Shelby County Schools

Title IX Sexual Harassment Training

April 9, 2026

by:
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Strength, Knowledge, Experience.

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A "Lawyerly" CYA

- 34 CFR 106.45(b)(10)(D) requires that all materials used to train Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators be publicly available on the recipient's website.
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  - We are not giving legal advice.
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"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Title IX of the Education Amendments of 1972

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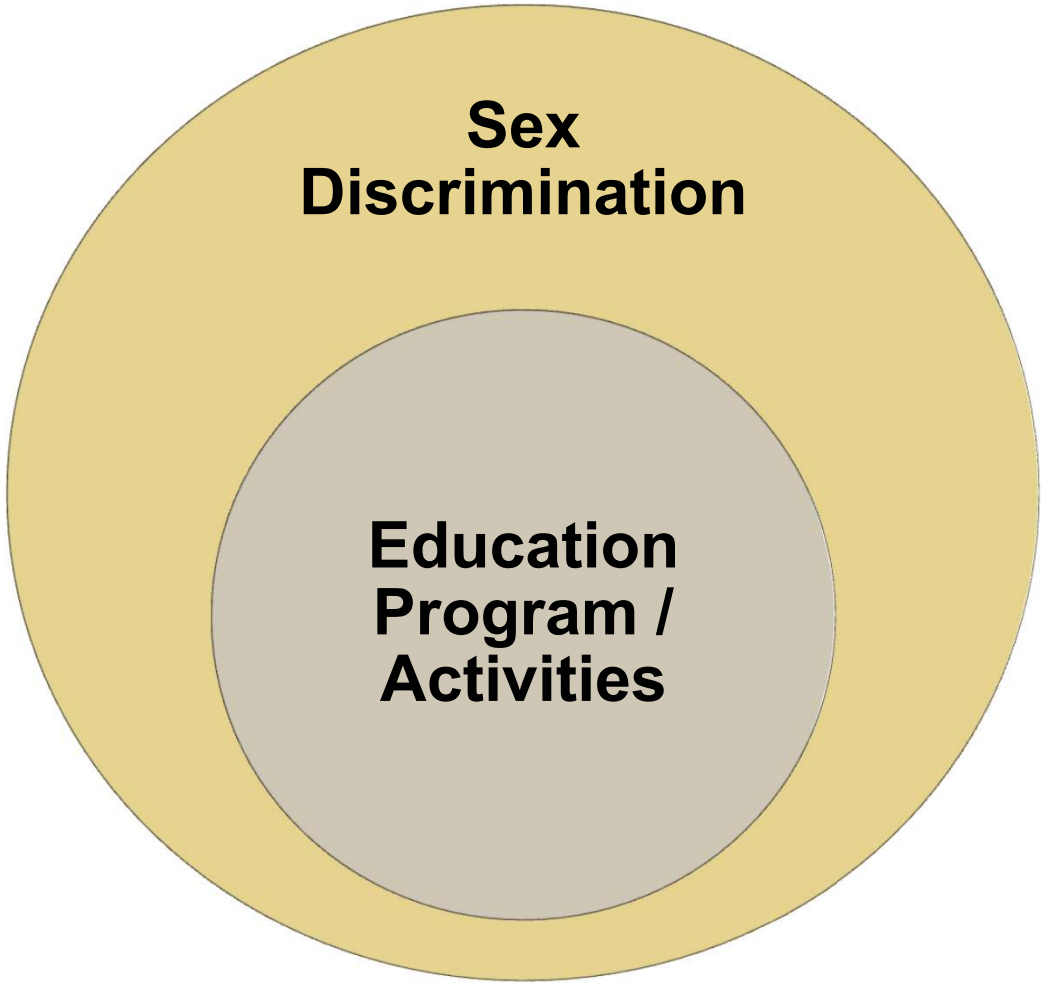
Scope of Title IX's Reach

- Applies to sex discrimination in the "education program or activity" of a recipient of federal funding
  - ➢ Includes the "operations" of educational institutions
- Does not apply to private conduct occurring in private locations not part of an educational program or activity



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Title IX Nondiscrimination Mandate

Cannon v. University of Chicago, 441 U.S. 677 (1979)

To avoid the use of federal resources to support discriminatory practices

To provide individual citizens effective protection against those practices

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Title IX
Legal Obligations

1

Promptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures

2

Follow a fair grievance process to resolve sexual harassment allegations when a complainant requests an investigation or a Title IX Coordinator decides that an investigation is necessary

3

Provide remedies to victims of sexual harassment

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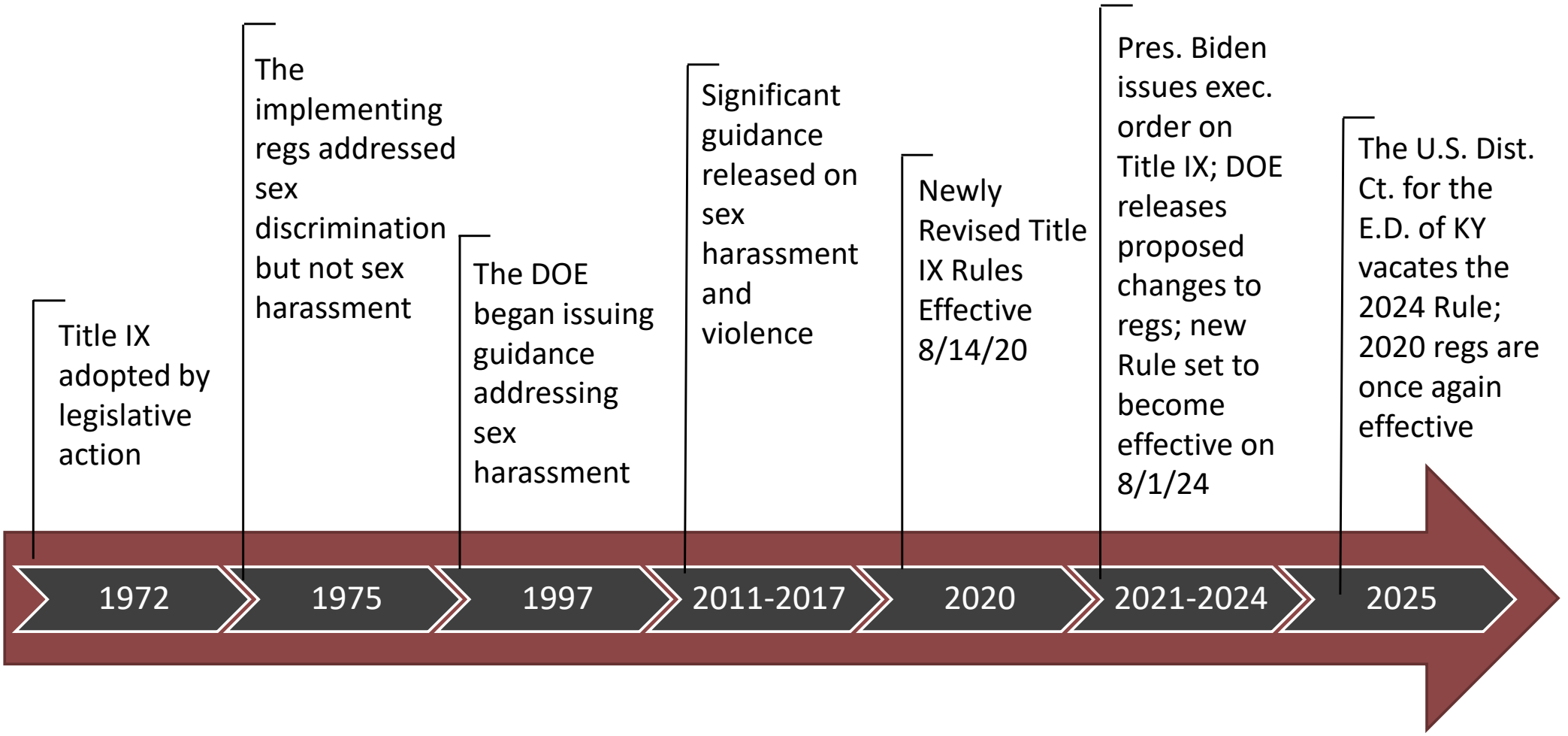
History of Title IX



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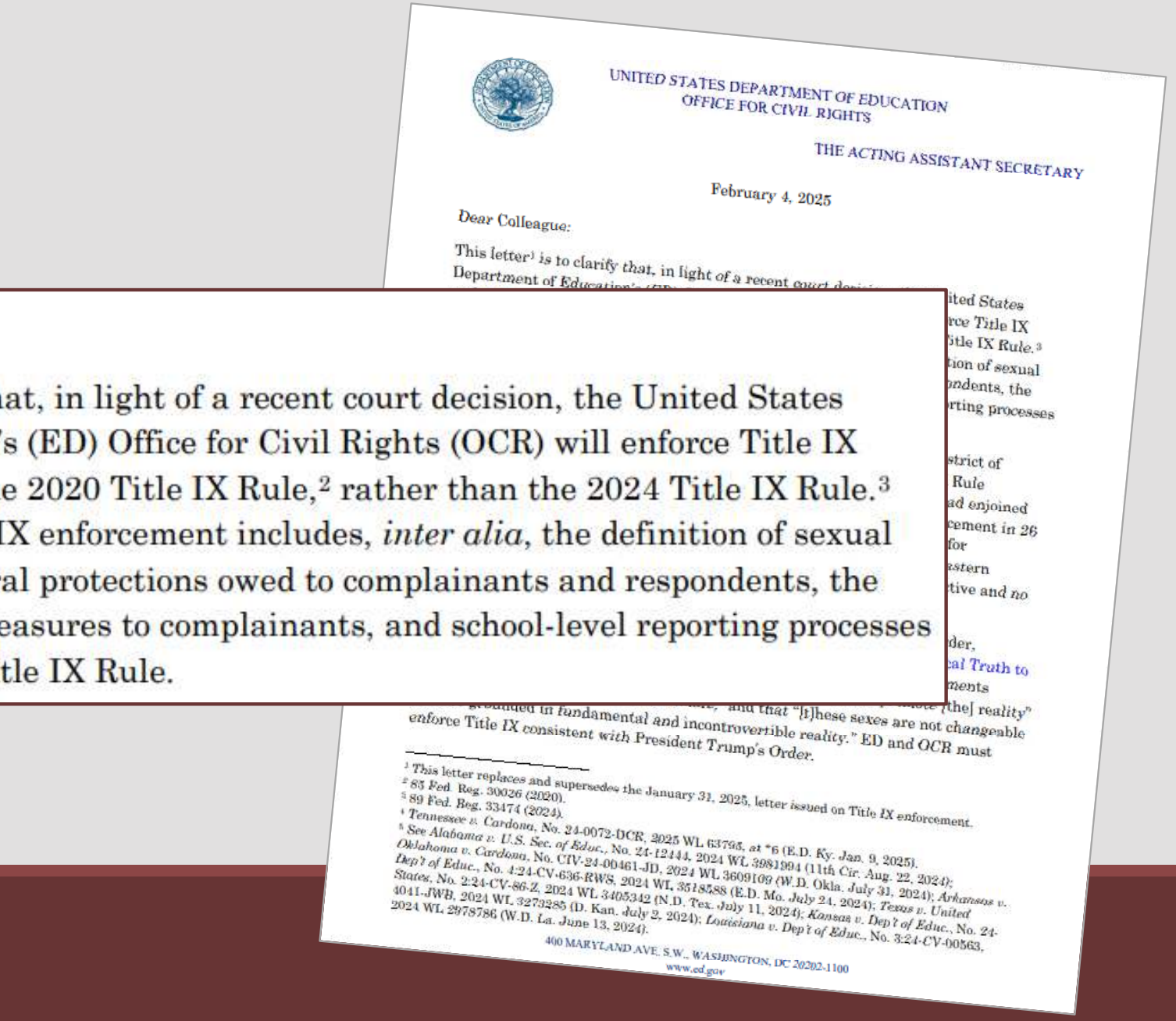

Dear Colleague:

This letter[1] is to clarify that, in light of a recent court decision, the United States Department of Education's (ED) Office for Civil Rights (OCR) will enforce Title IX under the provisions of the 2020 Title IX Rule,[2] rather than the 2024 Title IX Rule.[3] Accordingly, lawful Title IX enforcement includes, *inter alia*, the definition of sexual harassment, the procedural protections owed to complainants and respondents, the provision of supportive measures to complainants, and school-level reporting processes as outlined in the 2020 Title IX Rule.

OCR Dear Colleague Letter

February 4, 2025

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Two Avenues of Enforcement

- Administrative enforcement by agencies that disburse federal financial assistance to recipients
- Judicial enforcement by courts in private litigation



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U.S. Supreme Court Cases

Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998)

- Supreme Court determined conditions under which a school district will be liable for money damages for an **employee** sexually harassing a student
- School district violates Title IX when it has **actual knowledge** of the harassment but responds with **deliberate indifference**

Davis v. Monroe Co. Bd. of Educ., 526 U.S. 629 (1999)

- Supreme Court determined conditions under which a school district will be liable for money damages for a **student** sexually harassing another student
- Same standards of **actual knowledge** and **deliberate indifference** apply
- Supreme Court also defined sexual harassment to mean conduct so **severe, pervasive, and objectively offensive** that it denies its victims equal access to education

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Gebser / Davis Framework

- Actionable sexual harassment
- Actual knowledge
- Deliberate indifference liability standard

U.S. Supreme Court Cases

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Title IX Regulations

34 CFR PART 106

EFFECTIVE AUGUST 14, 2020



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Definition of “sex” does not include gender identity and sexual orientation

Focuses on defining responses to sex harassment and sexual assault rather than responses to all instances of sex-based discrimination

2020 Title IX Regulations

Big Picture on “Sexual Harassment”

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Title IX Training Components Required Pursuant to 34 CFR §106.45

All members of the Title IX team must receive training on the following:

- Definition of sexual harassment
- Scope of recipient's education program or activity
- How to conduct an investigation
- The grievance process including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially, including the avoidance of prejudgment of the facts at issue, conflicts of interest and bias
- Issues of relevance of questions and evidence (including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant)
- Issues of relevance to create an investigative report that fairly summarizes relevant evidence

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- **Certified**
  - Policy: 03.1621 – Title IX Sexual Harassment
  - Procedures: refer to Student Procedures
- **Classified**
  - Policy: 03.2621 – Title IX Sexual Harassment
  - Procedures: refer to Student Procedures
- **Student**
  - Policy: 09.428111 – Title IX Sexual Harassment
  - Procedures:
    - 09.428111 AP.1 – Notice to Individuals Regarding Title IX Sexual Harassment / Discrimination
    - 09.428111 AP.11 – Grievance Procedures
    - 09.428111 AP.21 – Reporting Form

Title IX Sexual Harassment Policy and Procedures

03.1621 / 03.2621 / 09.428111

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The Title IX Team



Title IX Coordinator



Investigator



Decision Maker



Appellate Decision Maker



Informal Resolution Facilitator



Advisors

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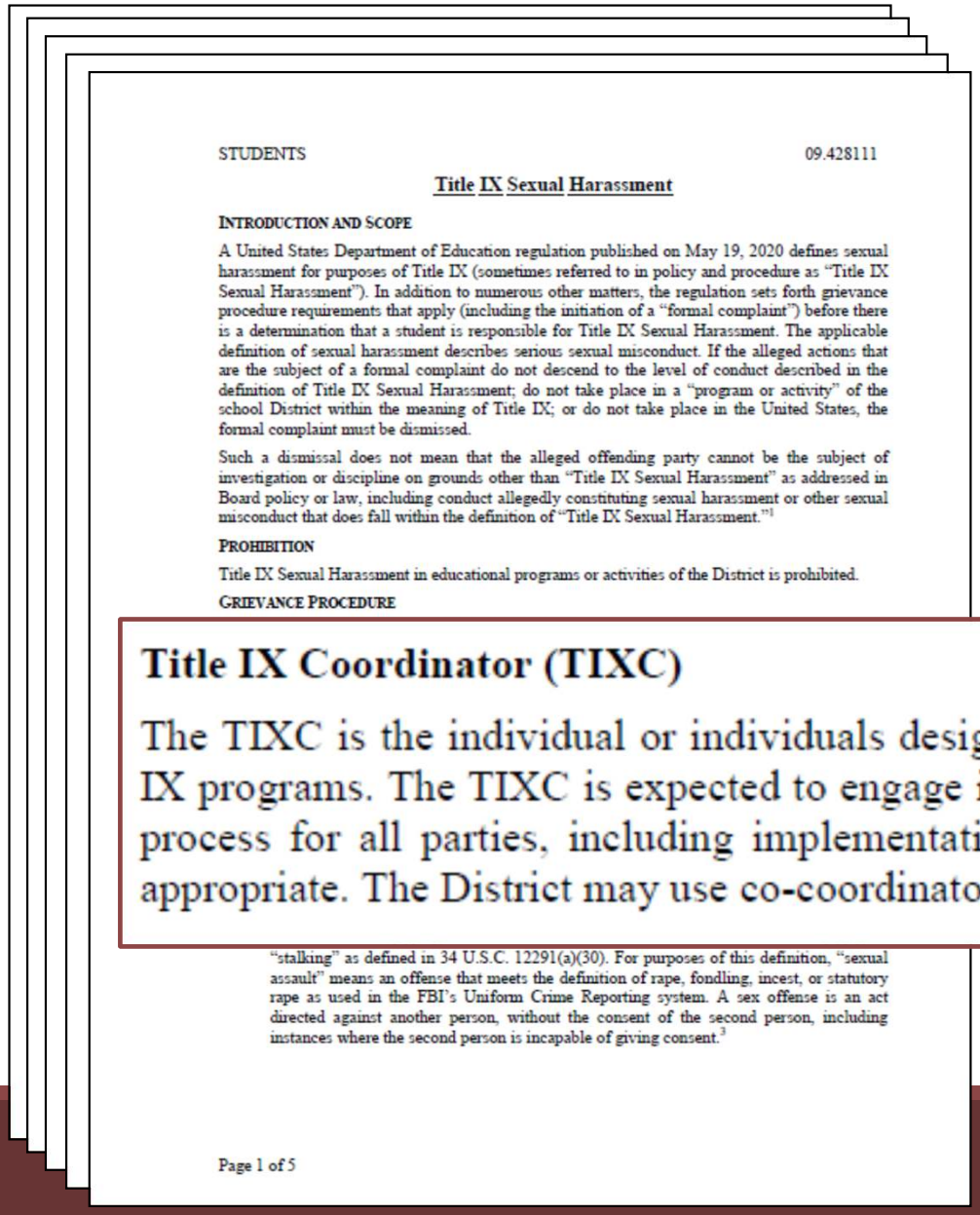

STUDENTS 09.428111

Title IX Sexual Harassment

INTRODUCTION AND SCOPE

A United States Department of Education regulation published on May 19, 2020 defines sexual harassment for purposes of Title IX (sometimes referred to in policy and procedure as "Title IX Sexual Harassment"). In addition to numerous other matters, the regulation sets forth grievance procedure requirements that apply (including the initiation of a "formal complaint") before there is a determination that a student is responsible for Title IX Sexual Harassment. The applicable definition of sexual harassment describes serious sexual misconduct. If the alleged actions that are the subject of a formal complaint do not descend to the level of conduct described in the definition of Title IX Sexual Harassment; do not take place in a "program or activity" of the school District within the meaning of Title IX; or do not take place in the United States, the formal complaint must be dismissed.

