NEW TITLE IX REGULATIONS: NUTS & BOLTS FOR IMPLEMENTATION

September 2, 2020

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New Title IX Regulations: Nuts & Bolts for Implementation

September 2, 2020

Page

Presentation Slides...........................................................................................................................................1

1.  A.  Legal Update Memo No. 32-2020 – New Title IX Regulations
    Effective August 14, 2020 ..................................................................................................................20
    B.  Legal Update Memo No. 18-2020(CC) – New Title IX Regulations
    Effective August 14, 2020 ..............................................................................................................37

2.  Sample Initial Letters to Complainant and Respondent
    K-12 ..................................................................................................................................................54
    CCD ..................................................................................................................................................65

3.  Determination Regarding Responsibility to Complainant and Respondent (K-12) ......................................................77

4.  Administrative Determination Letter (CCD) ............................................................................................83

5.  Sample Confidential Summary Investigation Report (K-12 & CCD) ....................................................89

6.  Model Sexual Harassment Board Policy 5145.7 ..................................................................................95

7.  Model Sexual Harassment Administrative Regulation 5145.7 ............................................................99

8.  SCLS’s Sample Policy Revision Items for Community College Districts, 2020 .................................114

9.  Title IX Flowchart, 2020
    K-12 ..................................................................................................................................................128
    CCD ..................................................................................................................................................129

10. Title IX Regulations ......................................................................................................................................130

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11. U.S. Department of Education Title IX Final Rule Overview – Guiding Principles ..............................................................156

12. Summary of Major Provisions of the Department of Education’s Title IX Final Rule ........................................................................................................159

13. Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to NPRM .........................................................................168
New Title IX Regulations: Nuts & Bolts for Implementation
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Agenda

I. Overview of Title IX
II. Receipt of Allegations
III. Investigation of Formal Complaint
IV. Decision Making
V. Other Considerations
VI. Next Steps
What is Title IX?

“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 educational program or activity receiving federal financial assistance.”


Title IX Legal Framework

• Federal law
• Implementing regulations
  • New Title IX regulations (effective 8/14/20)
• Regulatory Guidance
  • 1997 Guidance on Sexual Harassment
  • 2001 Revised Sexual Harassment Guidance
  • 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide
  • 2017 Interim Guide: Q&A on Campus Sexual Violence

Sex-Based Discrimination

• Title IX prohibits sex-based discrimination
• Sex-based discrimination includes:
  • Sexual harassment
  • Sexual violence
  • Discrimination based on gender stereotypes
  • Gender-based discrimination
• Does NOT prohibit discrimination on the basis of sexual orientation (but California law does)
Sexual Harassment

(1) Unwelcome conduct on the basis of sex that a reasonable person would determine is so “severe, pervasive and objectively offensive” that it effectively denies a person equal access to the recipient’s education program or activity;

(2) Quid pro quo harassment; or

(3) Sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act (“VAWA”).

Affirmative Consent
(Sexual Assault)

• The new regulations specifically note that schools are not required to adopt any particular definition of consent with regard to sexual assault.

• Effective 1/1/20, colleges that receive state funding must adopt a sexual assault policy that includes an affirmative consent standard in the determination of whether consent was given by both parties to sexual activity.

• “Affirmative consent” must be defined as “affirmative, conscious, and voluntary agreement to engage in sexual activity.”

Title IX Coordinator

“Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.” The recipient must notify [1] applicants for admission and employment, [2] students, [3] parents or legal guardians of elementary and secondary school students, [4] employees, and [5] all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph.”
Defined Terms

- **Complainant** means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent** means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Recipient** means elementary and secondary schools, as well as postsecondary institutions, that receive Federal financial assistance.

II. Receipt of Allegations

Obligation to Respond

- A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient must respond promptly in a manner that is not deliberately indifferent.
- A response is deliberately indifferent only if it’s response to sexual harassment is clearly unreasonable in light of the known circumstances.
Actual Knowledge

“Actual knowledge means notice of sexual harassment or allegations of sexual harassment...Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent.”

Receiving Actual Knowledge

• K-12:
  • Any elementary and secondary school employee.
• CCD:
  • The institution’s Title IX Coordinator, or any official who has authority to institute corrective measures on behalf of the recipient.

Educational Program or Activities

• Includes locations, events, or circumstances over which the recipient exercised *substantial control* over *both* the respondent and the context in which the harassment occurs.
• Includes any building owned or controlled by a student organization that is officially recognized by the CCD.
Responding to Notice

• Title IX Coordinator is responsible to *promptly contact* the Complainant and discuss:
  • Availability of Supportive Measures,
  • Option to File Formal Complaint, and
  • Formal Complaint Process.
• Title IX Coordinator must determine whether Title IX jurisdiction exists.

Supportive Measures

“Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”

Supportive Measures

• Counseling
• Extensions of deadlines or other course-related adjustments
• Modifications of work or class schedules
• Campus escort services
• Mutual restrictions on contact between the parties
• Changes in work or housing locations
• Leaves of absence
• Increased security and monitoring of certain areas of the campus
• Other similar measures
Emergency Removal

“Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient [1] undertakes an individualized safety and risk analysis, [2] determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and [3] provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.”

Jurisdictional Issues

• Sexual harassment that occurs off campus and does not occur in an education program or activity of the recipient will not be covered under Title IX.
• When might jurisdiction not exist?
  • When conduct occurs off campus via social media
  • When conduct occurs outside of the United States

Formal Complaint

• A Formal Complaint is a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.
• A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail.
• At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.
Mandatory Dismissal of Formal Complaint

• “If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part.”

Permissive Dismissal of Formal Complaint

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

III. Investigation of Formal Complaint
Written Notice of Allegations

- Title IX coordinator is responsible for providing the following information in a written notice to the parties:
  - Notice of recipient’s grievance process, including any informal resolution process; and
  - Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before an initial interview. This includes the identities of parties involved, if known, and the date and location of the alleged incident, if known.

Investigation Process Requirements

- Burden of gathering evidence is on the recipient – not the complainant, respondent, or witnesses.
- Complainant and Respondent are provided equal opportunity to present evidence, including witnesses.
- No “gag-orders;” either party must be allowed to discuss the allegations and gather evidence.

Investigation Process, Cont’d.

- Allow both parties to have advisor present throughout process.
- Provide notice of all proceedings to parties expected to attend.
- Both parties may review the evidence and have opportunity to meaningfully respond before final report.
- Prepare and issue a final investigation report.
Standard of Evidence

• There are two permissible standards of evidence for Title IX investigations:
  • Preponderance of the Evidence (>50%)
  • Clear and Convincing (>75%)
• Recipients must apply the same standard to Title IX investigations involving students as those investigations involving employees.

Investigation Report

• Report should:
  • Fairly summarize relevant evidence, and
  • Be provided to complainant and respondent (and their advisors) for comment at least 10 days before a hearing or final determination.

IV. Decision Making
Cross-Examination Requirement

“With or without a hearing, after the recipient has sent the investigative report to the parties...and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.”

Hearings

• CCDs (and other postsecondary institutions) are required to provide a live hearing prior to making a determination.
• K-12 schools may choose to adopt a hearing process, but are not required.
• At the hearing, the decision maker(s) cannot be the investigator of the complaint or the Title IX Coordinator.

Hearing Process

• The decision-maker(s) must allow each party’s advisor to ask the other party and witnesses all relevant questions and follow-up, including questions that go to credibility.
• Cross examination at the hearing must be conducted:
  • Directly
  • Orally
  • In real time
• Only relevant questions may be asked of a party or witness. Prior to answering a question, the decision-maker must rule on relevancy.
### Hearing Process, Cont’d.

- If a party does not have an advisor, the recipient must provide one, without charge. However, recipient chooses advisor.
- Questions about sexual history or predisposition are never relevant, unless they are offered to prove that someone else committed the conduct or to prove consent. (“Rape shield.”)
- If a party does not submit to cross-examination, the decision-maker(s) may not rely on their statements in making a determination.

### Hearing Process Tips

- Recipient must provide:
  - Decision-maker(s) trained in Title IX.
  - Representative to present the recipient’s case.
  - As necessary, an advisor for either party, which may but is not required to be an attorney.
  - Court-reporter or other method of recording the proceeding.
- Parties do not have to be in the same room during the hearing, so long as participants may simultaneously see and hear one another.

### Reaching a Determination

Following a hearing, if one is held, or after the parties have had an opportunity to review the investigative report and submit questions, “[t]he decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a **written determination** regarding responsibility.”
Written Determination

- The determination must contain:
  - Identification of the allegations potentially constituting sexual harassment;
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  - Findings of fact supporting the determination;

Written Determination, Cont’d.

- Conclusions regarding the application of the recipient’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 recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and
- The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

V. Other Considerations
### Parents/Legal Guardians

- The regulations make clear that, “Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a “complainant,” “respondent,” “party,” or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.”

### Informal Resolution

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

### Appeals

- A recipient must offer both parties an appeal from a determination regarding responsibility…on the following bases:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
Appeals Process

As to all appeals, the recipient must:

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

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

3. Ensure that the decision-maker(s) for the appeal is unbiased and meets the training requirements under Title IX;

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

5. Issue a written decision describing the result of the appeal and the rationale for the result; and

6. Provide the written decision simultaneously to both parties.

Title IX Training

“...A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on [1] the definition of sexual harassment in § 106.30, [2] the scope of the recipient’s education program or activity, [3] how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and [4] how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.”
Title IX Training, Cont’d.

“A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.”

Retention of Records

• Seven (7) year maintenance requirement for:
  • Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under Title IX, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;
  • Any appeal and the result therefrom; and
  • Any informal resolution and the result therefrom.

Publication of Training Materials

• “A recipient must make [all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process] publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.”
Recipient Liability Under Title IX

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

VI. Next Steps

Next Steps

1. Revise sexual harassment policy and regulation/procedure to incorporate new requirements
2. Ensure sexual harassment policy and regulation/procedure are posted on website and included in student and employee handbooks
3. Identify a Title IX Coordinator and clearly define their role
4. Identify other personnel to implement new grievance process
5. Provide training for Title IX Coordinator, potential investigators, decision makers, facilitators of informal resolution process
Next Steps, Cont’d.

6. Post training materials on website
7. Educate staff and students on new grievance process
8. Understand what the Department defines as actual knowledge of a Title IX incident that triggers duty to report to the district Title IX Coordinator
9. Ensure a prompt and equitable grievance process
10. Ensure effective documentation procedures are in place for how district receives and maintains information
Information in this presentation, including but not limited to PowerPoint handouts and presenters’ comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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May 20, 2020

To: Superintendents, Member School Districts (K-12)

From: Monica D. Batanero, Sr. Assoc. General Counsel
Kaitlyn A. Schwendeman, Schools Legal Counsel

Subject: New Title IX Regulations Effective August 14, 2020
Memo No. 32-2020

The Department of Education on May 6, 2020, issued much-awaited final regulations on how K-12 school districts and college campuses must respond to allegations of sexual harassment. Secretary of Education Betsy DeVos said the final regulations under Title IX — which prohibits sex discrimination in federally funded educational institutions — were issued after considering various stakeholder comments and as many as 124,000 public comments made since the proposed guidelines were issued in November 2018.

The overall intent of the new Title IX regulations is to provide students accused of sexual misconduct with stronger due process protections. As a result, there are many additional requirements that include very specific grievance and investigation procedures that must be adopted by educational institutions.

The new regulations are scheduled to take effect August 14, 2020, and will require modification of current sexual harassment policies, including investigation procedures.

This office is offering a webinar, entitled “New Title IX Regulations for 2020-2021,” on June 3, 2020, from 1:00 p.m. to 4:00 p.m. where we will cover in more detail the new requirements under Title IX. You may register here: DETAILS/REGISTER.¹

¹ https://sclscal.org/workshop/new-title-ix-regulations-for-2020-2021-k-12-ccd/
Some of the more notable changes are detailed below:

**NEW TERMINOLOGY**

The regulations define the following terms to ensure consistency and clarity:

- **Complainant** means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent** means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Recipient** means elementary and secondary schools, as well as postsecondary institutions, that receive Federal financial assistance.

**DEFINITION OF SEXUAL HARASSMENT**

The new regulations provide that there are only three categories of conduct that could constitute sexual harassment under Title IX:

1. unwelcome conduct on the basis of sex that a reasonable person would determine is so “severe, pervasive and objectively offensive” that it effectively denies a person equal access to the recipient’s education program or activity;
2. quid pro quo harassment; or
3. sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act (“VAWA”).

**What this means:** The final regulations continue the 1997 Guidance and 2001 Guidance approach of including as sexual harassment unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature by an employee, by another student, or by a third party. However, when determining whether conduct meets the definition of sexual harassment, particularly under category 1 (hostile environment), the conduct must be severe, pervasive and objectively offensive. Previously, the legal standard was that the conduct has to be either severe or pervasive. This will result in a huge shift in how we analyze whether sexual conduct creates a hostile environment for a complainant and will make it more difficult for a complainant to argue that he/she has been subjected to a hostile environment due to sexual harassment. Notably, under the new regulations a single instance of harassment on the basis of sex can no longer be considered sexual harassment pursuant to the hostile environment analysis.

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2 34 CFR § 106.30
3 Quid pro quo sexual harassment is defined as “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.”
5 34 U.S.C. § 12291(a)(10)
6 34 U.S.C. § 12291(a)(8)
7 34 U.S.C. § 12291(a)(30)
It is important to note that conduct that falls under the other two categories – quid pro quo and Clery Act/VAWA offenses - do not have to meet the elements of “severe, pervasiveness, and objective offensiveness” such that a single instance of sufficiently severe harassment on the basis of sex may have the systemic effect of denying the victim equal access to an education program or activity.

Lastly, recipients may continue to address harassing conduct that does not meet the Title IX definition of sexual harassment under other provisions of the recipient’s own code of conduct.

**DESIGNATION OF A TITLE IX COORDINATOR**

The Department of Education (“DOE”) has clarified that each recipient must designate and authorize at least one employee to coordinate its efforts with its responsibilities under Title IX. The employee must be referred to as the “Title IX Coordinator” and the recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name and title, office address, electronic mail address, and telephone number of the employee designated as the Title IX Coordinator.

**What this means:** The DOE has expanded the groups of individuals/organizations that must be notified of the Title IX Coordinator’s information. The recipient must prominently display on its website, if any, of the Title IX Coordinator’s contact information and the recipient’s sexual harassment prevention policy and in each handbook catalog that it makes available to the individuals who now must be notified of the Title IX Coordinator’s information. In addition, the contact information of the Title IX Coordinator must now include either the name or title of the individual and the email address (which was not required previously).

Most importantly, the regulations clarify the independent compliance and investigatory responsibilities of the Title IX Coordinator. Title IX Coordinators must be given independent authority to monitor and implement a recipient’s compliance under Title IX. The Title IX Coordinator must be free from conflicts of interest and bias, and must be trained on, among other things, how to serve impartially.

**GENERAL RESPONSE TO SEXUAL HARASSMENT**

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

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8 34 CFR § 106.8
9 34 CFR § 106.45(b)(1)(iii)
10 34 CFR § 106.44
Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.

Notice results whenever any elementary and secondary school employee, any Title IX Coordinator, or any official with authority: witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant’s parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means.

Education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution, e.g., off-campus housing, fraternity/sorority houses, etc.

These final regulations emphasize that any person may trigger a recipient’s response obligations by reporting sexual harassment to the Title IX Coordinator using contact information that the recipient must post on the recipient’s website. The person who reports does not need to be the complainant (i.e., the person alleged to be the victim); a report may be made by “any person” who believes that sexual harassment may have occurred and requires a recipient’s response.

