

BRISTOL TOWNSHIP SCHOOL DISTRICT

JUNE 22, 2023

# ***SLOW YOUR ROLE***

**TITLE IX OVERVIEW, CASES, AND PROCEDURES**

Presented by: Sharon W. Montanye

Copyright © 2023

**SWEET | STEVENS | KATZ | WILLIAMS**

# CAVEAT

This presentation does not address student rights or the responsibility of school employees and LEAs under Pennsylvania's Child Protective Services Law. The responsibility of school employees and/or IUs are very different under this law which mandates reporting whenever a school employee has a reasonable suspicion that a child is/has been subject to abuse.

Please contact us if you need additional information about the Child Protective Services Law.





## **WHAT IS TITLE IX?**

**Title IX of the Education Amendments of 1972 is a federal statute that prohibits discrimination on the basis of sex in education programs or activities of recipients of federal assistance including schools and IUs.**

# TITLE IX LANGUAGE

**“NO PERSON IN THE UNITED STATES SHALL, ON THE BASIS OF SEX, BE EXCLUDED FROM PARTICIPATION IN, BE DENIED THE BENEFITS OF, OR BE SUBJECTED TO DISCRIMINATION UNDER ANY EDUCATION PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE.”**



# SEXUAL HARASSMENT

SEXUAL HARASSMENT IS DEFINED AS “CONDUCT ON THE BASIS OF SEX THAT SATISFIES ONE OR MORE OF THE FOLLOWING:

- (1) AN EMPLOYEE OF THE SCHOOL DISTRICT CONDITIONING THE PROVISION OF AN AID, BENEFIT, OR SERVICE OF THE SCHOOL DISTRICT 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 IU’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)”



# ENFORCEMENT

Title IX is enforced by the Office of Civil Rights within the United States Department of Education (“OCR”).



- **DISCRIMINATION IN STUDENT DISCIPLINE OR ATHLETICS;**
- **UNEQUAL ACCESS TO EDUCATIONAL RESOURCES OR PROGRAMS;**
- **A SEXUAL RELATIONSHIP BETWEEN A STAFF MEMBER AND A STUDENT;**
- **SEXUAL RELATIONSHIP BETWEEN SUPERIOR AND SUBORDINATE;**
- **PEER ON PEER HARASSMENT;**
- **HARASSMENT BASED ON GENDER OR GENDER EXPECTATIONS;**
- **RETALIATION AGAINST AN INDIVIDUAL WHO HAS ASSERTED TITLE IX RIGHTS.**



# ATHLETICS

- Factors considered by OCR in reviewing Title IX issues in athletics include equal access to:
  - Equipment and supplies;
  - Medical services and training facilities;
  - Locker rooms, practice and competitive facilities;
  - Assignment and compensation of coaches; and
  - Game and practice times.





# SEXUAL HARASSMENT

Sexual Harassment is a type of discrimination based on sex which is prohibited under Title IX.



# EXAMPLES OF SEXUAL HARASSMENT

- SEXUALLY EXPLICIT COMMUNICATIONS;
- SEXUAL STATEMENTS ABOUT A PERSON'S APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY, OR PRIOR OR CURRENT SEXUAL EXPERIENCE/ACTIVITY; AND
- UNNECESSARY TOUCHING OF ANOTHER PERSON (E.G. BRUSHING AGAINST THEIR BODY OR HUGGING THEM).



# TITLE IX VIOLATIONS BASED UPON HOSTILE ENVIRONMENT

A Hostile Environment is an environment where a student is subjected to unwelcome conduct that interferes with the student's ability to access education due to an intimidating or offensive learning environment.



# SIGNS OF A TITLE IX VIOLATION

A denial of equal access to educational opportunities may be shown where a student:

- feels compelled to skip classes or miss school to avoid a harasser;
- has declining grades;
- has difficulty concentrating in class;
- has problems with sleeping;
- quits a sports team or other school activity.



# INJURY FROM A TITLE IX VIOLATION

Concrete injury is not required to prove effective denial of equal access

- Students do not need to have “dropped out of school, failed a class, had a panic attack, otherwise reached a ‘breaking point’ ,” or exhibited specific trauma symptoms to be effectively denied equal access.

<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>



# OFF-CAMPUS TITLE IX VIOLATIONS

Title IX applies to off-campus settings if a school entity exercises substantial control over the alleged perpetrator and the context in which the harassment occurs (e.g. a field trip).





# ON-LINE TITLE IX VIOLATIONS

The statute and regulations also apply to harassment occurring on-line.



# NOTICE OF TITLE IX VIOLATIONS

School entities do not have “notice” for purposes of Title IX if the only official who has actual notice of the harassment is the alleged perpetrator.



# CASES

*Franklin Gwinnett County Public Schools, ( S. Ct. 1992)*

- The United States Supreme Court held that victims of sexual harassment may seek money damages against a school district as a remedy for a violation of their Title IX rights. The Court also recognized that teacher on student harassment is a form of sex based discrimination under Title IX.



# CASES

*Gebser v. Lago Vista Independent School Dist.* (S. Ct. 1999)

- The United States Supreme Court held that a school district may be liable for damages under Title IX where it is *deliberately indifferent* to *known acts* of teacher-student sexual harassment. The high standard imposed in *Gebser* was designed to eliminate any risk that a recipient would be liable for damages for its employees' independent actions.
- The Court also held that damages cannot be awarded under Title IX unless an official who, at a minimum, has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf, has actual knowledge of discrimination in the recipient's programs and fails to adequately respond.

# CASES

Davis v. Monroe County Board of Education, (S. Ct. 1999)

- The United States Supreme Court found:
  - student on student harassment is covered by Title IX
  - a student seeking damages under these circumstances must show that the funding recipient acted with deliberate indifference to known acts of harassment in its programs/activities, and that the harassment is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to education
  - the recipient's deliberate indifference must, at a minimum, cause the student to undergo harassment or make the student vulnerable to it
  - the recipient is only liable if it exercises substantial control over both the harasser and the context in which the known harassment occurs
  - the recipient will not be liable if it is shown that officials responded to known peer harassment in a manner that is not clearly unreasonable (there is no requirement that alleged perpetrator must be suspended or expelled)



# CASES

*Davis continued*

“Courts, ... must bear in mind that ...that children may regularly interact in a manner that would be unacceptable among adults. .... Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender.”  
(emphasis added)

# CASES

*Davis continued*

- A reviewing court may consider a constellation of surrounding circumstances, expectations and relationships in determining whether sex-based harassment by fellow students is so severe, pervasive, and objectively offensive, and so undermined the victim-student, that she was denied equal access to a IU's resources and opportunities under Title IX.

# CASES

- *Bostock v. Clayton County*, (S. Ct., 2020)
  - The United States Supreme Court found that discriminating against an individual on the basis on their sexual orientation or gender identity is discriminating against them on the basis of sex in the employment context. OCR has published notice that it interprets this decision as also applying to discrimination under Title IX, explaining that the Court’s reasoning in *Bostock* applies equally to adults in the workplace and student’s in school.