Such a dismissal does not mean that the alleged offending party cannot be the subject of investigation or discipline on grounds other than "Title IX Sexual Harassment" as addressed in Board policy or law, including conduct allegedly constituting sexual harassment or other sexual misconduct that does fall within the definition of "Title IX Sexual Harassment."[1]

PROHIBITION

Title IX Sexual Harassment in educational programs or activities of the District is prohibited.

GRIEVANCE PROCEDURE

Title IX Coordinator (TIXC)

The TIXC is the individual or individuals designated and authorized to coordinate District Title IX programs. The TIXC is expected to engage in activities intended to provide a fair and neutral process for all parties, including implementation of supportive measures and remedies where appropriate. The District may use co-coordinators and/or deputy coordinators.

"stalking" as defined in 34 U.S.C. 12291(a)(30). For purposes of this definition, "sexual assault" means an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting system. A sex offense is an act directed against another person, without the consent of the second person, including instances where the second person is incapable of giving consent.[3]

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Title IX Sexual Harassment Policy

03.1621 / 03.2621 / 09.428111

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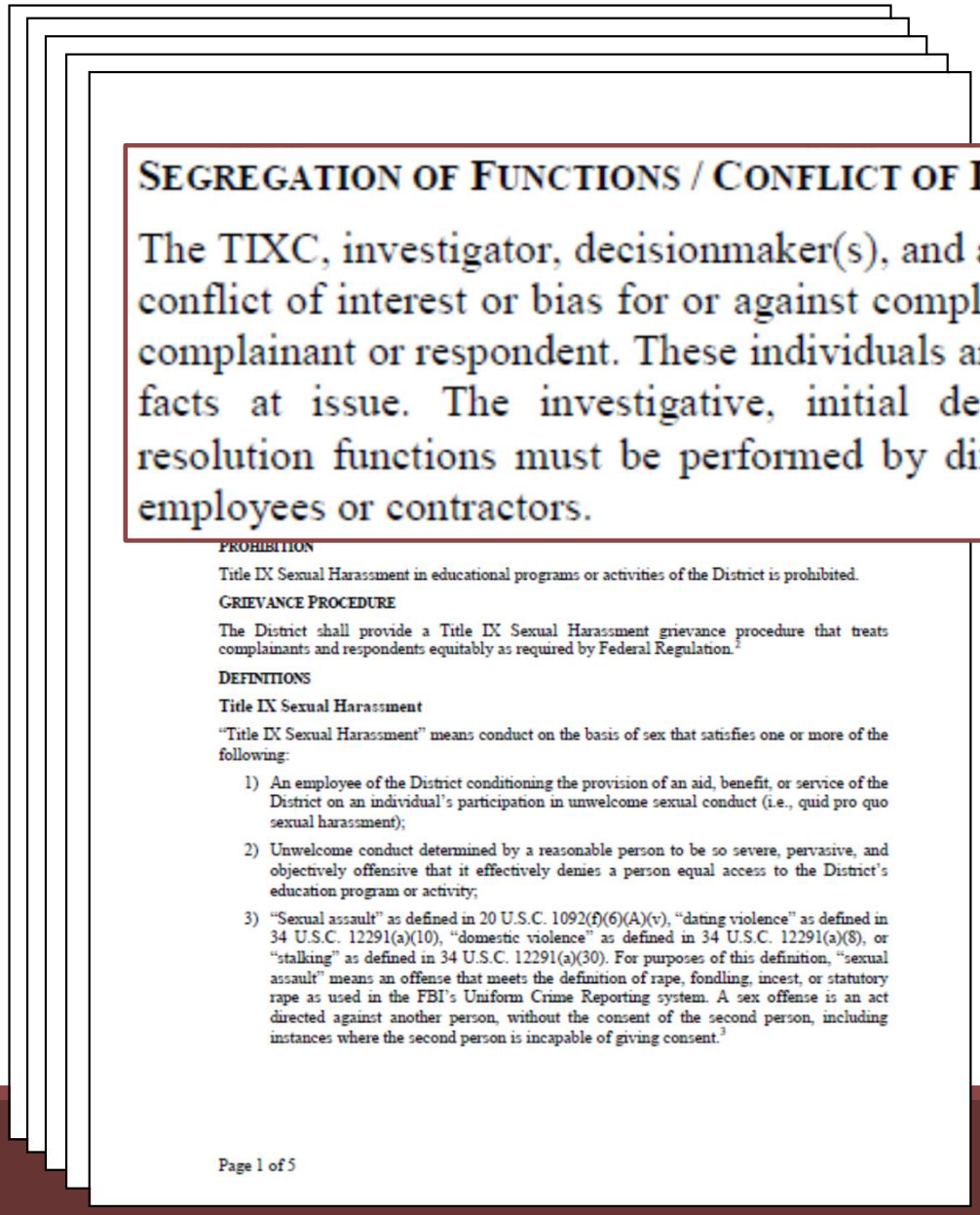

SEGREGATION OF FUNCTIONS / CONFLICT OF INTEREST

The TIXC, investigator, decisionmaker(s), and any informal resolution facilitator shall not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. These individuals are to serve impartially without prejudgment of the facts at issue. The investigative, initial decision-making, appellate decision-making, and resolution functions must be performed by different trained individuals, who may be District employees or contractors.

PROHIBITION

Title IX Sexual Harassment in educational programs or activities of the District is prohibited.

GRIEVANCE PROCEDURE

The District shall provide a Title IX Sexual Harassment grievance procedure that treats complainants and respondents equitably as required by Federal Regulation.[2]

DEFINITIONS

Title IX Sexual Harassment

"Title IX Sexual Harassment" means conduct on the basis of sex that satisfies one or more of the following:

1) 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 (i.e., quid pro quo sexual harassment);
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 District's education program or activity;
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). For purposes of this definition, "sexual assault" means an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting system. A sex offense is an act directed against another person, without the consent of the second person, including instances where the second person is incapable of giving consent.[3]

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Title IX Sexual Harassment Policy

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Notification Requirements



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Accessible Reporting to Title IX Coordinator

Notification Requirements

Schools Must Notify

- The following must be notified of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator:
  - Employees
  - Applicants for admission and employment
  - Students and parents or legal guardians of elementary and secondary school students
  - All unions

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Accessible Reporting to Title IX Coordinator

Notification Requirements

The Notice

- The notice must provide that:
  - The district does not discriminate on the basis of sex in the education program or activity that it operates;
  - The district is required by Title IX and the Title IX regulations not to discriminate in such a manner;
  - The requirement not to discriminate in the education program or activity extends to admissions and employment; and
  - Inquiries about the application of Title IX and the Title IX regulations may be referred to the Title IX Coordinator, the Assistant Secretary, or both.

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Accessible Reporting to Title IX Coordinator

Notification Requirements

- Schools must **prominently** display on their websites:
  - The required contact information for the Title IX Coordinator
  - The district's Title IX sexual harassment policy.
- This information must also be included in each handbook or catalog made available to those entitled to notice.
- Title IX training materials must be posted on school websites.

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Notice to Individuals of the District's Title IX Obligations

*The complete form is available at the end of the materials.

[Note: Title IX requires districts to provide three forms of notice of their Title IX obligations. The notice must be provided as follows: (1) to applicants for admission and employment, employees, students, parents or legal guardians, and unions or professional organizations; (2) in all handbooks and catalogs; and (3) prominently displayed on the district's website. The below notice is designed for use in all three required instances. Review carefully and add information where indicated. Remove this note before use.]

Notice to Individuals Regarding Title IX Sexual Harassment/Discrimination

[Insert District Name] (the "District") is committed to providing a working and learning environment that is free from discrimination based on sex, including sexual harassment and sexual violence. The District does not discriminate on the basis of sex in any of its education or employment programs or activities. Title IX of the Education Amendments of 1972 ("Title IX"), its regulations, and certain other federal and state laws prohibit discrimination in such a manner. Under Title IX, discrimination on the basis of sex includes sexual harassment.

Title IX's requirement not to discriminate in any of the District's education programs or activities applies to both students and employees and extends to both admission and employment. Inquiries about the application of Title IX and its regulations to the District may be referred to the District's Title IX Coordinator, the Assistant Secretary for Civil Rights of the United States Department of Education, or both:

Title IX Coordinator **[Insert name]** **[Insert address]** **[Insert e-mail address]** **[Insert telephone number]**	Assistant Secretary for Civil Rights U.S. Dept. of Education Office for Civil Rights 400 Maryland Ave., SW Washington, D.C. 20202-1100 1-800-421-3481; 1-800-877-8339 (TDD) 202-453-6012 (Fax) **OCR@ed.gov**

The District is committed to fostering an environment free from discrimination on the basis of sex. To the extent that any District policy or procedure regarding discrimination or harassment on the basis of sex (as defined by Title IX) conflicts with the Title IX regulations effective August 14, 2020, Title IX and its regulations will control.

Title IX of the Education Amendments of 1972

Title IX is a federal law that 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." The U.S. Department of Education's Office for Civil Rights (OCR) enforces Title IX.

Although Title IX is best known for breaking down barriers in sports for women and girls, Title IX and its regulations also require that schools adopt specific grievance procedures to address formal complaints of sexual harassment (as that term is defined by Title IX.)

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CITATION	SUMMARY
106.45(a)	School's treatment of parties may constitute discrimination
106.45(b)(1)(i)-(x)	**Grievance Process Requirements**
106.45(b)(2)	**Written Notice of Allegations to Both Parties**
106.45(b)(3)-(b)(4)	**Formal Complaints Must be Investigated, Dismissals, Consolidation**
106.45(b)(5)(i)-(vii)	**Investigation Requirements**
106.45(b)(6)	Cross Examination Conducted by Advisor
106.45(b)(7)	Independent/Neutral Decision-maker, Standard of Evidence Same, Written Determination
106.45(b)(8)	Appeals: Procedural Irregularities, New Evidence, Bias or Conflict of Interest
106.45(b)(9)	Informal Resolution: Voluntary, Written Consent, Not Allowed for Employee Respondent
106.45(b)(10)	Record Keeping, Publication of Training Materials

Procedural Protections

34 C.F.R. 106.45

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Definitions

Title IX Rule
§ 106.30(a)

Complainant

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

Respondent

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

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- Student reports to guidance counselor that she is being sexually harassed by another student.
- Teacher witnesses another teacher and student kissing in the other teacher's classroom and tells the Principal.
- Mother of student under 18 reports to the Title IX Coordinator that her son is being sexually harassed by other students on the bus.
- After reporting sexual harassment to the Title IX Coordinator, student decides she does not want her complaint investigated, and the Title IX Coordinator moves forward with a sexual harassment investigation.

Identifying the Complainant

Examples to Consider

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Complainant and Respondent

Applies to parties in both ***reports*** and ***formal complaints*** of sexual harassment

Complainant: A person who is alleged to be the victim of conduct that could constitute sexual harassment

NOT third party reporter

NOT Title IX Coordinator who "signs" complaint

Respondent: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment

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Actual Knowledge Triggers District's Duty to Respond

Examples to Consider

One evening after school, the Title IX Coordinator drives to the high school to retrieve an item he had left there earlier in the day. As he is exiting the building, he sees a teacher and student in the teacher's car kissing.

Actual Knowledge?

- What if the person who sees the conduct is the Superintendent?
- A teacher?
- The basketball coach who is not otherwise employed by the District?
- What if the complaint is anonymous and is sent to the Superintendent through the mail?

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Definition

Title IX Rule § 106.30(a)

Actual Knowledge

Notice of sexual harassment or allegations of sexual harassment to:

- A recipient's Title IX Coordinator
- 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.

**Standard not met when the only official with actual knowledge is the respondent.

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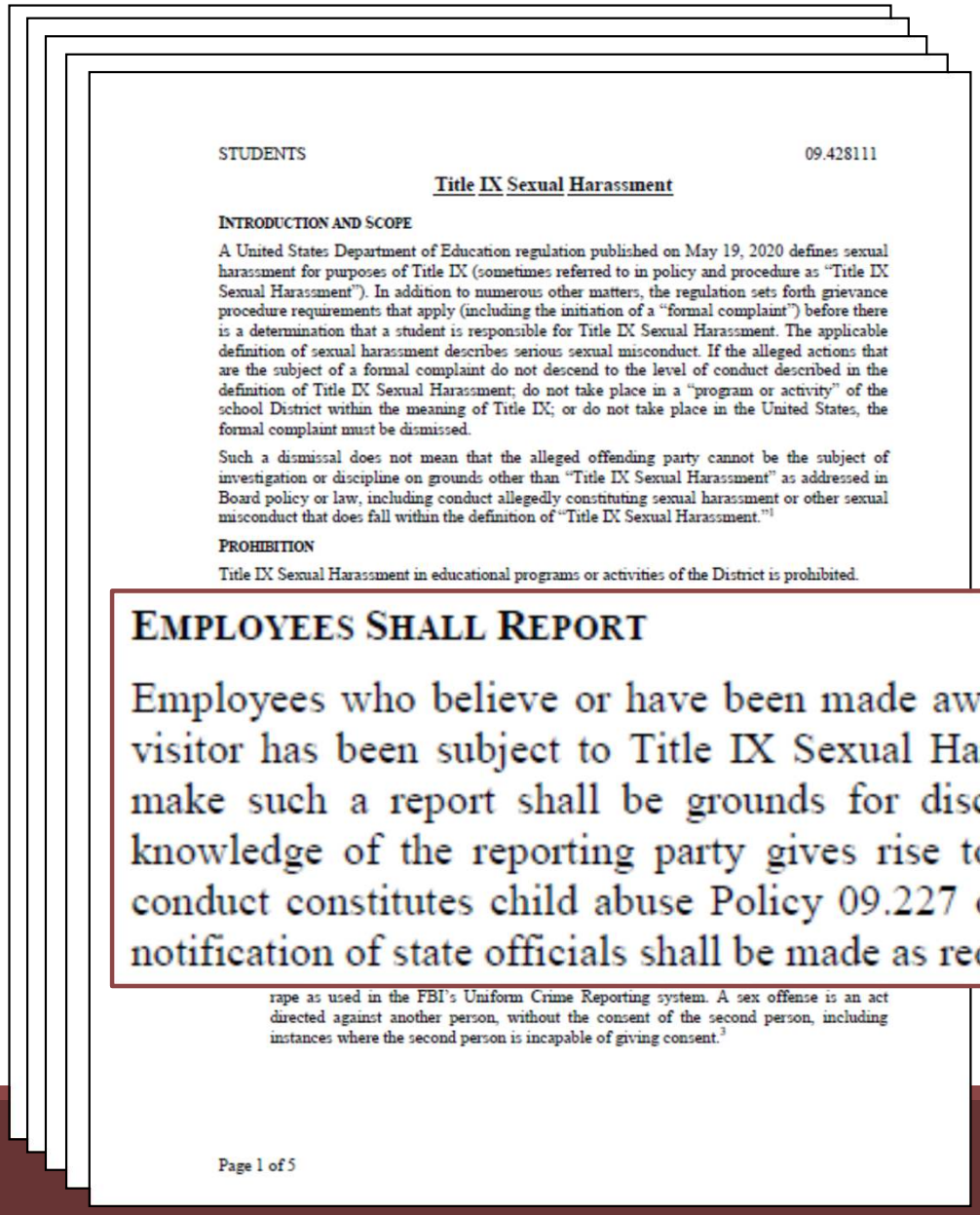

STUDENTS 09.428111

Title IX Sexual Harassment

INTRODUCTION AND SCOPE

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Such a dismissal does not mean that the alleged offending party cannot be the subject of investigation or discipline on grounds other than "Title IX Sexual Harassment" as addressed in Board policy or law, including conduct allegedly constituting sexual harassment or other sexual misconduct that does fall within the definition of "Title IX Sexual Harassment."[1]

PROHIBITION

Title IX Sexual Harassment in educational programs or activities of the District is prohibited.