A recipient’s response must treat complainants and respondents equitably by offering supportive measures to a complainant, and by following a grievance process now required under the new Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment or deter sexual harassment.

Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations,

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11 34 CFR § 106.44(a)
12 34 CFR § 106.30
leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. ¹³

With or without a formal complaint, a recipient must comply with the requirement to offer supportive services. ¹⁴

**What this means:** Previously, a recipient’s duty to investigate and remediate sexual misconduct was triggered when a “responsible employee” knew or should have known about the sexual harassment/sex discrimination. Not only do the new regulations no longer use the term “responsible employee,” the regulations also eliminated the concept of constructive notice (aka “should have known”).

For post-secondary educational institutions, notice of sexual harassment/sex discrimination only occurs when that institution’s Title IX Coordinator or any official who has authority to institute corrective measures on behalf of the recipient receives notice of sexual harassment or allegations of sexual harassment. Notice includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator and the filing of a formal complaint.

For K-12 educational institutions, when any employee receives notice from a student or employee of sexual harassment or allegations of sexual harassment, the recipient is deemed to have actual knowledge, thereby triggering the recipient’s duty to promptly respond. So, all K-12 employees are considered officials with authority to institute corrective measures and schools may not exempt any classification of employee, such as counselors or classified employees.

The new regulations also eliminated the previously-used term “interim measures” and instead use the term “supportive services.”

**JURISDICTIONAL ISSUES** ¹⁵

Sexual harassment that occurs off campus and does not occur in an education program or activity of the recipient (as defined above) will not be covered under Title IX. Therefore, sexual harassment that occurs off campus via social media that targets a student, for example, may not fall under the provision of Title IX. However, this type of misconduct may still be in violation of the recipient’s code of conduct and so the recipient’s response would be pursuant to that policy.

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¹³ 34 CFR § 106.30  
¹⁴ 34 CFR § 106.45  
¹⁵ 34 CFR § 106.44(a)
In addition, Title IX no longer applies for acts committed outside the United States even if the misconduct occurred in a recipient’s education program or activity, e.g., study abroad program. However, other policies may apply, e.g., a code of conduct policy, that would require a response from the recipient.

**What this means:** Recipients must be careful to first identify if they have jurisdiction over sexual misconduct in order to determine if Title IX applies. However, even if a recipient does not have jurisdiction under Title IX, it may have jurisdiction under another policy or provision. For example, for K-12 school districts, bullying via social media that occurs off campus may be within a recipient’s jurisdiction and subject the offending student to discipline. However, that same conduct may not require a recipient to investigate under Title IX.

**FORMAL COMPLAINT**

A formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail.

**What this means:** The definition of “formal complaint” precludes a third party from filing a formal complaint, which is defined as a document that must be filed by a complainant or signed by the Title IX Coordinator. However, as mentioned earlier, any person who believes that sexual harassment may have occurred may report sexual harassment which would then trigger a recipient’s responsibility to determine if supportive services are necessary under the circumstances. Furthermore, a complainant may not submit a formal complaint anonymously, as it requires their physical or digital signature. While a Title IX Coordinator may sign a formal complaint based upon an anonymous report, the identity of the complainant will be disclosed if known.

**NOTICE OF ALLEGATIONS**

Upon receipt of a formal complaint, a recipient must provide the following information through written notice to the parties who are known:

1. Notice of the recipient’s grievance process that complies with this section, including any informal resolution process.

2. Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the

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16 34 CFR § 106.8(d)  
17 34 CFR § 106.30  
18 34 CFR § 106.45(b)(2)
parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence obtained during the investigation.

The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.

**What this means:** The intent of the new Title IX regulations is to provide an equitable process that affords due process to the parties involved, particularly the respondent. Providing respondents with specific details about the allegations provides them a better opportunity to defend themselves, which is central to due process.

**RESPONSE TO A FORMAL COMPLAINT**

In response to a formal complaint, a recipient must adopt and follow a grievance process that complies with the following elements:

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

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

3. Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

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19 34 CFR § 106.45(b)(1)
A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

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

5. Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

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

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

8. Include the procedures and permissible bases for the complainant and respondent to appeal;

9. Describe the range of supportive measures available to complainants and respondents; and
10. Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

**What this means:** The two most notable changes are the never before required training requirements for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process and the requirement that recipients apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty. For example, if a collective bargaining agreement requires a clear and convincing standard for formal complaints against employees, then that same standard would have to be applied for formal complaints against students. The two standards of evidence that a recipient must choose from are preponderance of the evidence (more likely than not or >50%) or clear and convincing evidence (substantially more likely than not or ~75%).

Regarding the new training requirements for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, there is no minimum hourly training requirement, but instead the training must include the following components: the definition of sexual harassment, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. Decision-makers specifically must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

**DISMISSAL OF A FORMAL COMPLAINT**

The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Upon dismissal of a formal complaint, the recipient must promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties.

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20 34 CFR § 106.45(b)(3)
What this means: The Title IX regulations now specify when a recipient must dismiss a complaint under Title IX. In addition, a complainant can request to dismiss a formal complaint, but the recipient is not required to dismiss the complaint.

**EMERGENCY REMOVAL**

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

What this means: A recipient may only remove a respondent from his/her education program or activity after considering several criteria in order to determine if the respondent must be removed to ensure the physical health or safety of any student. In addition, a respondent is entitled to some form of due process immediately following his/her removal from his/her education program or activity. This “due process” may be a hearing or meeting with an administrator responsible for conducting the individualized safety and risk analysis for the sole purpose of providing the respondent the opportunity to challenge the decision.

**INVESTIGATION OF A FORMAL COMPLAINT**

When investigating a formal complaint and throughout the grievance process, a recipient must—

1. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties. Furthermore, the recipient cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR § 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR § 99.3);

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

3. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

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21 34 CFR § 106.44(c)
22 34 CFR § 106.45(b)(5)
4. Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

5. 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;

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

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

What this means: The investigation procedure that recipients must now adopt must be followed in order to provide the parties, particularly the respondent, with due process. The regulations make clear that it is the recipient’s responsibility, not the parties’, to gather evidence sufficient to reach a determination regarding responsibility and the burden of proof rests with the recipient.

Each party is now entitled to review, prior to the completion of the investigation report, all evidence, inculpatory and exculpatory, that is directly related to the allegations raised in the formal complaint. Practically speaking, this will be accomplished by the investigator providing a copy of the draft investigation report prior to the completion of the report and allow each party at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
HEARINGS

For postsecondary institutions, the recipient’s grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally, notwithstanding the discretion of the recipient to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.

Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

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

For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a

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23 34 CFR § 106.45(b)(6)(i)
hearing. With or without a hearing, after the recipient has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

With or without a hearing, questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

**What this means:** Postsecondary institutions are now required to conduct a live hearing conducted by a neutral decision-maker (hearing officer or panel) who will review the evidence and make a decision as to culpability. The decision-maker cannot be the Title IX Coordinator or the investigator. The hearing can be conducted via video conference and it must always be recorded. The parties must be allowed to ask relevant questions and cross-examine witnesses.

If a party does not have an advisor present at a live hearing, the recipient must provide an advisor of the recipient’s choice to conduct cross-examination on behalf of that party. A party cannot conduct questioning on their own behalf. Therefore, if a party does not have an advisor, the recipient will need to provide one, which can be an employee of the recipient; however, the recipient chooses the advisor.

Recipients that are elementary and secondary schools are not required to conduct live hearings to determine culpability. However, the parties must be given the opportunity to submit written, relevant questions they wanted asked of any party or witness after receiving the investigation report. The recipient will then provide each party with the answers to their questions and then allow for additional, limited follow-up questions from each party.

**STANDARD OF EVIDENCE**

The final regulations were revised to clearly require a recipient’s grievance process to state up front which of the two permissible standards of evidence the recipient has selected and then to apply that selected standard to all formal complaints of sexual harassment, including those against employees.

**DETERMINATION REGARDING RESPONSIBILITY**

The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence that it applies to all formal

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24 34 CFR § 106.45(b)(1)(vii)
25 34 CFR § 106.45(b)(7)
complaints of sexual harassment – either preponderance of the evidence or clear and convincing evidence.

The written determination must include the following elements:

1. Identification of the allegations potentially constituting sexual harassment;

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

3. Findings of fact supporting the determination;

4. Conclusions regarding the application of the recipient’s code of conduct to the facts;

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

6. The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

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

The Title IX Coordinator is responsible for effective implementation of any remedies.26

**What this means:** A recipient must now ensure that an individual, other than the Title IX Coordinator or investigator, reviews all the evidence and makes a determination regarding a respondent’s responsibility under Title IX. In small elementary and secondary districts, this will require that the Title IX Coordinator be an employee other than the chief administrative officer.

**APPEALS**27

A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:

1. Procedural irregularity that affected the outcome of the matter;

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26 34 CFR § 106.45(b)(7)(iv)
27 34 CFR § 106.45(b)(8)
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

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

A recipient may offer an appeal equally to both parties on additional bases. As to all appeals, the recipient must:

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

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

3. Ensure that the decision-maker(s) for the appeal is unbiased and meets the training requirements under Title IX;

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

5. Issue a written decision describing the result of the appeal and the rationale for the result; and

6. Provide the written decision simultaneously to both parties.

**What this means:** Both parties must now be offered the opportunity to appeal a determination regarding responsibility. Previously, recipients generally only provided the complainant with an opportunity to appeal a determination regarding responsibility. Also, the decision-maker for the appeal must meet the same training requirement as the Title IX Coordinator.

**INFORMAL RESOLUTION**

A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.

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28 34 CFR § 106.45(b)(9)
However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

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

2. Obtains the parties’ voluntary, written consent to the informal resolution process; and

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

**What this means:** Recipients are not required to develop and implement an informal resolution process. However, if a recipient chooses to develop an informal resolution process, it cannot be offered unless a formal complaint has been filed.

**RECORDKEEPING**

A recipient must maintain for a period of seven (7) years records of –

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under Title IX, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;

2. Any appeal and the result therefrom;

3. Any informal resolution and the result therefrom; and

4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.

**What this means:** Recipients must now maintain records regarding every phase of a sexual harassment investigation under Title IX for at least seven years. Previously, there was no express requirement on maintaining records for a specific period of time.

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29 34 CFR § 106.45(b)(10)
**TRAINING MATERIALS PUBLICATION REQUIREMENT**

Each recipient must publish on its website the training materials used to train its Title IX Coordinator.

**What this means:** If the training materials are proprietary, and thus copyrighted, we recommend you list the materials by its title, but not make them available on your website. You can further state on your website that the materials may be available for inspection with the Title IX Coordinator.

**REMEDIAL ACTION**

The DOE has clarified that it may require a recipient to take remedial action for discriminating in violation of Title IX and for violating Title IX regulations.

**What this means:** A recipient that does not follow the requirements of Title IX, such as not designating an employee as a Title IX Coordinator, failing to offer supportive services, failing to send written notice after dismissing a complainant’s allegations, or not following its grievance procedures, may be found to have violated Title IX, even if the violation does not, itself, constitute sex discrimination.

**RIGHTS OF PARENTS**

The regulations expressly recognize the legal rights of parents/guardians to act on behalf of a complainant or respondent on any Title IX matter.

**What this means:** Parents/guardians cannot be prevented from representing their child or acting on their behalf on any Title IX matter. However, once a child attains the age of majority (18), he/she holds his/her educational rights, unless he/she is conserved, and can act on their own behalf. However, an adult child can assign his/her educational rights to his/her parent/guardian so that the parent/guardian can act on their child’s behalf.

Please contact our office with questions regarding this Legal Update or any other legal matter.

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The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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30 34 CFR § 106.45(b)(10)(i)(D)
31 34 CFR § 106.3
32 34 CFR § 106.6(g)
The Department of Education on May 6, 2020, issued much-awaited final regulations on how K-12 school districts and college campuses must respond to allegations of sexual harassment. Secretary of Education Betsy DeVos said the final regulations under Title IX — which prohibits sex discrimination in federally funded educational institutions — were issued after considering various stakeholder comments and as many as 124,000 public comments made since the proposed guidelines were issued in November 2018.

The overall intent of the new Title IX regulations is to provide students accused of sexual misconduct with stronger due process protections. As a result, there are many additional requirements that include very specific grievance and investigation procedures that must be adopted by educational institutions.

The new regulations are scheduled to take effect August 14, 2020, and will require modification of current sexual harassment policies, including investigation procedures.

This office is offering a webinar, entitled “New Title IX Regulations for 2020-2021,” on June 3, 2020, from 1:00 p.m. to 4:00 p.m. where we will cover in more detail the new requirements under Title IX. You may register here: DETAILS/REGISTER.
Some of the more notable changes are detailed below:

NEW TERMINOLOGY

The regulations define the following terms to ensure consistency and clarity:

- **Complainant** means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent** means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Recipient** means elementary and secondary schools, as well as postsecondary institutions, that receive Federal financial assistance.

DEFINITION OF SEXUAL HARASSMENT

The new regulations provide that there are only three categories of conduct that could constitute sexual harassment under Title IX:

1. unwelcome conduct on the basis of sex that a reasonable person would determine is so “severe, pervasive and objectively offensive” that it effectively denies a person equal access to the recipient’s education program or activity;

2. quid pro quo harassment; or

3. sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act (“VAWA”).

What this means: The final regulations continue the 1997 Guidance and 2001 Guidance approach of including as sexual harassment unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature by an employee, by another student, or by a third party. However, when determining whether conduct meets the definition of sexual harassment, particularly under category 1 (hostile environment), the conduct must be severe, pervasive and objectively offensive. Previously, the legal standard was that the conduct has to be either severe or pervasive. This will result in a huge shift in how we analyze whether sexual conduct creates a hostile environment for a complainant and will make it more difficult for a complainant to argue that he/she has been subjected to a hostile environment due to sexual harassment. Notably, under the new regulations a single instance of harassment on the basis of sex can no longer be considered sexual harassment pursuant to the hostile environment analysis.

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2 34 CFR § 106.30
3 Quid pro quo sexual harassment is defined as “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.”
5 34 U.S.C. § 12291(a)(10)
6 34 U.S.C. § 12291(a)(8)
7 34 U.S.C. § 12291(a)(30)
It is important to note that conduct that falls under the other two categories – quid pro quo and Clery Act/VAWA offenses - do not have to meet the elements of “severe, pervasiveness, and objective offensiveness” such that a single instance of sufficiently severe harassment on the basis of sex may have the systemic effect of denying the victim equal access to an education program or activity.

Lastly, recipients may continue to address harassing conduct that does not meet the Title IX definition of sexual harassment under other provisions of the recipient’s own code of conduct.

**DESIGNATION OF A TITLE IX COORDINATOR**

The Department of Education (“DOE”) has clarified that each recipient must designate and authorize at least one employee to coordinate its efforts with its responsibilities under Title IX. The employee must be referred to as the “Title IX Coordinator” and the recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name and title, office address, electronic mail address, and telephone number of the employee designated as the Title IX Coordinator.

**What this means:** The DOE has expanded the groups of individuals/organizations that must be notified of the Title IX Coordinator’s information. The recipient must prominently display on its website, if any, of the Title IX Coordinator’s contact information and the recipient’s sexual harassment prevention policy and in each handbook catalog that it makes available to the individuals who now must be notified of the Title IX Coordinator’s information. In addition, the contact information of the Title IX Coordinator must now include either the name or title of the individual and the email address (which was not required previously).

