rests on the
10 school district and not the complainant or respondent.

11 Once a complaint is received, the investigator shall initiate an investigation within forty-eight (48) hours
12 of receipt of the complaint. If an investigation is not initiated within forty-eight (48) hours, the
13 investigator shall provide the Title IX Coordinator with appropriate documentation detailing the reasons
14 why the investigation was not initiated within the required timeframe.

15 All investigations shall be completed within twenty (20) calendar days from the receipt of the initial
16 complaint. If the investigation is not complete within twenty (20) calendar days, the investigator shall
17 provide the Title IX Coordinator with appropriate documentation detailing the reasons why the
18 investigation has not been completed.

19 All investigations shall:

- 20 1. Provide an equal opportunity for the parties to present witnesses and evidence;
21
- 22 2. Not restrict the ability of either party to discuss the allegations under investigation or gather
23 and present relevant evidence;
24
- 25 3. Refrain from requiring, allowing, relying upon, or otherwise using questions or evidence that
26 seek disclosure of information protected under a legally recognized privilege unless such
27 privilege has been waived;¹⁷
28
- 29 4. Provide the parties with the same opportunities to have others present during any grievance
30 proceeding;
31
- 32 5. Provide to parties whose participation is requested written notice of the date, time, location,
33 participants, and purpose of all investigative interviews, or other meetings, with sufficient time
34 for the party to prepare to participate;
35
- 36 6. Provide both parties an equal opportunity to inspect and review any evidence directly related to
37 the allegations in the formal complaint; and
38
- 39 7. Result in the creation of an investigative report that fairly summarizes relevant evidence.
40

- 1 a. Prior to the completion of the investigative report, the investigator shall send to each
2 party the evidence subject to inspection and review. All parties shall have at least ten
3 (10) days to submit a written response which shall be taken into consideration in
4 creating the final report.

5 Within the parameters of the federal Family Educational Rights and Privacy Act,¹⁸ the Title IX
6 Coordinator shall keep the complainant and the respondent informed of the status of the investigation
7 process. At the close of the investigation, a written final report on the investigation will be delivered to
8 the parent(s)/guardian(s) of the complainant, parent(s)/guardian(s) of the respondent, and to the
9 Director of Schools.

10 **Determination of Responsibility**¹⁹

11 The respondent is presumed not responsible for the alleged conduct until a determination regarding
12 responsibility is made at the conclusion of the grievance process.²⁰ The [insert either the
13 preponderance of the evidence standard OR the clear and convincing evidence standard] shall be
14 used in making this determination.²¹

15 [Insert title of employee] shall act as the decision-maker. He/she shall receive the final report of the
16 investigation and allow each party the opportunity to submit written questions that he/she wants asked
17 of any party or witness prior to the determining responsibility.

18 The decision-maker shall make a determination regarding responsibility and provide the written
19 determination to the parties simultaneously along with information about how to file an appeal.

20 A substantiated charge against a student may result in corrective or disciplinary action up to and
21 including expulsion. A substantiated charge against an employee shall result in disciplinary action up to
22 and including termination.

23 After a determination of responsibility is made, the Title IX Coordinator shall work with the complainant
24 to determine if further supportive measures are necessary. The Title IX Coordinator shall also determine
25 whether any other actions are necessary to prevent reoccurrence of the harassment.

26 **APPEALS**²²

27 Either party may appeal from a determination of responsibility based on a procedural irregularity that
28 affected the outcome, new evidence that was not reasonably available at the time of the determination
29 that could affect the outcome, or an alleged conflict of interest on the part of the Title IX Coordinator or
30 any personnel chosen to facilitate the grievance process. Appeals shall be submitted to the Title IX
31 Coordinator within ten (10) days of a determination of responsibility.

32 Upon receipt of an appeal, the Title IX Coordinator shall:

- 33 1. Assign an impartial hearing officer [or insert other entity that may hear the appeal] within
34 five (5) days of receipt of the appeal; and
35
36 2. Notify the parties in writing.

1 During the appeal process, the parties shall have a reasonable, equal opportunity to submit written
 2 statements. Within ten (10) calendar days, the hearing officer shall issue a written decision describing
 3 the result of the appeal and the rationale for the result. The written decision shall be provided
 4 simultaneously to both parties.