EMPLOYEES SHALL REPORT

Employees who believe or have been made aware that they or any other employee, student, or visitor has been subject to Title IX Sexual Harassment shall report it to the TIXC. Failure to make such a report shall be grounds for discipline up to and including termination. If the knowledge of the reporting party gives rise to reasonable cause to believe that the reported conduct constitutes child abuse Policy 09.227 or a reportable criminal offense Policy 09.2211, notification of state officials shall be made as required by law.[6]

rape as used in the FBI's Uniform Crime Reporting system. A sex offense is an act directed against another person, without the consent of the second person, including instances where the second person is incapable of giving consent.[3]

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Title IX Sexual Harassment Policy

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Defining Sexual Harassment



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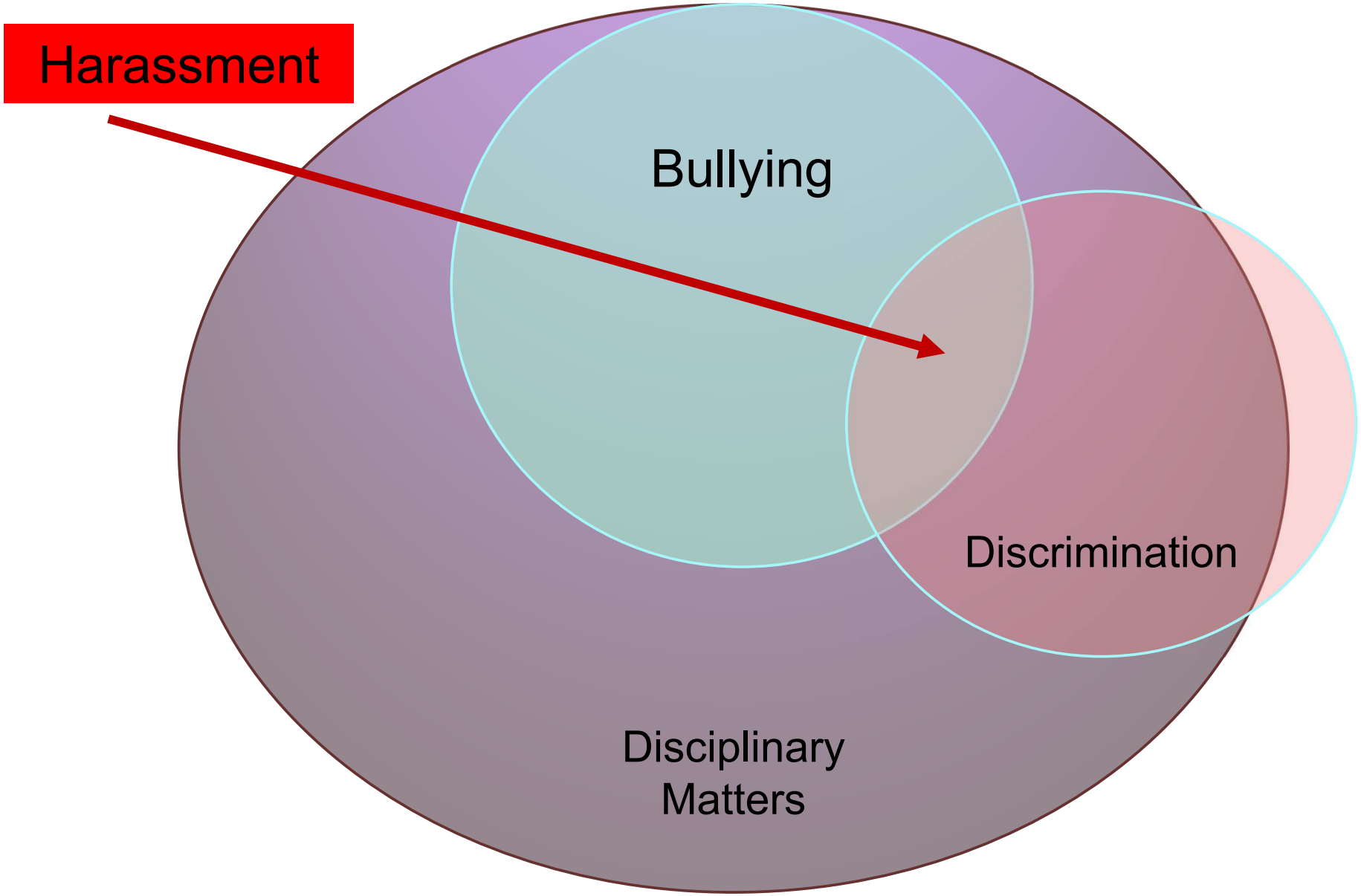
Harassment vs. Discrimination vs. Bullying vs. Discipline



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Definition of Sexual Harassment

Title IX Rule § 106.30(a)

- The Rule's definition of sexual harassment has **three** components.

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

1) Quid pro quo harassment
2) Harassment pursuant to the Supreme Court's *Davis v. Monroe Co. Bd. of Ed.* opinion
3) Crimes under the Violence Against Women Act (VAWA) and the Clery Act

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Definition of Sexual Harassment

Quid Pro Quo	• An **employee** conditions something of value for a sexual favor
Davis Standard	• Conduct that is **so severe, pervasive, AND objectively offensive** that it denies equal access
Clery and VAWA Crimes	• Sexual Assault, Stalking, Dating and Domestic Violence

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Definition of Sexual Harassment

Scenario to Ponder

Female student at the middle school "butt slaps" a male student.

Is this behavior sexual harassment under Title IX that warrants an investigation?

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Three Components of Sexual Harassment Definition

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).

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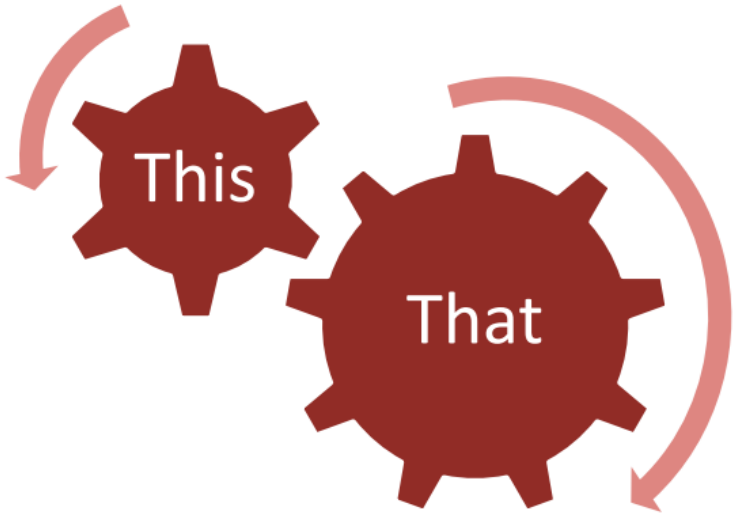
Quid Pro Quo Sexual Harassment

- Applies only to an employee respondent
- Involves an abuse of authority over another employee or student
- Does not require a showing of severity, pervasiveness or offensiveness
- May involve implied conduct (need not be explicit)



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Quid Pro Quo Sexual Harassment

Examples to Consider

- The custodial supervisor tells a night custodian he will consider her for a day shift position if she will go to dinner with him.



- Susie, the smartest girl in 11th grade, tells John she will write his term paper for him if he will date her.
- The Finance Officer asks the payroll clerk to give him a shoulder massage and further comments that if she "plays her cards right," she can expect to have extended days added to her contract.



- John's hours were reduced after he refused the sexual advances of his supervisor.

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Sexual Harassment – *Davis* Standard

- Evaluated under a "reasonable person" standard that takes into consideration a constellation of facts, including ages of the parties involved, disability status, and positions of authority of the involved parties
- Can involve verbal, nonverbal, or physical conduct
- Must be severe, pervasive, **and** objectively offensive
  - Involves the denial of equal access to education as compared to access of person not subjected to sexual harassment

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Words from OCR….

- Only serious situations will be actionable
- Not every instance of subjectively unwelcome conduct meets the sexual harassment definition under Davis standard
- Behavior that does not meet the definition of sexual harassment may still be addressed under other district policies and procedures

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Denial of Equal Access

- Total exclusion of access not required
- Denial is measured against the access of a person who has ***not*** been subjected to sexual harassment
- Examples
  - 3rd grader who starts bedwetting or crying at night
  - High school wrestler who quits team but carries on with other school activities
  - Skipping class to avoid harasser
  - Decline in student's grade point average
  - Difficulty concentrating in class

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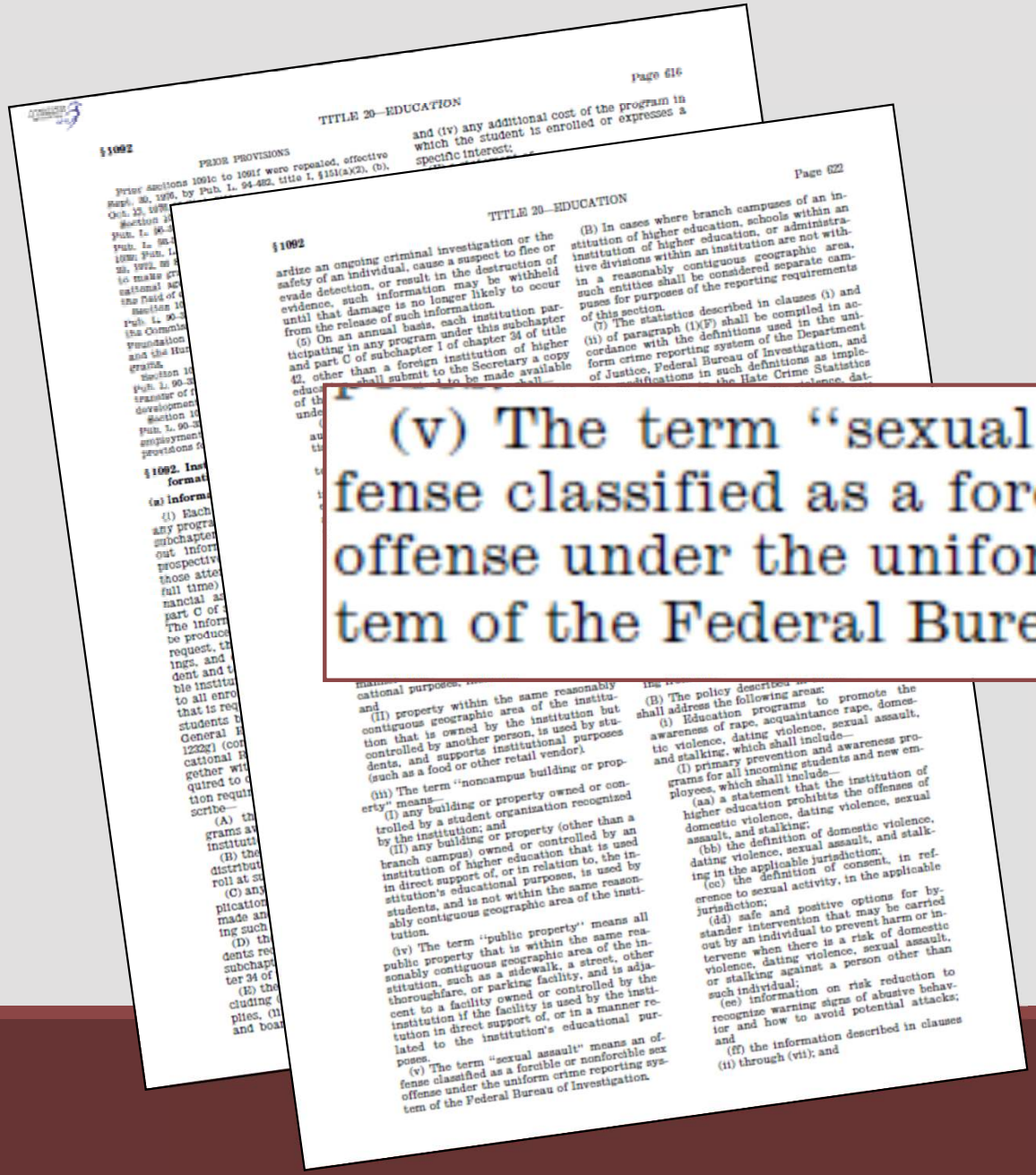

(v) The term "sexual assault" means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

Sexual Harassment: Clery/VAWA Crimes

Definition of Sexual Assault – 20 U.S.C. 1092(f)(6)(A)(v)

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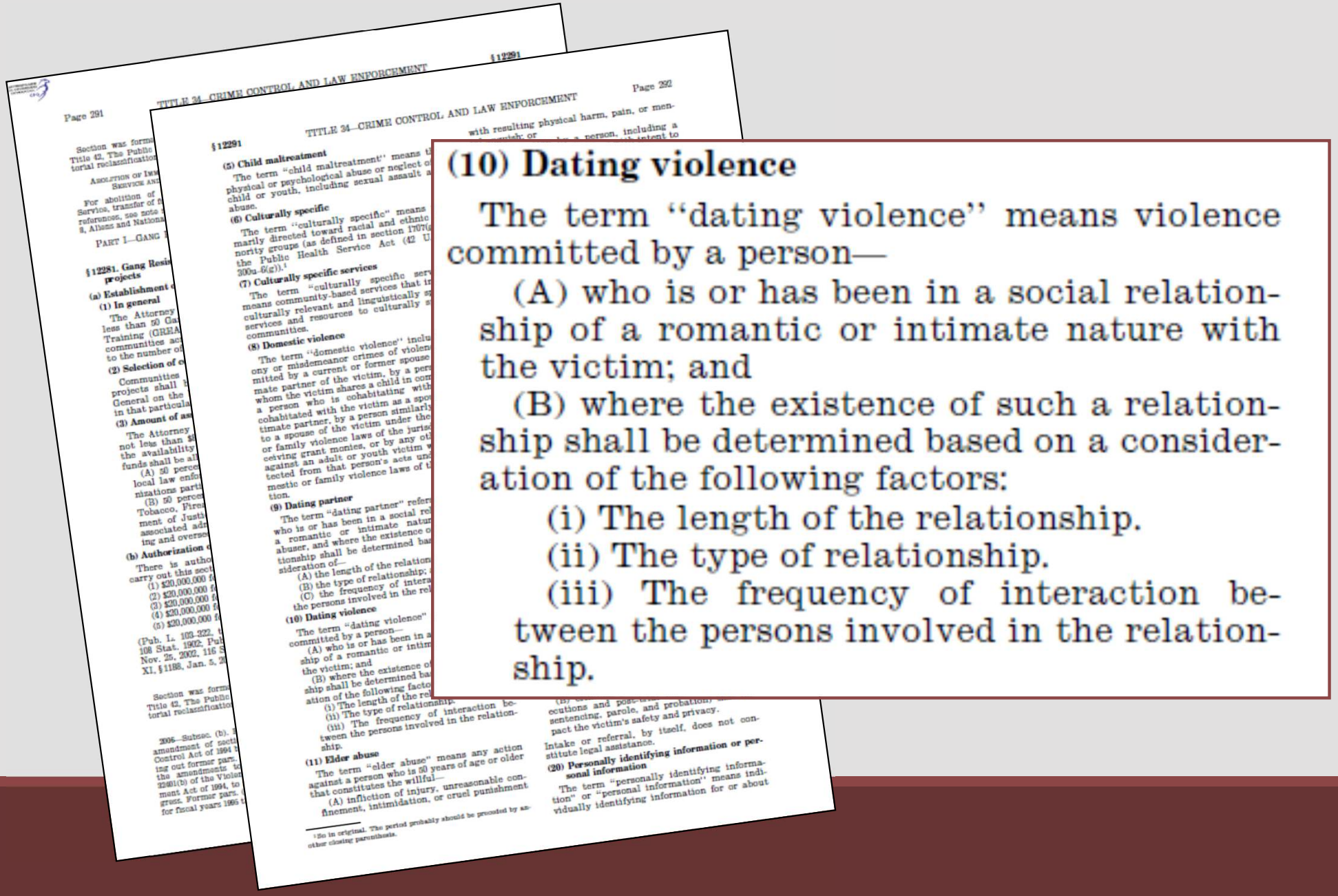

(10) Dating violence

The term "dating violence" means violence committed by a person—

(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

(i) The length of the relationship.

