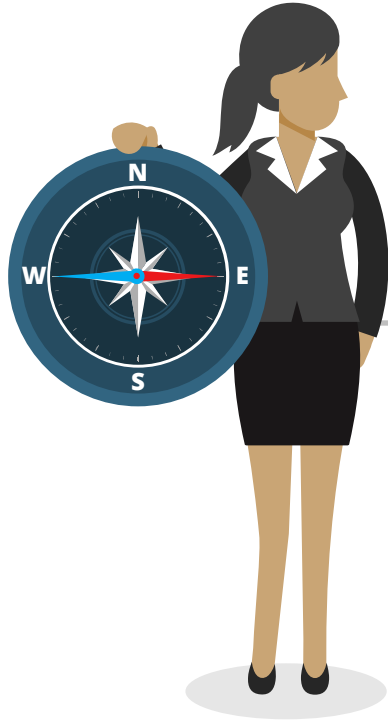


NAVIGATING TITLE IX

In the K-12 Setting
Holly Dincman, Esq.
Coppins Monroe, P.A.

CM
COPPINS
MONROE

Where Are We Headed Today?



**Title IX
Overview**



**Defining
Sexual
Harassment
Under Title IX**



**Reporting
Sexual
Harassment.**

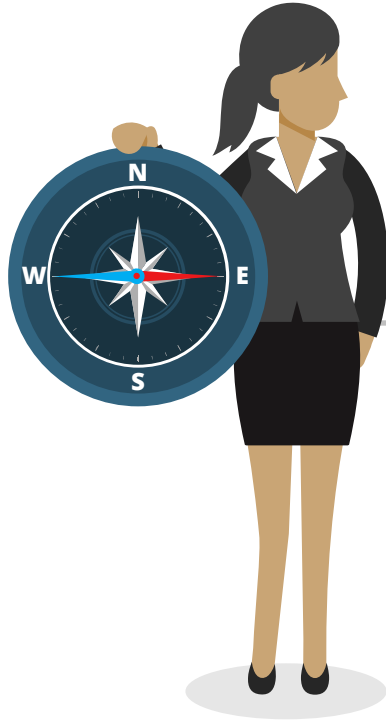


**How Schools
Must Respond**



**Deciding
whether an
incident falls
under Title
IX.**

Where Are We Headed Today?



**Stages of the
Title IX
Grievance
Process**



**The
School's
Responsibilities**



**Student and
Employee
Rights**



**Title IX Team
Members and
Their Roles**



**Confidentiality
and
Recordkeeping
Requirements**

Title IX provides.....



“[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).

Title IX Prohibits Discrimination On the Basis of Sex



- “Sex-based discrimination” is not actually defined in the Title IX regs.
- The USDOE follows the Supreme Court’s approach in interpreting conduct on the basis of sex – includes **conduct of a sexual nature or conduct referencing or aimed at a particular sex.**
- Discrimination *includes sexual harassment.*
- Requires equity in the treatment of complainant and respondent.

The Current Regulations Took Effect August 14, 2020

USDOE ISSUED NEW
REGULATIONS
IMPLEMENTING TITLE IX



NEW DEFINITIONS



NEW INVESTIGATION
REQUIREMENTS



Covered Groups

Student-on-Student

Employee-on-Student

Employee-on-Employee

Applicants for admission and employment

Student organizations

Third parties participating in an education program or activity

A school's obligation to respond appropriately to Title IX complaints is the same irrespective of the sex of the parties involved.

Sexual Harassment is conduct based on sex, and....



1. A school employee **conditions** receipt of a benefit on **participating** in unwelcome sexual conduct, **or**
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 school's education program or activity, **or**
3. **Sexual assault, dating violence, domestic violence, or stalking**, as those terms are defined by federal law.

The “new” regulations actually *narrowed* the definition of sexual harassment.

Defining Sexual Harassment – Quid Pro Quo

An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct is commonly referred to as *quid pro quo* harassment, which in Latin means “this for that.”