# CASES

*M.S. v. Susquehanna Township School IU*, (3<sup>rd</sup>. Cir. 2020)

- The federal appellate court from our jurisdiction (the Third Circuit) held that the school district was not liable under Title IX where the only individual who knew about the sexual relationship between the student and the assistant principal was the assistant principal. The court based its decision on the following:
  - the goals of Title IX would be frustrated if the IU were punished for harassment when it did not know about the relationship because the perpetrator did not report himself; and
  - the IU's indifference did not lead to its lack of knowledge

# CASES

*Grimm v. Gloucester County School Board*, (4<sup>th</sup> Cir. 2020)

- This case began in 2015 when a transgender student challenged his school district's policy which prohibited him from using male restrooms. His suit was brought by the ACLU and was supported by the federal government during the Obama administration. The U.S. Supreme Court granted review but eventually dismissed the case after the Justice Dept. under the Trump administration withdrew its support for the student's case. The case was then sent back to the lower courts.
- The 4<sup>th</sup> Circuit ruled that the district's restroom policy and its refusal to amend the student's records to reflect his male gender constituted unlawful discrimination under Title IX.

# CASES

*Doe v. Boyertown Area School District*, (3<sup>rd</sup> Cir. 2018)

- Cisgender high school students and parents were unlikely to succeed on their claim that their Title IX rights were violated by a district policy allowing transgender students to access bathrooms and locker rooms consistent with their gender identity.
- The mere presence of a transgender individual in a bathroom or locker room is not the type of conduct that would be highly offensive to a reasonable person. Students in a locker room expect to see other students in varying stages of undress, and they expect that other students will see them in varying stages of undress.

*A.H. v. Minersville Area School District*, (M.D. Pa. 2019)

- District's policy that all students except transgender students could use the restroom corresponding with their gender identity on field trips discriminated against transgender elementary student on the basis of her gender non-conformity. Use of restrooms by students is part of the provision of their educational services.



# CASES

*Doe v. Manor College*, (E.D. Pa. 2020)

- The college's action in evicting the student from her dormitory and demanding that she move off campus was "adverse action" for purposes of the student's Title IX retaliation claim.
- Courts look to the totality of circumstances when determining whether the recipient was deliberately indifferent.

# CASES

*Doe v. School District Number 1, Denver Colorado, (10<sup>th</sup> Cir. 2020)*

- If proven, conduct alleged by student which was exhibited by associates of another student who raped her was harassment under Title IX

# SUMMARY OF CHANGES

THE REGULATIONS DEFINES “SEXUAL HARASSMENT” MORE NARROWLY THAN PRIOR CASE LAW HAD DONE

THE SCHOOL DISTRICT MUST SELECT A BURDEN OF PROOF: EITHER “PREPONDERANCE OF THE EVIDENCE” OR “CLEAR AND CONVINCING EVIDENCE”

THE BURDEN OF PROOF IS ON THE IU, NOT THE COMPLAINANT OR RESPONDENT

THE SCHOOL DISTRICT MUST IDENTIFY: 1) A TITLE IX COORDINATOR; 2) A TITLE IX INVESTIGATOR; 3) A TITLE IX DECISION MAKER; AND 4) A TITLE IX APPEALS DECISION MAKER

STANDARD FOR LIABILITY FOR THE SCHOOL DISTRICT IS CHANGED TO “ACTUAL KNOWLEDGE” OF HARASSMENT AND “DELIBERATE INDIFFERENCE” TO THAT HARASSMENT

# **SUMMARY OF CHANGES (CONT.)**

**ACTION MAY NOT BE TAKEN AGAINST A RESPONDENT  
UNLESS A FORMAL COMPLAINT IS FILED**

**SUPPORTIVE SERVICES MUST BE OFFERED TO A  
COMPLAINANT EVEN IF NO FORMAL COMPLAINT IS FILED**

**A TITLE IX COMPLAINT MAY BE FILED BY THE TITLE IX  
COORDINATOR WHO RECEIVES MULTIPLE INFORMAL  
COMPLAINTS ABOUT THE SAME RESPONDENT**

**THE RESPONDENT IS ENTITLED TO ALL INFORMATION  
SECURED IN THE COMPLAINT AND INVESTIGATION**

**NO CONFIDENTIALITY REQUIREMENTS CAN BE IMPOSED**

# **SUMMARY OF CHANGES (CONT.)**

**INFORMAL RESOLUTION MAY BE OFFERED UNDER CERTAIN CONDITIONS**

**THE SCHOOL DISTRICT MUST POST ON ITS WEBSITE:**

**THE IDENTITY AND CONTACT INFORMATION FOR THE TITLE IX COORDINATOR; ITS NO-DISCRIMINATION POLICY; AND ITS TRAINING MATERIALS FOR TITLE IX**

**NEW DUE PROCESS REQUIREMENTS FOR DISPOSITION OF A COMPLAINT, WHETHER BY HEARING OR THROUGH WRITTEN QUESTIONS**

# **SEXUAL HARASSMENT DEFINED (CONT.)**

**SEXUAL HARASSMENT IS DEFINED AS “CONDUCT ON THE BASIS OF SEX THAT SATISFIES ONE OR MORE OF THE FOLLOWING:**

- (1) AN EMPLOYEE OF THE SCHOOL DISTRICT CONDITIONING THE PROVISION OF AN AID, BENEFIT, OR SERVICE OF THE SCHOOL DISTRICT 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 IU’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)”**

# FORMAL COMPLAINT

**NO PARTICULAR FORMAT IS REQUIRED, AND ANY SIGNED, WRITTEN ASSERTION OF HARASSMENT MAY CONSTITUTE A FORMAL COMPLAINT.**

**THE TITLE IX COORDINATOR MAY CONCLUDE THAT THEY SHOULD FILE A FORMAL COMPLAINT EVEN IF THE COMPLAINANT HAS NOT ELECTED TO.**

**EVEN IN THE ABSENCE OF A FORMAL COMPLAINT, THE SCHOOL DISTRICT MUST OFFER SUPPORTIVE SERVICES TO THE COMPLAINANT, SUCH AS A CHANGE IN CLASS SCHEDULE TO AVOID**

# **TITLE IX COORDINATOR**

**MUST RECEIVE TITLE IX TRAINING AS TO THE DEFINITION OF SEXUAL HARASSMENT, THE SCOPE OF THE SCHOOL'S EDUCATION PROGRAMS AND ACTIVITIES, HOW TO CONDUCT AN INVESTIGATION AND GRIEVANCE PROCESS, REMAINING IMPARTIAL AND FREE OF BIAS, AND THE ISSUE OF RELEVANCE**

**TITLE IX COORDINATORS CANNOT HAVE A CONFLICT OF INTEREST OR BIAS FOR OR AGAINST COMPLAINANTS OR RESPONDENTS GENERALLY OR INDIVIDUALLY**