5 **RETALIATION**²³

6 Retaliation against any person who makes a report or complaint or assists, participates, or refuses to
 7 participate in any investigation of an act alleged in this policy is prohibited.

Legal References

1. 34 CFR § 106.1
2. 34 CFR § 106.8(b),(c)
3. 34 CFR § 106.45(b)(1)(iii); 34 CFR § 106.45(b)(10)(D)
4. 34 CFR § 106.30(a)
5. 34 CFR § 106.8(a)
6. 20 USCA 1092(f)(6)(A)(v); TCA 36-3-601(10); TCA 71-6-302
7. 34 USCA 12291(a)(10)
8. 34 USCA 12291(a)(8); TCA 40-14-109
9. 34 USCA 12291(a)(30); TCA 39-17-315; TCA 36-3-601(11)
10. 34 CFR § 106.44(a)
11. 34 CFR § 106.44(c)
12. 34 CFR § 106.44(d)
13. TRR/MS 0520-02-03-.09(2); TCA 49-5-417(c)
14. 34 CFR § 106.45(b)(2)
15. 34 CFR § 106.45(b)(3)
16. 34 CFR § 106.45(b)(5); 34 CFR § 106.45(b)(1)(v)
17. 34 CFR § 106.45(b)(1)(x)
18. 20 USCA § 1232g
19. 34 CFR § 106.45(b)(7)
20. 34 CFR § 106.45(b)(1)(iv)
21. 34 CFR § 106.45(b)(1)(vii)
22. 34 CFR § 106.45(b)(8)
23. 34 CFR § 106.71

Cross References

Section 504 and ADA Grievance Procedures 1.802
 Discrimination/Harassment of Employees (Sexual, Racial,
 Ethnic, Religious) 5.500
 Complaints and Grievances 5.501
 Staff-Student Relations 5.610
 Code of Conduct 6.300
 Student Discrimination, Harassment, Bullying, Cyber-
 bullying, and Intimidation 6.304
 Student Concerns 6.305
 Reporting Child Abuse 6.409

Title IX Coordinator Checklist

If a report is filed...

- Respond promptly in a manner that is not deliberately indifferent by contacting the complainant and discussing: (1) the availability of supportive measures; (2) the complainant's wishes regarding supportive measures; (3) the availability of supportive measures with or without the filing of a formal complaint; and (4) the process for filing a formal complaint.
- Notify the Director of Schools if the respondent in the report is a district employee.
- Coordinate effective implementation of supportive measures for the complainant.
- Keep a detailed record of all actions taken in response to a report being filed.

If a formal complaint is filed...

- Provide written notice to each party that a formal complaint has been filed.
- Coordinate effective implementation of supportive measures for the complainant.
- Forward the formal complaint to the Investigator within forty-eight (48) hours of receipt. *[if the Title IX Coordinator is different than the Investigator]*
- Keep the complainant and respondent informed during the investigation process.
- Send written notice to the complainant and respondent if the formal complaint is dismissed at any time during the grievance process.
- Ensure that the Decision-Maker receives all relevant materials to make a determination regarding responsibility once the investigation is completed.
- Effectively implement any remedies and further supportive measures, if needed by the complainant, based off the written determination regarding responsibility received from the Decision-Maker.
- Notify the other party in writing if a party appeals the determination regarding responsibility.
- Oversee the process leading up to the appeal, including assigning a hearing officer within five (5) days of the receipt of an appeal (if applicable).
- Keep a detailed record of all actions taken in response to a formal complaint being filed.
- Maintain all sexual harassment records, including any appeals, for seven (7) years.

If an appeal is filed...

- Determine if the appeal is filed timely (e.g. within ten (10) days of a determination regarding responsibility).
- Notify the other party in writing that an appeal has been filed.
- Initiate the appeal process by assigning an impartial hearing officer [**or insert other entity that may hear the appeal**] within five (5) days of receipt of the appeal.

Investigator Checklist

Within forty-eight (48) hours from the initial receipt of the formal complaint...