(ii) The type of relationship.

(iii) The frequency of interaction between the persons involved in the relationship.

Sexual Harassment: Clery/VAWA Crimes

Definition of Dating Violence – 34 U.S.C. 12291(a)(10)

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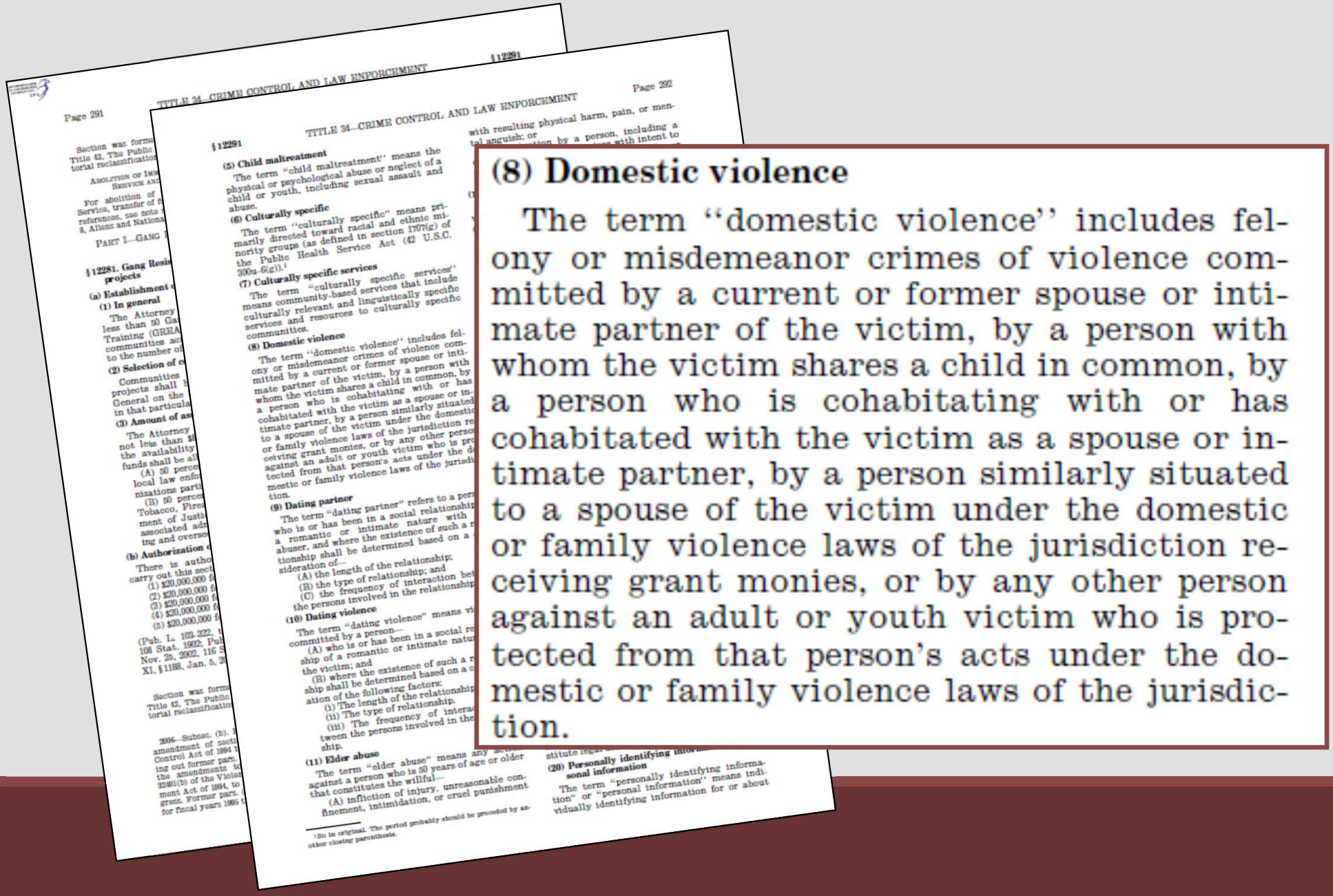

Sexual Harassment: Clery/VAWA Crimes

Definition of Domestic Violence – 34 U.S.C. 12291(a)(10)

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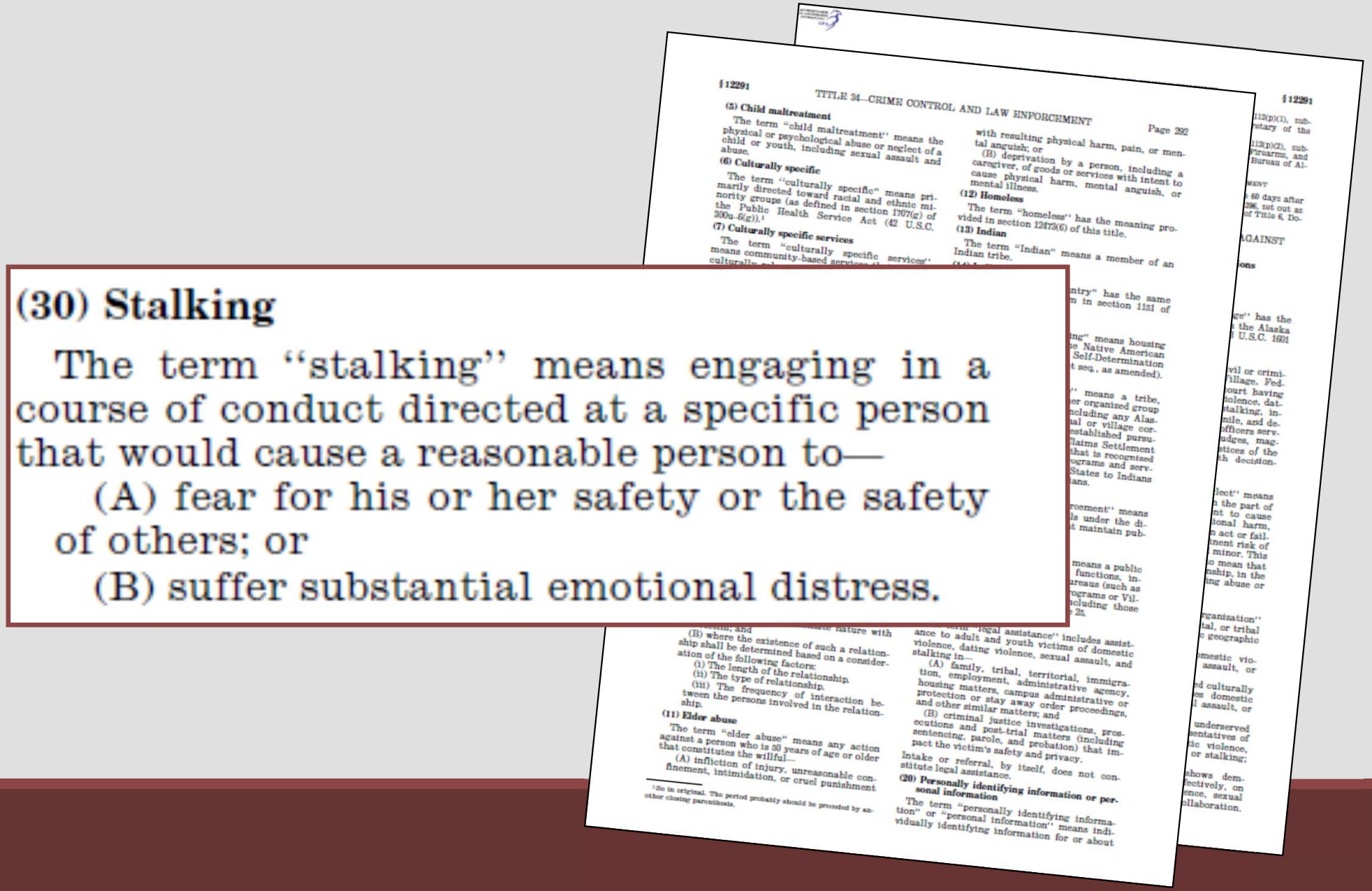

(30) Stalking

The term "stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

(A) fear for his or her safety or the safety of others; or

(B) suffer substantial emotional distress.

Sexual Harassment: Clery/VAWA Crimes

Definition of Stalking – 34 U.S.C. 12291(a)(30)

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What Is Sexual Assault?

- The regulations define “sexual assault” as any sexual act directed against another person without their consent and incorporates the following classes of conduct:

Rape and Statutory Rape

Sodomy

Sexual assault with an object

Fondling

(touching private body parts without consent for the purpose of sexual gratification)

Incest

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Consent

- The Rules do not provide a definition of consent.
- Schools must adopt a definition of consent.



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Definition of Consent

Title IX Sexual Harassment Policy

03.1621 / 03.2621 / 09.428111

"Consent means a voluntary expression of willingness, permission, or agreement to engage in sexual activity throughout a sexual encounter."

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Who CANNOT Give Consent?

Title IX Sexual Harassment Policy

03.1621 / 03.2621 / 09.428111

Consent **cannot** be granted by an individual:

- Who is less than the statutory age of consent under Kentucky criminal law (age 16 or 16 or 17 if the perpetrator is at least 10 years older than the victim);
- Has a mental or physical condition or incapacity that prevents the giving of consent; or
- From whom ostensible 'consent' is extracted through threat, coercion, or forcible compulsion."

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Revisit “butt slapping” scenario by female student toward male student at the middle school



Consent

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Per OCR -

"Where the touching of a person's private body part occurs for the purpose of sexual gratification, that offense warrants inclusion as sexual assault."

Consent

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L.S. v. Hanover Area Sch. Dist.

2024 WL 2393038
(M.D. Pa. May 23, 2024)

Case Example

- Plaintiff arrived early to preschool to pick up her three-year-old daughter, D.S., and observed her on the playground.
- Plaintiff alleged 2 boys in her daughter's class pushed D.S. to the ground. One of the boys then sat on her back and pressed her face in the mulch while the other boy pulled down her pants and underwear, separated her buttocks, and shoved mulch into her rectum.
- When the two teachers and 2 aides failed to see what was happening, the Plaintiff ran screaming towards D.S., at which point the staff took notice.
- The Plaintiff immediately reported the incident to the Pre-K Program Director, who advised she would report it to the Superintendent.
- Two days after the incident, when Plaintiff had not heard anything from the Director, she called and requested that the 2 boys be transferred out of D.S.'s class.
- The Director advised the school would not accommodate that request but offered to move D.S. out of her class or move 1 of the boys out of the class.

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L.S. v. Hanover Area Sch. Dist.

2024 WL 2393038
(M.D. Pa. May 23, 2024)

- Three weeks later, the Director e-mailed Plaintiff to determine if D.S. was returning to school. Plaintiff responded that D.S. was terrified of doing so without a guarantee that she would not be around the boys who assaulted her. She also advised the district's proposal to move D.S. out of her class was unacceptable.
- Plaintiff then contacted the Superintendent and reported that D.S. had been diagnosed with sexual trauma and was receiving counseling services. She further advised that the Director had refused to transfer both boys out of D.S.'s class. She explained that D.S. would love to return to school and should not be punished for what had occurred.
- A few days later, Plaintiff had a telephone conference with the Director and the Superintendent. Plaintiff was again advised that her request to move the 2 boys from D.S.'s classroom was denied but that they had implemented a safety plan which included designating spots on the playground for employee supervision.
  - The Superintendent described the incident as "horseplay," and the Director indicated that the "manner in which the kids played with mulch" would be monitored moving forward.
- Two months later, Plaintiff filed suit alleging deliberate indifference and retaliation in violation of Title IX, amongst multiple other claims.

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The facts, as alleged, meet the definition of "sexual assault" under the regulations.	• The Court disagreed with the district's contention that the boys were biologically incapable of acting with sexual impulses due to their age and that the incident was only "playground bullying."
The facts, as alleged, constitute harassment that **was severe, pervasive, and objectively offensive**.	• The incident did not involve mere insults, banter, or teasing but objectively offensive physical touching that even the defendant acknowledged was serious.
D.S. was deprived of access to educational benefits.	• D.S.'s failure to return to school did not warrant dismissal of her claim because the district's proposed classroom placement and playground safety plan were deficient in light of the sexual assault that was alleged.

The Court's Holding – Deliberate Indifference

L.S. v. Hanover Area Sch. Dist.

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The Formal Complaint



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Formal Complaint

A document ***filed by a complainant*** or ***signed by the Title IX Coordinator*** alleging sexual harassment against a respondent and requesting that the district investigate the allegation.

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Formal Complaint

- A formal complaint may be filed with the Title IX Coordinator
  - In person
  - By mail
  - By electronic mail using the contact info required to be listed for the Coordinator under § 106.8(a)
  - By any additional method designated by the recipient



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Formal Complaint

- At the time of the filing, 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.

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Formal Complaint

- Must almost always be signed by complainant
- Must allege sexual harassment against a respondent and request an investigation
- No requirement of a detailed statement of facts
- District can have actual notice of sexual harassment without a formal complaint
- Title IX Coordinator has discretion to sign formal complaint and initiate the district's grievance process when the Title IX Coordinator believes doing so is necessary to avoid being deliberately indifferent.

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What if an alleged victim does not want to file a complaint?

When deciding whether to "sign" a formal complaint, the Title IX Coordinator should consider:

- Pattern of alleged conduct, especially by person with authority
- Involvement of violence, weapons, etc.
- Seriousness of alleged conduct
- Age of student harassed

Decision to sign a Formal Complaint, or not, reviewed for "deliberate indifference"

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- Can a third party file a formal complaint for a friend?
- Can an anonymous report constitute a formal complaint?
- Can a parent file a formal complaint on behalf of their child?
- Can a complainant file a formal complaint by telephone?
- Does the complainant have to use the district's form?

Questions about the Formal Complaint

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Title IX Sexual Harassment Procedure

Title IX Sexual Harassment Reporting Form

09.428111 AP.21

Certified, Classified & Students

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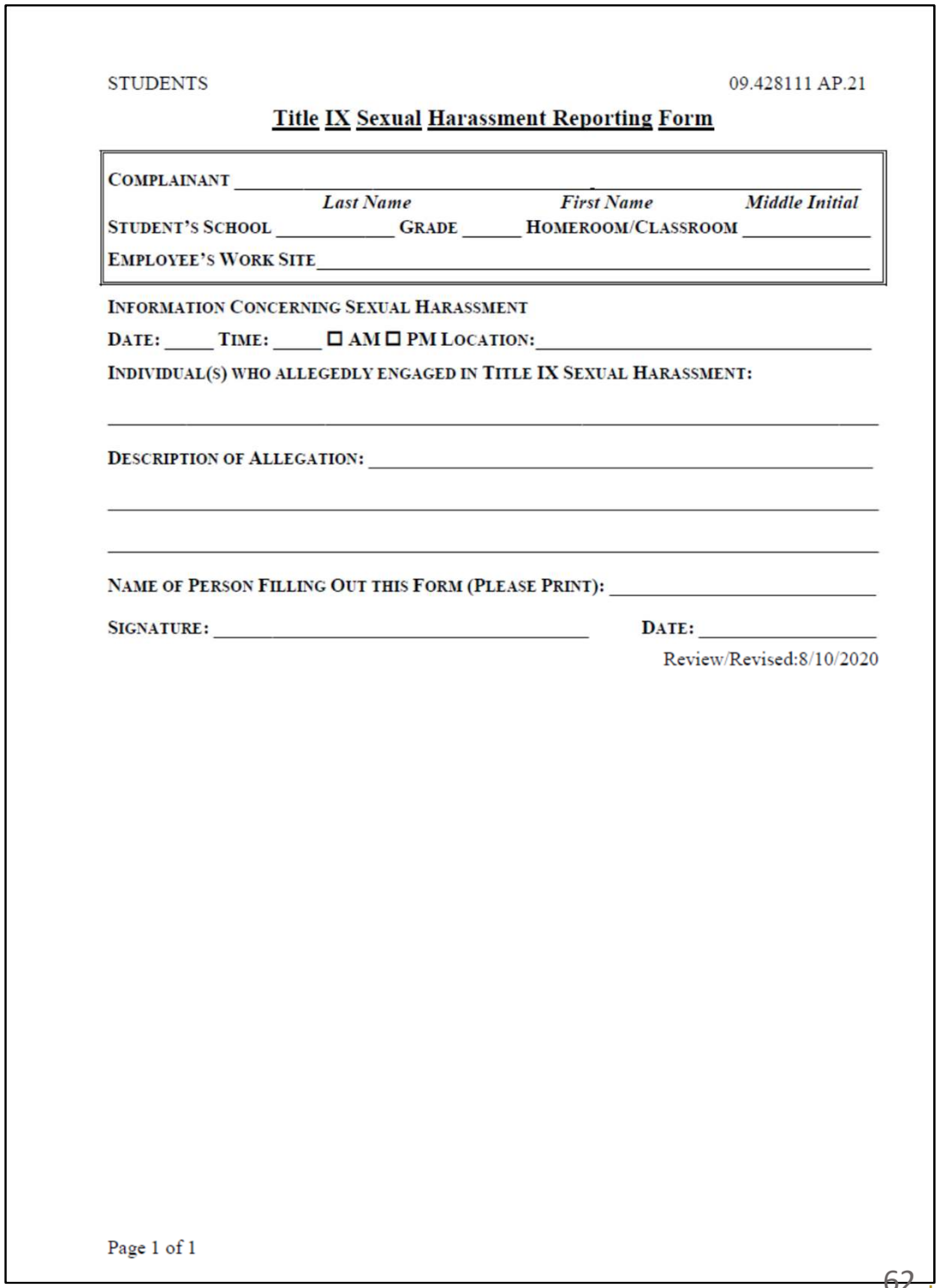

STUDENTS 09.428111 AP.21

Title IX Sexual Harassment Reporting Form

COMPLAINANT _____
Last Name *First Name* *Middle Initial*

STUDENT'S SCHOOL _____ GRADE _____ HOMEROOM/CLASSROOM _____

EMPLOYEE'S WORK SITE _____

INFORMATION CONCERNING SEXUAL HARASSMENT

DATE: _____ TIME: _____ ☐ AM ☐ PM LOCATION: _____

INDIVIDUAL(S) WHO ALLEGEDLY ENGAGED IN TITLE IX SEXUAL HARASSMENT:

_____

DESCRIPTION OF ALLEGATION: _____

_____

_____

NAME OF PERSON FILLING OUT THIS FORM (PLEASE PRINT): _____

SIGNATURE: _____ DATE: _____

Review/Revised:8/10/2020

Page 1 of 1

Definition

Title IX Rule § 106.44

Educational Program or Activity

- Locations, events, or circumstances where the school exercises substantial control over both:
  - the Respondent; and
  - the context in which the alleged sexual harassment or discrimination occurs
- This includes any building owned or controlled by the school or in use by a student organization that is officially recognized by the school.