**MUST ACCEPT COMPLAINTS BY EMAIL, MAIL, OR PHONE. THESE REPORTS CAN BE MADE AT ANY TIME, INCLUDING DURING NON-BUSINESS HOURS, AND MAY BE MADE BY ANYONE, WHETHER OR NOT THEY ARE THE ALLEGED VICTIM OF DISCRIMINATION**



# **TITLE IX COORDINATOR (CONT.)**

**THE TITLE IX COORDINATOR IS THE ONLY EMPLOYEE WHO CAN SIGN A FORMAL COMPLAINT ALLEGING SEXUAL HARASSMENT. WHEN SIGNING A FORMAL COMPLAINT, THE TITLE IX COORDINATOR DOES NOT BECOME A COMPLAINANT OR OTHERWISE A PARTY**

**ONCE A SCHOOL DISTRICT HAS ACTUAL KNOWLEDGE, THE TITLE IX COORDINATOR MUST RESPOND PROMPTLY AND IN A MANNER THAT IS NOT DELIBERATELY INDIFFERENT. AN SCHOOL DISTRICT IS DELIBERATELY INDIFFERENT IF THE RESPONSE IS CLEARLY UNREASONABLE GIVEN THE KNOWN CIRCUMSTANCES. THE TITLE IX COORDINATOR MUST REACH OUT TO THE COMPLAINANT TO DISCUSS THE AVAILABILITY OF SUPPORTIVE MEASURES AT NO COST, AND THE PROCESS FOR FILING A FORMAL COMPLAINT**

**ACTUAL KNOWLEDGE MEANS NOTICE GIVEN TO THE TITLE IX COORDINATOR OR TO ANY EMPLOYEE'S SUPERVISOR**

# COMPLAINT PROCESS

**UPON RECEIPT OF A FORMAL COMPLAINT, WRITTEN NOTICE MUST BE PROVIDED TO ALL PARTIES. SUCH NOTICE SHALL INCLUDE:**

Notice of grievance process

Notice of the allegations providing sufficient details known at the time, including the names of the parties and dates and locations of the alleged incident(s) if known, as well as sufficient time to prepare a response before any initial interviews

Statement that Respondent is presumed not responsible and that a determination of responsibility will be made at the end of the grievance process

# COMPLAINT PROCESS (CONT.)

## NOTICE MUST ALSO INCLUDE:

Notice that the parties are entitled to an advisor who may be, but is not required to be, an attorney, and that the parties and their advisors will be entitled to review any evidence obtained as part of the investigation into the allegations

Notice of any provision of school code of conduct that prohibits knowingly submitting false information during the grievance process

IF IN THE COURSE OF AN INVESTIGATION THE SCHOOL DISTRICT DECIDES TO INVESTIGATE ALLEGATIONS CONCERNING THE COMPLAINANT OR RESPONDENT THAT ARE NOT PART OF THE ORIGINAL NOTICE TO THE PARTIES, THE SCHOOL DISTRICT MUST PROVIDE NOTICE OF THE NEW ALLEGATIONS TO THE PARTIES WHO ARE KNOWN

# COMPLAINT PROCESS (CONT.)

COMPLAINANTS AND RESPONDENTS MUST BE TREATED EQUITABLY, AND IT IS THE RESPONSIBILITY OF THE TITLE IX COORDINATOR TO COORDINATE AND IMPLEMENT SUPPORTIVE MEASURES FOR BOTH PARTIES. SUPPORTIVE MEASURES ARE NON-DISCIPLINARY SERVICES OFFERED TO THE PARTIES FREE OF CHARGE, EITHER BEFORE OR AFTER THE FILING OF A FORMAL COMPLAINT, OR WHERE NO FORMAL COMPLAINT HAS BEEN FILED. SUPPORTIVE MEASURES COULD INCLUDE COUNSELING, COURSE-RELATED ADJUSTMENTS, MODIFICATION OF SCHEDULES, RESTRICTIONS OF CONTACT BETWEEN THE PARTIES, ETC. PARTIES SHOULD BE MADE AWARE OF THE RANGE OF SUPPORTIVE MEASURE THAT MAY BE AVAILABLE TO THEM.

# COMPLAINT PROCESS (CONT.)

**A FORMAL COMPLAINT MUST BE DISMISSED FOR PURPOSES OF SEXUAL HARASSMENT UNDER TITLE IX IF ANY OF THE FOLLOWING IS TRUE:**

1. The alleged misconduct would not constitute sexual harassment even if proved
2. The alleged misconduct did not occur in a school education program or activity
3. The alleged misconduct did not occur against a person in the United States

# COMPLAINT PROCESS (CONT.)

**A FORMAL COMPLAINT MAY BE DISMISSED IF AT ANY TIME DURING THE INVESTIGATION OR HEARING ANY OF THE FOLLOWING IS TRUE:**

A Complainant notifies the school district in writing that they wish to withdraw the complaint

The Respondent is no longer enrolled or employed by the school district

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

**ANY DISMISSAL OF COMPLAINT REQUIRES WRITTEN NOTICE AND THE REASONS FOR DISMISSAL SIMULTANEOUSLY TO THE PARTIES**

**ALTHOUGH CONDUCT MAY NOT SATISFY THE DEFINITION OF “SEXUAL HARASSMENT” UNDER TITLE IX, THAT DOES NOT MEAN THAT THE CONDUCT IS IMMUNE FROM DISCIPLINE**

**IU’S HAVE OTHER BOARD POLICIES OR CODES OF CONDUCT THAT MAY GOVERN THE BEHAVIOR AT ISSUE, AND UNDER WHICH CORRECTIVE ACTION MAY BE TAKEN**

# COMPLAINT PROCESS (CONT.)

**FORMAL COMPLAINTS MAY BE CONSOLIDATED AS TO ALLEGATIONS OF SEXUAL HARASSMENT AGAINST MORE THAN ONE RESPONDENT, OR BY MORE THAN ONE COMPLAINANT AGAINST ONE OR MORE RESPONDENTS, OR BY ONE PARTY AGAINST THE OTHER WHERE THE ALLEGATIONS OF SEXUAL HARASSMENT ARISE OUT OF THE SAME FACTS OR CIRCUMSTANCES**