- It occurs when a school employee (or agent of the school) creates a situation in which a student's participation in an education program or activity is conditioned on the student's submission to sexual conduct, whether verbal, nonverbal, or physical in nature.
- For example, if a biology teacher offers to raise a student's lab-grade if they perform sexual favors for the teacher, then that would almost certainly constitute *quid pro quo* harassment.
- It's worth noting that *quid pro quo* harassment does not require explicit conduct. The harassment may be implicit. If a teacher continuously makes veiled allusions as to their request for student sexual favors without outright saying so, then that may still qualify as *quid pro quo* harassment.

Defining Sexual Harassment – Hostile Environment

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 school's education program or activity is commonly referred to as "hostile environment" harassment.

- Reasonable person means a reasonable person in the shoes of the complainant, considering the ages, abilities, and relative positions of authority of the individuals involved in an incident.
- Examples of this include bullying, abusive, or intimidating comments and actions based on sex, intimidating or offensive comments that alter the conditions of a person's work, classroom, team, or program environment, or continual offensive comments or surroundings of a discriminatory or sexual nature.

Defining Sexual Harassment – Sexual Assault

Sexual assault means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

Forcible: Any sexual act directed against another person, without consent or where the victim is incapable of consent; includes forcible rape, forcible sodomy, sexual assault with an object, or forcible fondling.

Nonforcible: Unlawful, nonforcible sexual intercourse, which includes incest and statutory rape.

The definition of sexual assault, dating violence, and stalking no longer include violations that occur outside an educational program or off-campus.

Defining Sexual Harassment – Dating Violence

Dating violence means *violence* committed by a person:

- 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 a consideration of the following factors:
 - The length of the relationship;
 - The type of the relationship;
 - The frequency of the interaction between the persons involved in the relationship.

Defining Sexual Harassment – Domestic Violence

Domestic violence includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim.

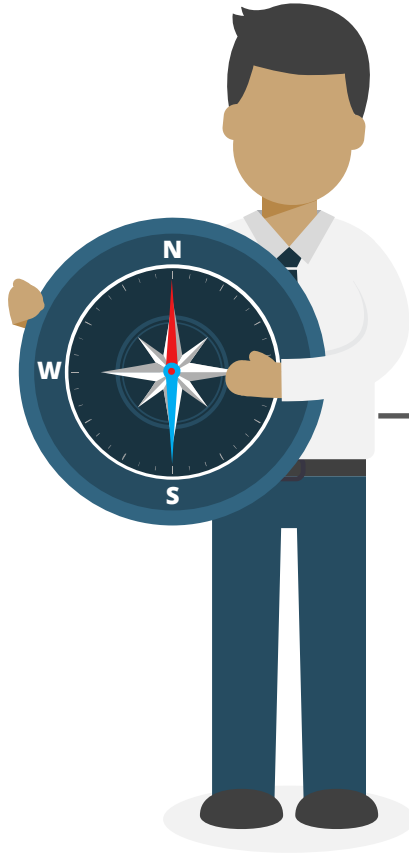
Defining Sexual Harassment – Stalking

Stalking means engage in a course of conduct directed at a specific person that would cause a reasonable person to:

Fear for his or her safety or the safety of others; or

Suffer substantial emotional distress.

Reporting Sex Discrimination or Harassment – the Who, When, and How.



Any person can report. It does not matter if the person is the victim or not.



In person, by mail, by telephone, or by e-mail, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