Most importantly, the regulations clarify the independent compliance and investigatory responsibilities of the Title IX Coordinator. Title IX Coordinators must be given independent authority to monitor and implement a recipient’s compliance under Title IX. The Title IX Coordinator must be free from conflicts of interest and bias, and must be trained on, among other things, how to serve impartially.

**GENERAL RESPONSE TO SEXUAL HARASSMENT**

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

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8 34 CFR § 106.8
9 34 CFR § 106.45(b)(1)(iii)
10 34 CFR § 106.44
» **Actual knowledge** means *notice* of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.

» **Notice** results whenever *any* elementary and secondary school employee, any Title IX Coordinator, or any official with authority: witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant’s parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means.

» **Education program or activity** includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution, e.g., off-campus housing, fraternity/sorority houses, etc.

These final regulations emphasize that any person may trigger a recipient’s response obligations by reporting sexual harassment to the Title IX Coordinator using contact information that the recipient must post on the recipient’s website. The person who reports does not need to be the complainant (i.e., the person alleged to be the victim); a report may be made by “any person” who believes that sexual harassment may have occurred and requires a recipient’s response.

A recipient’s response must treat complainants and respondents equitably by offering **supportive measures** to a complainant, and by following a grievance process now required under the new Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent.¹¹ The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

» **Supportive measures**¹² means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment or deter sexual harassment.

» **Supportive measures** may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations.

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¹¹ 34 CFR § 106.44(a)
¹² 34 CFR § 106.30
leaves of absence, increased security and monitoring of certain areas of the campus, and
other similar measures. The recipient must maintain as confidential any supportive
measures provided to the complainant or respondent, to the extent that maintaining such
confidentiality would not impair the ability of the recipient to provide the supportive
measures.

The Title IX Coordinator is responsible for coordinating the effective implementation of
supportive measures.\textsuperscript{13}

With or without a formal complaint, a recipient must comply with the requirement to offer
supportive services.\textsuperscript{14}

**What this means:** Previously, a recipient’s duty to investigate and remediate sexual misconduct
was triggered when a “responsible employee” knew or should have known about the sexual
harassment/sex discrimination. Not only do the new regulations no longer use the term
“responsible employee,” the regulations also eliminated the concept of constructive notice (aka
“should have known”).

For post-secondary educational institutions, notice of sexual harassment/sex discrimination only
occurs when that institution’s Title IX Coordinator or any official who has authority to institute
corrective measures on behalf of the recipient receives notice of sexual harassment or allegations
of sexual harassment. Notice includes, but is not limited to, a report of sexual harassment to the
Title IX Coordinator and the filing of a formal complaint.

For K-12 educational institutions, when any employee receives notice from a student or
employee of sexual harassment or allegations of sexual harassment, the recipient is deemed to
have actual knowledge, thereby triggering the recipient’s duty to promptly respond. So, all K-12
employees are considered officials with authority to institute corrective measures and schools
may not exempt any classification of employee, such as counselors or classified employees.

The new regulations also eliminated the previously-used term “interim measures” and instead
use the term “supportive services.”

**JURISDICTIONAL ISSUES**\textsuperscript{15}

Sexual harassment that occurs off campus and does not occur in an education program or
activity of the recipient (as defined above) will not be covered under Title IX. Therefore, sexual
harassment that occurs off campus via social media that targets a student, for example, may not
fall under the provision of Title IX. However, this type of misconduct may still be in violation of
the recipient’s code of conduct and so the recipient’s response would be pursuant to that policy.

\textsuperscript{13} 34 CFR § 106.30
\textsuperscript{14} 34 CFR § 106.45
\textsuperscript{15} 34 CFR § 106.44(a)
In addition, Title IX no longer applies for acts committed outside the United States even if the misconduct occurred in a recipient’s education program or activity, e.g., study abroad program. However, other policies may apply, e.g., a code of conduct policy, that would require a response from the recipient.

**What this means:** Recipients must be careful to first identify if they have jurisdiction over sexual misconduct in order to determine if Title IX applies. However, even if a recipient does not have jurisdiction under Title IX, it may have jurisdiction under another policy or provision. For example, for K-12 school districts, bullying via social media that occurs off campus may be within a recipient’s jurisdiction and subject the offending student to discipline. However, that same conduct may not require a recipient to investigate under Title IX.

**FORMAL COMPLAINT**

A formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail.

**What this means:** The definition of “formal complaint” precludes a third party from filing a formal complaint, which is defined as a document that must be filed by a complainant or signed by the Title IX Coordinator. However, as mentioned earlier, any person who believes that sexual harassment may have occurred may report sexual harassment which would then trigger a recipient’s responsibility to determine if supportive services are necessary under the circumstances. Furthermore, a complainant may not submit a formal complaint anonymously, as it requires their physical or digital signature. While a Title IX Coordinator may sign a formal complaint based upon an anonymous report, the identity of the complainant will be disclosed if known.

**NOTICE OF ALLEGATIONS**

Upon receipt of a formal complaint, a recipient must provide the following information through written notice to the parties who are known:

1. Notice of the recipient’s grievance process that complies with this section, including any informal resolution process.

2. Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the

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16 34 CFR § 106.8(d)
17 34 CFR § 106.30
18 34 CFR § 106.45(b)(2)
parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence obtained during the investigation.

The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.

**What this means:** The intent of the new Title IX regulations is to provide an equitable process that affords due process to the parties involved, particularly the respondent. Providing respondents with specific details about the allegations provides them a better opportunity to defend themselves, which is central to due process.

**RESPONSE TO A FORMAL COMPLAINT**

In response to a formal complaint, a recipient must adopt and follow a grievance process that complies with the following elements:

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

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

3. Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

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19 34 CFR § 106.45(b)(1)
A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

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

5. Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

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

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

8. Include the procedures and permissible bases for the complainant and respondent to appeal;

9. Describe the range of supportive measures available to complainants and respondents; and
10. Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

**What this means**: The two most notable changes are the never before required training requirements for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process and the requirement that recipients apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty. For example, if a collective bargaining agreement requires a clear and convincing standard for formal complaints against employees, then that same standard would have to be applied for formal complaints against students. The two standards of evidence that a recipient must choose from are preponderance of the evidence (more likely than not or >50%) or clear and convincing evidence (substantially more likely than not or ~75%).

Regarding the new training requirements for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, there is no minimum hourly training requirement, but instead the training must include the following components: the definition of sexual harassment, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. Decision-makers specifically must receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

**DISMISSAL OF A FORMAL COMPLAINT**

The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Upon dismissal of a formal complaint, the recipient must promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties.

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20 34 CFR § 106.45(b)(3)
**What this means:** The Title IX regulations now specify when a recipient must dismiss a complaint under Title IX. In addition, a complainant can request to dismiss a formal complaint, but the recipient is not required to dismiss the complaint.

**EMERGENCY REMOVAL**

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

**What this means:** A recipient may only remove a respondent from his/her education program or activity after considering several criteria in order to determine if the respondent must be removed to ensure the physical health or safety of any student. In addition, a respondent is entitled to some form of due process immediately following his/her removal from his/her education program or activity. This “due process” may be a hearing or meeting with an administrator responsible for conducting the individualized safety and risk analysis for the sole purpose of providing the respondent the opportunity to challenge the decision.

**INVESTIGATION OF A FORMAL COMPLAINT**

When investigating a formal complaint and throughout the grievance process, a recipient must—

1. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties. Furthermore, the recipient cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR § 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR § 99.3);

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

3. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

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21 34 CFR § 106.44(c)
22 34 CFR § 106.45(b)(5)
4. Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

5. 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;

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

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

**What this means:** The investigation procedure that recipients must now adopt must be followed in order to provide the parties, particularly the respondent, with due process. The regulations make clear that it is the recipient’s responsibility, not the parties’, to gather evidence sufficient to reach a determination regarding responsibility and the burden of proof rests with the recipient.

Each party is now entitled to review, prior to the completion of the investigation report, all evidence, inculpatory and exculpatory, that is directly related to the allegations raised in the formal complaint. Practically speaking, this will be accomplished by the investigator providing a copy of the draft investigation report prior to the completion of the report and allow each party at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
For postsecondary institutions, the recipient’s grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally, notwithstanding the discretion of the recipient to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.

Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

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

For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a

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23 34 CFR § 106.45(b)(6)(i)
hearing. With or without a hearing, after the recipient has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

With or without a hearing, questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

**What this means:** Postsecondary institutions are now required to conduct a live hearing conducted by a neutral decision-maker (hearing officer or panel) who will review the evidence and make a decision as to culpability. The decision-maker cannot be the Title IX Coordinator or the investigator. The hearing can be conducted via video conference and it must always be recorded. The parties must be allowed to ask relevant questions and cross-examine witnesses.

If a party does not have an advisor present at a live hearing, the recipient must provide an advisor of the recipient’s choice to conduct cross-examination on behalf of that party. A party cannot conduct questioning on their own behalf. Therefore, if a party does not have an advisor, the recipient will need to provide one, which can be an employee of the recipient; however, the recipient chooses the advisor.

Recipients that are elementary and secondary schools are not required to conduct live hearings to determine culpability. However, the parties must be given the opportunity to submit written, relevant questions they wanted asked of any party or witness after receiving the investigation report. The recipient will then provide each party with the answers to their questions and then allow for additional, limited follow-up questions from each party.

**STANDARD OF EVIDENCE**

The final regulations were revised to clearly require a recipient’s grievance process to state up front which of the two permissible standards of evidence the recipient has selected and then to apply that selected standard to all formal complaints of sexual harassment, including those against employees.

**DETERMINATION REGARDING RESPONSIBILITY**

The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence that it applies to all formal

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24 34 CFR § 106.45(b)(1)(vii)
25 34 CFR § 106.45(b)(7)
complaints of sexual harassment – either preponderance of the evidence or clear and convincing evidence.

The written determination must include the following elements:

1. Identification of the allegations potentially constituting sexual harassment;

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

3. Findings of fact supporting the determination;

4. Conclusions regarding the application of the recipient’s code of conduct to the facts;

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

6. The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

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

The Title IX Coordinator is responsible for effective implementation of any remedies.26

**What this means:** A recipient must now ensure that an individual, other than the Title IX Coordinator or investigator, reviews all the evidence and makes a determination regarding a respondent’s responsibility under Title IX. In small elementary and secondary districts, this will require that the Title IX Coordinator be an employee other than the chief administrative officer.

**APPEALS**27

A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:

1. Procedural irregularity that affected the outcome of the matter;

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26 34 CFR § 106.45(b)(7)(iv)
27 34 CFR § 106.45(b)(8)
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

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

A recipient may offer an appeal equally to both parties on additional bases. As to all appeals, the recipient must:

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

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

3. Ensure that the decision-maker(s) for the appeal is unbiased and meets the training requirements under Title IX;

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

5. Issue a written decision describing the result of the appeal and the rationale for the result; and

6. Provide the written decision simultaneously to both parties.

**What this means:** Both parties must now be offered the opportunity to appeal a determination regarding responsibility. Previously, recipients generally only provided the complainant with an opportunity to appeal a determination regarding responsibility. Also, the decision-maker for the appeal must meet the same training requirement as the Title IX Coordinator.

**INFORMAL RESOLUTION**

A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.

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28 34 CFR § 106.45(b)(9)
However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

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

2. Obtains the parties’ voluntary, written consent to the informal resolution process; and

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

**What this means:** Recipients are not required to develop and implement an informal resolution process. However, if a recipient chooses to develop an informal resolution process, it cannot be offered unless a formal complaint has been filed.

**RECORDKEEPING**

A recipient must maintain for a period of seven (7) years records of –

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under Title IX, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;

2. Any appeal and the result therefrom;

3. Any informal resolution and the result therefrom; and

4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.

**What this means:** Recipients must now maintain records regarding every phase of a sexual harassment investigation under Title IX for at least seven years. Previously, there was no express requirement on maintaining records for a specific period of time.

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29 34 CFR § 106.45(b)(10)
TRAINING MATERIALS PUBLICATION REQUIREMENT

Each recipient must publish on its website the training materials used to train its Title IX Coordinator.

**What this means:** If the training materials are proprietary, and thus copyrighted, we recommend you list the materials by its title, but not make them available on your website. You can further state on your website that the materials may be available for inspection with the Title IX Coordinator.

REMEDIAL ACTION

The DOE has clarified that it may require a recipient to take remedial action for discriminating in violation of Title IX and for violating Title IX regulations.

**What this means:** A recipient that does not follow the requirements of Title IX, such as not designating an employee as a Title IX Coordinator, failing to offer supportive services, failing to send written notice after dismissing a complainant’s allegations, or not following its grievance procedures, may be found to have violated Title IX, even if the violation does not, itself, constitute sex discrimination.

RIGHTS OF PARENTS

The regulations expressly recognize the legal rights of parents/guardians to act on behalf of a complainant or respondent on any Title IX matter.

**What this means:** Parents/guardians cannot be prevented from representing their child or acting on their behalf on any Title IX matter. However, once a child attains the age of majority (18), he/she holds his/her educational rights, unless he/she is conserved, and can act on their own behalf. However, an adult child can assign his/her educational rights to his/her parent/guardian so that the parent/guardian can act on their child’s behalf.

Please contact our office with questions regarding this Legal Update or any other legal matter.
[INITIAL LETTER TO COMPLAINANT (K-12)]
**AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE**

[COMPLAINANT]
[ADDRESS]
[ADDRESS]

Via USPS Mail, First Class
Via Certified Mail
Via Email: [EMAIL ADDRESS]

[DATE]

Re: Formal Complaint (Received on [DATE])

Dear [COMPLAINANT],

This letter is to confirm that the [DISTRICT] (“District”) has received the formal complaint against [RESPONDENT] (“Respondent”) that you submitted to [NAME] on [DATE]. The District will process this complaint as a Formal Complaint under the District’s grievance process pursuant to its Sexual Harassment Board Policy and Administrative Regulation [INSERT BP/AR NUMBER]. I have enclosed a copy of Board Policy and Administrative Regulation [_______] for your reference. Please contact me if you have any questions.

Formal Complaint

Based on your Formal Complaint, I have developed the following allegations, which will be investigated pursuant to the District’s policies and regulations. If you disagree with my understanding of your Formal Complaint, or with the allegations as I have written them, or if you wish to supplement your Formal Complaint, please let me know in writing as soon as possible.

In your complaint, you alleged that the Respondent discriminated against you [OR YOUR CHILD] on the basis of sex based on incidents that took place [ON [DATE] OR DURING THE _______ SEMESTER]. In the allegations below, you [OR YOUR CHILD] are referred to as “Complainant.”

**Allegation No. 1:**


**Allegation No. 2:**

In your Complaint, you stated that your desired resolution of this matter is that:

- [ADD DESIRED RESOLUTIONS]
Investigation of the Complaint under the Grievance Process

The District takes these allegations seriously and has a duty to conduct a fair, thorough, and legally compliant investigation, which will be conducted within the required timelines, but may be subject to a temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

The District has retained outside counsel, [NAME OF OUTSIDE COUNSEL], to conduct an independent investigation of this complaint. [OUTSIDE COUNSEL] or [DISTRICT EMPLOYEE] will be in touch with you to schedule a meeting.

The District will investigate the allegations in accordance with the grievance process set forth in Administrative Regulation [______]. An investigator will be assigned to conduct a fact-finding investigation and as part of the investigation they will meet with you to discuss these allegations and to ask you questions related to the allegations and other issues that may be raised in the course of the investigation. At this and any follow up meetings, you will be entitled to present evidence supporting the allegations, including any documentation you may have. You are also entitled to have an advisor of your choice, who may be, but is not required to be an attorney, and may inspect and review evidence obtained during the investigation. In addition, your advisor may attend any meeting with the District related to this investigation. The [INVESTIGATOR OR A DISTRICT EMPLOYEE] will contact you to arrange the meeting time.