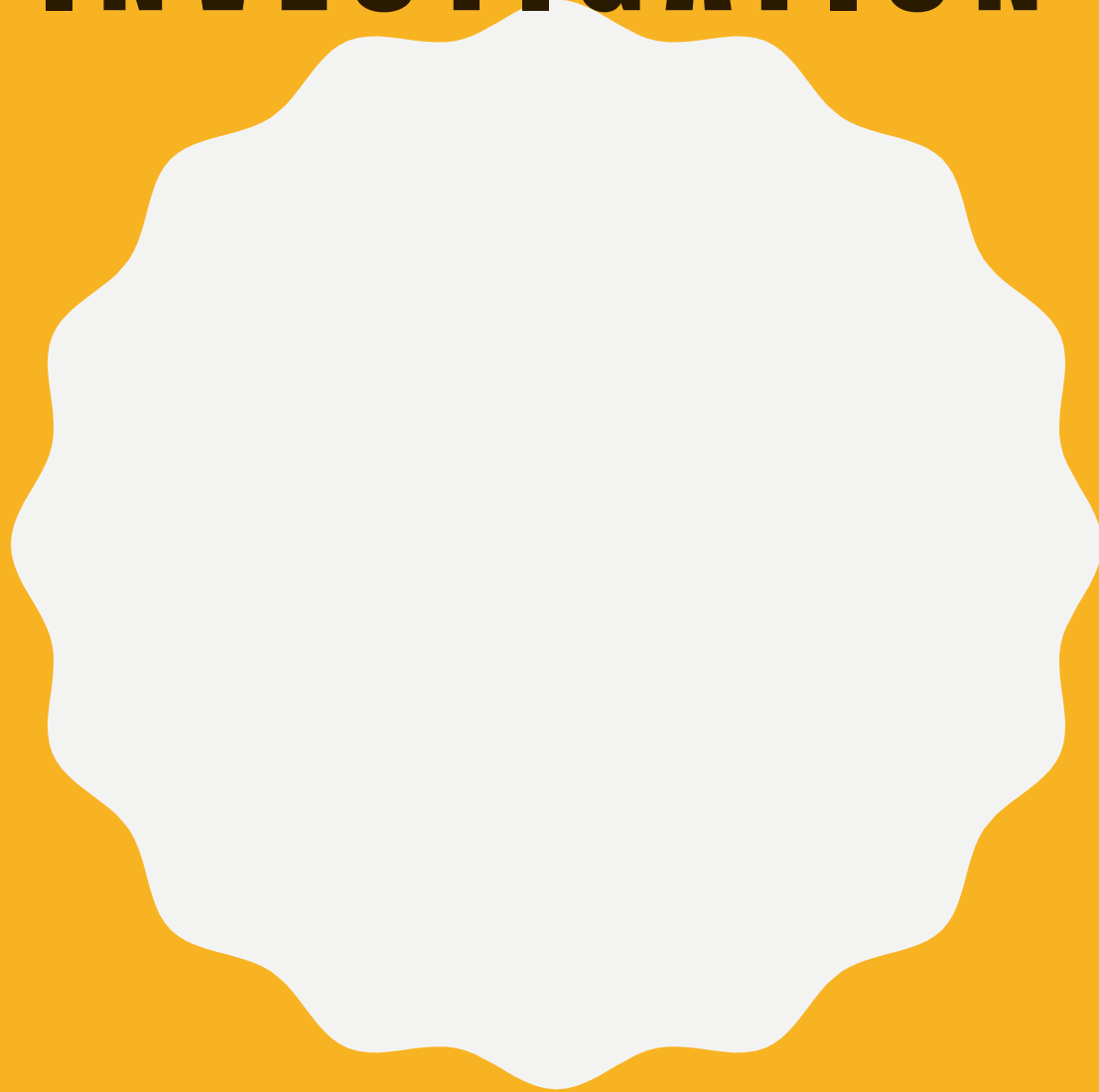
# COMPLAINT PROCESS (CONT.)

RESPONDENTS ARE CONSIDERED NON-RESPONSIBLE UNTIL A DETERMINATION HAS BEEN MADE. THEREFORE, IUS MAY NOT PUNISH OR IMPOSE SANCTIONS UPON A RESPONDENT UNLESS THEY ARE DETERMINED TO BE RESPONSIBLE

IUS MAY REMOVE A RESPONDENT FROM AN EDUCATION PROGRAM OR ACTIVITY ON AN EMERGENCY BASIS IF, AFTER APPLYING AN INDIVIDUALIZED SAFETY AND RISK ANALYSIS, IT IS DETERMINED THAT THERE IS AN IMMEDIATE THREAT TO THE PHYSICAL HEALTH OR SAFETY OF ANOTHER PERSON ARISING FROM THE ALLEGATIONS OF SEXUAL HARASSMENT. THE RESPONDENT MUST BE GIVEN NOTICE AND THE OPPORTUNITY TO CHALLENGE THE DECISION IMMEDIATELY FOLLOWING REMOVAL

IUS MAY PLACE NON-STUDENT EMPLOYEES ON ADMINISTRATIVE LEAVE DURING THE PENDENCY OF A GRIEVANCE PROCESS

# TITLE IX INVESTIGATION PROCESS



# TITLE IX INVESTIGATION PROCESS

6. HOLD INVESTIGATIVE HEARINGS AND INTERVIEWS. PROVIDE EQUAL OPPORTUNITIES FOR THE PARTIES TO PRESENT WITNESSES AND EVIDENCE, BOTH INCULPATORY AND EXCULPATORY
7. DO NOT RESTRICT EITHER PARTY FROM DISCUSSING THE ALLEGATIONS OR FROM GATHERING AND PRESENTING RELEVANT EVIDENCE
8. ENSURE THAT THE PARTIES HAVE EQUAL OPPORTUNITY TO HAVE OTHERS PRESENT AT ANY PROCEEDING, INCLUDING AN ADVISOR. DO NOT RESTRICT THE PARTIES' CHOICE OF ADVISOR OR THEIR PRESENCE AT ANY PROCEEDING, ALTHOUGH IT IS PERMISSIBLE TO LIMIT THE EXTENT TO WHICH THE ADVISORS MAY PARTICIPATE IN PROCEEDINGS, SO LONG AS RESTRICTIONS APPLY EQUALLY TO BOTH PARTIES
9. PROVIDE WRITTEN NOTICE OF DATE, TIME, LOCATION, PARTICIPANTS AND PURPOSE FOR ANY HEARING, INTERVIEW, OR OTHER MEETING, WITH SUFFICIENT TIME FOR THE PARTIES TO PREPARE
10. PROVIDE THE PARTIES WITH EQUAL OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE GATHERED DURING THE INVESTIGATION THAT IS DIRECTLY RELATED TO THE ACCUSATIONS IN THE FORMAL COMPLAINT. THIS EVIDENCE MUST BE SENT TO THE PARTIES AND THEIR ADVISORS IN ELECTRONIC FORMAT OR HARD COPY PRIOR TO COMPLETION OF THE INVESTIGATIVE REPORT. THE PARTIES MUST BE GIVEN AT LEAST 10 DAYS TO SUBMIT A WRITTEN RESPONSE, WHICH YOU WILL NEED TO TAKE INTO CONSIDERATION PRIOR TO FINALIZING THE REPORT

# INVESTIGATION SIDEBAR

**FERPA STILL APPLIES**  
**COMPLAINANTS AND RESPONDENTS MAY**  
**DISCUSS ALLEGATIONS TO THE EXTENT**  
**NECESSARY TO PREPARE THEIR RESPECTIVE**  
**POSITIONS, BUT IF THE DISCUSSION INCLUDES**  
**PERSONALLY IDENTIFIABLE INFORMATION ABOUT**  
**STUDENTS, THAT IS THE LIMIT OF THE**  
**PERMISSION**