- Receive the formal complaint and all relevant materials from the Title IX Coordinator. *[if the Title IX Coordinator is different than the Investigator]*
- Initiate the investigation process based off the allegations in the written notice.
- Gather evidence sufficient to reach a determination regarding responsibility.
- Provide an equal opportunity for each party to present witnesses and submit additional evidence.
- Conduct meetings and interviews (if needed).
- Give written notice to all parties participating in a meeting or interview of the date, time, location, participants, and purpose with sufficient time for the party to prepare to participate.
- Provide each party an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised.
- Allow each party to respond to the evidence within ten (10) days.
- Create an investigative report that fairly summarizes the relevant evidence.
- Send to each party for their review and written response.
- Send a copy of the investigative report to the Director of Schools.
- Send the investigative report and evidence to the Decision-Maker.
- Notify the Title IX Coordinator when the investigation is completed.

Decision-Maker Checklist

After the Investigator has sent the investigative report to all parties...

- Receive the investigative report as well as all evidence and relevant materials from the Investigator.
- Afford each party the opportunity to submit written, relevant questions that a party wants to ask of any party or witness.
- Provide each party with the answers.
- Allow for additional, limited follow-up questions from each party.
- Assess all relevant evidence and materials surrounding the complaint.
- Apply [**insert either the preponderance of the evidence standard OR the clear and convincing evidence standard, as chosen by the Board**] to see if the burden of proof has been met.
- Make a determination regarding responsibility.
- Issue to each party a written determination regarding responsibility that includes: (1) identification of the allegations; (2) a description of the procedural steps taken; (3) findings of fact supporting the determination; (4) conclusions regarding the application of the district's code of conduct to the facts; (5) a statement of, and rationale for, the result as to each allegation; and (6) the procedures and permissible bases for the complainant and respondent to appeal.
- Send a copy of the written determination regarding responsibility to the Title IX Coordinator.

Appellate Body Checklist

When one or both parties file an appeal...

- Receive the written appeal, the evidence, and all relevant materials from the Title IX Coordinator.
- Implement appeal procedures equally for each party.
- Give each party a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
- Review the written statements as well as the evidence and all relevant materials to make a decision.
- Issue a written decision describing the result of the appeal and the rationale for the result within ten (10) calendar days.
- Provide the written decision to each party.

Reporting Title IX Grievances

Title IX Coordinator - Insert Name
INSERT SCHOOL DISTRICT NAME | INSERT ADDRESS

[Insert School District]

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Note: When adding new sections to this packet, use the process below to ensure that they will display in the table of contents.

1. Type the title of the new section.
2. Highlight the title and click the “Styles Pane” on the “Home” tab.
3. Select “Heading 1” for main sections, or “Heading 2” for subsections.
4. Go back to the top table of contents and click “Table of Contents”.
5. Click the arrow for the drop-down menu next to “Table of Contents” and select “Update table”.
6. A new window will appear. Within it, select “update entire table”.
7. Click “ok”.

[Insert School District]

Reports of Sexual Harassment

In order to maintain a safe, civil, and supportive learning environment, all forms of sexual harassment and discrimination on the basis of sex are prohibited. The Title IX Coordinator shall respond promptly to all general reports of sexual harassment.

Any individual who has knowledge of behaviors that may constitute a violation of Title IX shall immediately report such information to the Title IX Coordinator, however, nothing requires a complainant to either report or file a formal complaint within a certain timeframe. If the report involves the Title IX Coordinator, the report shall be filed with the Director of Schools.

Definitions

“Complainant” is an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

“Respondent” is an individual who is reported to be the perpetrator of conduct that could constitute sexual harassment.

“Reporter” is an individual who is submitting a report of sexual harassment to the Title IX Coordinator.

“Sexual harassment” is conduct on the basis of sex that satisfies one or more of the following:

1. A school district employee conditioning an aid, benefit, or service of an education program or activity on an individual’s participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking as defined in state and federal law.

Behaviors that constitute sexual harassment may include, but are not limited to:

1. Sexually suggestive remarks;
2. Verbal harassment or abuse;
3. Sexually suggestive pictures;
4. Sexually suggestive gesturing;
5. Harassing or sexually suggestive or offensive messages that are written or electronic;

[Insert School District]

6. Subtle or direct propositions for sexual favors; and
7. Touching of a sexual nature.

Sexual harassment may be directed against a particular person or persons, or a group, whether of the opposite sex or the same sex.