Please be advised that knowingly making false statements or knowingly submitting false information during the grievance process may subject you to discipline. [INSERT RELEVANT PROVISION OF POLICY/REGULATION]

For each of the allegations, the District will investigate to determine whether it is more likely than not the alleged conduct occurred. [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]

The District will keep any investigation confidential to the extent possible, but it cannot guarantee absolute confidentiality. Release of some information on a “need-to-know basis” is necessary for a thorough investigation and to protect the rights of alleged victims, respondents, and the school community.

Information about the Grievance Process and Your Rights

The District is committed to providing an academic and work environment that respects the dignity of individuals and groups, and is free from unlawful sexual harassment and sex discrimination. (Board Policy [______] (Sexual Harassment), enclosed with this letter.)
If an individual believes that he or she has been the victim of unlawful sexual harassment, sex discrimination, or retaliation, the District encourages the individual to file a complaint. An individual may file a formal complaint using the procedures outlined in Administrative Regulation [_____] (enclosed).

Here is some information about your rights under the grievance process:

- You will not be required to confront or work out problems directly with the Respondent.
- You may file a complaint with local law enforcement.
- You may file a complaint with the United States Department of Education, Office for Civil Rights, if the complaint is not based on employment.
- You may file a complaint with the United States Equal Employment Opportunity Commission or the California Department of Fair Employment and Housing if the complaint is based on employment.
- You may be entitled to the following supportive services during the grievance process: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The District will maintain as confidential any supportive measures provided to you, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the supportive measures.
- You will have an opportunity to present witnesses, including fact and expert witnesses, and any evidence supporting the allegation(s) and have that evidence considered as part of the District’s investigation.
- The District will conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and any credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.
- The District may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- Any individual designated by the District as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- You are entitled to the same periodic status updates that the District provides to the respondent.
You will be given an equal opportunity as the respondent to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint, including the evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that you can meaningfully respond to the evidence prior to conclusion of the investigation.

Prior to completion of the investigative report, the District must send to you, and your advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and you will have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.

You are entitled to receive an investigative report in an electronic format or a hard copy that fairly summarizes relevant evidence at least 10 days prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, for your review and written response.

Prior to reaching a determination regarding responsibility, you will be given the opportunity to submit written, relevant questions to the decision maker that you want asked of any party or witness. You are entitled to receive answers to your questions and the opportunity to submit additional, limited follow-up questions.

The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. A determination regarding responsibility will only be made at the conclusion of the grievance process.

If you are not satisfied with the results of the written determination regarding responsibility, you will have the right to appeal. The appeals process is described in Administrative Regulation [______].

At all times the District retains discretion to determine whether alleged harassment, discrimination, or retaliation warrants discipline. Please be aware that the District may require an investigation to continue even if you withdraw your complaint.

**Informal Resolution Process [INCLUDE IF APPLICABLE]**

At any time prior to reaching a determination regarding responsibility, the District mayfacilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the District:

- Provides the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to
**AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE**

withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

- Obtains the parties’ voluntary, written consent to the informal resolution process; and
- Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

**Prohibition against and Protection from Retaliation**

Please be reminded that this matter is confidential; however, you may discuss the allegations under investigation with other individuals in order to gather and present relevant evidence. We appreciate, in advance, your understanding that it is critically important that those named in the complaint, and witnesses, feel free to candidly and confidentially speak during the investigation without fear of intimidation, harassment or retaliation. Just the same, the District prohibits retaliation against complainants or other participants in the investigation process.

In accordance with state and federal law, you are directed not to retaliate against the respondent or any individual involved in the investigation. Any retaliatory conduct will result in immediate disciplinary action. You also have the right to be free from retaliation. If you believe you have experienced mistreatment or retaliation as a result of your involvement in the investigation, please let me know right away.

**Next Steps**

The [INVESTIGATOR OR DISTRICT EMPLOYEE] will contact you to schedule a meeting.

Please do not hesitate to contact me if you have any questions. I can be reached directly at [PHONE NUMBER].

Sincerely,

[NAME]
[TITLE]

Enclosures: [AMEND AS NECESSARY]

Board Policy [_____] (Sexual Harassment)
Administrative Regulation [_____] (Sexual Harassment)
Board Policy [_____] (Nondiscrimination/Harassment)
Administrative Regulation [_____] (Nondiscrimination/Harassment)
[NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (K-12)]

** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE **

[RESPONDENT]
[ADDRESS]
[ADDRESS]

Via U.S. Mail, First Class
Via Certified Mail
Via Email: [EMAIL ADDRESS]

[DATE]

Re: Notice of Allegations in Formal Complaint

Dear [RESPONDENT]:

This letter is to inform you that the [DISTRICT] (“District”) has received a formal complaint against you filed by [INSERT NAME OF COMPLAINANT] (“Complainant”). The Complainant alleged that you engaged in unlawful sex discrimination/sexual harassment in violation of District policies and regulations. In the allegations as described here, you are referred to as the “Respondent.” Please review the allegations below. Please contact me if you have any questions.

The specific allegations are as follows:

** Allegation No. 1:**


** Allegation No. 2:**

Such behavior may constitute unlawful sex discrimination or sexual harassment, a violation of Board Policies and Administrative Regulations [INSERT RELEVANT BP/AR – SEXUAL HARASSMENT, NONDISCRIMINATION, ETC.] and Article [ ] of the collective bargaining agreement between [UNION] (“UNION”) and the District [IF APPLICABLE]. If you are found to have engaged in misconduct, you may be subject to discipline on these or other grounds.

The District is confirming these allegations with the Complainant, and will notify you if the allegations change or are supplemented.

While no determination has been made, and the District does not presume that you have acted inappropriately, the District will investigate the allegations in accordance with the grievance process set forth in Administrative Regulation [____]. I have enclosed a copy of Administrative Regulation [____] for your reference.
Investigation of the Complaint under the Grievance Process

The District takes these allegations seriously and has a duty to conduct a fair, thorough, and legally compliant investigation, which will be conducted within the required timelines, but may be subject to a temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

[INCLUDE IF APPLICABLE] The District has retained outside counsel, [NAME OF OUTSIDE COUNSEL], to conduct an independent investigation of this complaint. [OUTSIDE COUNSEL] or [DISTRICT EMPLOYEE] will be in touch with you to schedule a meeting.

The District will investigate the allegations in accordance with the grievance process set forth in Administrative Regulation [______]. An investigator will be assigned to conduct a fact-finding investigation and as part of the investigation they will meet with you to discuss these allegations and to ask you questions related to the allegations and other issues that may be raised in the course of the investigation. At this and any follow up meetings, you will be entitled to present evidence refuting the allegations, including any documentation you may have. You are also entitled to have an advisor of your choice, who may be, but is not required to be an attorney, and may inspect and review evidence obtained during the investigation. In addition, your advisor may attend any meeting with the District related to this investigation. The [INVESTIGATOR OR A DISTRICT EMPLOYEE] will contact you to arrange the meeting time.

Please be advised that knowingly making false statements or knowingly submitting false information during the grievance process may subject you to discipline. [INSERT RELEVANT PROVISION OF POLICY/REGULATION]

For each of the allegations, the District will investigate to determine whether it is more likely than not the alleged conduct occurred. [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]

The District will keep any investigation confidential to the extent possible, but it cannot guarantee absolute confidentiality. Release of some information on a “need-to-know basis” is necessary for a thorough investigation and to protect the rights of alleged victims, respondents, and the school community.

Information about the Grievance Process and Your Rights

The District is committed to providing an academic and work environment that respects the dignity of individuals and groups, and is free from unlawful sexual harassment and sex discrimination. (Board Policy [______] (Sexual Harassment), enclosed with this letter.)
If an individual believes that he or she has been the victim of unlawful sexual harassment, sex discrimination, or retaliation, the District encourages the individual to file a complaint. An individual may file a formal complaint using the procedures outlined in Administrative Regulation [_____] (enclosed).

Here is some information about your rights under the grievance process:

- You will be provided written notice of the allegation(s) against you with sufficient details known at the time and with sufficient time to prepare a response before any initial interview.

- You may be entitled to the following supportive services during the grievance process: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The District will maintain as confidential any supportive measures provided to you, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the supportive measures.

- You will have an opportunity to present witnesses, including fact and expert witnesses, and any evidence refuting the allegation(s) against you and have that evidence considered as part of the District’s investigation.

- The District will conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and any credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.

- The District may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

- You are entitled to a presumption that you are not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

- Any individual designated by the District as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

- You are entitled to the same periodic status updates that the District provides to the complainant.

- You will be given an equal opportunity as the complainant to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations.
raised in the formal complaint, including the evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that you can meaningfully respond to the evidence prior to conclusion of the investigation.

- Prior to completion of the investigative report, the District must send to you, and your advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and you will have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.

- You are entitled to receive an investigative report in an electronic format or a hard copy that fairly summarizes relevant evidence at least 10 days prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, for your review and written response.

- Prior to reaching a determination regarding responsibility, you will be given the opportunity to submit written, relevant questions to the decision maker that you want asked of any party or witness. You are entitled to receive answers to your questions and the opportunity to submit additional, limited follow-up questions.

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. A determination regarding responsibility will only be made at the conclusion of the grievance process.

- If you are not satisfied with the results of the written determination regarding responsibility, you will have the right to appeal. The appeals process is described in Administrative Regulation [______].

At all times the District retains discretion to determine whether alleged harassment, discrimination, or retaliation warrants discipline. Please be aware that the District may require an investigation to continue even if a complainant withdraws a complaint.

**Informal Resolution Process [INCLUDE IF APPLICABLE]**

At any time prior to reaching a determination regarding responsibility, the District may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the District:

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

- Obtains the parties’ voluntary, written consent to the informal resolution process; and
- Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

**Prohibition against and Protection from Retaliation**

Please be reminded that this matter is confidential; however, you may discuss the allegations under investigation with other individuals in order to gather and present relevant evidence. We appreciate, in advance, your understanding that it is critically important that those named in the complaint, and witnesses, feel free to candidly and confidentially speak during the investigation without fear of intimidation, harassment or retaliation. Just the same, the District prohibits retaliation against complainants or other participants in the investigation process.

In accordance with state and federal law, you are directed not to retaliate against the Complainant or any individual involved in the investigation. Any retaliatory conduct will result in immediate disciplinary action. You also have the right to be free from retaliation. If you believe you have experienced mistreatment or retaliation as a result of your involvement in the investigation, please let me know right away.

**Next Steps**

The [INVESTIGATOR OR DISTRICT EMPLOYEE] will contact you to schedule a meeting.

Pursuant to the [UNION]-District collective bargaining agreement, the District will notify [UNION] representative [UNION REPRESENTATIVE]) that you are the subject of a student complaint.

If you would like to be represented by your union in this matter, please contact your union representative directly.

Please do not hesitate to contact me if you have any questions. I can be reached directly at [PHONE NUMBER].

Sincerely,

[NAME]
[TITLE]

Enclosures: [AMEND AS NECESSARY]
NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (K-12)
** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE**

Board Policy [_____] (Sexual Harassment)
Administrative Regulation [_____] (Sexual Harassment)
Board Policy [_____] (Nondiscrimination/Harassment)
Administrative Regulation [_____] (Nondiscrimination/Harassment)

Cc: [GREIVANCE OFFICER], [UNION] Grievance Officer
    [UNION PRESIDENT], [UNION] President
Dear [COMPLAINANT],

This letter is to confirm that the [COMMUNITY COLLEGE DISTRICT] (“District”) has received the formal complaint against [RESPONDENT] (“Respondent”) that you submitted to [NAME] on [DATE]. The District will process this complaint as a Formal Complaint under the District’s grievance process pursuant to its Sexual Harassment Board Policy and Administrative Procedure [INSERT BP/AP NUMBER]. I have enclosed a copy of Board Policy and Administrative Procedure [_______] for your reference. Please contact me if you have any questions.

Formal Complaint

Based on your Formal Complaint, I have developed the following allegations, which will be investigated pursuant to the District’s policies and regulations. If you disagree with my understanding of your Formal Complaint, or with the allegations as I have written them, or if you wish to supplement your Formal Complaint, please let me know in writing as soon as possible.

In your complaint, you alleged that the Respondent committed unlawful sexual harassment/sex discrimination against you based on incidents that took place [ON [DATE] OR DURING THE _______ SEMESTER]. In the allegations below, you are referred to as “Complainant.”

In the complaint, the following allegations are made:

**Allegation No. 1:**

Allegation No. 2:

In your Complaint, you stated that your desired resolution of this matter is that:

- [ADD DESIRED RESOLUTIONS]

Investigation of the Complaint under the Grievance Process

The District takes these allegations seriously and has a duty to conduct a fair, thorough, and legally compliant investigation, which will be conducted within the required timelines, but may be subject to a temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

[INCLUDE IF APPLICABLE] The District has retained outside counsel, [NAME OF OUTSIDE COUNSEL], to conduct an independent investigation of this complaint. [OUTSIDE COUNSEL] or [DISTRICT EMPLOYEE] will be in touch with you to schedule a meeting.

The District will investigate the allegations in accordance with the grievance process set forth in Administrative Procedure [______]. An investigator will be assigned to conduct a fact-finding investigation and as part of the investigation they will meet with you to discuss these allegations and to ask you questions related to the allegations and other issues that may be raised in the course of the investigation. At this and any follow up meetings, you will be entitled to present evidence supporting the allegations, including any documentation you may have. You are also entitled to have an advisor of your choice, who may be, but is not required to be an attorney, and may inspect and review evidence obtained during the investigation. In addition, your advisor may attend any meeting with the District related to this investigation. The [INVESTIGATOR OR A DISTRICT EMPLOYEE] will contact you to arrange the meeting time.

Please be advised that knowingly making false statements or knowingly submitting false information during the grievance process may subject you to discipline. [INSERT RELEVANT PROVISION OF POLICY/REGULATION]

For each of the allegations, the District will investigate to determine whether it is more likely than not the alleged conduct occurred. [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]

The District will keep any investigation confidential to the extent possible, but it cannot guarantee absolute confidentiality. Release of some information on a “need-to-know basis” is necessary for a thorough investigation and to protect the rights of alleged victims, respondents, and the school community.
Information about the Grievance Process and Your Rights

The District is committed to providing an academic and work environment that respects the dignity of individuals and groups, and is free from unlawful sexual harassment and sex discrimination. (Board Policy [_____] (Sexual Harassment), enclosed with this letter.)

If an individual believes that he or she has been the victim of unlawful sexual harassment, sex discrimination, or retaliation, the District encourages the individual to file a complaint. An individual may file a formal complaint using the procedures outlined in Administrative Procedure [_____] (enclosed).

Here is some information about your rights under the grievance process:

- You will not be required to confront or work out problems directly with the Respondent.
- You may file a complaint with local law enforcement.
- You may file a complaint with the United States Department of Education, Office for Civil Rights, if the complaint is not based on employment.
- You may file a complaint with the United States Equal Employment Opportunity Commission or the California Department of Fair Employment and Housing if the complaint is based on employment.
- You may be entitled to the following supportive services during the grievance process: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The District will maintain as confidential any supportive measures provided to you, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the supportive measures.
- You will have an opportunity to present witnesses, including fact and expert witnesses, and any evidence supporting the allegation(s) and have that evidence considered as part of the District’s investigation.
- The District will conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and any credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.
- The District may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- Any individual designated by the District as a Title IX Coordinator, investigator,
decision-maker, or any person designated by a recipient to facilitate an informal resolution process, may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

- You are entitled to the same periodic status updates that the District provides to the Respondent.