# TITLE IX INVESTIGATION PROCESS

- ▶ With or without a formal hearing, questions and evidence about a Complainant's sexual predisposition or prior sexual behavior are not relevant unless 1) offered to prove that someone other than the Respondent committed the act alleged in the complaint, or 2) the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent
- ▶ Finalize an investigative report that summarizes the relevant evidence and send a copy of this report, either electronically or hard copy, to the parties and their advisors at least ten days before any hearing or time of determination

# TITLE IX INVESTIGATION PROCESS

## Gathering Evidence

### Suggested questioning

- ▶ Names of all alleged to have committed the discriminatory conduct
- ▶ Complainant's relationship to the Respondent(s)
- ▶ Names and contact information of any witnesses
- ▶ Times and locations of alleged misconduct
- ▶ Is the misconduct ongoing
- ▶ Who has the Complainant told about the alleged misconduct? When and what where they told

# TITLE IX INVESTIGATION PROCESS

## Gathering Evidence

### Suggested questioning

- ▶ Are there any documents, emails, photos, texts, letters, etc. that corroborate or refute the assertion
- ▶ What about the complained behavior seems prompted by sex
- ▶ How does the Respondent behave with people other than the Complainant
- ▶ Any history of prior interpersonal conflict between the Complainant and Respondent
- ▶ An open-ended question to allow both the Complainant and Respondent to share whatever they think the Investigator should consider

# RELEVANCE

- ▶ Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.
- ▶ If a female Complainant alleges that a male colleague uses inappropriate and suggestive language around her:
  - ▶ And a witness says the Complainant often wears skirts above the knee
  - ▶ And the Respondent says the Complainant often wears skirts above the knee



# BIAS AND IMPARTIALITY

- ▶ Bias is a pre-disposition toward an outcome
  - ▶ Bias can be specific to an individual, or a broad group
- ▶ All Title IX officers are expected to be impartial, both regarding general issues and specific individuals
  - ▶ One intent of the new regulations is to clarify that the Title IX response system should not be designed to favor Complainants
  - ▶ Impartiality does not mean that Title IX officers may not make credibility determinations – they should do so, but based on factors such as the presence or absence of corroboration, the internal inconsistencies of evidence or even such elements as the demeanor of the witness, Complainant or Respondent
  - ▶ Those credibility determinations should be made after the evidence has been collected

# GRIEVANCE PROCESS

- ▶ Provide reasonably prompt time frames for conclusion of the grievance process including appeals and any informal resolution process. A temporary delay in the grievance process may be instituted with good cause and written notice to the Complainant and Respondent
- ▶ Describe or list the range of possible disciplinary sanction and remedies that may be implemented after a determination of responsibility
- ▶ Indicate the standard of evidence that will be used to determine responsibility, whether it be a preponderance of evidence or clear and convincing evidence. The standard must be the same in all formal complaints of sexual harassment, whether the Respondent is a student or an employee
- ▶ Provide the process and basis for the parties to appeal
- ▶ If also designated as the Investigator, conduct an investigation that adheres to the requirements of §106.45 (see Guidance for Title IX Investigators)

# GRIEVANCE PROCESS (CONT.)

- ▶ Ensure that no information is required to be given that is protected by a legally recognized privilege, unless the person holding the privilege has waived it
- ▶ Ensure that the Decision Maker is not the same person as Title IX Coordinator, Investigator, or Decision Maker on appeal
- ▶ The grievance process for elementary and secondary schools does not need to include a formal hearing. Regardless of whether or not there will be a formal hearing, and upon receipt of the investigative report, the parties must have the opportunity to submit written questions to be asked of any party or witness. Such questions should be answered, with opportunity for limited follow-up questions, before a final determination is made

# GRIEVANCE PROCESS (CONT.)

- ▶ With or without a formal hearing, questions and evidence about a Complainant's sexual predisposition or prior sexual behavior are not relevant unless 1) offered to prove that someone other than the Respondent committed the act alleged in the complaint, or 2) the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent
- ▶ WE DO NOT RECOMMEND A FORMAL HEARING PROCESS
- ▶ Title IX Coordinator is responsible for effectively implementing any remedies after a final determination of responsibility by the Decision Maker

# APPEALS

- ▶ Both Complainants and the school district are entitled to an appeal from the final determination of responsibility and from the IU's dismissal of a formal complaint on the following basis: procedural irregularity that affected the outcome; new evidence that could affect the outcome; or bias or conflict of interest on the part of a Title IX Coordinator, Investigator, or Decision Maker that affected the outcome. Appeals may also be offered equally to both parties on other grounds
- ▶ When a party appeals, the school district must notify the other party in writing. The Decision Maker in the appeal cannot be the same person as those who serve as Title IX Coordinator, Investigator, or the original Decision Maker
- ▶ Each party shall have the opportunity to submit a written statement supporting or challenging the determination of responsibility
- ▶ A written decision should be issued to the parties simultaneously and include the rationale for reaching the decision

# INFORMAL RESOLUTION

- ▶ An informal resolution process can be offered to the parties only after a formal complaint has been filed, and can be entered into with the written consent of all parties at any time prior to reaching a final determination of responsibility. The parties cannot be required to participate in an informal resolution process
- ▶ The school district must provide the parties with the allegations, the requirements of the process, including any circumstances under which the parties would then be precluded from resuming the formal complaint, and any consequences resulting from participating in the informal resolution process such as records being maintained or shared
- ▶ Either party may withdraw from the informal resolution process at any time prior to reaching an agreed upon resolution
- ▶ The informal resolution process is not available where there are allegations of an employee sexually harassing a student

# DECISION MAKERS

- ▶ Receive Title IX training as to the definition of sexual harassment, the scope of the school's education programs and activities, how to conduct a grievance process including hearings and appeals, remaining impartial and free of bias, and the issue of relevance
- ▶ Decision Makers cannot serve in any other capacity, i.e. Title IX Coordinator, Investigator, or Decision Maker on appeal
- ▶ Decision Makers cannot have a conflict of interest or bias for or against Complainants or Respondents generally or individually
- ▶ Provide reasonably prompt time frames for the conclusion of the grievance process
- ▶ Describe the range of possible sanctions and remedies that may be implemented following a determination of responsibility
- ▶ State the standard of evidence: [preponderance of the evidence or clear and convincing]. This standard must be the same for all formal complaints of sexual harassment

# DECISION MAKERS (CONT.)

- ▶ The burden of proof rests on the school district, not on the parties
- ▶ Parties must receive procedures and basis on which to file an appeal
- ▶ Do not seek or use evidence or information protected under a legally recognized privilege, unless the person holding the privilege has waived it
- ▶ Regardless of whether or not there will be a formal hearing, and upon receipt of the investigative report, the parties must have the opportunity to submit written questions to be asked of any party or witness. Such questions should be answered, with opportunity for limited follow-up questions, before a final determination is made