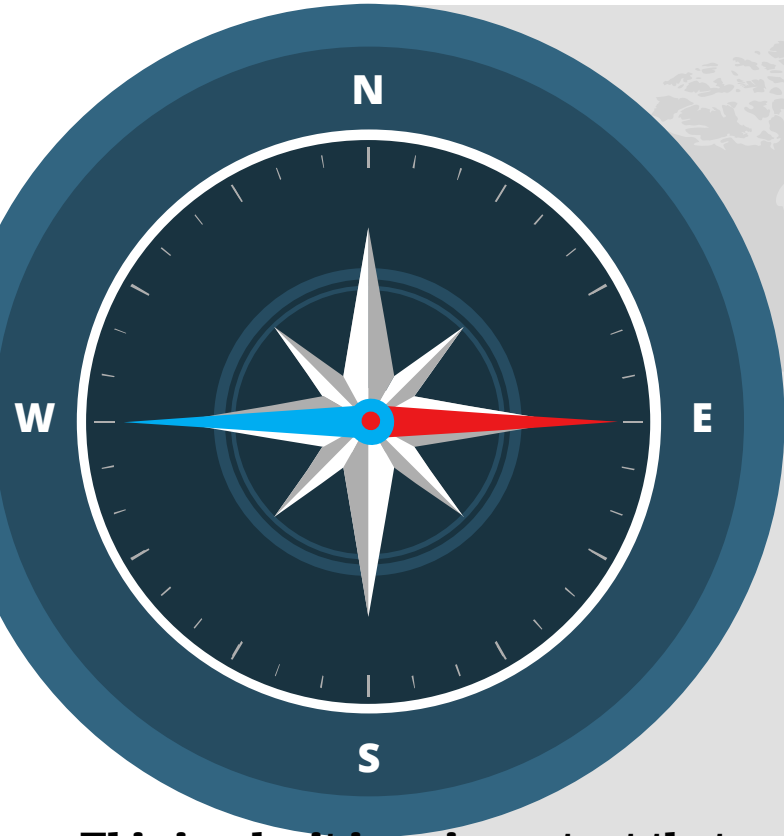


Report can be made at any time, including non-business hours by using the Title IX Coordinator's phone, email or mail address.



Title IX Coordinator, official with authority to institute corrective measures or any employee of an elementary or secondary school.

Very Important Definition – Actual Knowledge



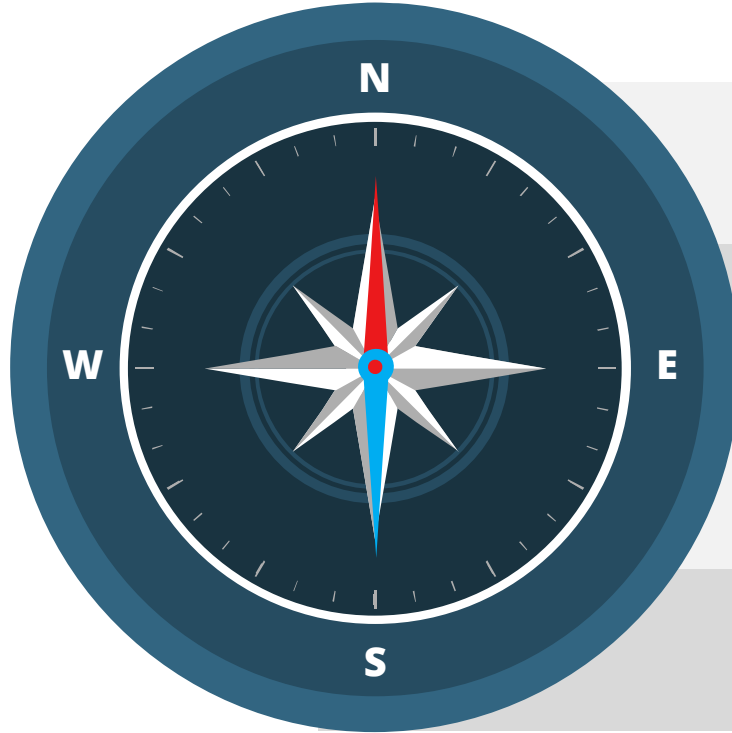
Actual knowledge means 1) notice of sexual harassment or 2) *allegations* of sexual harassment

To

- 1) Title IX Coordinator or**
- 2) any official with authority to institute corrective measures, or**
- 3) any employee of an elementary and secondary school.**

This is why it is so important that every employee understands the obligation to quickly report and how to report.

“Schools” Must:



HAVE A POLICY AND
DISSEMINATE POLICY

1



IDENTIFY A TITLE IX
COORDINATOR

2



OFFER SUPPORTIVE
MEASURES

3



HAVE AND FOLLOW A
GRIEVANCE PROCESS

4

RESPONSE TO ALLEGATIONS OF SEX 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.

Recipient

Recipient of federal funds.

All public school districts in Florida receive federal funds.