- You will be given an equal opportunity as the Respondent to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint, including the evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that you can meaningfully respond to the evidence prior to conclusion of the investigation.

- Prior to completion of the investigative report, the District must send to you, and your advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and you will have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The District will make all such evidence subject to the parties’ inspection and review available at any hearing to give each part equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

- You are entitled to receive an investigative report in an electronic format or a hard copy that fairly summarizes relevant evidence at least 10 days prior to a hearing where a determination regarding responsibility is made, for your review and written response.

- You are entitled to a live hearing where the decision maker must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

- If a party does not have an advisor present at a live hearing, the District must provide one to that party without fee or charge to conduct cross-examination on behalf of that party. The advisor may be an attorney, but is not required to be, and is chosen by the District.

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. A determination regarding responsibility will only be made at the conclusion of the grievance process.

- If you are not satisfied with the results of the written determination regarding responsibility, you will have the right to appeal. The appeals process is described in Administrative Procedure [______].

At all times the District retains discretion to determine whether alleged harassment, discrimination, or retaliation warrants discipline. Please be aware that the District may require an investigation to continue even if a complainant (or alleged victim) withdraws a complaint.
Informal Resolution Process [INCLUDE IF APPLICABLE]

At any time prior to reaching a determination regarding responsibility, the District may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the District:

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

- Obtains the parties’ voluntary, written consent to the informal resolution process; and

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

Prohibition against and Protection from Retaliation

Please be reminded that this matter is confidential; however, you may discuss the allegations under investigation with other individuals in order to gather and present relevant evidence. We appreciate, in advance, your understanding that it is critically important that those named in the complaint, and witnesses, feel free to candidly and confidentially speak during the investigation without fear of intimidation, harassment or retaliation. Just the same, the District prohibits retaliation against complainants or other participants in the investigation process.

In accordance with state and federal law, you are directed not to retaliate against the Respondent or any individual involved in the investigation. Any retaliatory conduct will result in immediate disciplinary action. You also have the right to be free from retaliation. If you believe you have experienced mistreatment or retaliation as a result of your involvement in the investigation, please let me know right away.

Next Steps

The [INVESTIGATOR OR DISTRICT EMPLOYEE] will contact you to schedule a meeting.

Please do not hesitate to contact me if you have any questions. I can be reached directly at [PHONE NUMBER].

Sincerely,
[INITIAL LETTER TO COMPLAINANT (CCD)]
** AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE**

[NAME]
[TITLE]

Enclosures: [AMEND AS NECESSARY]

Administrative Procedure [_____] (Discrimination and Harassment Complaint Procedures)
Board Policy [_____] (Nondiscrimination)
Administrative Procedure [_____] (Nondiscrimination)
Board Policy [_____] (Prohibition of Harassment)
Administrative Procedure [_____] (Prohibition of Harassment)
Re: Notice of Allegations in Formal Complaint

Dear [RESPONDENT]:

This letter is to inform you that the [COMMUNITY COLLEGE DISTRICT] (“District”) has received a complaint against you filed by [INSERT NAME OF COMPLAINANT] (“Complainant”). The Complainant alleged that you engaged in unlawful sex discrimination/sexual harassment in violation of District policies and procedures. In the allegations as described here, you are referred to as the “Respondent.” Please review the revised allegations below. Please contact me if you have any questions.

In the complaint, the following allegations are made:

Allegation No. 1:


Allegation No. 2:

Such behavior may constitute unlawful sex discrimination or sexual harassment, a violation of Board Policies and Administrative Procedures [INSERT RELEVANT BP/AP – SEXUAL HARASSMENT, NONDISCRIMINATION, ETC.] and Article ___ of the collective bargaining agreement between [UNION] (“UNION”) and the District [IF APPLICABLE]. If you are found to have engaged in misconduct, you may be subject to discipline on these or other grounds.

The District is confirming these allegations with the Complainant, and will notify you if the allegations change or are supplemented.

While no determination has been made, and the District does not presume that you have acted inappropriately, the District will investigate the allegations in accordance with the grievance process set forth in Administrative Procedure [____]. I have enclosed a copy of Administrative Procedure [_____] for your reference.
Investigation of the Complaint under the Grievance Process

The District takes these allegations seriously and has a duty to conduct a fair, thorough, and legally compliant investigation, which will be conducted within the required timelines, but may be subject to a temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

The District has retained outside counsel, [NAME OF OUTSIDE COUNSEL], to conduct an independent investigation of this complaint. [OUTSIDE COUNSEL] or [DISTRICT EMPLOYEE] will be in touch with you to schedule a meeting.

The District will investigate the allegations in accordance with the grievance process set forth in Administrative Procedure [______]. An investigator will be assigned to conduct a fact-finding investigation and as part of the investigation they will meet with you to discuss these allegations and to ask you questions related to the allegations and other issues that may be raised in the course of the investigation. At this and any follow up meetings, you will be entitled to present evidence refuting the allegations, including any documentation you may have. You are also entitled to have an advisor of your choice, who may be, but is not required to be an attorney, and may inspect and review evidence obtained during the investigation. In addition, your advisor may attend any meeting with the District related to this investigation. The [INVESTIGATOR OR A DISTRICT EMPLOYEE] will contact you to arrange the meeting time.

Please be advised that knowingly making false statements or knowingly submitting false information during the grievance process may subject you to discipline. [INSERT RELEVANT PROVISION OF POLICY/REGULATION]

For each of the allegations, the District will investigate to determine whether it is more likely than not the alleged conduct occurred. [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]

The District will keep any investigation confidential to the extent possible, but it cannot guarantee absolute confidentiality. Release of some information on a “need-to-know basis” is necessary for a thorough investigation and to protect the rights of alleged victims, respondents, and the school community.

Information about the Grievance Process and Your Rights

The District is committed to providing an academic and work environment that respects the dignity of individuals and groups, and is free from unlawful sexual harassment and sex discrimination. (Board Policy [______] (Sexual Harassment), enclosed with this letter.)
If an individual believes that he or she has been the victim of unlawful sexual harassment, sex discrimination, or retaliation, the District encourages the individual to file a complaint. An individual may file a formal complaint using the procedures outlined in Administrative Procedure [_____] (enclosed).

Here is some information about your rights under the grievance process:

- You will be provided written notice of the allegation(s) against you with sufficient details known at the time and with sufficient time to prepare a response before any initial interview.

- You may be entitled to the following supportive services during the grievance process: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The District will maintain as confidential any supportive measures provided to you, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the supportive measures.

- You will have an opportunity to present witnesses, including fact and expert witnesses, and any evidence refuting the allegation(s) against you and have that evidence considered as part of the District’s investigation.

- The District will conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and any credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.

- The District may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

- You are entitled to a presumption that you are not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

- Any individual designated by the District as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

- You are entitled to the same periodic status updates that the District provides to the complainant.

- You will be given an equal opportunity as the complainant to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations.
raised in the formal complaint, including the evidence upon which the District does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that you can meaningfully respond to the evidence prior to conclusion of the investigation.

- Prior to completion of the investigative report, the District must send to you, and your advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and you will have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The District will make all such evidence subject to the parties’ inspection and review available at any hearing to give each part equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

- You are entitled to receive an investigative report in an electronic format or a hard copy that fairly summarizes relevant evidence at least 10 days prior to a hearing where a determination regarding responsibility is made, for your review and written response.

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. A determination regarding responsibility will only be made at the conclusion of the grievance process.

- At all times the District retains discretion to determine whether alleged harassment, discrimination, or retaliation warrants discipline. Please be aware that the District may require an investigation to continue even if a complainant (or alleged victim) withdraws a complaint.

- If you are not satisfied with the results of the written determination regarding responsibility, you will have the right to appeal. The appeals process is described in Administrative Procedure [______].

At all times the District retains discretion to determine whether alleged harassment, discrimination, or retaliation warrants discipline. Please be aware that the District may require an investigation to continue even if a complainant (or alleged victim) withdraws a complaint.

**Informal Resolution Process [INCLUDE IF APPLICABLE]**

At any time prior to reaching a determination regarding responsibility, the District may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the District:

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

- Obtains the parties’ voluntary, written consent to the informal resolution process; and

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

**Prohibition against and Protection from Retaliation**

Please be reminded that this matter is confidential; however, you may discuss the allegations under investigation with other individuals in order to gather and present relevant evidence. We appreciate, in advance, your understanding that it is critically important that those named in the complaint, and witnesses, feel free to candidly and confidentially speak during the investigation without fear of intimidation, harassment or retaliation. Just the same, the District prohibits retaliation against complainants or other participants in the investigation process.

In accordance with state and federal law, you are directed not to retaliate against the Complainant or any individual involved in the investigation. Any retaliatory conduct will result in immediate disciplinary action. You also have the right to be free from retaliation. If you believe you have experienced mistreatment or retaliation as a result of your involvement in the investigation, please let me know right away.

**Next Steps**

The [INVESTIGATOR OR DISTRICT EMPLOYEE] will contact you to schedule a meeting.

Pursuant to the [UNION]-District collective bargaining agreement, the District will notify [UNION] representative [UNION REPRESENTATIVE] that you are the subject of a student complaint.

If you would like to be represented by your union in this matter, please contact your union representative directly.

Please do not hesitate to contact me if you have any questions. I can be reached directly at [PHONE NUMBER].

Sincerely,

[NAME]
[TITLE]

Enclosures: [AMEND AS NECESSARY]
**NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (CCD)**

**AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE**

Administrative Procedure [_____] (Discrimination and Harassment Complaint Procedures)
Board Policy [_____] (Nondiscrimination)
Administrative Procedure [_____] (Nondiscrimination)
Board Policy [_____] (Prohibition of Harassment)
Administrative Procedure [_____] (Prohibition of Harassment)

Cc: [GREIVANCE OFFICER], [UNION] Grievance Officer
[UNION PRESIDENT], [UNION] President
[LETTER TO COMPLAINANT RE: DETERMINATION REGARDING RESPONSIBILITY
(K-12)]

CONFIDENTIAL

[DATE]

Via USPS Mail, First Class
Via Certified Mail
Via Email: [EMAIL ADDRESS]

[COMPLAINANT]
[ADDRESS]
[ADDRESS]

Re: Determination Regarding Responsibility

Dear Mr./Ms. [__________________]:

I am writing you on behalf of the [DISTRICT] ("District") to provide you with the Determination Regarding Responsibility in regards to the investigation the District conducted after it received a formal complaint from you on [DATE], alleging the following:

Allegation No. 1:

Allegation No. 2:

The following procedural steps were taken upon the District’s receipt of the formal complaint:

- [DATE THE INITIAL NOTIFICATIONS WERE SENT TO THE PARTIES, E.G., NOTICE OF ALLEGATIONS TO RESPONDENT AND NOTICE OF FORMAL COMPLAINT TO COMPLAINANT]
- [LIST OF NAMES AND DATES OF INTERVIEWS WITH PARTIES AND WITNESSES]
- [DATE OF ANY SITE VISITS]
- [METHODS USED TO GATHER EVIDENCE]
- [DATE PARTIES WERE PROVIDED OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE PRIOR TO THE COMPLETION OF INVESTIGATIVE REPORT]
- [DATE PARTIES WERE PROVIDED INVESTIGATIVE REPORT PRIOR TO A DETERMINATION OF RESPONSIBILITY]
- [DATE PARTIES WERE PROVIDED OPPORTUNITY TO SUBMIT RELEVANT, WRITTEN QUESTIONS TO THE DECISION MAKER THAT THE PARTY WANTS ASKED OF ANY PARTY OR WITNESS]
- [DATE OF HEARING HELD, IF REQUIRED]

The District conducted an impartial investigation under its grievance process pursuant to its Sexual Harassment Administrative Regulation, which is attached to this letter.
The investigation was conducted by [NAME OF INVESTIGATOR] who conducted an investigation into the allegations and applied a "preponderance of the evidence" standard in determining the veracity of the factual allegations. This standard is met if the allegation is more likely to be true than not. [IF THE DISTRICT APPLIED THE CLEAR AND CONVINCING STANDARD, PLEASE STATE SO INSTEAD]

**SUMMARY OF ALLEGATIONS, FINDINGS, & CONCLUSIONS**

**Allegation No. 1**

**Finding No. 1**

[THE DECISION MAKER MUST STATE THE FINDINGS RELEVANT TO THE INVESTIGATION AND ITS OUTCOME BASED ON THE INVESTIGATIVE REPORT AND INPUT FROM THE PARTIES. THE DECISION MAKER SHOULD ALSO INCLUDE THE POLICY(IES) THAT HAVE BEEN ALLEGED TO BE VIOLATED]

**Conclusion of Law**

[THE DECISION MAKER MUST DETERMINE IF THE ALLEGED CONDUCT OCCURRED BASED ON THE APPROPRIATE STANDARD OF EVIDENCE, AND IF SO, WHETHER THE CONDUCT VIOLATED DISTRICT POLICY OR CODE OF CONDUCT]

[REMEMBER TO USE THE NEW DEFINITION OF SEXUAL HARASSMENT UNDER TITLE IX]

**DETERMINATION OF RESPONSIBILITY**

**[CHOOSE ONE]**

The District did not substantiate the allegations you made against [RESPONDENT]; therefore, in light of this, the District will not proceed further at this time. However, this is a reminder that retaliation against you or any witness is unlawful and that the District will not tolerate retaliation of any kind.

**OR**

As Allegation No. __ was substantiated, the District will proceed with taking appropriate corrective action to address the findings. [IF CORRECTIVE ACTION IS BEING TAKEN, YOU CAN LIST THEM HERE SO LONG AS ANY CONFIDENTIALITY RULES ARE NOT VIOLATED]
REMEDIES [IF APPLICABLE]

The District is required to notify you of remedies offered to you to restore or preserve your equal access to the District’s education programs or activities. As such, the District is offering the following individual remedies to address the findings: [INSERT INDIVIDUAL REMEDIES]

It is very important to note that this Determination Regarding Responsibility is confidential and that you are not authorized to release this to the public.

APPEAL RIGHTS

Please be advised that you have the right to appeal a determination regarding responsibility (see attached AR ______). You also have the following additional appeal and other rights:

1. You have the right to appeal the District's decision to the California Department of Education (“CDE”) by filing a written appeal within 15 calendar days of receiving the District's decision;

2. You may pursue available civil law remedies outside of the District's complaint procedures, including seeking assistance from mediation centers or public/private interest attorneys, 60 calendar days after the filing of an appeal with the CDE. (Education Code § 262.3);

3. The 60 days moratorium does not apply to complaints seeking injunctive relief in state courts or to discrimination complaints based on federal law. (Education Code § 262.3); and

4. Complaints alleging discrimination based on race, color, national origin, sex, gender, disability, or age may also be filed with the U.S. Department of Education, Office for Civil Rights at www.ed.gov/ocr within 180 days of the alleged discrimination.

In conclusion, I would like to thank you for your patience and understanding as this investigation was completed.

If I can be of further assistance, please contact me at your convenience.