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Online or Digital Sexual Harassment

OCR Guidance Document (Jan. 15, 2025)

- Title IX requires schools to address sex harassment occurring in its education programs or activities, including conduct that takes place on **digital platforms operated by, or used in the operations of, the school**.
  - Includes artificial intelligence technologies
- Schools are not required to monitor the online activity of its students or staff pursuant to Title IX but are required to address sex harassment **regardless of the method by which the harassment is carried out, or whether the school knows the identity of the harasser**.



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Examples of Educational Programs and Activities

Classroom Instruction	Other school-day activities (breakfast, lunch, changing classes, etc.)	Sporting Events
Extracurricular Clubs	Virtual Instruction	Athletic Programs
Field Trips	School Events (drama performances, dances, etc.)	Participation on school district's digital platforms / technology

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Jurisdictional Issue

- Fact specific inquiry
- If the alleged sexual harassment did not occur in the district's educational program or activity, Title IX does not apply.
- All on campus activities covered

Off Campus Activities Covered **If**:

- Off-campus incident occurs as part of district's operations; or
- The District exercised substantial control over both the respondent and the context of the alleged sexual harassment that occurred off campus

If Title IX does not apply, District can still act under its own code of conduct.

Educational Program or Activity

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Educational Program or Activity

Questions

- What if some conduct occurs in the district's educational program or activity and some occurs outside the district's program or activity?
- What if a student uses a personal device (*i.e.* cell phone) to perpetrate online sexual harassment during class time?
- What if a student engages in online sexual harassment at home using a personal device?

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Definition

Title IX Rule § 106.30(a)

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
- Designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party

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- May include the following:
  - Counseling
  - Extensions of deadlines
  - Other course-related adjustments
  - Modifications of work or class schedules
  - School escort services
  - Mutual restrictions on contact between the parties
  - Unilateral restrictions on contact that are not unreasonably burdensome on a respondent
  - Changes in work locations
  - Authorized leaves of absence
  - Increased security and monitoring of certain areas of the district



Supportive Measures

Title IX Sexual Harassment Policy 03.1621 / 03.2621 / 09.428111

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Supportive Measures

- Every complainant entitled to an offer of supportive measures by Title IX Coordinator upon report of sexual harassment
- KSBA Board Procedure also requires Title IX Coordinator to discuss possible supportive measures with respondent
- Formal complaint not required
- Cannot be designed to punish the respondent
- Must remain confidential unless disclosure needed to implement
- If district determines that a violation of Title IX did not occur, within discretion of district to continue supportive measures
- If supportive measures are not provided, the Title IX Coordinator must document the reasons why the failure was not clearly unreasonable in light of the known circumstances

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Serving Impartially and Avoiding Conflicts of Interest and Bias



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Impartiality Is Key

- Persons serving in key roles must not have any **conflict of interest or bias** against:
  - Complainants and respondents in general; or
  - An individual complainant or respondent.
- **Prejudging** the facts must be avoided.



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How Bias, Conflicts of Interest, and Prejudgment Harms a Title IX Investigation

- **Undermines** impartiality
  - A biased investigator cannot remain neutral.
- **Discourages** evidence
  - An investigator who has prejudged the facts may fail to gather or consider all relevant evidence.
- **Fails** to treat parties as individuals
  - Bias treats people as members of a class rather than as individuals with unique circumstances.

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What Is a Conflict of Interest?

A conflict of interest occurs when personal or private interests compromise one's judgment, decisions, or actions.

There are no ***per se*** conflicts of interests outlined in the Title IX regulations, but there may exist the appearance of a conflict or a bias that would prevent an investigator from serving.

May be based on:

- Prior or existing relationships
- Professional interests
- Financial interests
- Prior involvements or experiences

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Conflicts of Interest

Actual

- A direct conflict between your official duties and responsibilities and a competing personal interest or obligation.
- Example: The Title IX decision maker's daughter is the Complainant.

Perceived

- A situation where it reasonably could be perceived that a competing interest could improperly influence your duties and responsibilities.
- Example: The Title IX investigator previously had a relationship with a family member of the Respondent.

Potential

- Arises where a personal interest or obligation may conflict with your future duties and responsibilities.
- Example: The Title IX Coordinator and Complainant are scheduled to co-chair an upcoming school event.

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- Ask yourself the following questions:
  - Would I be happy if my colleagues became aware of the conflict?
  - Would I be happy if the conflict was the subject of a social media post?
  - If someone else was in my position, would I think he/she should be barred from participating?
  - If I were the Complainant or the Respondent, would I want someone in my position to investigate the allegations?

How to Know if You Have a Conflict of Interest



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What is Bias?



- A bias is a **prejudice**, **predisposition**, or a tendency or inclination to be in favor of or against someone or something
- Bias is often based on **stereotypes**, rather than actual knowledge of an individual or a particular circumstance.
  - Frequently based on gender, race, or sexual orientation

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Understanding Bias

Skin color, gender, and age are generally what people think of when they consider biases, but individuals can harbor a bias about a myriad of characteristics, including:

- Height and weight
- Marital and parental status
- Disability status (for example, the use of a wheelchair or cane)
- Foreign accents
- Religious preferences
- Hobbies or extracurricular activities

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Examples of Bias

Members of athletic teams always lie for each other.

Girls who wear short dresses (shorts, skirts, etc.) and go to parties are asking for trouble.

Men are always the aggressors in a sexual encounter.

Persons who speak English as a second language are not as credible.

Students with bad grades and a history of disciplinary issues are usually guilty.

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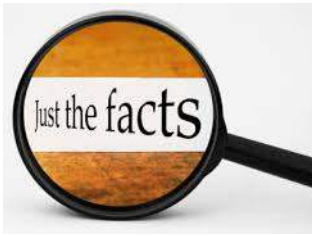
Avoiding Bias



- The evidence should lead to the conclusion.
  - Be thorough.
  - Don't limit the investigation to either party's witnesses or evidence.
  - Evaluate the source of the information, the content, and the plausibility in light of other evidence.
- Document your efforts.

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Prejudgment of the Facts

Prejudgment occurs when one passes judgment prematurely or without sufficient reflection or investigation. Stereotypes often lead to prejudgment.

Example: Complainant was crying while making her report. You conclude that because she was crying, she must have been telling the truth about the Respondent's conduct.

Example: Men cannot be sexually assaulted.

Example: A witness to the event was drinking at the time, so you presume his/her memory of the event is not accurate.

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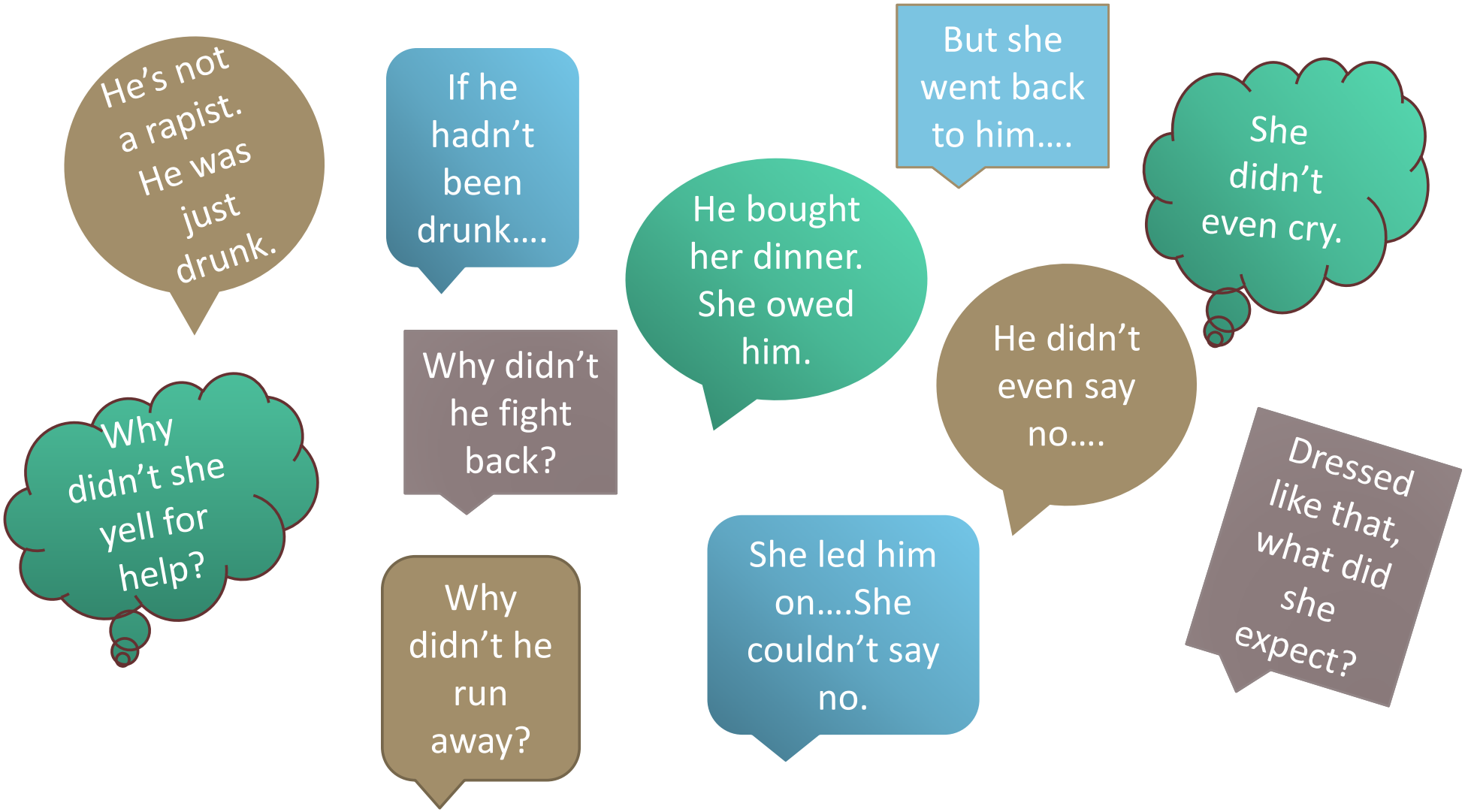

Stories We Tell Ourselves

Prejudging the Facts

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- Keep an open mind throughout the process.
- Wait to hear **all** of the facts.
- Seek out additional facts and/or witnesses if you feel you are jumping to conclusions.
- Consider potential responses to trauma
  - Delayed or reluctant reporting
  - Difficulty remembering details
  - Being calm and composed after an assault
- Do not assume that because there **are** signs of trauma, the trauma was caused by the Respondent.
- Do not assume that because there **are not** signs of trauma that nothing bad happened.

How to Avoid Prejudgment

Serving Impartially

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A Lesson on Bias

Schiebel v. Schoharie Cent. Sch. Dist.
120 F.4th 1082 (2nd Cir. 2024)



- Keith Schiebel contracted with school districts to work with high school students on the preparation of agriculture presentations for elementary school students.
- Almost a month after directing 10 high school students in one such presentation, the district Superintendent notified Schiebel that the mother of one of its students had reported that Schiebel had made her daughter feel uncomfortable and that Title IX paperwork would be filed.
- Schiebel repeatedly asked for more details regarding the allegations, which the district ignored.

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Schiebel v. Schoharie Cent. Sch. Dist.

Eventually, a meeting was scheduled between the Title IX Coordinator and Schiebel.

- The Coordinator advised Schiebel that because of her concerns about him, "her back was to the wall and she was aware of the exits."
- Schiebel was told the student had alleged he had reached around her with both of his hands and had touched her breast and butt. He was also told that another student who was present at the time said she had not seen anything like that.
- Schiebel did not recall the incident but speculated he might have reached around the student to get supplies from a cabinet. At that point, the Coordinator abruptly ended the meeting.

Two weeks later, the Coordinator found the allegations were "well-founded" and that Schiebel had not denied that he may have reached around the student.

Schiebel was banned from district property for 5 years.

Schiebel appealed, but the Superintendent upheld the findings, explaining Schiebel's failure and/or inability to deny the allegations made it "more likely than not that the conduct occurred as alleged."

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[T]he district was "deliberately indifferent to the truth or falsity of the accusations…because its investigation was so deficient as to constitute a sham, which rendered its decision inexplicable" and because "the Title IX coordinator exhibited sex-based bias…."

The Second Circuit's Holding

Schiebel v. Schoharie Cent. Sch. Dist.
120 F.4th 1082 (2nd Cir. 2024)

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The Journey of a Complaint



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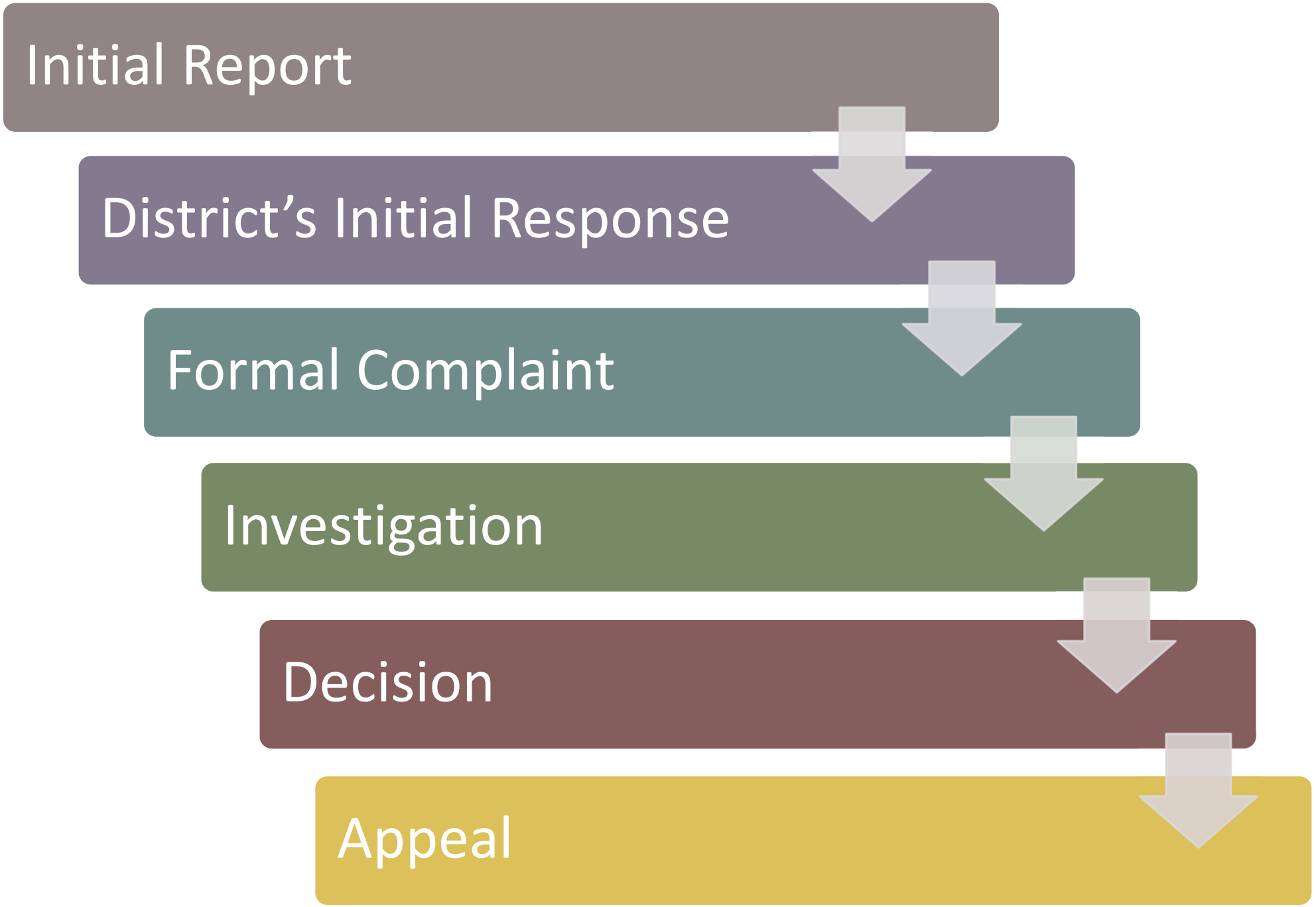