Actual Knowledge

- Actual knowledge means notice of 1) sexual harassment or 2) 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
 - Any employee of an elementary and secondary school.
- All employees (not just instructional) need to be trained in the Title IX definitions of sexual harassment and need to be trained on how to inform a student to go about making a report, and their obligation to report to the Title IX Coordinator, even if the student does not make a report.

Educational Program or Activity

- “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,
- Also includes any **building owned or controlled by a student organization** that is officially recognized by a postsecondary institution.
- Includes internet networks, digital platforms, and computer equipment owned or controlled by the District.
- Includes field trips, virtual learning, school buses, and athletic events.

Person in the United States

- Title IX regs do not extend to conduct that occurs outside the United States.
- This is a basis for dismissal of a formal complaint for purposes of sexual harassment under Title IX, although it does not preclude action under another provision of the recipient's code of conduct.

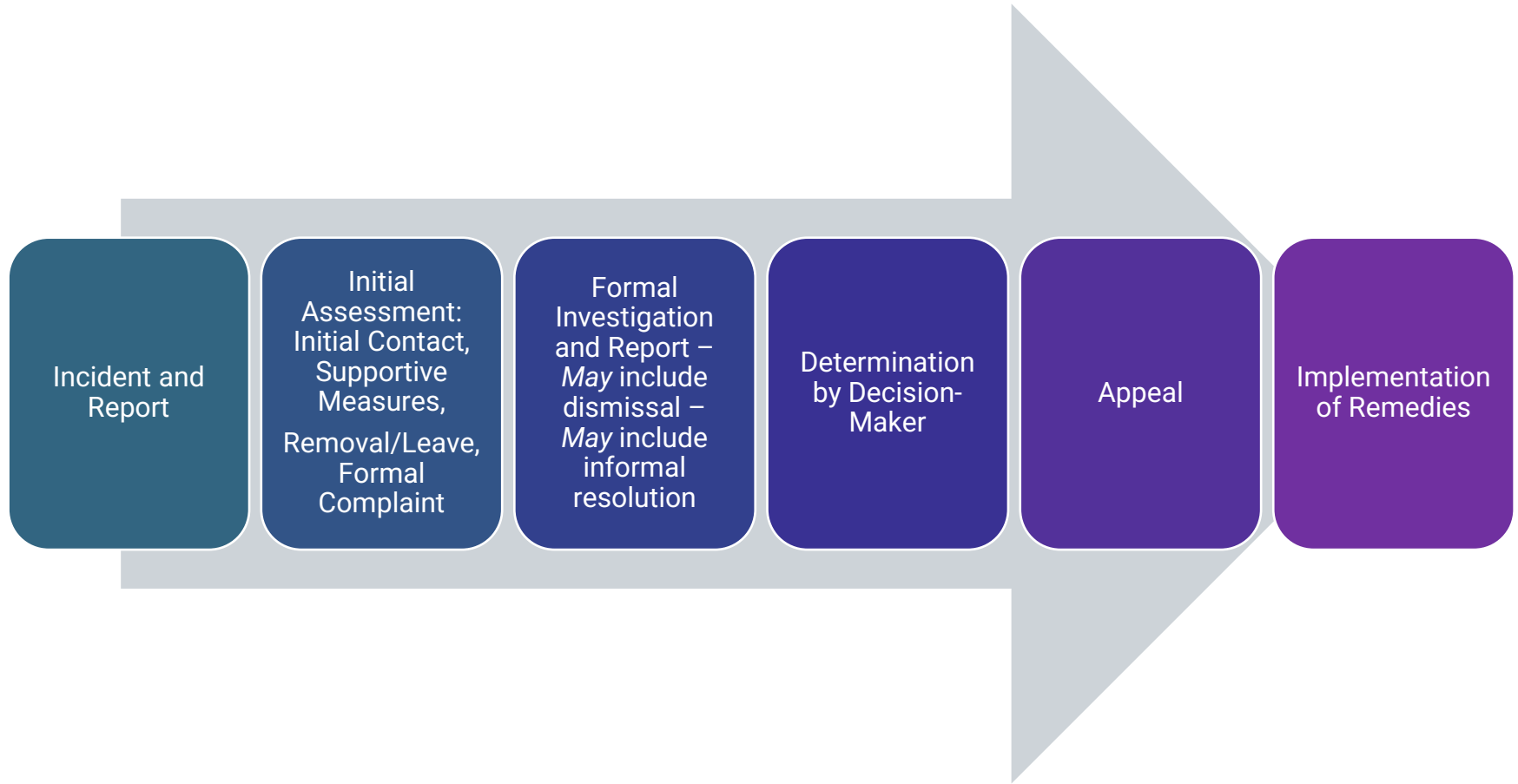
**DELIBERATE
INDIFFERENCE**
**School is
deliberately
indifferent if it
acted
unreasonably in
light of the
known
circumstances.**