# DECISION MAKERS (CONT.)

- ▶ Questions and evidence about a Complainant's sexual predisposition or prior sexual behavior are not relevant unless 1) offered to prove that someone other than the Respondent committed the act alleged in the complaint, or 2) the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent. The Decision Maker must explain to the party proposing the questions any decision to exclude a question as not relevant
- ▶ The Decision Maker must issue a written determination regarding responsibility, applying the appropriate standard of evidence. The written determination must include the following:
  - ▶ Identification of allegations potentially constituting sexual harassment
  - ▶ A description of the procedural steps taken from receipt of formal complaint through determination, including any notifications to parties, interviews with parties and witnesses, site visits, methods used to gather evidence, hearings held

# DECISION MAKERS (CONT.)

- ▶ Findings of fact supporting the determination
- ▶ Conclusions regarding the application of the IU's code of conduct to the facts
- ▶ A statement of rationale for each allegation, including a determination of responsibility, any disciplinary sanctions to be imposed on the Respondent, and whether remedies designed to restore or preserve equal access to the IU's education program or activity will be provided by the school district to the Complainant
- ▶ Procedures and bases to appeal
- ▶ The written determination must be provided to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the school district provides the parties with the determination of the result of the appeal, or if an appeal is not filed, it becomes final on the date on which an appeal would no longer be considered timely

# APPEALS DECISION MAKERS

- ▶ Receive Title IX training as to the definition of sexual harassment, the scope of the school's education programs and activities, how to conduct a grievance process including appeals, remaining impartial and free of bias, and the issue of relevance
- ▶ Appeals Decision Makers cannot serve in any other capacity, i.e. Title IX Coordinator, Investigator, or initial Decision Maker
- ▶ Decision Makers cannot have a conflict of interest or bias for or against Complainants or Respondents generally or individually
- ▶ Both parties must be offered the chance to appeal the determination of responsibility
- ▶ Both parties must be given equal opportunity to submit a written statement in support of or challenging the outcome of the determination of responsibility

# APPEALS DECISION MAKERS (CONT.)

- ▶ Issue a written decision describing the result of the appeal and the rationale behind it
- ▶ The written decision must be provided simultaneously to both parties
- ▶ The determination regarding responsibility becomes final on the date that the school district provides the parties with the determination of the result of the appeal

# MISCELLANEOUS

# MISCELLANEOUS (CONT.)

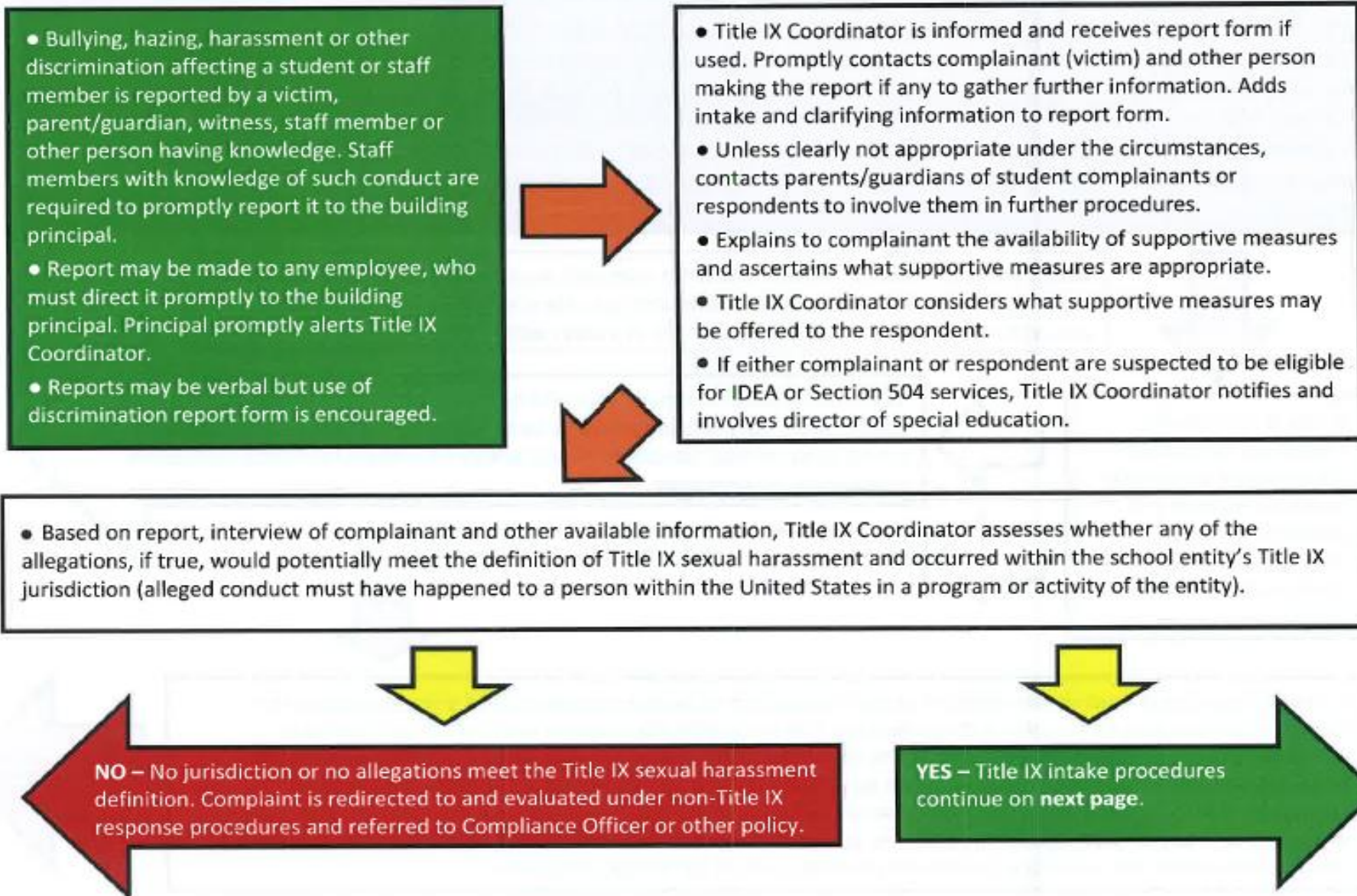
- ▶ No school district or other person may intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX because that person made a report or complaint, testified or refused to testify or refused to participate in any manner in an investigation, proceeding, or hearing
- ▶ Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation
- ▶ The school district must keep confidential the identity of any persons who make a report or complaint of sex discrimination, including a report or formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by statute or required by law to carry out an investigation, hearing, or judicial proceeding

# 2020 AMENDMENTS TO THE TITLE IX REGULATIONS

On April 6, 2021, OCR announced a comprehensive review of these amendments and all Title IX regulations, orders, guidance documents, policies and other similar Department actions pursuant to President Biden's March 8, 2021 Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex. Including Sexual Orientation or Gender Identity.

OCR recently announced that final regulations will not be issued until October, 2023. Separate regulations will be issued for sex based discrimination and athletic participation requirements.

<https://www.ed.gov/news/press-releases/departments-office-civil-rights-launches-comprehensive-review-title-ix-regulations-fulfill-president-bidens-executive-order-guaranteeing-educational-environment-free-sex-discrimination>





**NOTE:** Disciplinary action may **not** be taken against a respondent until the conclusion of a grievance process for formal complaints.