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The Initial Report



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A school district must respond promptly in a manner that is not deliberately indifferent when it has:



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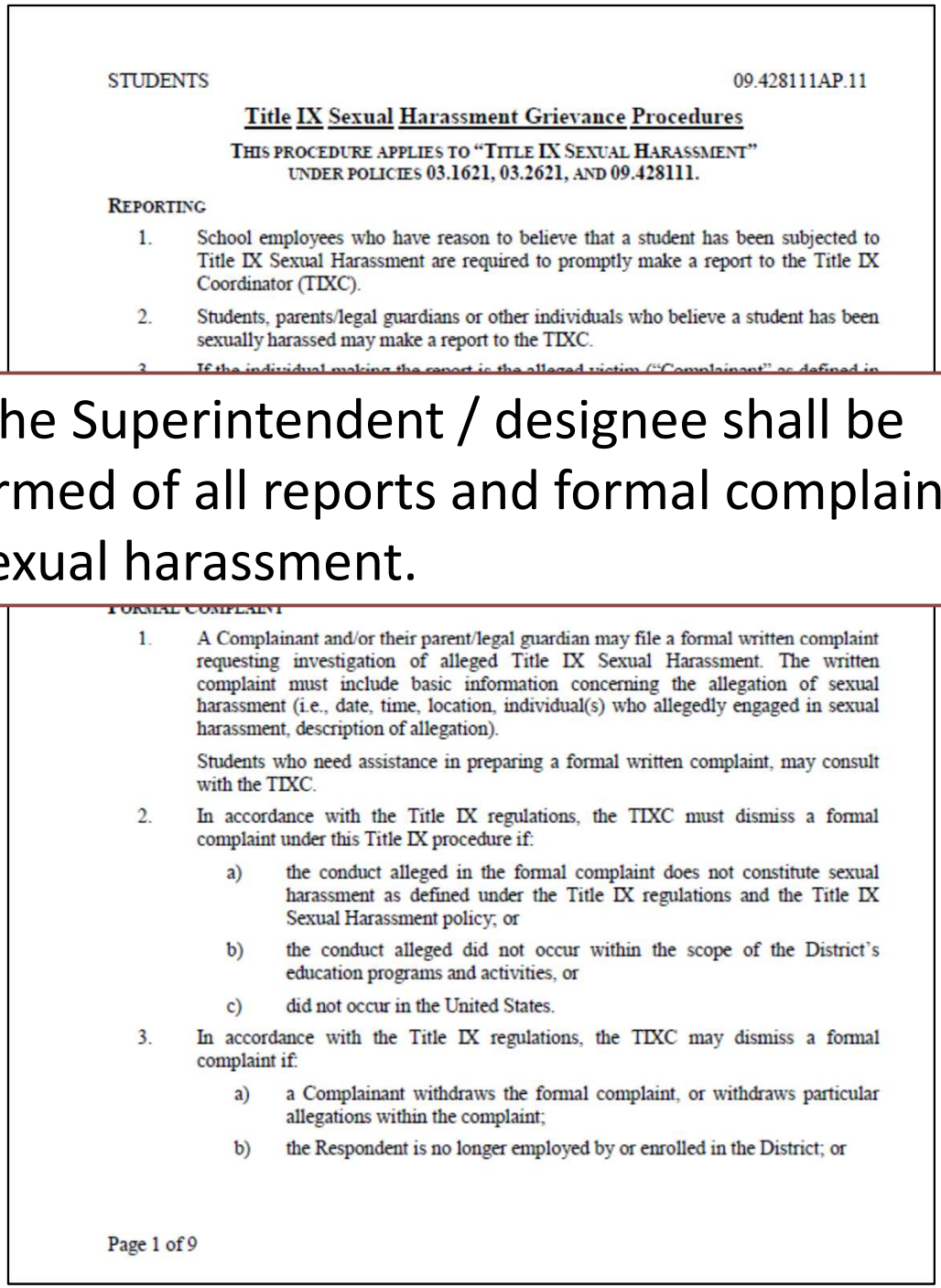
Reporting

Title IX Sexual Harassment Grievance Procedures

09.428111 AP.11



STUDENTS 09.428111AP.11

Title IX Sexual Harassment Grievance Procedures

THIS PROCEDURE APPLIES TO "TITLE IX SEXUAL HARASSMENT" UNDER POLICIES 03.1621, 03.2621, AND 09.428111.

REPORTING

1. School employees who have reason to believe that a student has been subjected to Title IX Sexual Harassment are required to promptly make a report to the Title IX Coordinator (TIXC).
2. Students, parents/legal guardians or other individuals who believe a student has been sexually harassed may make a report to the TIXC.

5. The Superintendent / designee shall be informed of all reports and formal complaints of sexual harassment.

FORMAL COMPLAINT

1. A Complainant and/or their parent/legal guardian may file a formal written complaint requesting investigation of alleged Title IX Sexual Harassment. The written complaint must include basic information concerning the allegation of sexual harassment (i.e., date, time, location, individual(s) who allegedly engaged in sexual harassment, description of allegation).

   Students who need assistance in preparing a formal written complaint, may consult with the TIXC.
2. In accordance with the Title IX regulations, the TIXC must dismiss a formal complaint under this Title IX procedure if:
   a) the conduct alleged in the formal complaint does not constitute sexual harassment as defined under the Title IX regulations and the Title IX Sexual Harassment policy; or
   b) the conduct alleged did not occur within the scope of the District's education programs and activities, or
   c) did not occur in the United States.
3. In accordance with the Title IX regulations, the TIXC may dismiss a formal complaint if:
   a) a Complainant withdraws the formal complaint, or withdraws particular allegations within the complaint;
   b) the Respondent is no longer employed by or enrolled in the District; or

Page 1 of 9

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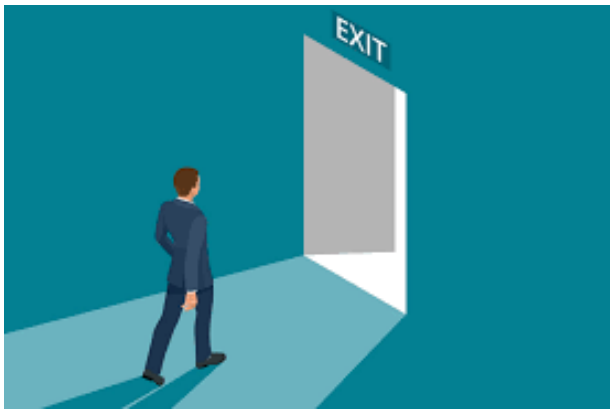
Emergency Removal / Employee Administrative Leave

- Removal / leave can occur before an investigation into sexual harassment allegations concludes or where no grievance process is pending.
- The Superintendent directs the removal.



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Immediate Emergency Removal of Student

Based on an individualized safety or risk analysis (**See KSBA Policy 09.429 Threat Assessment)

To protect a student or other individual from immediate threat to physical health or safety

Notice, opportunity to challenge provided "immediately" after the removal (**See KSBA Policy 09.434 Suspension)

Can place burden of proof on Respondent to show removal decision was incorrect

Consider other laws, *e.g.*, state laws, "change in placement" under IDEA

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Employee Administrative Leave

Not prohibited

KSBA Board Policies 03.173 (Certified) and 03.27 (Classified) allow for temporary suspension with pay while awaiting the outcome of a pending investigation

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Initial Meeting with Complainant

Title IX Coordinator must promptly, even if no formal complaint is filed….

Contact	Upon receipt of actual knowledge, contact the complainant to discuss the availability of "supportive measures"
Consider	Consider the complainant's wishes with respect to supportive measures
Inform	Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
Explain	Explain the process for filing a formal complaint

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Written Notice and Other Preliminary Issues



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Written Notice Regarding Formal Complaint

Upon receipt of a formal complaint and prior to any interviews, the Title IX Coordinator must provide **the parties** written notice of:

- ✓ The district's grievance process, including any informal resolution process;
- ✓ The allegations of sexual harassment;
- ✓ The identity of the parties;
- ✓ The conduct allegedly constituting sexual harassment;
- ✓ The date and location of the incident;
- ✓ The presumption of nonresponsibility until a determination has been made regarding responsibility at the end of the grievance process;
- ✓ The right to inspect and review evidence;
- ✓ The right to have an advisor during the process; and
- ✓ Any provision in the district's code of conduct that prohibits knowingly making false statements or submitting false information during the grievance process.

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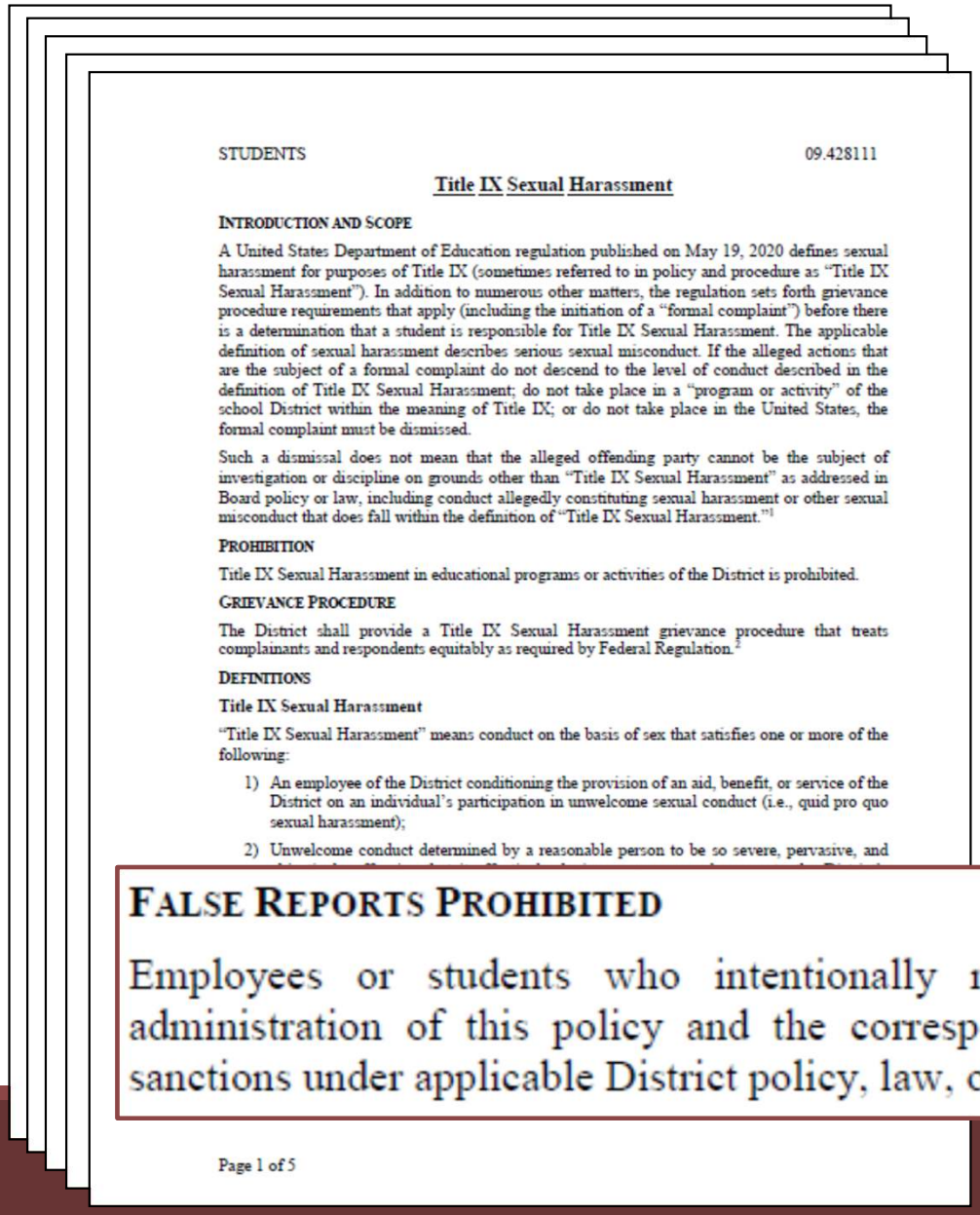

STUDENTS 09.428111

Title IX Sexual Harassment

INTRODUCTION AND SCOPE

A United States Department of Education regulation published on May 19, 2020 defines sexual harassment for purposes of Title IX (sometimes referred to in policy and procedure as "Title IX Sexual Harassment"). In addition to numerous other matters, the regulation sets forth grievance procedure requirements that apply (including the initiation of a "formal complaint") before there is a determination that a student is responsible for Title IX Sexual Harassment. The applicable definition of sexual harassment describes serious sexual misconduct. If the alleged actions that are the subject of a formal complaint do not descend to the level of conduct described in the definition of Title IX Sexual Harassment; do not take place in a "program or activity" of the school District within the meaning of Title IX; or do not take place in the United States, the formal complaint must be dismissed.

Such a dismissal does not mean that the alleged offending party cannot be the subject of investigation or discipline on grounds other than "Title IX Sexual Harassment" as addressed in Board policy or law, including conduct allegedly constituting sexual harassment or other sexual misconduct that does fall within the definition of "Title IX Sexual Harassment."[1]

PROHIBITION

Title IX Sexual Harassment in educational programs or activities of the District is prohibited.

GRIEVANCE PROCEDURE

The District shall provide a Title IX Sexual Harassment grievance procedure that treats complainants and respondents equitably as required by Federal Regulation.[2]

DEFINITIONS

Title IX Sexual Harassment

"Title IX Sexual Harassment" means conduct on the basis of sex that satisfies one or more of the following:

1) 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 (i.e., quid pro quo sexual harassment);
2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and

FALSE REPORTS PROHIBITED

Employees or students who intentionally make false reports related to the District's administration of this policy and the corresponding procedures, are subject to disciplinary sanctions under applicable District policy, law, or the Student Discipline Code, as applicable.

Page 1 of 5

Title IX Sexual Harassment Policy

03.1621 / 03.2621 / 09.428111

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The District must keep confidential the identity of the following:

- Any individual who has made a report or complaint
- Any complainant, respondent, or witness
- Any individual who has been reported to be the perpetrator

Exceptions

- Those permitted by FERPA, by law, or those needed to carry out Title IX purposes, including the conduct of any investigation, hearing or judicial proceeding

Title IX Sexual Harassment Policy - Confidentiality Provision
03.1621 / 03.2621 / 09.428111

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Confidentiality

- Investigative evidence directly related to the allegations of a formal complaint is subject to inspection and review by the parties
  - **BUT** is not to be disseminated to the public
  - DOE rule commentary: In accordance with FERPA's definition of "education records," a parent of a complainant or a respondent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student **EVEN IF** that statement contains information directly related to another student **IF** the information cannot be segregated or redacted without destroying its meaning.

Title IX Sexual Harassment Policy

03.1621 / 03.2621 / 09.428111

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Title IX Scenario

A single teacher brings a complaint against a married administrator alleging learing, glaring, comments about short skirts, etc. There is also an underlying rumor about a physical sexual relationship. The investigation has begun with an interview of the Respondent, and the Complainant has now written an e-mail to the superintendent withdrawing her complaint.

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Dismissals

Mandatory

- The conduct alleged does not meet the definition of sexual harassment; or
- The conduct alleged did not occur in the district's educational programs or activities; or
- The conduct did not occur in the U.S.

- If dismissed, the TIXC must provide written notice to the parties explaining the reasons, and the parties can appeal.

Discretionary

- The Complainant withdraws the complaint; or
- The Respondent is no longer employed or enrolled in the district; or
- There are special circumstances that prevent the district from gathering evidence sufficient to reach a determination.