- *Davis v. Monroe County Bd. of Education*, 526 U.S. 629 (1999).
- Female 5th-grade student in Georgia.
- Reported to parents and teacher three incidents during school by a male classmate.
- Mom speaks to the teacher.
- Eventually, parents speak to the principal.
- Teacher assures parents that she has spoken with the principal.
- No disciplinary action is taken in response.
- Student reports to P.E. teacher when a male classmate puts a door stop in her pants and motions toward the student.
- Another student asks to speak to the principal but is denied.
- The female student's grades plummet, she does not want to attend school, she writes a suicide note.
- The male student was charged with and pled guilty to sexual battery.

**DELIBERATE
INDIFFERENCE**
**School is
deliberately
indifferent if it
acted
unreasonably in
light of the
known
circumstances.**

- *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998).
- High school student had a sexual relationship with one of her teachers.
- They were discovered having sex and the teacher was arrested and fired.
- Before the discovery of the relationship, the principal received multiple parent complaints that the teacher made sexually suggestive remarks to other students.
- The teacher had been confronted about the suggestive remarks, apologized, and was warned about his conduct but the principal did not investigate the matter further.
- The U.S. Supreme Court held that a Title IX plaintiff could not recover damages “unless an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.” Later on, the Court provided that deliberate indifference occurs when such an official possesses “actual knowledge of discrimination,” and, “fails adequately to respond.”

The Process – A View from 10,000 Feet



Title IX Coordinator



The Title IX Coordinator Does A Lot:

- Ensures policy and procedures are updated.
- Ensures notices are given to staff and students.
- Ensures formal complaints are investigated.
- Ensures supportive measures are identified and implemented.
- Ensures appropriate steps to prevent immediate harm (removal/leave) are taken.
- Ensures Title IX personnel – coordinators, investigators, decision-makers, appeals officers – are appointed and trained.
- Ensures proper record-keeping.
- Ensures proper interaction with law enforcement and outside agencies.
- Generally oversees the Title IX investigation and decision-making process.