Sincerely,

[ADMINISTRATOR]
[TITLE]

Enclosures

Cc: [_______________________], Superintendent
[LETTER TO RESPONDENT RE: DETERMINATION REGARDING RESPONSIBILITY (K-12)]

CONFIDENTIAL

[DATE]

Via USPS Mail, First Class
Via Certified Mail
Via Email: [EMAIL ADDRESS]

[RESPONDENT]
[ADDRESS]
[ADDRESS]

Re: Determination Regarding Responsibility

Dear Mr./Ms. [__________________]:

I am writing you on behalf of the [DISTRICT] (“District”) to provide you with the Determination Regarding Responsibility in regards to the investigation the District conducted after it received a formal complaint against you from [COMPLAINANT] on [DATE], alleging the following:

Allegation No. 1:

Allegation No. 2:

The following procedural steps were taken upon the District’s receipt of the formal complaint:

• [DATE THE INITIAL NOTIFICATIONS WERE SENT TO THE PARTIES, E.G., NOTICE OF ALLEGATIONS TO RESPONDENT AND NOTICE OF FORMAL COMPLAINT TO COMPLAINANT]
• [LIST OF NAMES AND DATES OF INTERVIEWS WITH PARTIES AND WITNESSES]
• [DATE OF ANY SITE VISITS]
• [METHODS USED TO GATHER EVIDENCE]
• [DATE PARTIES WERE PROVIDED OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE PRIOR TO THE COMPLETION OF INVESTIGATIVE REPORT]
• [DATE PARTIES WERE PROVIDED INVESTIGATIVE REPORT PRIOR TO A DETERMINATION OF RESPONSIBILITY]
• [DATE PARTIES WERE PROVIDED OPPORTUNITY TO SUBMIT RELEVANT, WRITTEN QUESTIONS TO THE DECISION MAKER THAT THE PARTY WANTS ASKED OF ANY PARTY OR WITNESS]
• [DATE OF HEARING HELD, IF REQUIRED]
The District conducted an impartial investigation under its grievance process pursuant to its Sexual Harassment Administrative Regulation, which is attached to this letter.

The investigation was conducted by [NAME OF INVESTIGATOR] who conducted an investigation into the allegations and applied a "preponderance of the evidence" standard in determining the veracity of the factual allegations. This standard is met if the allegation is more likely to be true than not.  [IF THE DISTRICT APPLIED THE CLEAR AND CONVINCING STANDARD, PLEASE STATE SO INSTEAD]

SUMMARY OF ALLEGATIONS, FINDINGS, & CONCLUSIONS

Allegation No. 1

Finding No. 1

[THE DECISION MAKER MUST STATE THE FINDINGS RELEVANT TO THE INVESTIGATION AND ITS OUTCOME BASED ON THE INVESTIGATIVE REPORT AND INPUT FROM THE PARTIES. THE DECISION MAKER SHOULD ALSO INCLUDE THE POLICY(IES) THAT HAVE BEEN ALLEGED TO BE VIOLATED]

Conclusion of Law

[THE DECISION MAKER MUST DETERMINE IF THE ALLEGED CONDUCT OCCURRED BASED ON THE APPROPRIATE STANDARD OF EVIDENCE, AND IF SO, WHETHER THE CONDUCT VIOLATED DISTRICT POLICY OR CODE OF CONDUCT]

[REMEMBER TO USE THE NEW DEFINITION OF SEXUAL HARASSMENT UNDER TITLE IX]

DETERMINATION OF RESPONSIBILITY

[CHOOSE ONE]

The District did not substantiate the allegations made against you; therefore, in light of this, the District will not proceed further at this time. However, this is a reminder that retaliation against the Complainant or any witness is unlawful and that the District will not tolerate retaliation of any kind.

OR

As Allegation No. __ was substantiated, the District will proceed with taking the following corrective action to address the findings:  [SPECIFY CORRECTIVE ACTION BEING TAKEN]
It is very important to note that this Determination Regarding Responsibility is confidential and that you are not authorized to release this to the public.

**APPEAL RIGHTS**

Please be advised that you have the right to appeal a determination regarding responsibility (see attached AR [ ]).

In conclusion, I would like to thank you for your patience and understanding as this investigation was completed.

If I can be of further assistance, please contact me at your convenience.

Sincerely,

[ADMINISTRATOR]  
[TITLE]

Enclosures

Cc: [ ], Superintendent
[ADMINISTRATIVE DETERMINATION REGARDING RESPONSIBILITY TO COMPLAINANT (CCD)]

CONFIDENTIAL

[DATE]

Via USPS Mail, First Class
Via Certified Mail
Via Email: [EMAIL ADDRESS]

[COMPLAINANT]
[ADDRESS]
[ADDRESS]

Re: Summary of Investigation Findings and Administrative Determination Regarding Responsibility

Dear Mr./Ms. [__________________]:

I am writing you on behalf of the [DISTRICT] (“District”) to provide you with the Administrative Determination Regarding Responsibility in regards to the investigation the District conducted after it received a formal complaint from you on [DATE], alleging the following:

**Allegation No. 1:**

**Allegation No. 2:**

The following procedural steps were taken upon the District’s receipt of the formal complaint:

- [DATE THE INITIAL NOTIFICATIONS WERE SENT TO THE PARTIES, E.G., NOTICE OF ALLEGATIONS TO RESPONDENT AND NOTICE OF FORMAL COMPLAINT TO COMPLAINANT]
- [LIST OF NAMES AND DATES OF INTERVIEWS WITH PARTIES AND WITNESSES]
- [DATE OF ANY SITE VISITS]
- [METHODS USED TO GATHER EVIDENCE]
- [DATE PARTIES WERE PROVIDED OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE PRIOR TO THE COMPLETION OF INVESTIGATIVE REPORT]
- [DATE PARTIES WERE PROVIDED INVESTIGATIVE REPORT PRIOR TO A DETERMINATION OF RESPONSIBILITY]
- [DATE PARTIES WERE PROVIDED OPPORTUNITY TO SUBMIT RELEVANT, WRITTEN QUESTIONS TO THE DECISION MAKER THAT THE PARTY WANTS ASKED OF ANY PARTY OR WITNESS]
- [DATE OF HEARING HELD]

The District conducted an impartial investigation under its grievance process pursuant to its Sexual Harassment Administrative Procedure, which is attached to this letter.
The investigation was conducted by [NAME OF INVESTIGATOR] who conducted an investigation into the allegations and applied a "preponderance of the evidence" standard in determining the veracity of the factual allegations. This standard is met if the allegation is more likely to be true than not. [IF THE DISTRICT APPLIED THE CLEAR AND CONVINCING STANDARD, PLEASE STATE SO INSTEAD]

**SUMMARY OF ALLEGATIONS, FINDINGS, & CONCLUSIONS**

**Allegation No. 1**

**Finding No. 1**

THE DECISION MAKER MUST STATE THE FINDINGS RELEVANT TO THE INVESTIGATION AND ITS OUTCOME BASED ON THE INVESTIGATIVE REPORT AND INPUT FROM THE PARTIES. THE DECISION MAKER SHOULD ALSO INCLUDE THE POLICY(IES) THAT HAVE BEEN ALLEGED TO BE VIOLATED

**Conclusion of Law**

THE DECISION MAKER MUST DETERMINE IF THE ALLEGED CONDUCT OCCURRED BASED ON THE APPROPRIATE STANDARD OF EVIDENCE, AND IF SO, WHETHER THE CONDUCT VIOLATED DISTRICT POLICY OR CODE OF CONDUCT

[REMEMBER TO USE THE NEW DEFINITION OF SEXUAL HARASSMENT UNDER TITLE IX]

**DETERMINATION OF RESPONSIBILITY**

**CHOOSE ONE**

The District did not substantiate the allegations you made against [RESPONDENT]; therefore, in light of this, the District will not proceed further at this time. However, this is a reminder that retaliation against you or any witness is unlawful and that the District will not tolerate retaliation of any kind.

**OR**

As Allegation No. ___ was substantiated, the District will proceed with taking appropriate corrective action to address the findings. [IF CORRECTIVE ACTION IS BEING TAKEN, YOU CAN LIST THEM HERE SO LONG AS ANY CONFIDENTIALITY RULES ARE NOT VIOLATED]

**PROPOSED RESOLUTION OF THE COMPLAINT**

For all the reasons above, the District will resolve the complaint by proceeding with disciplinary action against [RESPONDENT]. Student disciplinary matters such as this are confidential. However, as a victim of sexual assault, the District is required to notify you of the
results of any disciplinary proceedings taken against [RESPONDENT].

The District is required to notify you of remedies offered to you to restore or preserve your equal access to the District’s education programs or activities. As such, the District is offering the following individual remedies to address the findings: [INSERT INDIVIDUAL REMEDIES]

It is very important to note that this Determination Regarding Responsibility is confidential and that you are not authorized to release this to the public.

DESCRIPTION OF ACTIONS TAKEN, IF ANY, TO PREVENT SIMILAR PROBLEMS FROM OCCURRING IN THE FUTURE

[INCLUDE PROACTIVE STEPS TO BE TAKEN IN THE FUTURE TO PREVENT SIMILAR PROBLEMS FROM OCCURRING, PARTICULARLY IF A SYSTEMIC ISSUE IS DISCOVERED. OTHERWISE, DELETE IF NOT APPLICABLE]

COMPLAINANT'S RIGHT TO APPEAL

If you are not satisfied with the results of this investigation, you may submit a written appeal to the District Governing Board within fifteen (15) days from the date of this letter. The Board shall review the original complaint, the Administrative Determination, and the appeal and issue a final decision within 45 days after receipt of the appeal. If the Board elects to take no action, the Administrative Determination shall be deemed approved and become final on the 45th day.

[IN ANY CASE NOT INVOLVING EMPLOYMENT DISCRIMINATION] You also have the right to file a written appeal of this Administrative Determination with the Chancellor within 30 days after the Administrative Determination becomes final (by board action or elapse of 45 days from Board's receipt of appeal) or the date the College notifies the Chancellor of the final decision, whichever is later.

[IN ANY CASE INVOLVING EMPLOYMENT DISCRIMINATION] You also have the right to file a complaint with the Department of Fair Employment and Housing.

Sincerely,

[ADMINISTRATOR]
[TITLE]

Enclosures

Cc: State Chancellor's Office
Re: Summary of Investigation Findings and Administrative Determination Regarding Responsibility

Dear Mr./Ms. [__________________]:

I am writing you on behalf of the [DISTRICT] (“District”) to provide you with the Administrative Determination Regarding Responsibility in regards to the investigation the District conducted after it received a formal complaint against you on [DATE], alleging the following:

**Allegation No. 1:**

**Allegation No. 2:**

The following procedural steps were taken upon the District’s receipt of the formal complaint:

- [DATE THE INITIAL NOTIFICATIONS WERE SENT TO THE PARTIES, E.G., NOTICE OF ALLEGATIONS TO RESPONDENT AND NOTICE OF FORMAL COMPLAINT TO COMPLAINANT]
- [LIST OF NAMES AND DATES OF INTERVIEWS WITH PARTIES AND WITNESSES]
- [DATE OF ANY SITE VISITS]
- [METHODS USED TO GATHER EVIDENCE]
- [DATE PARTIES WERE PROVIDED OPPORTUNITY TO INSPECT AND REVIEW EVIDENCE PRIOR TO THE COMPLETION OF INVESTIGATIVE REPORT]
- [DATE PARTIES WERE PROVIDED INVESTIGATIVE REPORT PRIOR TO A DETERMINATION OF RESPONSIBILITY]
- [DATE PARTIES WERE PROVIDED OPPORTUNITY TO SUBMIT RELEVANT, WRITTEN QUESTIONS TO THE DECISION MAKER THAT THE PARTY WANTS ASKED OF ANY PARTY OR WITNESS]
- [DATE OF HEARING HELD]

The District conducted an impartial investigation under its grievance process pursuant to its Sexual
Harassment Administrative Procedure, which is attached to this letter.

The investigation was conducted by [NAME OF INVESTIGATOR] who conducted an investigation into the allegations and applied a "preponderance of the evidence" standard in determining the veracity of the factual allegations. This standard is met if the allegation is more likely to be true than not. [IF THE DISTRICT APPLIED THE CLEAR AND CONVINCING STANDARD, PLEASE STATE SO INSTEAD]

SUMMARY OF ALLEGATIONS, FINDINGS, & CONCLUSIONS

Allegation No. 1

Finding No. 1

[THE DECISION MAKER MUST STATE THE FINDINGS RELEVANT TO THE INVESTIGATION AND ITS OUTCOME BASED ON THE INVESTIGATIVE REPORT AND INPUT FROM THE PARTIES. THE DECISION MAKER SHOULD ALSO INCLUDE THE POLICY(IES) THAT HAVE BEEN ALLEGED TO BE VIOLATED]

Conclusion of Law

[THE DECISION MAKER MUST DETERMINE IF THE ALLEGED CONDUCT OCCURRED BASED ON THE APPROPRIATE STANDARD OF EVIDENCE, AND IF SO, WHETHER THE CONDUCT VIOLATED DISTRICT POLICY OR CODE OF CONDUCT]

[REMEMBER TO USE THE NEW DEFINITION OF SEXUAL HARASSMENT UNDER TITLE IX]

DETERMINATION OF RESPONSIBILITY

[CHOOSE ONE]

The District did not substantiate the allegations made against you; therefore, in light of this, the District will not proceed further at this time. However, this is a reminder that retaliation against the Complainant or any witness is unlawful and that the District will not tolerate retaliation of any kind.

OR

As Allegation No. __ was substantiated, the District will proceed with taking the following corrective action to address the findings: [SPECIFY CORRECTIVE ACTION BEING TAKEN]

It is very important to note that this Determination Regarding Responsibility is confidential and that you are not authorized to release this to the public.

APPEAL RIGHTS
If you are not satisfied with the results of this investigation, you may submit a written appeal to the District Governing Board within fifteen (15) days from the date of this letter. The Board shall review the original complaint, the Administrative Determination, and the appeal and issue a final decision within 45 days after receipt of the appeal. If the Board elects to take no action, the Administrative Determination shall be deemed approved and become final on the 45th day.

In conclusion, I would like to thank you for your patience and understanding as this investigation was completed.

If I can be of further assistance, please contact me at your convenience.

Sincerely,

[ADMINISTRATOR]
[TITLE]

Enclosures
I. INTRODUCTION

This report summarizes the investigation and findings concerning allegations made by [COMPLAINANT] (“Complainant”) against [RESPONDENT] (“Respondent”) for the [SCHOOL DISTRICT OR COMMUNITY COLLEGE DISTRICT] (“District”). The Complainant alleged that Respondent engaged in unlawful sex discrimination/sexual harassment in violation of District policies and regulations.

The specific allegations are as follows:

Allegation No. 1:

Allegation No. 2:

II. FACTUAL BACKGROUND

Complainant is an [EMPLOYEE OR STUDENT] of the District. Respondent is an [EMPLOYEE OR STUDENT] of the District. The Complainant submitted a written formal complaint (“Complaint”) to the Title IX Coordinator on [DATE], which was received by the District on [DATE].

III. INVESTIGATION

The Complaint was accepted under its Grievance Process outlined in Administrative Regulation [OR Administrative Procedure]. In addition, this complaint was investigated under Title IX of the Education Amendments of 1972, which requires recipients of federal funds to protect people from discrimination based on sex in education programs or activities.
Under Title IX, sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

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

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

3. Sexual assault, dating violence, domestic violence or stalking.

California Education Code section 212.5 defines sexual harassment as the following:

“Prohibited sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the work or educational setting when:

1. Submission to the conduct is made explicitly or implicitly a term or condition of the individual’s employment.
2. Submission to or rejection of such conduct by the individual is used as the basis for an employment decision affecting him/her.
3. The conduct has the purpose or effect of having a negative impact upon the individual's work or has the purpose or effect of creating an intimidating, hostile, or offensive work environment. The conduct is sufficiently severe, persistent, pervasive, or objectively offensive so as to create a hostile or abusive working environment or to limit the individual's ability to participate in or benefit from an education program or activity.
4. Submission to or rejection of the conduct by the other individual is used as the basis for any decision affecting him/her regarding benefits, services, honors, programs, or activities available at or through the district.