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Reasonably Prompt Time Frames

Time frames for grievance process must be **reasonably prompt**, including appeals and internal resolution process

The Investigation

- The investigation shall be concluded within **40 calendar days** from the date of the notice to the parties following a formal complaint
  - Initial Interviews of the Parties: Not less than **10** calendar days from the date of the notice to the parties following a formal complaint
  - Parties Raise Conflict of Interest or Bias Concerns regarding Investigator: **3** calendar days from the date of the notice to the parties following a formal complaint
  - Written Response Regarding Evidence: **10** calendar days
  - Written Response to Investigative Report: **10** calendar days

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Reasonably Prompt Time Frames

Time frames for grievance process must be **reasonably prompt**, including appeals and internal resolution process

Pre-Determination Matters

- Written Questions a Party Wants Decision Maker to Ask Other Party or Witness: **5** calendar days from date Decision Maker Received Investigative Report
- Follow-Up Questions: **5** calendar days to submit written follow-up questions after reviewing the responses of the other party and/or witness

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- Determination of Responsibility: issued by the Decision Maker within **30** calendar days of receipt of the Investigator's report
- Written Appeal: Filed within **5** calendar days of receipt of the determination decision
- Written Response to Appeal: **5** calendar days upon receipt of notification by the Appellate Decision Maker of a party's appeal



Reasonably Prompt Time Frames

The Determination and Appeals

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Reasonably Prompt Time Frames

Limited extensions permitted only for good cause

Absence of a party	Absence of a party's advisor	Language assistance	Disability accommodations

A concurrent criminal investigation does not alleviate Title IX investigating requirements but could support short delay

Must try to accommodate schedules of parties or witnesses but they cannot indefinitely delay the grievance process by failing to cooperate

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Conducting the Investigation



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Who Should Investigate?

- Title IX Coordinator?
- Human Resources?
- Administrator(s)?
- External Investigator?

****All must be well-trained!**



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No specific requirement, BUT:

- Investigation must be prompt, thorough, and impartial
- Always have alternates available in case of recusal, illness, etc.

More than 1 investigator?

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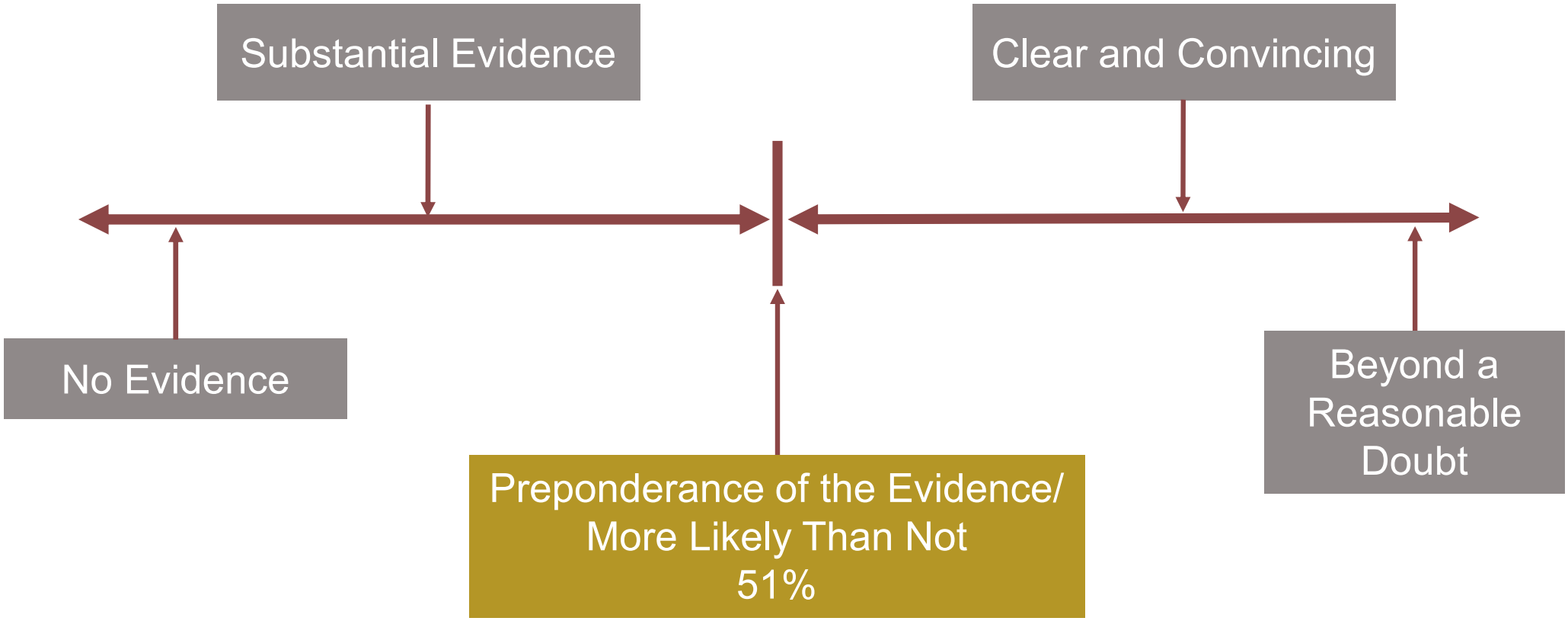
Evidentiary Standards



Understanding Evidence Threshold

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Standard of Evidence

Districts must adopt a standard of evidence:

- **Preponderance of the evidence** = concluding that a fact is more likely than not to be true
- **Clear and convincing evidence** = concluding that a fact is highly probable to be true



Must use the same standard of evidence for **all** complaints against students and employees

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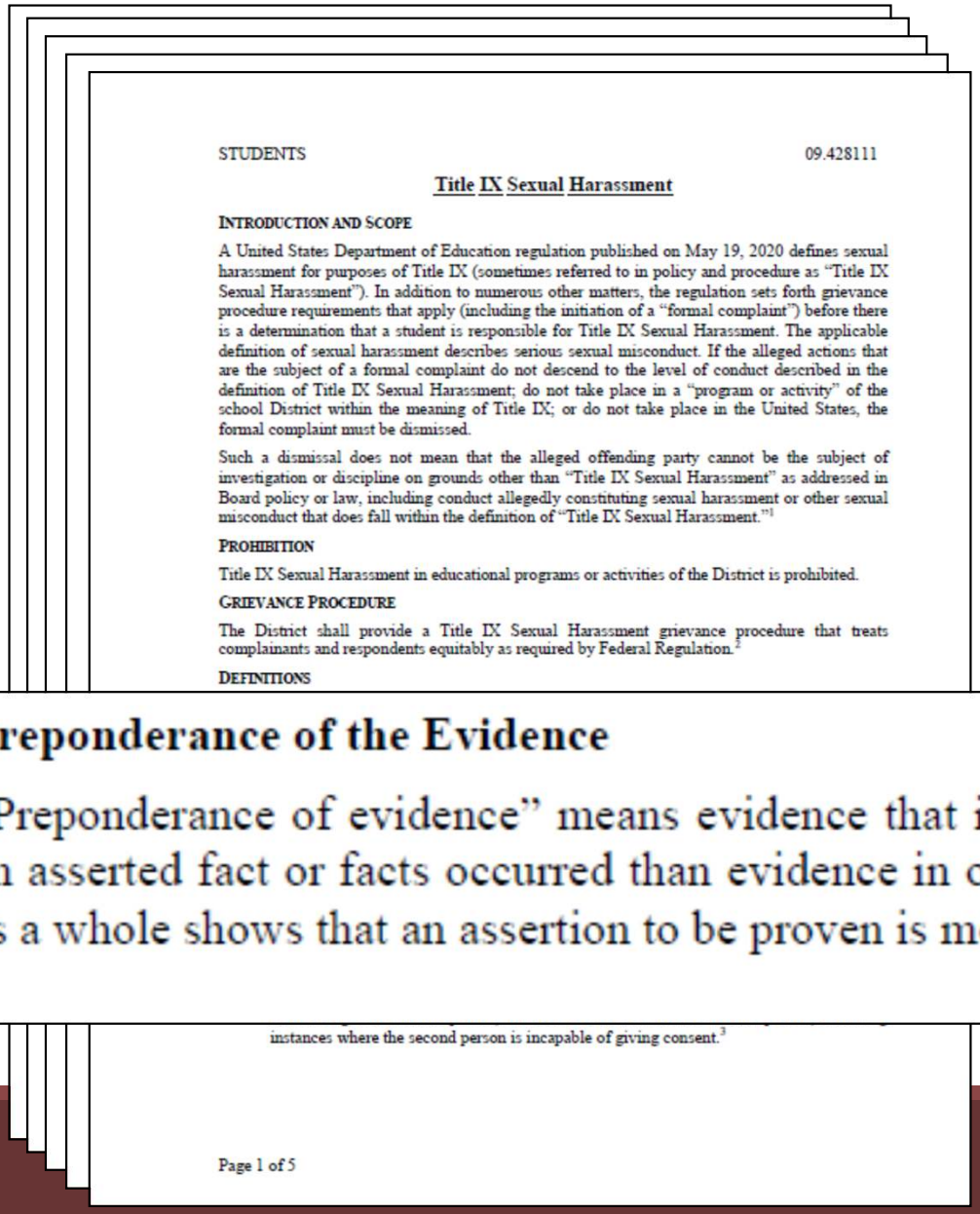

STUDENTS 09.428111

Title IX Sexual Harassment

INTRODUCTION AND SCOPE

A United States Department of Education regulation published on May 19, 2020 defines sexual harassment for purposes of Title IX (sometimes referred to in policy and procedure as "Title IX Sexual Harassment"). In addition to numerous other matters, the regulation sets forth grievance procedure requirements that apply (including the initiation of a "formal complaint") before there is a determination that a student is responsible for Title IX Sexual Harassment. The applicable definition of sexual harassment describes serious sexual misconduct. If the alleged actions that are the subject of a formal complaint do not descend to the level of conduct described in the definition of Title IX Sexual Harassment; do not take place in a "program or activity" of the school District within the meaning of Title IX; or do not take place in the United States, the formal complaint must be dismissed.

Such a dismissal does not mean that the alleged offending party cannot be the subject of investigation or discipline on grounds other than "Title IX Sexual Harassment" as addressed in Board policy or law, including conduct allegedly constituting sexual harassment or other sexual misconduct that does fall within the definition of "Title IX Sexual Harassment."[1]

PROHIBITION

Title IX Sexual Harassment in educational programs or activities of the District is prohibited.

GRIEVANCE PROCEDURE

The District shall provide a Title IX Sexual Harassment grievance procedure that treats complainants and respondents equitably as required by Federal Regulation.[2]

DEFINITIONS

instances where the second person is incapable of giving consent.[3]

Page 1 of 5

Preponderance of the Evidence

"Preponderance of evidence" means evidence that is of greater weight or more convincing that an asserted fact or facts occurred than evidence in opposition to such facts. It is evidence which as a whole shows that an assertion to be proven is more likely than not.

Title IX Sexual Harassment Policy

03.1621 / 03.2621 / 09.428111

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Statute of Limitations - Example

When Jane was in 7th grade she was subjected to severe sexual harassment by several boys on the bus which included unwanted verbal taunts and grabbing her body. She never reported their behavior. Jane is now in 11th grade and is aware of the "Me Too" Movement. She decides to tell her high school guidance counselor about what happened and wants the boys punished.

Is Jane's report too late?

How far back must the district go to fulfill its Title IX obligations?

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Burden of Proof

- The burden of gathering evidence and the burden of proof remains on the district throughout the grievance process
- Both parties have the right to provide evidence and witnesses but not required
- The district bears the responsibility of gathering evidence and interviewing witnesses
- The district is neutral during the investigative process
- **Goal** of the investigation is to gather information so the neutral decision maker can make an accurate determination

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The Parties' Rights

- Notice and opportunity to prepare
- Right to an advisor
- Opportunity to present evidence (documentation and witnesses)
- Cannot restrict the parties' right to discuss the allegations with others
- Right to review all evidence directly related to the investigation
- Right to review the Investigative Report

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Notice and Opportunity to Prepare

Title IX Rule
§ 106.45(b)(5)(v)

"When investigating a formal complaint and throughout the grievance process…a recipient must 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…."

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Right to an Advisor

Title IX Rule §106.45(b)(5)(iv)

- The parties shall have the same opportunity to have an advisor of his/her choice
  - Advisor can be anyone – attorney, friend, parent, another student
- The role of the advisor is to provide support and to accompany the party to meetings and interviews
- The district can establish restrictions regarding the extent to which the advisor can participate in the proceedings BUT any restrictions must apply equally to both parties

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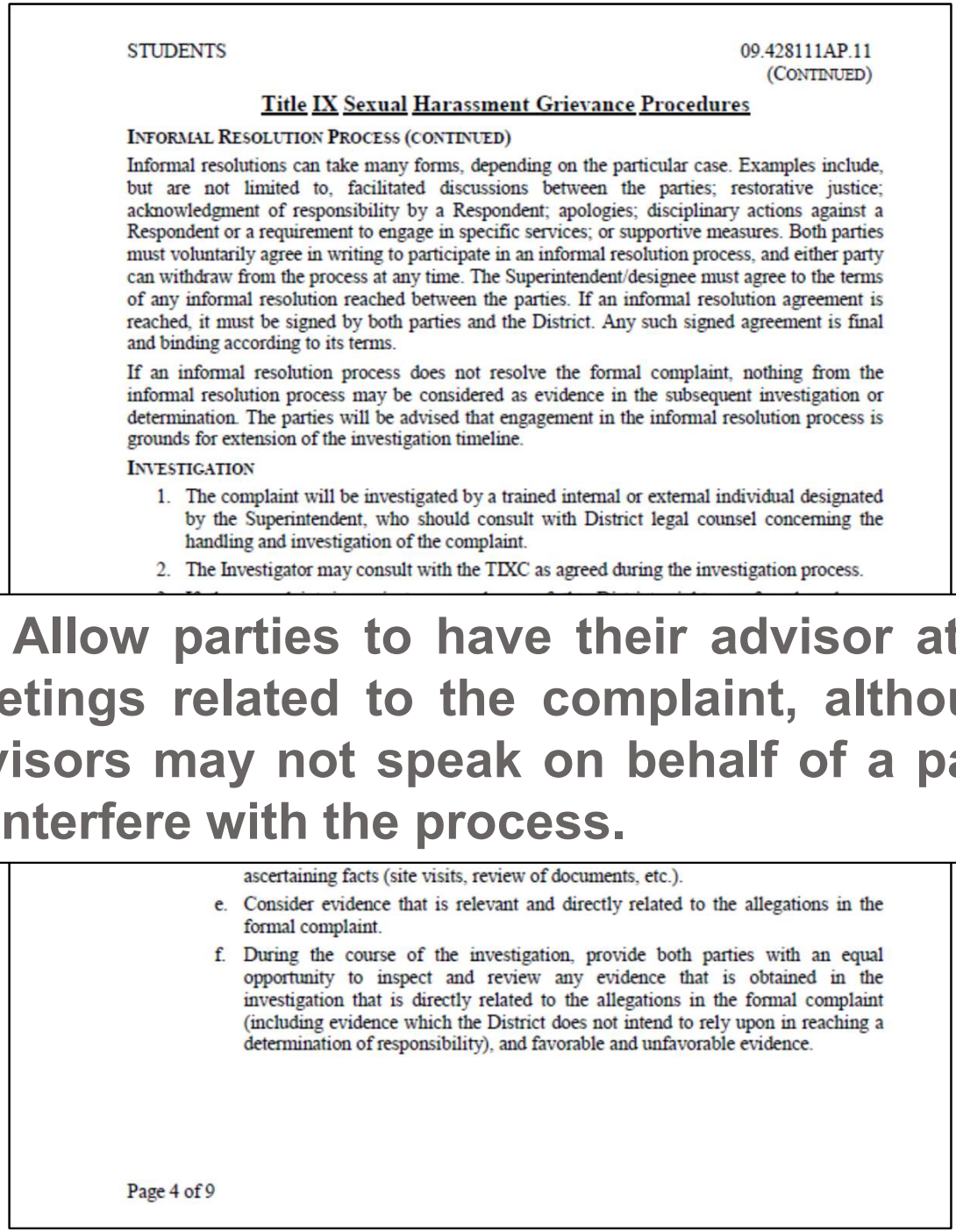
Right to an Advisor

KSBA Procedure 09.428111 AP.11



STUDENTS 09.428111AP.11
(CONTINUED)

Title IX Sexual Harassment Grievance Procedures

INFORMAL RESOLUTION PROCESS (CONTINUED)

Informal resolutions can take many forms, depending on the particular case. Examples include, but are not limited to, facilitated discussions between the parties; restorative justice; acknowledgment of responsibility by a Respondent; apologies; disciplinary actions against a Respondent or a requirement to engage in specific services; or supportive measures. Both parties must voluntarily agree in writing to participate in an informal resolution process, and either party can withdraw from the process at any time. The Superintendent/designee must agree to the terms of any informal resolution reached between the parties. If an informal resolution agreement is reached, it must be signed by both parties and the District. Any such signed agreement is final and binding according to its terms.

If an informal resolution process does not resolve the formal complaint, nothing from the informal resolution process may be considered as evidence in the subsequent investigation or determination. The parties will be advised that engagement in the informal resolution process is grounds for extension of the investigation timeline.