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graph LR; A[Title IX Coordinator Receives Report] --> B[Title IX Coordinator promptly contacts complainant to discuss supporting measures and process for filing a formal complaint.]; B --> C[Title IX Coordinator considers complainant's wishes regarding supportive measures and provides even without a formal complaint.];
```

Title IX Coordinator
Receives Report

Title IX Coordinator
promptly contacts
complainant to discuss
supporting measures
and process for filing a
formal complaint.

Title IX Coordinator
considers complainant's
wishes regarding
supportive measures
and provides even
without a formal
complaint.

EXAMPLES

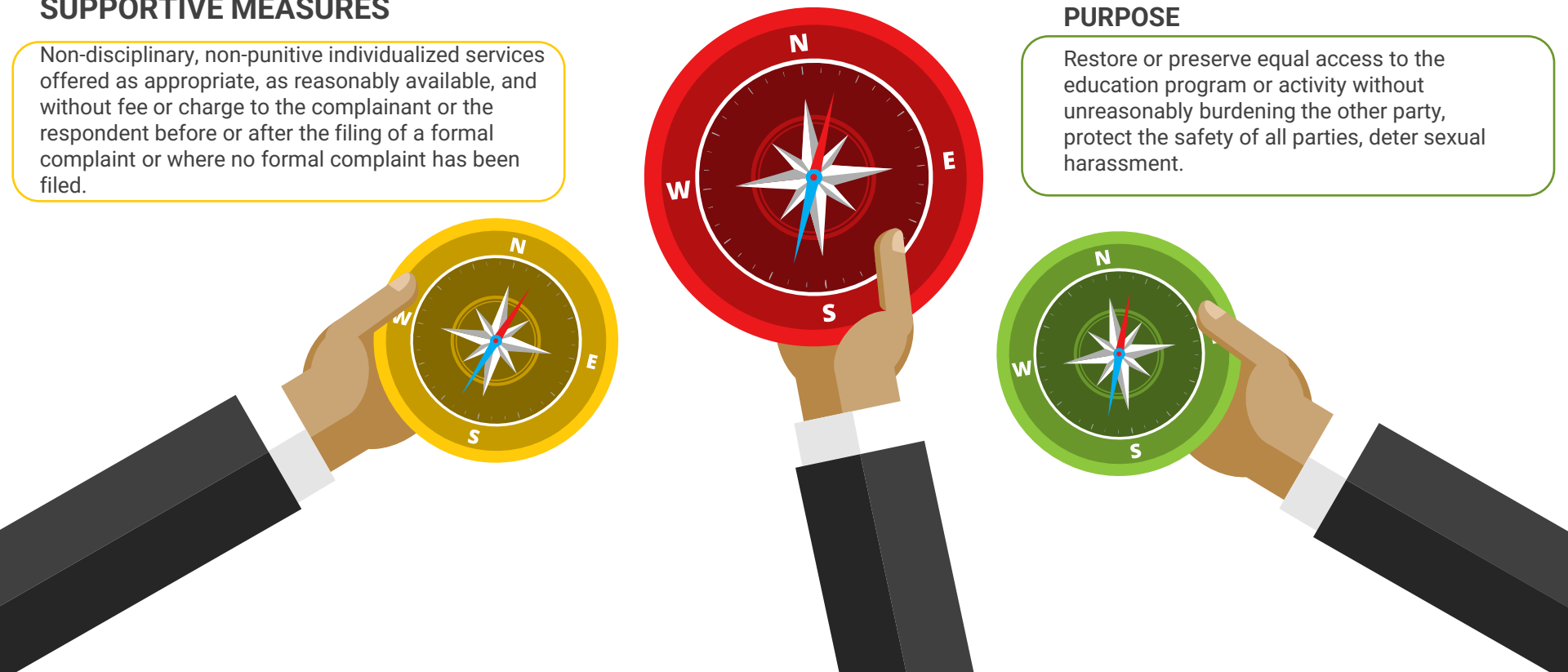
Counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

SUPPORTIVE MEASURES

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.

PURPOSE

Restore or preserve equal access to the education program or activity without unreasonably burdening the other party, protect the safety of all parties, deter sexual harassment.



The Formal Complaint Requirement



Previously, a formal complaint was not required.



Now a “formal complaint” is required and means:

The Complainant files a written complaint, or
The Title IX Coordinator files a written complaint.
No other third-party complaints.

Report vs. Formal Complaint

Report

- Can be verbal or written.
- Actual knowledge by school employee of harassment or
- Actual knowledge by employee of report, or
- Complainant reports to Title IX Coordinator, but no formal complaint has been filed.

Formal Complaint

- By the Complainant in writing, or
- By the Title IX Coordinator

Emergency Removal of Student Respondents

- This *is* permitted, but the district must first:
 - Undertake an individualized safety and risk analysis, and
 - Determine 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
 - Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.

Administrative Leave for Employee Respondents

- The regulations allow Districts to place employee respondents on administrative leave during the pendency of the grievance process.

Mandatory Dismissal of Complaints

A formal complaint **must** immediately be dismissed if:

- The conduct alleged in the formal complaint, even if proven, does not meet the definition of sexual harassment set by the regulations;
- The conduct alleged in the formal complaint did not occur in the school or school district's education program or activity; or
- The conduct alleged did not occur against a person in the United States.

Permissive Dismissal of Complaints



A formal complaint *may* be dismissed if:



The complainant notifies the Title IX Coordinator, in writing, that they would like to withdraw the complaint;



The respondent is no longer enrolled at or employed by the school; or



Specific circumstances prevent the school or school district from gathering evidence sufficient to reach a determination as to the complaint.

I need to dismiss from the Title IX Process, but I have concerns, so now what? – First, written notice of dismissal and reasons to both parties.... Then....



I have to dismiss, but I'm worried that the alleged conduct is still a problem.