- Title IX Coordinator conducts an individualized safety and risk analysis to determine if emergency removal of a respondent is warranted due to an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment.
- If alternative instructional settings are insufficient, any exclusion of a student from school on this basis must be accomplished in accordance with procedures for suspensions or expulsion in Policy 233 and if applicable Policy 113.1.
- Administrative leave for employees is implemented in accordance with law and policy 317.

**NOTE:** All written notices, reports and other materials provided to parties throughout the Title IX grievance process for formal complaints are also provided to a party's advisor if any, and normally, also to parents/guardians of a party who is a student.

• Title IX Coordinator explains to complainant the grievance process for formal complaints and ascertains whether complainant desires to file a formal complaint under Title IX.

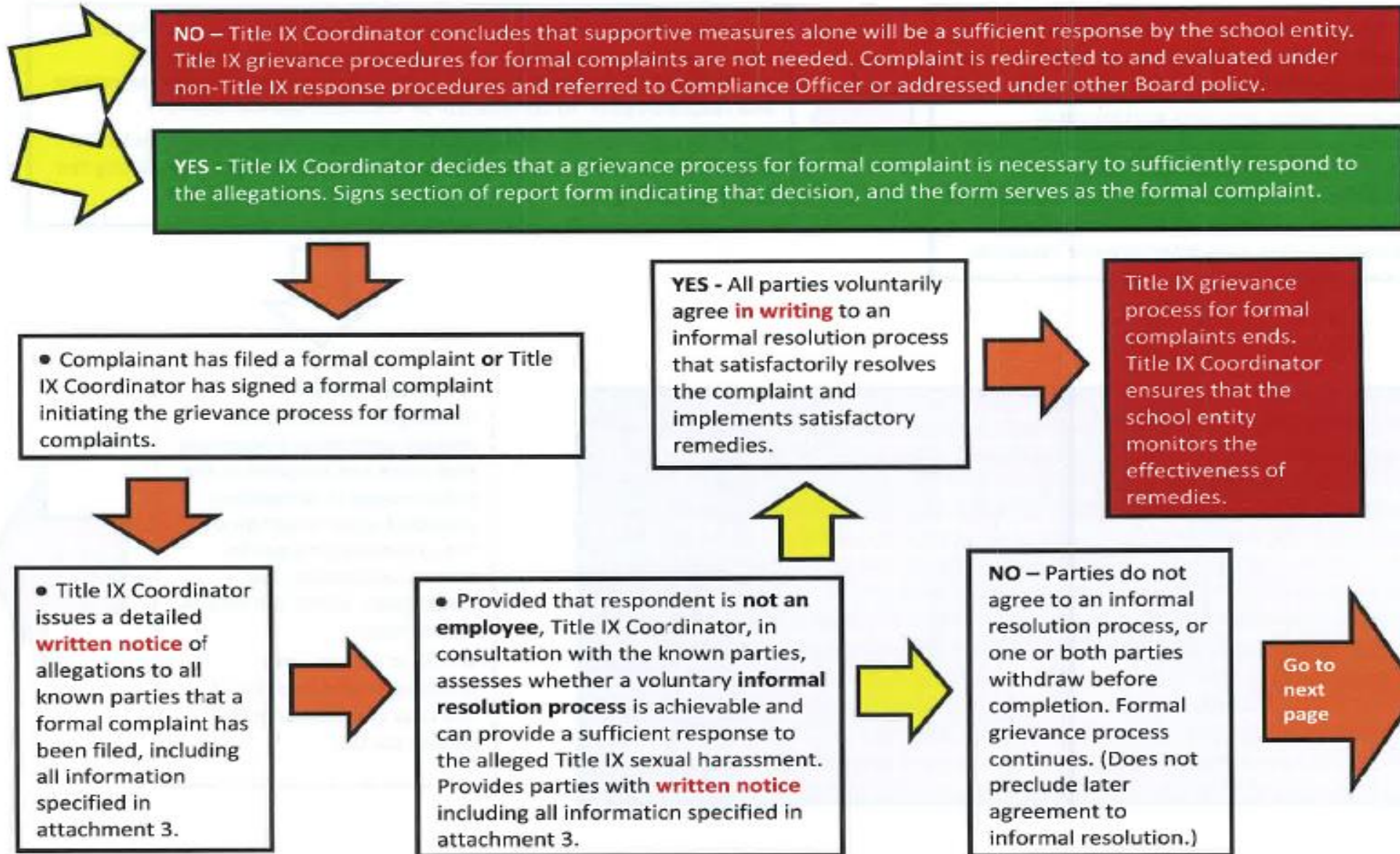
**YES** – Complainant chooses to file a formal complaint with the Title IX Coordinator. Signs section of report form indicating that choice, and that form serves as the formal complaint. Title IX grievance process for formal complaints commences on **next page**.