“Formal complaint” is a document filed by a complainant alleging sexual harassment against a respondent and requesting that the District investigate the allegation of sexual harassment.

“Education program or activity” is the locations, events, or circumstances over which the District exercised substantial control over both the respondent and the context in which the sexual harassment occurred.

Contact Information for Title IX Coordinator

Any individual may contact the Title IX Coordinator at any time using the information below:

Title:

Mailing address:

Phone number:

Email:

Retaliation

Retaliation against any person who makes a report or assists, participates, or refuses to participate in any investigation of an act alleged is prohibited.

Examples of retaliation may include termination, refusal to hire, demotion, and denial of promotion. Retaliation may also include threats, intimidation, coercion, unjustified negative evaluations, unjustified negative references, or increased surveillance.

Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation

Contact the Title IX Coordinator if there is the possibility that retaliation has occurred.

Confidentiality

[Insert School District]

The District will keep the report confidential as allowed by law. However, it may be necessary to disclose information contained in the report in order to investigate the conduct alleged and to administer appropriate consequences.

If you have any questions regarding how the information contained in the report may be used, please discuss them with the Title IX Coordinator prior to submitting the report. Once the report is submitted, the District has an obligation to investigate the information provided.

General Report of Sexual Harassment (Form)

NOTE: Individuals may report and choose to remain anonymous. In such cases, no signature is necessary OR this form can be filled out by a district employee and submitted

[Insert School District]

to the Title IX Coordinator. Submitting this form is distinct from submitting a formal complaint as it will not result in the beginning of the grievance process.

Name of Person Reporting: _____

Email address: _____ Phone Number: _____

Location(s), date(s), and time(s) of incident(s) (if unknown, provide approximate timeframes):

Nature of the Incident: _____

Name of Witness (if any): _____

Please provide any additional relevant information: _____

Name or identity of the individual(s) alleged to have committed the misconduct: _____

Relationship to reporting individual:

- Student
- Boyfriend/girlfriend
- Staff
- Other: _____

Incident Reported By: _____ Date: _____

[Insert School District]

Form Completed By: _____ Date: _____

I understand that, by providing this information, I am not initiating a complaint under the District's formal complaint process. I also understand that, if I choose to remain anonymous, the District will not know who I am, and this may limit its ability to respond to the incident I am reporting.

Signature of Reporter

Date

[Insert School District]

Communication with the Complainant

Upon learning of an instance of alleged sexual harassment, even if no formal complaint is filed, the Title IX Coordinator shall:

1. Promptly contact the complainant to discuss the availability of supportive measures;
2. Consider the complainant's wishes with respect to supportive measures; and
3. Inform the complainant of the availability of supportive measures.

Supportive Measures

Supportive measures are non-disciplinary, non-punitive, individualized services and shall be offered to the complainant and the respondent, as appropriate.

The measures offered to the complainant and the respondent shall remain confidential to the extent that maintaining such confidentiality would not impair the ability of the District to provide the supportive measures.

Based on availability, the following supportive measures will be offered accordingly to the circumstances of the situation:

1. Counseling;
2. Course modifications;
3. Schedule changes;
4. Increased monitoring or supervision;
5. **[Insert additional supportive measures.]**

Initial Meeting with the Title IX Coordinator

The specifics of these supportive measures as well as the implementation will be discussed and determined during a meeting between the complainant and the Title IX Coordinator.

The Title IX Coordinator will contact the complainant to schedule this meeting within one (1) calendar day of the Title IX Coordinator receiving the report.

[Insert School District]

Process for Filing a Formal Complaint

Upon learning of an instance of alleged sexual harassment, even if no formal complaint is filed, the Title IX Coordinator shall explain to the complainant the process for filing a formal complaint.

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 District with which the formal complaint is filed.

A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail by using the contact information listed for the Title IX Coordinator. **[Insert any additional method designated by the District for filing a formal complaint (e.g. online portal).]**

Signature of Title IX Coordinator

When the complainant wishes not to file a formal complaint, the Title IX Coordinator has the option of signing a formal complaint when he/she believes it is clearly unreasonable not to investigate the allegations.

Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party.