A dismissal under the Title IX policy and procedure does not preclude action under another policy or conduct standard.



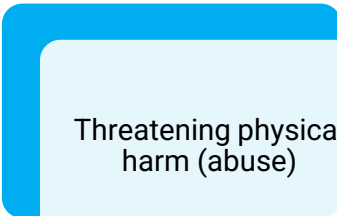
MISCONDUCT THAT MAY IMPLICATE OTHER BOARD POLICIES



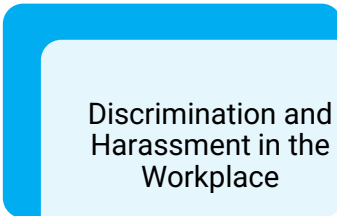
Bullying/Cyberbullying




Hazing



Threatening physical
harm (abuse)



Discrimination and
Harassment in the
Workplace





Written Notice After Formal Complaint to Parties Must Contain:

- Notice of the grievance process and any informal resolution process.
- Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
- 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.
- Right to an advisor of the party's choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
- Provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
- If additional allegations are to be investigated that are not included in the written notice, an additional written notice must be provided.

Retaliation is Prohibited

Individuals, schools, and districts may not intimidate, threaten, coerce, or discriminate against an individual

For the purpose of interfering with their Title IX rights; or

Because the individual filed a complaint, testified, participated, or refused to participate in a Title IX proceeding.



The exercise of First Amendment rights does not constitute retaliation.

01

UNDERSTANDS LAW AND
POLICY –
TRAINED TO INVESTIGATE
AND WRITE REPORTS –
TRAINED IN ISSUES OF
RELEVANCE

04

MAY MAKE
RECOMMENDATION
BUT NOT REQUIRED

03

MUST SUMMARIZE
FINDINGS IN
OBJECTIVE WAY AND
ADDRESS CREDIBILITY
ISSUES

02

MAY NOT BE BIASED OR
HAVE CONFLICT OF
INTEREST



Investigator

Burden of Proof and Limitation on Medical Records

- The burden of proof and of gathering evidence sufficient to reach a determination regarding responsibility rests on the school district and not on the parties.
- The investigator cannot use a party's medical records without the party's voluntary, written consent to do so for a grievance process.

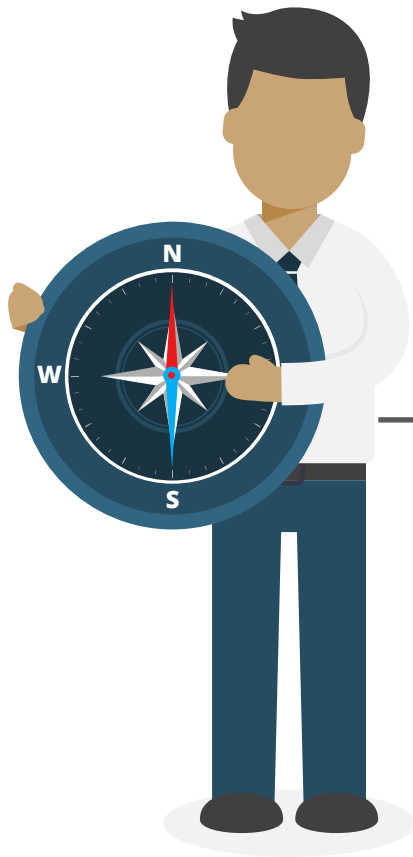
The Investigator Must:

- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- Provide the parties with the same opportunities to have others present, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice; the investigator may establish restrictions regarding the extent to which the advisor may participate as long as the restrictions apply equally to both parties;
- Provide 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;
- Provide 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.

Investigative Process

- Prior to completion of the investigative report, send 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; and
- 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.

Decision-Maker



Understands law and policy – trained in issues of relevance and evidence.



May not be biased or have conflict of interest.



Must issue written report in compliance with requirements.



May not be Title IX Investigator and may not decide appeal.

The Decision-Maker's Job:

- Issue a written determination regarding responsibility.