Other examples of actions that might constitute sexual harassment, whether committed by a supervisor, a co-worker, or a non-employee, in the work or educational setting, include, but are not limited to:

1. Unwelcome verbal conduct such as sexual flirtations or propositions; graphic comments about an individual's body; overly personal conversations or pressure for sexual activity; sexual jokes or stories; unwelcome sexual slurs, epithets, threats, innuendoes, derogatory comments, sexually degrading descriptions, or the spreading of sexual rumors.
2. Unwelcome visual conduct such as drawings, pictures, graffiti, or gestures; sexually explicit emails; displaying sexually suggestive objects.
3. Unwelcome physical conduct such as massaging, grabbing, fondling, stroking, or brushing the body; touching an individual's body or clothes in a sexual way; cornering, blocking, leaning over, or impeding normal movements.

Prohibited sexual harassment may also include any act of retaliation against an individual who reports a violation of the district's sexual harassment policy or who participates in the investigation of a sexual harassment complaint.”

The investigation was conducted by [NAME OF INVESTIGATOR], hired by the District to conduct a fair and impartial review of the facts related to this complaint.

Findings in this matter were based on a Preponderance of Evidence Standard [CONFIRM IF THE DISTRICT USES THE PREPONDERANCE OF EVIDENCE OR CLEAR AND CONVINCING EVIDENCE STANDARD]. The Preponderance of Evidence Standard is defined as reaching a finding that the alleged conduct more likely than not occurred as alleged.

In making findings of fact, this investigator applied the following standards:

- Where the investigation established by a preponderance of the evidence that the alleged conduct did not occur, the allegation is UNFOUNDED.
- Where there is insufficient evidence based on a preponderance of the evidence to determine whether the alleged conduct occurred, the allegation is NOT SUSTAINED.
- Where the investigation established by a preponderance of the evidence that the alleged conduct occurred, the allegation is SUSTAINED.

If an allegation was sustained, this investigator determined if the conduct was based on the Complainant’s sex/gender or was of a sexual nature on which the Complainant alleged discrimination/harassment.

The findings are based on this investigator’s best judgment as to whether or not a disputed event is more likely than not to have occurred, based on the available evidence. Consistent with District practice, the complaint was investigated promptly and thoroughly. In the course of the investigation, the Complainant and the Respondent were given an equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence. For each potential witness, this investigator made a case-by-case decision on whether or not to conduct interviews, depending upon whether this investigator believed the potential witness to have information directly relevant to the matter under investigation. This investigator instructed the Complainant, Respondent, and all witnesses regarding the confidential nature of the proceedings and the prohibitions on retaliation.

To the extent credibility determinations of witness statements were necessary in preparing my report and findings, this investigator examined the potential motives of the witnesses to fabricate or deny charges and examined circumstantial evidence such as timing or similar sustained charges. In addition, this investigator utilized principles for determining credibility as outlined in California Evidence Code Section 780, which provides:
Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his [or her] testimony at the hearing, including but not limited to any of the following:

- His [or her] demeanor while testifying and the manner in which he [or she] testifies.
- The character of his [or her] testimony.
- The extent of his [or her] capacity to perceive, to recollect, or to communicate any matter about which he [or she] testifies.
- The extent of his [or her] opportunity to perceive any matter about which he [or she] testifies.
- His [or her] character for honesty or veracity or their opposites.
- The existence or nonexistence of a bias, interest, or other motive.
- A statement previously made by him [or her] that is consistent with his [or her] testimony at the hearing.
- A statement made by him [or her] that is inconsistent with any part of his [or her] testimony at the hearing.
- The existence or nonexistence of any fact testified to by him [or her].
- His [or her] attitude toward the action in which he [or she] testifies or toward the giving of testimony.
- His [or her] admission of untruthfulness.

**WITNESS INTERVIEWS**

The investigation included interviews of the following:

1. _____________ – Complainant
2. _____________ – Respondent
3. _____________ – Witness
4. _____________ – Witness
5. _____________ – Witness

The Complainant was asked to identify witnesses. She identified witnesses 1 and 2 as individuals who could have relevant information to provide in this investigation since they are both current students of the District.
The Respondent was asked to identify witnesses. The Respondent identified witnesses 3 and 4 as individuals who could have relevant information to provide in this investigation since they are or were employees of the District.

This investigator also determined that it was necessary to interview witnesses 5 and 6 because [PROVIDE REASONS].

**DOCUMENTS**

1. Complaint, dated _________
2. Respondent’s Response to Complaint
3. [INSERT EMAILS, TEXTS, VIDEO SURVEILLANCE, ETC.]
4. [INSERT RELEVANT BOARD POLICY/ADMINISTRATIVE REGULATION (OR PROCEDURE)]

This investigator asked both parties to provide me with any relevant documentation. The following documentation was provided by Complainant:

The following documentation was provided by Respondent:

**WITNESS SUMMARIES**

[COMPLAINANT], Complainant

**Credibility Determination [SEE BELOW FOR EXAMPLE LANGUAGE]**

Complaint was interviewed by this investigator on [DATE], at the District office. Complainant was a willing participant and understood the confidential nature of the investigation. Complainant presented himself/herself in an honest and straightforward manner. This investigator specifically evaluated whether there was evidence of bias or a motive to lie about Respondent. In particular, Respondent claimed that Complainant filed the complaint in retaliation for breaking up with him/her. This investigator determined that there was no evidence of bias or motive to lie about Respondent in regards to the specific allegations that were subject of this investigation.

**Interview Summary**

[INSERT RELEVANT DETAILS OF INTERVIEW]

**IV. SUMMARY OF ALLEGATIONS, FINDINGS & CONCLUSIONS**

ALLEGATION NO. 1:
FINDINGS

CONCLUSION

Based on the above findings, this investigator has determined that the investigation established by a preponderance of the evidence that the alleged conduct occurred; therefore, the allegation is sustained. Further, this investigator determined that the conduct was based on the Complainant’s sex/gender or was of a sexual nature on which the Complainant alleged discrimination/harassment.
Sample

Board Policy
Sexual Harassment

BP 5145.7
Students

The Governing Board is committed to maintaining a safe school environment that is free from harassment and discrimination. The Board prohibits, at school or at school-sponsored or school-related activities, sexual harassment targeted at any student by anyone. The Board also prohibits retaliatory behavior or action against any person who reports, files a complaint or testifies about, or otherwise supports a complainant in alleging sexual harassment.

The district strongly encourages any student who feels that he/she is being or has been sexually harassed on school grounds or at a school-sponsored or school-related activity by another student or an adult to immediately contact his/her teacher, the principal, or any other available school employee. Any employee who receives a report or observes an incident of sexual harassment shall notify the principal or the district Title IX Coordinator. Once notified, the principal or Title IX Coordinator shall take the steps to investigate and address the allegation, as specified in the accompanying administrative regulation.

(cf. 0410 - Nondiscrimination in District Programs and Activities)
(cf. 1312.1 - Complaints Concerning District Employees)
(cf. 5131 - Conduct)
(cf. 5131.2 - Bullying)
(cf. 5137 - Positive School Climate)
(cf. 5141.4 - Child Abuse Prevention and Reporting)
(cf. 5145.3 - Nondiscrimination/Harassment)
(cf. 6142.1 - Sexual Health and HIV/AIDS Prevention Instruction)

The Superintendent or designee shall take appropriate actions to reinforce the district's sexual harassment policy.

Instruction/Information

The Superintendent or designee shall ensure that all district students receive age-appropriate information on sexual harassment. Such instruction and information shall include:

1. What acts and behavior constitute sexual harassment, including the fact that sexual harassment could occur between people of the same sex and could involve sexual violence;

2. A clear message that students do not have to endure sexual harassment under any circumstance;
3. Encouragement to report observed incidents of sexual harassment even where the alleged complainant of the harassment has not complained;

4. A clear message that student safety is the district's primary concern, and that any separate rule violation involving an alleged victim or any other person reporting a sexual harassment incident will be addressed separately and will not affect the manner in which the sexual harassment complaint will be received, investigated, or resolved;

5. A clear message that every report of sexual harassment that involves a student shall trigger the district’s response obligations, which involves discussing with the complainant the availability of supportive measures and the process for filing a formal complaint;

6. Information about the district's grievance process for investigating complaints and the person(s) to whom a report of sexual harassment should be made;

7. Information about the rights of students and parents/guardians to file a civil or criminal complaint, as applicable, including the right to file a civil or criminal complaint while the district investigation of a sexual harassment complaint continues; and

8. A clear message that, when needed, the district will provide supportive measures, which are designed to restore or preserve equal access to the district’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the district’s educational environment, or deter sexual harassment.

Complaint Process and Disciplinary Actions

Sexual harassment complaints by and against students shall be investigated and resolved in accordance with law and district procedures specified in AR 5145.7 Sexual Harassment. Principals are responsible for notifying students and parents/guardians that complaints of sexual harassment can be filed under AR 5145.7 and where to obtain a copy of the procedures.

Upon investigation of a sexual harassment complaint, any student found to have engaged in sexual harassment or sexual violence in violation of this policy shall be subject to disciplinary action. For students in grades 4-12, disciplinary action may include suspension and/or expulsion, provided that, in imposing such discipline, the entire circumstances of the incident(s) shall be taken into account.

(cf. 5144 - Discipline)
(cf. 5144.1 - Suspension and Expulsion/Due Process)
(cf. 5144.2 - Suspension and Expulsion/Due Process (Students with Disabilities))

Upon investigation of a sexual harassment complaint, any employee found to have engaged in sexual harassment or sexual violence toward any student shall have his/her employment terminated in accordance with law and the applicable collective bargaining agreement.
Record-Keeping

The District shall maintain for a period of seven (7) years records of –

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under Title IX, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;

2. Any appeal and the result therefrom;

3. Any informal resolution and the result therefrom; and

4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. The District must make these training materials publicly available on its website, or if the District does not maintain a website, the District must make these materials available upon request for inspection by members of the public.

Legal Reference:
EDUCATION CODE
200-262.4  Prohibition of discrimination on the basis of sex
48900  Grounds for suspension or expulsion
48900.2  Additional grounds for suspension or expulsion; sexual harassment
48904  Liability of parent/guardian for willful student misconduct
48980  Notice at beginning of term
CIVIL CODE
51.9  Liability for sexual harassment; business, service and professional relationships
1714.1  Liability of parents/guardians for willful misconduct of minor
GOVERNMENT CODE
12950.1  Sexual harassment training
CODE OF REGULATIONS, TITLE 5
4600-4670  Uniform complaint procedures
4900-4965  Nondiscrimination in elementary and secondary education programs
UNITED STATES CODE, TITLE 20
1221 Application of laws
1232g  Family Educational Rights and Privacy Act
1681-1688  Title IX, discrimination
UNITED STATES CODE, TITLE 42
1983  Civil action for deprivation of rights
2000d-2000d-7  Title VI, Civil Rights Act of 1964
2000e-2000e-17  Title VII, Civil Rights Act of 1964 as amended
CODE OF FEDERAL REGULATIONS, TITLE 34
99.1-99.67  Family Educational Rights and Privacy
106.1-106.71  Nondiscrimination on the basis of sex in education programs
COURT DECISIONS
Flores v. Morgan Hill Unified School District, (2003, 9th Cir.) 324 F.3d 1130
Oona by Kate S. v. McCaffrey, (1998, 9th Cir.) 143 F.3d 473
Doe v. Petaluma City School District, (1995, 9th Cir.) 54 F.3d 1447

Management Resources:
CSBA PUBLICATIONS
Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students, Policy Brief, February 2014
Safe Schools:  Strategies for Governing Boards to Ensure Student Success, 2011
U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS PUBLICATIONS
Q&A on Campus Sexual Misconduct, September 2017
Dear Colleague Letter:  Title IX Coordinators, April 2015
Sexual Harassment:  It's Not Academic, September 2008
Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, January 2001
WEB SITES
CSBA:  http://www.csba.org
California Department of Education:  http://www.cde.ca.gov
U.S. Department of Education, Office for Civil Rights:  http://www.ed.gov/about/offices/list/ocr

[DATE OF REVISION]
Sample

Administrative Regulation
Sexual Harassment

AR 5145.7
Students

The district designates the following individual(s) as the responsible employee(s) to coordinate its efforts to comply with Title IX of the Education Amendments of 1972 and California Education Code § 234.1, as well as to investigate and resolve sexual harassment complaints. The coordinator/compliance officer(s) may be contacted at:

_________________________________________________________
(title or position)

_________________________________________________________
(address)

_________________________________________________________
(telephone number)

_________________________________________________________
(email)

Title IX of the Education Amendments Act of 1972 defines sexual harassment as conduct on the basis of sex that satisfies one or more of the following:

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

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

3. Sexual assault, dating violence, domestic violence or stalking.

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. (20 U.S.C. 1092(f)(6)(A)(v))

The term “sex offense” means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.
There are four types of sex offenses:

1. **Rape:** the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females.

2. **Fondling:** the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

3. **Incest:** sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

4. **Statutory Rape:** sexual intercourse with a person who is under your state’s statutory age of consent (18).

The term “dating violence” means violence committed by a person:

1. who is or has been in a social relationship of a romantic or intimate nature with the victim; and
2. where the existence of such a relationship shall be determined based on a consideration of the following factors:
   a. The length of the relationship.
   b. The type of relationship.
   c. The frequency of interaction between the persons involved in the relationship.  (34 U.S.C. 12291(a)(10))

The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.  (34 U.S.C. 12291(a)(8))

The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

1. Fear for his or her safety or the safety of others; or
2. Suffer substantial emotional distress.  (34 U.S.C. 12291(a)(30))

Pursuant to California Education Code, prohibited sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the educational setting, under any of the following conditions (Education Code § 212.5; 5 CCR 4916):
1. Submission to the conduct is explicitly or implicitly made a term or condition of a student's academic status or progress.

2. Submission to or rejection of the conduct by a student is used as the basis for academic decisions affecting the student.

3. The conduct has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment.

4. Submission to or rejection of the conduct by the student is used as the basis for any decision affecting the student regarding benefits and services, honors, programs, or activities available at or through any district program or activity.

(cf. 5131 - Conduct)
(cf. 5131.2 - Bullying)
(cf. 5137 - Positive School Climate)
(cf. 5145.3 - Nondiscrimination/Harassment)
(cf. 6142.1 - Sexual Health and HIV/AIDS Prevention Instruction)

Examples of types of conduct which are prohibited in the district and which may constitute sexual harassment include, but are not limited to:

1. Unwelcome leering, sexual flirtations, or propositions;
2. Unwelcome sexual slurs, epithets, threats, verbal abuse, derogatory comments, or sexually degrading descriptions;
3. Graphic verbal comments about an individual's body or overly personal conversation;
4. Sexual jokes, derogatory posters, notes, stories, cartoons, drawings, pictures, obscene gestures, or computer-generated images of a sexual nature;
5. Spreading sexual rumors;
6. Teasing or sexual remarks about students enrolled in a predominantly single-sex class;
7. Massaging, grabbing, fondling, stroking, or brushing the body;
8. Touching an individual's body or clothes in a sexual way;
9. Impeding or blocking movements or any physical interference with school activities when directed at an individual on the basis of sex;
10. Displaying sexually suggestive objects;
11. Sexual assault, sexual battery, or sexual coercion; and

12. Electronic communications containing comments, words, or images described above.

Prohibited sexual harassment may also include any act of retaliation against an individual who reports a violation of the district's sexual harassment policy or who participates in the investigation of a sexual harassment complaint.