[Insert School District]

Formal Complaint of Sexual Harassment (Form)

NOTE: A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail. [Insert additional methods if so designated by the District.] Filing a formal complaint initiates the grievance process. After the formal complaint is filed, written notice regarding the allegations will be prepared and given to both parties – the complainant and the respondent.

Name of Person Filing: _____

Location(s), date(s), and time(s) of incident(s) (if unknown, provide approximate timeframes):

Nature of the Incident: _____

Name of Witness (if any): _____

Please provide any additional relevant information: _____

Name or identity of the individual(s) who committed the misconduct: _____

Relationship to reporting individual:

- Student
- Boyfriend/girlfriend
- Staff
- Other _____

Signature of Filer

Date

[Insert School District]

Title IX Coordinator's Designation of Report (Form)

***Note: This form is for the Title IX Coordinator to complete once an initial review of the sexual harassment report is conducted. The Designation of Report will be shared with the reporter and may require the reporter to share additional information.**

After review, the report is designated as:

- A report giving the District actual knowledge of allegations of sexual harassment under Title IX (including retaliation) that satisfies one or more of the following (check all that apply):
 - An employee of the District conditioning the provision of an aid, benefit, or service of the District on an individual's participation in unwelcome sexual conduct.
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District's education program or activity.
 - "Sexual assault" which includes offenses classified as a forcible or non-forcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. These classifications include any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of consent.
 - Under federal law, sexual assault includes rape, sodomy, sexual assault with an object, fondling, incest, and statutory rape.
 - Under state law, sexual assault also includes: (1) any person, regardless of the relationship with the perpetrator, who has been subjected to, threatened with, or placed in fear of any form of rape or sexual battery; and (2) the commission of any act that constitutes any of the following criminal offenses: aggravated rape, rape of a child, aggravated sexual battery, sexual battery by an authority figure, sexual exploitation of a minor, aggravated sexual exploitation of a minor, solicitation of a minor, especially aggravated sexual exploitation of a minor, solicitation of a minor, criminal attempt, solicitation, or conspiracy to commit any of the above offenses, or the criminal responsibility for facilitating the commission of or being an accessory after the fact to any of the offenses as stated above.
 - "Dating violence" is violence committed by a person: (1) who is or has been in a social relationship of a romantic or intimate nature with the victim; and where the existence of such a relationship shall be determined based on consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

[Insert School District]

- “Domestic Violence” is a felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under state law, or by any other person against an adult or youth victim who is protected from that person’s acts under state law.
 - Under state law, domestic violence also includes an offense that (1) is classified as a misdemeanor; (2) has an element of the use or attempted use of physical force or the threatened use of a deadly weapon; and (3) is committed by a current or former spouse, parent, or guardian of the victim; person with whom the victim shares a child in common; person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or person similarly situated to a spouse, parent, or guardian of the victim.

- “Stalking” is engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his/her safety or the safety of others or suffer substantial emotional distress.
 - Under state law, stalking also includes a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

- OR -

- NOT** a report giving the District actual knowledge of allegations of sexual harassment under Title IX. These allegations reported fall under the following category:
 - An employee complaint of discrimination and/or harassment or associated retaliation.
 - A student complaint of bullying, discrimination, cyber-bullying, harassment, etc. or associated retaliation.
 - An employee grievance regarding a violation of federal rights.
 - A student grievance regarding unfair treatment.
 - A report of potential misbehavior the reporter is required to provide the District or voluntarily provides the district. The reporter seeks no other action.
 - Other (explain): _____

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And, therefore:

- While these allegations are not considered sexual harassment under Title IX, the Title IX Coordinator has determined that the allegations could still result in disciplinary action, and the district shall continue to investigate under a different process. The reported allegations will be transferred to **[insert title of employee and contact information]** who will continue the investigation in accordance with board policy and/or administrative procedures; or
- No further action is being taken on the reported allegations at this time.

Upon making the foregoing designation, a copy of this completed form shall be provided to the reporter.

Signature of Title IX Coordinator

Date

[Insert School District]

Resources Page

[Insert additional resource information that could be utilize for an individual reporting a sexual harassment grievance (e.g. Title IX & Sexual Harassment board policy).]

For the reasons discussed in the preamble, the Secretary amends part 106 of title 34 of the Code of Federal Regulations as follows:

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

2. Section 106.3 is amended by revising paragraph (a) to read as follows:

§106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682.