- The standard of evidence is either preponderance of the evidence or clear and convincing evidence. Whichever standard is used, the decision-maker must apply the same standard of evidence for formal complaints against students as for formal complaints against employees and apply the same standard of evidence to all formal complaints of sexual harassment.
- The written determination must include:
 - Allegations potentially constituting sexual harassment.
 - Description of the procedural steps from receipt of the formal complaint through the determination.
 - Findings of fact supporting the determination.
 - Conclusions regarding the application of the code of conduct to the facts.
 - Statement of and rationale for the determination for each allegation and any disciplinary sanctions and remedies.
 - The procedures and permissible bases for either party to appeal.

Potential Remedies

May include but are not limited to:

Education

Continued Supportive Measures

Discipline

Restorative Justice

Common Sanctions

- Warning
- Probation
- Loss of privileges
- Counseling
- No contact
- Limited access to areas of school
- Service Hours
- Online Education
- Alcohol and Drug Assessment
- Suspension
- Expulsion
- Termination

Appeal Decision-Maker

Must allow for written statement.



Must be unbiased and have no conflict of interest.



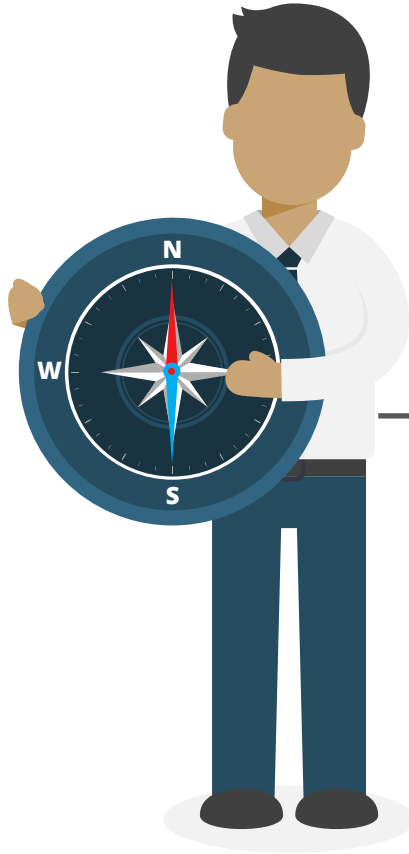
May not be Title IX Coordinator or Decision-Maker



Appeals

- Can be based only on procedural irregularity that affected the outcome of the matter, or
- 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; or
- The Title IX Coordinator, Investigator, or Decision-maker had a conflict of interest or bias that affected the outcome of the matter.
- The other party must be notified in writing when an appeal is filed and the procedures must apply equally for both parties.
- The appeal decision-maker must give both parties a reasonable opportunity to submit a written statement in support of or challenging the outcome.
- The appeal decision-maker must issue a written decision describing the result of the appeal and the rationale for the result.
- Both parties must be provided with the written decision simultaneously.

Facilitator of Informal Resolutions



Can be anyone except for other Title IX personnel.



Does not have to be a district employee.



Should have good negotiating skills.



Should have a basic understanding of the Title IX framework.

Informal Resolutions

Participation cannot be required, only offered.

Can only be offered once a formal complaint has been filed.

The District can facilitate an informal resolution any time before the determination, but a written notice with certain disclosures is required.

The parties must voluntarily consent to the informal resolution in writing.

Informal resolution is not available to resolve allegations that an employee sexually harassed a student.

Recordkeeping

**KEEP FOR SEVEN
YEARS**



SUPPORTIVE MEASURES

Or documentation of why none were provided,...

**TRAINING
MATERIALS –
MUST BE POSTED
ON WEBSITE**



**INFORMAL
RESOLUTIONS**



**INVESTIGATIVE
RECORDS**



**DETERMINATIONS
AND
APPEALS**



Confidentiality

- District must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except 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.



Questions?
More Information?