INVESTIGATION

1. The complaint will be investigated by a trained internal or external individual designated by the Superintendent, who should consult with District legal counsel concerning the handling and investigation of the complaint.
2. The Investigator may consult with the TIXC as agreed during the investigation process.

b. Allow parties to have their advisor at all meetings related to the complaint, although advisors may not speak on behalf of a party or interfere with the process.

ascertaining facts (site visits, review of documents, etc.).

e. Consider evidence that is relevant and directly related to the allegations in the formal complaint.

f. During the course of the investigation, provide both parties with an equal opportunity to inspect and review any evidence that is obtained in the investigation that is directly related to the allegations in the formal complaint (including evidence which the District does not intend to rely upon in reaching a determination of responsibility), and favorable and unfavorable evidence.

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Right to Discuss the Allegations

Title IX Rule
§ 106.45(b)(5)(iii)

- The district cannot restrict the parties from discussing the allegations or from gathering evidence.
  - No confidentiality or gag orders
- Some limited exceptions
  - No-contact directive
  - Purpose cannot be retaliatory



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The Investigative Process

- Formal Complaint is brought
- Notice sent regarding the allegations
- Plan Investigation
- Conduct Interviews and Collect Evidence
- Follow-Up
- Parties to review, inspect, and comment on the evidence
- Complete Investigation Report and recommendation and send to parties for their review and written responses
- Distribute Investigation Report and parties' written responses to Decision Maker

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The Investigation

Develop
Gather
Conduct
Provide

- Develop an investigation plan
- Gather all relevant evidence
- Conduct interviews
- Provide evidence to parties and prepare final Investigative Report and recommendation

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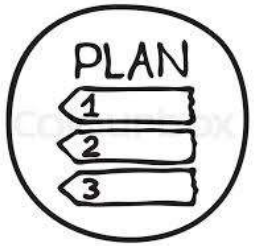
Investigation Plan

- Determine the scope of the investigation
- Prepare a chronology of known events with respect to the allegations
- Identify important witnesses to be interviewed and develop a preliminary schedule of interviews
- Identify relevant evidence to be obtained



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Conducting Interviews



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Interviews of the Parties and Witnesses

- Determine where to conduct the interviews
  - Private location where parties and witnesses will be comfortable
- Explain the investigation process
  - Give expected time frame for completion of investigation
  - Explain what details might be shared with others
- Cover the district's prohibition on retaliation

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Interviews of the Parties and Witnesses

Do's and Don'ts

DON'T: Be too formal

DO: Show empathy while maintaining a professional objectivity

****

DON'T: Refuse to ask a particular question because it may be embarrassing or because it may make you or the witness uncomfortable

DO: Ask questions in a tactful manner in order to obtain all the necessary details

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Interviews of the Parties and Witnesses

Do's and Don'ts

DON'T: Ask questions based on what you think might have happened

DO: Ask open-ended questions to obtain the facts and then follow up to clarify the details

****

DON'T: Interrupt the witness or make assumptions

DO: Allow the witness time to tell his/her story

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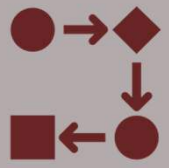
"Please tell me what happened that day."



"Can you walk me through what happened?"



"In your own words, tell me what occurred."



"Can you tell me everything that happened after you got to the dance?"

Examples of Open-Ended Questions

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"You mentioned….Can you tell me more about that?"

"You said….Can you elaborate?"

"You said they forced you. Can you tell me specifically what they did?"

"If I understood you correctly, you said that after….Can you tell me what happened in between?"

Examples of Follow-Up Questions

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Interviews of the Parties and Witnesses

Do's and Don'ts

DON'T: Act like a detective on Law & Order and treat the interview like an interrogation

DO: Remember your role as an investigator and remain objective

****

DON'T: Allow unconscious bias or your personal beliefs to erode your objectivity

DO: Continually remind yourself to keep an open mind and gather all the evidence.

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The Evidence



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Taking in Evidence

Throughout the investigative process, including the decision-making stage, evidence will be evaluated for:

- Reliability
- Relevance
- Weight

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Types of Evidence

- Electronic communications (e-mail, text message, voicemail recordings, social media chats or posts, direct messages, etc.)
- Security information
- Pictures, videos, audio
- Police reports
- Personnel files
- Education records
- Prior complaints against the respondent
- Interviews and Statements

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Evidence

- The **district** carries the burden of proof.
- The Investigator must collect **all** of the evidence **related to** the allegations and then evaluate the relevant evidence.
- **Cannot exclude relevant evidence** because it may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- The parties have the **right to inspect** all the evidence (both related to and relevant).
- Privileged evidence is **not** relevant **without consent**.
  - ► Attorney-client
  - ► Doctor-patient
  - ► Spouse
- Medical and counseling records are **not** relevant **without voluntary, written consent**.
- Complainant's prior sexual behavior is **not** relevant with **two exceptions**.

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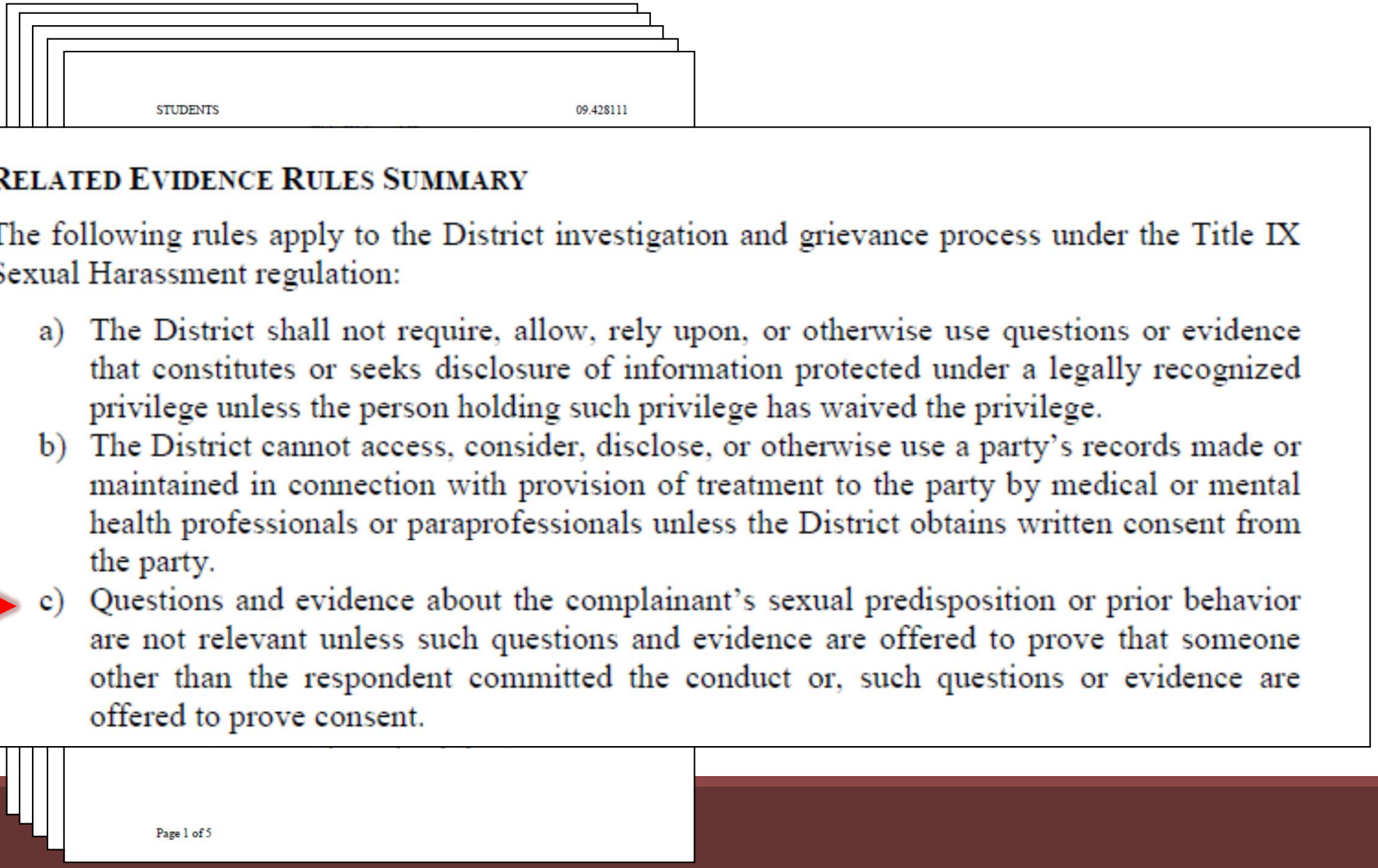

Relevance, Rape Shield Protections & Exceptions

Excerpt from Title IX Sexual Harassment Policy 03.1621 / 03.2621 / 09.428111

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Evidence pertinent to proving whether facts material to the allegation are more or less likely to be true.



Relevant Evidence

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Reviewing the Evidence



Before issuing the Investigative Report, the Investigator must provide the parties and advisors an opportunity to inspect and review the evidence.

- Evidence that is directly related to (both relevant and irrelevant) the allegations raised in the Formal Complaint
- Statements, notes of interviews, and other types of evidence the school plans to use before reaching a determination **and evidence the school doesn't think it will use**
- Provide the evidence in electronic or hard copy format
- Advise the parties that the evidence is not to be publicly disseminated

The parties must be given at least **10 calendar days** to review all the evidence and submit written responses about the evidence to the investigator.

The Investigator **must** consider parties' input prior to completion of Investigative Report.

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The Investigative Report



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The Investigative Report

- The final investigative report must fairly summarize **relevant** evidence.
- Per KSBA Board procedure 09.428111 AP.11, **must include** the Investigator's recommendation on whether or not the evidence supports a finding that the Respondent engaged in conduct constituting Title IX sexual harassment.
  - **BUT**, the Decision Maker is under an independent obligation to objectively evaluate the relevant evidence and **cannot defer** to the Investigator's recommendations.
- Investigator must send the final investigative report to the parties and any advisors simultaneously for their review and written responses.
  - Written responses to be filed within **10 calendar days** of receipt of the report
  - Investigator must forward the Investigative Report and party responses to the assigned Decision Maker

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Determination Regarding Responsibility



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Opportunity of Parties to Submit Questions

- Prior to reaching a determination regarding responsibility, the Decision Maker
  - Must immediately inform the parties of the date he/she received the Investigative Report and give each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness
  - Must allow 5 calendar days
  - Must provide each party with answers
  - Must allow for additional, limited follow-up questions from each party within 5 calendar days from receiving the answers
  - Must provide each party with follow-up answers
  - Must explain to the party proposing the questions any decision to exclude a question as not relevant

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- The Decision Maker must review the Investigative Report, the parties' responses and other written materials before issuing the determination.
- Preponderance of the evidence standard applies



The Written Determination

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Written Determination

Title IX Rule § 106.45(b)(7)(ii)

Written Determination must include the following:

- Identification of the allegations potentially constituting sexual harassment;
- 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;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the district's code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the district imposes on the Respondent, and whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the Complainant; and
- The district's procedures and permissible bases for the Complainant and Respondent to appeal.

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Written Determination

- Written Determination to be issued within **30 calendar days** of the Decision Maker's receipt of the Investigative Report
  - ➢ Reasonable extension for good cause allowed
- Decision Maker must provide determination to the parties simultaneously
- Determination becomes final when the district issues a written decision regarding any appeal or, if no appeal is filed, the date when an appeal would no longer be considered timely

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- Required if the determination substantiates that sexual harassment occurred.
- Designed to restore or preserve equal access to the district's education program or activity.
- Nature of remedies being offered should not appear in the written determination of responsibility
- Title IX Coordinator responsible for effective implementation of remedies
- Can be same as supportive measures and can include other appropriate measures
- Need not be non-disciplinary or non-punitive and may burden the Respondent

Remedies

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Disciplinary Sanctions

Title IX Sexual Harassment Grievance Procedure

09.428111 AP.11

- For students, the non-exhaustive range includes:
  - In or out of school suspension
  - Expulsion
  - Assignment to alternative education programs
  - Requirement to engage in education or counseling program
  - Disqualification or modification of privileges to participate in sports or extracurricular programs
  - Unilateral no-contact orders
  - School assignment alteration or schedule changes
  - Prohibitions or limitations on presence on school property or at school-related events
  - Other disciplinary sanctions and interventions set forth in the district's code of conduct

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Disciplinary Sanctions

Title IX Sexual Harassment Grievance Procedure

09.428111 AP.11

- For employees, the non-exhaustive range includes:
  - Requirement to engage in education or counseling program
  - Unilateral no-contact orders
  - School assignment alteration
  - Prohibitions or limitations on presence on school property or at school-related events
  - Private reprimand
  - Public reprimand
  - Suspension without pay
  - Termination

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Appeals



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Appeals

- Both parties have the right to appeal from a determination of responsibility and the decision to dismiss a formal complaint, on the following bases:
  - A procedural irregularity that affected the outcome
  - New evidence that could affect the outcome and that was not *reasonably available* at the time the determination or dismissal was made
  - The Title IX Coordinator, Investigator, or Decision Maker had a conflict of interest or bias against complainants or respondents in general or against the specific Complainant or Respondent that affected the outcome

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Appeals

- An appeal must be filed within 5 calendar days of decision
- An appeal must be filed in writing with the Superintendent and state the grounds and arguments for reversal or modification of the decision

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The Appeal Process

- The Superintendent may serve as the Appellate Decision Maker **or** submit the appeal to the designated Appellate Decision Maker.
- The Appellate Decision Maker must notify the other party **in writing** when an appeal is filed **and** include copies of the document setting forth the grounds and arguments in support of the appeal.
- The other party has the option of filing written arguments in response to the opposing party's appeal within **5 calendar days** of the appeal document.

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The Appeal Process

The Appellate Decision Maker must:

- Conduct an impartial review of the appeal including consideration of arguments of the parties and the written record
- Issue a written decision describing the result of the appeal and rationale for the result
- Provide notice of the written decision simultaneously to the parties

The decision may:

- Affirm the determination
- Reverse the determination
- Modify the determination in whole or in part

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Recordkeeping

Records related to sexual harassment reports and the complaint process must be maintained for **a minimum of 7 years**.



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Informal Resolution



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Informal Resolution



- **School has discretion** to choose to offer and facilitate informal resolution process
  - **Not** required
- **IF** informal resolution offered
  - Can only be utilized when there is a formal complaint
  - Can be used so long as **both** parties **voluntarily** agree
  - Informed, written consent required
- Process can be utilized any time **prior to** reaching a **determination**
- At any time before resolution, a party can withdraw from the informal process and resume the grievance process.
- School may not require a waiver of the right to a formal investigation.

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The District may not require Informal Resolution…

As condition of enrollment or continuing enrollment;

As condition of employment or continuing employment; or

As condition of enjoyment of any other rights.

Informal Resolution

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Informal Resolution - Considerations

- Cannot be used to resolve allegations that employee sexually harassed a student
- Avoid using in severe situations or with violent incidents
- Title IX Coordinator determines if the informal resolution process should be utilized
  - **Remember:** The parties must voluntarily agree to participate. The Title IX Coordinator cannot pressure a party to participate.

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Reasons to Consider Informal Resolution

- Parties may be more satisfied with outcomes they reach themselves
- Solutions are tailored to the parties' needs
- Process is less adversarial

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Types of Informal Resolution

Mediation

- Informal Resolution Officer
  - Extensive experience needed
  - Private mediation a plus
  - School officer or third party?
  - Ensure no bias or conflicts of interest
- Who pays cost?
- Is result privileged and confidential?

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Types of Informal Resolution

Restorative Justice

- Not defined in the regulations
- Purpose is to repair harm through facilitation
- Any requirement to admit responsibility?
- Supportive vs. Punitive

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- Acknowledgement of responsibility by a Respondent
- Apologies
- Disciplinary actions against a Respondent or a requirement to engage in specific services
- Supportive Measures

Other Examples of Informal Resolution
Title IX Grievance Procedure 09.428111 AP.11

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Requirements for Informal Resolution Process

KSBA Procedure 09.428111 AP.11

- **Both** parties must **voluntarily** agree **in writing**.
- **Either** party can withdraw at any time.
- The Superintendent, or designee, **must agree** to the terms of the informal resolution reached by the parties.
- Any agreement reached **must be signed** by **both** parties and the District.
- The parties must be advised that engagement in the informal resolution process is grounds for an **extension of the investigation timeline**.

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- Create ground rules in writing
- Utilize remote technology
- Keep parties apart in mediation



Informal Resolution
Recommendations

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Retaliation



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Retaliation

Title IX Rule
§ 106.71

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 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….

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Retaliation



- Any reports of retaliation should be made **immediately** to the Title IX Coordinator.
- Retaliation complaints may be filed under Title IX grievance process.
- The exercise of First Amendment rights does not constitute retaliation.

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Retaliation

- Beware of disciplining for a non-harassment code of conduct violation where you learned of the violation via the sexual harassment complaint.
  - ➢ It can be done, but should be for an infraction for which you typically would discipline.
  - ➢ Someone other than the Investigator or the Decision Maker should process any such discipline and should know as little as possible about the Title IX Complaint.
- Disciplining a student based on a code of conduct violation for making a **materially false statement in bad faith** during the investigation of a complaint does not constitute retaliation.

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Questions?

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