* * * * *

3. Section 106.6 is amended by revising the section heading and adding paragraphs (d), (e), (f), (g), and (h) to read as follows:

§ 106.6 Effect of other requirements and preservation of rights.

* * * * *

(d) *Constitutional protections.* Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA)*. The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

(f) *Title VII of the Civil Rights Act of 1964*. Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.

(g) *Exercise of rights by parents or guardians*. Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

(h) *Preemptive effect*. To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

4. Section 106.8 is revised to read as follows:

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

(a) *Designation of coordinator*. Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator." The recipient must notify applicants

for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

(b) *Dissemination of policy*—(1) *Notification of policy*. Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

(2) *Publications*. (i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook

or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.

(c) *Adoption of grievance procedures.* A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

(d) *Application outside the United States.* The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

5. Section 106.9 is revised to read as follows:

§ 106.9 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

6. Section 106.12 is amended by revising paragraph (b) to read as follows:

§ 106.12 Educational institutions controlled by religious organizations.

* * * * *

(b) *Assurance of exemption.* An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

* * * * *

7. Add § 106.18 to subpart B to read as follows:

§ 106.18 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

8. Add § 106.24 to subpart C to read as follows:

§ 106.24 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

9. Add § 106.30 to subpart D to read as follows:

§ 106.30 Definitions.

(a) As used in this part:

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 authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Consent. The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or

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

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

(b) As used in §§ 106.44 and 106.45:

Elementary and secondary school means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.

Postsecondary institution means an institution of graduate higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), or an institution of vocational education as defined in § 106.2(o).

10. Add § 106.44 to subpart D to read as follows:

§ 106.44 Recipient's response to sexual harassment.

(a) *General response to sexual harassment.* A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department may not deem a

recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) *Response to a formal complaint.* (1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) *Emergency removal.* Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

11. Add § 106.45 to subpart D to read as follows:

§ 106.45 Grievance process for formal complaints of sexual harassment.

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) *Grievance process.* For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

(1) *Basic requirements for grievance process.* A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(ii) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the

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

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

(ix) Describe the range of supportive measures available to complainants and respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) *Notice of allegations*—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(3) *Dismissal of a formal complaint*—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient

must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) *Consolidation of formal complaints.* A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

(5) *Investigation of a formal complaint.* When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records

that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with 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 be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal

complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

(6) *Hearings.* (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the

parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio

or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

(7) *Determination regarding responsibility.* (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

(8) *Appeals.* (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) *Informal resolution.* A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to

participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

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

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) *Recordkeeping.* (i) A recipient must maintain for a period of seven years records of –

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) 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.

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

12. Add §_106.46 to subpart D to read as follows:

§ 106.46 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

13. Add § 106.62 to subpart E to read as follows:

§ 106.62 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

14. Subpart F is revised to read as follows:

Subpart F–Retaliation

Sec.

106.71 Retaliation

106.72 Severability

Subpart F–Retaliation

§ 106.71 Retaliation.

(a) *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. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or

filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(b) *Specific circumstances.* (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

§ 106.72 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

15. Add subpart G to read as follows:

Subpart G – Procedures

Sec.

106.81 Procedures

106.82 Severability

Subpart G – Procedures

§ 106.81 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR part 101. The definitions in § 106.30 do not apply to 34 CFR 100.6-100.11 and 34 CFR part 101.

§ 106.82 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subject Index to Title IX Preamble and Regulation [Removed]

16. Remove the Subject Index to Title IX Preamble and Regulation.

17. In addition to the amendments set forth above, in 34 CFR part 106, remove the parenthetical authority citation at the ends of §§ 106.1, 106.2, 106.3, 106.4, 106.5, 106.6, 106.7, , 106.11, 106.12, 106.13, 106.14, 106.15, 106.16, 106.17, 106.21, 106.22, 106.23, 106.31, 106.32, 106.33, 106.34, 106.35, 106.36, 106.37, 106.38, 106.39, 106.40, 106.41, 106.42, 106.43, 106.51, 106.52, 106.53, 106.54, 106.55, 106.56, 106.57, 106.58, 106.59, 106.60, and 106.61.

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