**NO** – complainant declines to file a formal complaint.

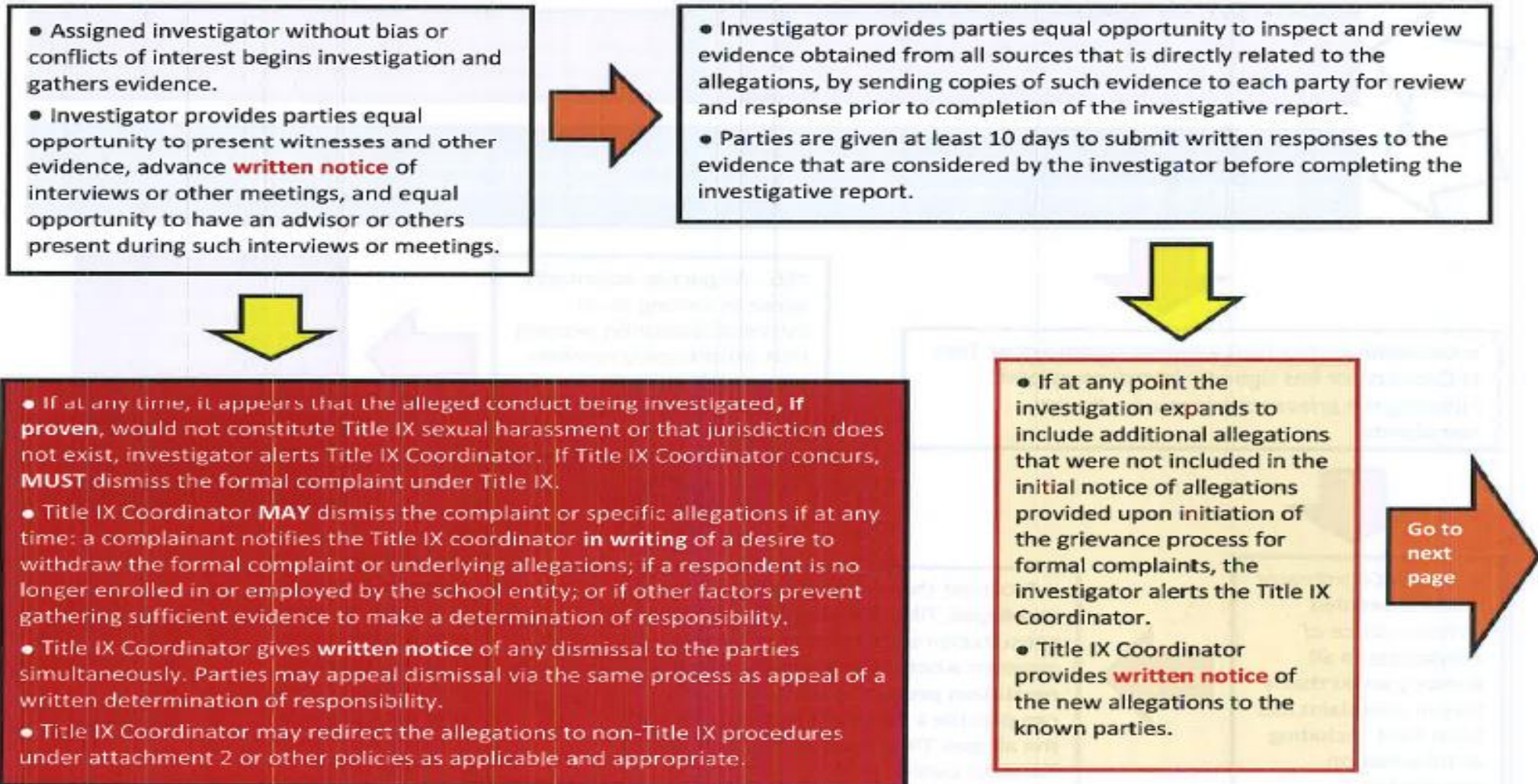
• Title IX Coordinator must decide whether to sign a complaint initiating investigation and grievance process for formal complaints despite complainant's preference. Title IX Coordinator assesses whether actions limited to supportive measures are a sufficient response by the school entity to the behavior alleged, or whether a Title IX grievance process for formal complaints should be initiated in order to investigate and address the situation adequately. For example, if disciplinary action would be warranted if allegations are true, if the respondent is an employee, or if further investigation is needed to assess the extent of the behavior and impact on others, it may be clearly unreasonable not to initiate the Title IX grievance process for formal complaints .

Go to  
next page









- Investigator prepares a written investigative report that fairly summarizes the relevant evidence.
- Investigator submits the completed investigative report to the designated decision-maker.
- Investigator provides copies of the report to all parties (and to a party's advisor if any) for their review and written response.



- Designated decision-maker without bias or conflict of interest notifies parties of the deadline for submitting written responses to the investigative report and submitting written relevant questions for the decision-maker to ask any party or witnesses.
- Decision-maker provides parties with answers to the questions submitted and notifies them of the deadline for submitting limited follow-up questions.
- Decision-maker may exclude questions that are not relevant and must provide parties with an explanation of why a question was deemed not relevant.

**NOTE:** No person can perform more than one role as investigator, decision-maker, appeal authority or facilitator of informal resolution (if any) in the same case. Each must be free of bias or conflicts of interest. Title IX Coordinator cannot serve as decision-maker or appeal authority.



- At least ten days must elapse between providing the investigative report to the parties and the decision-maker's written determination of responsibility for the conduct alleged in the complaint.
- After considering all relevant evidence using the "preponderance of evidence" standard of proof<sup>1</sup>, the decision-maker provides all parties simultaneously with a **written determination** regarding responsibility for the conduct alleged in the complaint.
- The written determination must:
  1. Outline the allegations at issue and procedural steps to that point;
  2. Provide findings of facts and conclusions regarding application of applicable policies and codes of conduct;
  3. Set forth the result and rationale for each allegation, including determination of responsibility and disciplinary sanctions or other remedies deemed appropriate;
  4. Explain the procedures, deadline and permitted grounds for filing an appeal with the Title IX Coordinator.

<sup>1</sup>[NOTE: Title IX Regulations also permit use of a "clear and convincing" standard of proof, a higher standard. Before choosing this alternative, consultation with the solicitor about the legal risk is strongly recommended.]

Go to  
next page



- Neither party files a timely appeal with the Title IX Coordinator within the specified time period.
- Title IX Coordinator provides **written notice** that the written determination of responsibility has become final.
- Title IX Coordinator initiates implementation of any disciplinary sanctions and/or remedies, provides further supportive measures if needed, and monitors effectiveness.



- If the written determination deems suspension or expulsion from school or class to be appropriate disciplinary sanctions for a student respondent, this serves as a recommendation that the school administration initiate applicable procedures prescribed in Policy 233 and in the case of students with disabilities also in accordance with Policy 113.1. Disciplinary sanctions deemed appropriate for employee respondents will proceed in accordance with law and Policy 317/317.1.

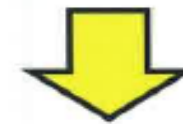
- One or both of the parties file a timely appeal with Title IX Coordinator.
- Title IX Coordinator forwards the appeal(s) to the designated appeal authority.
- Title IX Coordinator provides **written notice** to the parties that appeal(s) have been filed, and of the deadline for submitting written statements in support of or in opposition to the appeal(s).
- Notice identifies the designated appeal authority and explains requirements from attachment 3 that statements in support or opposition to the appeal must include.



- Appeal authority without bias or conflict of interest decides whether the appeal establishes one or more permitted grounds for appeal that justify modifying the written determination.
- Appeal authority may accept and consider evidence submitted in support of or in opposition to an appeal in making any conclusions necessary to deciding the appeal.
- When the appeal authority determines that it is advantageous to further develop the evidentiary record relevant to a basis for appeal, and if it would not result in undue delay, the appeal authority may return the matter to the decision-maker for that limited purpose.



- Appeal authority issues a written decision granting or denying the appeal and explaining the rationale.
- Title IX Coordinator provides the written appeal decision simultaneously to each party.



- Appeal is **granted** in whole or part.
- Appeal authority's written decision sets forth the respects in which the written determination is modified as a result of the appeal.
- Title X Coordinator initiates implementation of any remaining disciplinary sanctions or remedies set forth in the written determination as modified on appeal, as well as any further supportive measures if needed.
- Title IX Coordinator monitors effectiveness of remedies and supportive measures.

- Appeal is **denied** without modification of the written determination.
- Title IX Coordinator initiates the implementation of any disciplinary sanctions and/or remedies set forth in the written determination and any further supportive measures if needed.
- Title IX Coordinator monitors effectiveness of remedies and supportive measures.



- Title IX Coordinator ensures that the school entity keeps records of Title IX sexual harassment investigations, including any written determination regarding responsibility, any audio or audiovisual recording or transcript, records of any disciplinary sanctions imposed on the respondent, and documentation of other remedies. Records are retained for a minimum of seven years after conclusion of procedures and implementation of sanctions and/or remedies, or in the case of a complainant or respondent who is a minor, until the expiration of the longest statute of limitations for filing a civil suit applicable to any allegation.