A school district with *actual knowledge* of sexual harassment in an *education program or activity* of the recipient must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

*Actual knowledge* means *notice* of sexual harassment or allegations of sexual harassment to any employee of an elementary and secondary school.

*Notice* results whenever any elementary and secondary school employee witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant’s parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means.

*Education program or activity* includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.

**Reporting Process**

Any student who believes that he/she has been subjected to sexual harassment by another student, an employee, or a third party or who has witnessed sexual harassment is strongly encouraged to report the incident to his/her teacher, the principal, or any other available school employee. Within one school day of receiving such a report, the school employee shall forward the report to the principal or the district's Title IX Coordinator. In addition, any school employee who observes an incident of sexual harassment involving a student shall, within one school day, report his/her observation to the principal or Title IX Coordinator. The employee shall take these actions, whether or not the alleged victim files a complaint. If the employee submits a report of sexual harassment to the principal, the principal shall forward the report to the Title IX Coordinator within two school days.

Any person may trigger a recipient’s response obligations by reporting sexual harassment to the Title IX Coordinator using contact information provided by the district, which must be available on the district’s website. The person who reports does not need to be the complainant; a report may be made by “any person” who believes that sexual harassment may have occurred and requires a recipient’s response.

**Supportive Measures**
When the Title IX Coordinator receives a verbal or informal report of sexual harassment, the Title IX Coordinator must promptly do the following:

1. Contact the complainant to discuss the availability of supportive measures;
2. Consider the complainant’s wishes with respect to supportive measures;
3. Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; and
4. Explain to the complainant the process for filing a formal complaint.

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.

Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The district must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the district to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Filing a Formal Complaint

Any student who believes that he/she has been subjected to sexual harassment/sex discrimination by another student, an employee, or a third party may file a written formal complaint with the Title IX Coordinator in person, by mail, or by electronic mail.

The complaint shall be initiated no later than six months from the date that the alleged unlawful sexual harassment/sex discrimination occurred, or six months from the date that the complainant first obtained knowledge of the facts of the alleged unlawful sex harassment/sex discrimination. The time for filing may be extended for up to 90 days by the Superintendent or designee for good cause upon written request by the complainant setting forth the reasons for the extension. (5 CCR 4630)

A formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.
If a complaint of sexual harassment is initially submitted to the principal, he/she shall, within two (2) school days, forward the report to the compliance officer to initiate investigation of the complaint.

In any case of sexual harassment involving the compliance officer, the complaint may instead be submitted to the Superintendent or designee who shall determine who will investigate the complaint.

(cf. 5141.4 - Child Abuse Prevention and Reporting)

Consolidation of Formal Complaints

The district may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.

Dismissal of a Formal Complaint

The district must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in this regulation even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX; such a dismissal does not preclude action under another provision of the district’s code of conduct.

The district may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Upon dismissal of a formal complaint, the district must promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties.

Notice of Allegations

Upon receipt of a formal complaint, a recipient must provide the following information through written notice to the parties who are known:

1. Notice of the district’s grievance process that complies with this section, including any informal resolution process.

2. Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the
parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence obtained during the investigation.

The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.

Informal Resolution Process

The district may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment. Similarly, the district may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed.

However, at any time prior to reaching a determination regarding responsibility the district may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient:

1. Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
2. Obtains the parties’ voluntary, written consent to the informal resolution process; and
3. Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Emergency removal

The district may remove a respondent from the district’s education program or activity on an emergency basis, provided that the district undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other
individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

Administrative leave

The district may place a non-student employee respondent on administrative leave during the pendency of the grievance process. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

Grievance Process: Investigation of a Formal Complaint

Within 10 business days after the Title IX Coordinator receives the complaint, the Title IX Coordinator shall begin an investigation into the formal complaint. As necessary, additional staff or legal counsel may conduct or support the investigation.

Any individual designated by the district as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

Within five (5) business days of initiating the investigation, the Title IX Coordinator shall provide the complainant and respondent with the opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence any evidence, or information leading to evidence. Such evidence or information may be presented at any time during the investigation.

In conducting the investigation, the Title IX Coordinator shall collect all available documents and review all available records, notes, or statements related to the complaint, including any additional evidence or information received from the parties during the course of the investigation. The Title IX Coordinator shall individually interview all available witnesses with information pertinent to the complaint, and may visit any reasonably accessible location where the relevant actions are alleged to have taken place. At appropriate intervals, the Title IX Coordinator shall inform both parties of the status of the investigation.

The district will conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.

The district shall have the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility. Furthermore, the district cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made
and maintained in connection with the provision of treatment to the party, unless the district obtains that party’s voluntary, written consent to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR § 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR § 99.3).

The Title IX Coordinator shall interview the complainant, respondent, and other relevant witnesses privately, separately, and in a confidential manner. The district shall 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. The complainant and respondent shall be entitled to have an advisor of their choice, who may be, but is not required to be, an attorney to accompany them to any related meeting or interview. However, the district may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

The district will presume that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

A complainant's refusal to provide the district's investigator with documents or other evidence related to the allegations in the complaint, failure or refusal to cooperate in the investigation, or engagement in any other obstruction of the investigation may result in the dismissal of the complaint because of a lack of evidence to support the allegation. Similarly, a respondent's refusal to provide the district's investigator with documents or other evidence related to the allegations in the complaint, failure or refusal to cooperate in the investigation, or engagement in any other obstruction of the investigation may result in a finding, based on evidence collected, that a violation has occurred and in the imposition of a remedy in favor of the complainant. (5 CCR 4631)

In accordance with law, the district shall provide the investigator with access to records and other information related to the allegation in the complaint and shall not in any way obstruct the investigation. Failure or refusal of the district to cooperate in the investigation may result in a finding based on evidence collected that a violation has occurred and in the imposition of a remedy in favor of the complainant. (5 CCR 4631)

The district shall provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

Prior to completion of the investigative report, the district shall send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties shall have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
The district shall create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

Grievance Process: Determination Regarding Responsibility

After the recipient has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the district must apply the standard of evidence that it applies to all formal complaints of sexual harassment – [SPECIFY IF THE STANDARD OF EVIDENCE IS PREPONDERANCE OF THE EVIDENCE OR CLEAR AND CONVINCING EVIDENCE]. The written determination must include the following elements:

1. Identification of the allegations potentially constituting sexual harassment;

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

3. Findings of fact supporting the determination. In reaching a factual determination, the following factors may be taken into account:

   a. Statements made by any witnesses
   b. The relative credibility of the individuals involved
   c. How the complaining individual reacted to the incident
   d. Any documentary or other evidence relating to the alleged conduct
   e. Past instances of similar conduct by any alleged offenders
   f. Past false allegations made by the complainant

4. Conclusions regarding the application of the recipient’s code of conduct to the facts;
5. A statement of, and rationale for, the result as to each allegation, including a
determination regarding responsibility, any disciplinary sanctions the recipient imposes
on the respondent, and whether remedies designed to restore or preserve equal access to
the recipient’s education program or activity will be provided by the recipient to the
complainant; and

6. The recipient’s procedures and permissible bases for the complainant and respondent to
appeal.

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

The determination of whether a hostile environment exists may involve consideration of the
following:

1. The manner in which the misconduct affected one or more students' education

2. The type, frequency, and duration of the misconduct

3. The relationship between the alleged victim(s) and offender(s)

4. The number of persons engaged in the conduct and at whom the conduct was directed

5. The size of the school, location of the incidents, and context in which they occurred

6. Other incidents at the school involving different individuals

Timeline for Determination Regarding Responsibility

Unless extended by written agreement with the complainant, the compliance officer shall prepare
and send to the complainant a written Determination Regarding Responsibility, as described in
the section above entitled “Determination Regarding Responsibility,” within 60 calendar days of
the district's receipt of the complaint. (5 CCR 4631)

The respondent shall be informed of any extension of the timeline agreed to by the complainant.

Corrective Actions

The district will treat complainants and respondents equitably by providing remedies to a
complainant where a determination of responsibility for sexual harassment has been made
against the respondent, and by following a grievance process before the imposition of any
disciplinary sanctions or other actions that are not supportive measures against a respondent.
Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.

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

After a Determination Regarding Responsibility has been made, the Title IX Coordinator shall adopt any appropriate corrective action permitted by law. Appropriate corrective actions that focus on the larger school or district environment may include, but are not limited to, actions to reinforce district policies; training for faculty, staff, and students; updates to school policies; or school climate surveys.

Appropriate remedies that may be offered to the Complainant but not communicated to the respondent may include, but are not limited to, the following:

1. Counseling  
   (cf. 6164.2 - Guidance/Counseling Services)
2. Academic support
3. Health services
4. Assignment of an escort to allow the victim to move safely about campus
5. Information regarding available resources and how to report similar incidents or retaliation
6. Separation of the victim from any other individuals involved, provided the separation does not penalize the victim
7. Restorative justice
8. Follow-up inquiries to ensure that the conduct has stopped and there has been no retaliation

Appropriate corrective actions that focus on a respondent may include, but are not limited to, the following:

1. Transfer from a class or school as permitted by law
2. Parent/guardian conference
3. Education regarding the impact of the conduct on others
4. Positive behavior support
5. Referral to a student success team  
   (cf. 6164.5 - Student Success Teams)
6. Denial of participation in extracurricular or cocurricular activities or other privileges as permitted by law  
   (cf. 6145 - Extracurricular and Cocurricular Activities)
7. Disciplinary action, such as suspension or expulsion, as permitted by law  
   (cf. 5144 - Discipline)  
   (cf. 5144.1 - Suspension and Expulsion/Due Process)
In consultation with district legal counsel, the district may notify the complainant of any sanction imposed upon the respondent that directly relates to the complainant.

When an employee is found to have committed retaliation or sexual harassment/sex discrimination, the district shall take appropriate disciplinary action, up to and including dismissal, in accordance with applicable law and collective bargaining agreement. (cf. 4118 - Dismissal/Suspension/Disciplinary Action) (cf. 4218 - Dismissal/Suspension/Disciplinary Action)

The district may also consider training and other interventions for the larger school community to ensure that students, staff, and parents/guardians understand the types of behavior that constitute unlawful sexual harassment/sex discrimination, that the district does not tolerate it, and how to report and respond to it.

Appeal

Any complainant or respondent who is dissatisfied with the district's written Determination Regarding Responsibility or with the district’s dismissal of a formal complaint or any allegations therein may file an appeal in writing with the Governing Board within 15 calendar days of receiving the district's decision on the following bases:

1. Procedural irregularity that affected the outcome of the matter;

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

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

As to all appeals, the district must:

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

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

3. Ensure that the decision-maker(s) for the appeal is unbiased and meets the training requirements under Title IX;

4. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
5. Issue a written decision describing the result of the appeal and the rationale for the result; and

6. Provide the written decision simultaneously to both parties.

**Appeals to the California Department of Education**

Any complainant or respondent who is dissatisfied with the district's written Determination Regarding Responsibility may file an appeal in writing with CDE within 15 calendar days of receiving the district's decision. (5 CCR 4632)

The party shall specify the basis for the appeal of the decision and how the facts of the district's decision are incorrect and/or the law has been misapplied. The appeal shall be sent to CDE with a copy of the original locally filed complaint and a copy of the district's decision in that complaint. (5 CCR 4632)

Upon notification by CDE that the district's decision has been appealed, the Superintendent or designee shall forward the following documents to CDE (5 CCR 4633):

1. A copy of the original complaint;
2. A copy of the written decision;
3. A summary of the nature and extent of the investigation conducted by the district, if not covered by the decision;
4. A copy of the investigation file including, but not limited to, all notes, interviews, and documents submitted by the parties and gathered by the investigator;
5. A report of any action taken to resolve the complaint;
6. A copy of the district's UCP; and
7. Other relevant information requested by CDE.

**Confidentiality**

All complaints and allegations of sexual harassment shall be kept confidential except as necessary to carry out the investigation or take other subsequent necessary action. (5 CCR 4964)

However, a complainant may not file a formal complaint with the Title IX Coordinator anonymously. If a complainant chooses not to ultimately file a formal complaint under the grievance process, the Title IX Coordinator will take into account the wishes of a complainant and will only initiate a grievance process against the complainant’s wishes if doing so is not clearly unreasonable in light of the known circumstances.

However, each party may discuss the allegations under investigation with other individuals in order to gather and present relevant evidence.

However, when a complainant or victim of sexual harassment notifies the district of the harassment but requests confidentiality, the compliance officer shall inform him/her that the
request may limit the district's ability to investigate the harassment or take other necessary action. When honoring a request for confidentiality, the district will nevertheless take all reasonable steps to investigate and respond to the complaint consistent with the request.

When a complainant of sexual harassment notifies the district of the harassment but requests that the district not pursue an investigation, the district will determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students.

(cf. 4119.23/4219.23/4319.23 - Unauthorized Release of Confidential/Privileged Information)
(cf. 5125 - Student Records)

Notifications

A copy of the district's sexual harassment policy and regulation shall:

1. Be included in the notifications that are sent to parents/guardians at the beginning of each school year (Education Code § 48980; 5 CCR 4917)

(cf. 5145.6 - Parental Notifications)

2. Be displayed in a prominent location in the main administrative building or other area where notices of district rules, regulations, procedures, and standards of conduct are posted (Education Code § 231.5)

A copy of the district's sexual harassment policy and regulation shall be posted on district and school web sites and, when available, on district-supported social media.

(cf. 1113 - District and School Web Sites)
(cf. 1114 - District-Sponsored Social Media)

3. Be provided as part of any orientation program conducted for new students at the beginning of each quarter, semester, or summer session (Education Code § 231.5)

4. Appear in any school or district publication that sets forth the school's or district's comprehensive rules, regulations, procedures, and standards of conduct (Education Code § 231.5)

5. Be included in the student handbook

6. Be provided to employees and employee organizations

[DATE OF REVISION]
2020 Title IX Amendments as they apply to CCD’s Sexual Harassment/Sexual Violence Policy

TABLE OF CONTENTS

1. Definitions
2. Jurisdiction
3. Responding to Reports
4. Dismissal of Complaint
5. Investigation Time Frames
6. Standard of Proof
7. Investigation Guidelines
8. Hearing Guidelines
9. Remedies and Disciplinary Consequences
10. Appeal of Determination
11. Informal Resolution
12. Title IX Nondiscrimination Statement

This guide is not meant to replace your District’s Sexual Harassment/Sexual Violence Policy in its entirety. The information contained herein is meant to assist your District with amending your current policy in light of the new Title IX regulations, effective August 14, 2020. Many aspects of your policy are required and were not revised with these regulations (for example, definition of affirmative consent and anti-retaliation language), these sections are not addressed in this guide as your current language is likely sufficient.

Please note, in some instances your obligations under Title IX may now be different from your obligations pursuant to the Clery Act/VAWA. When this is the case, the sample language strives to clarify that the Title IX language update will only apply when investigating a formal complaint that falls within the definition of sexual harassment pursuant to Title IX.

For assistance with using this guide, please contact either Monica Batanero or Kaitlyn Schwendeman, or your preferred attorney at School and College Legal Services.
Sample Definitions

1. **Sexual Harassment**: Sexual harassment under Title IX means conduct on the basis of sex that satisfies one or more of the following:
   
a. 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;
   b. 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; or

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

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

4. **Actual Knowledge**: Actual knowledge, for purposes of Title IX, means notice of sexual harassment or allegations of sexual harassment to the District’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient. “Notice” includes, but is not limited to, a report of sexual harassment to the District’s Title IX Coordinator.

5. **Formal Complaint**: Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment pursuant to Title IX against a respondent and requesting that the District investigate the allegation of sexual harassment. The phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

6. **Supportive Measures**: Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
Sample Jurisdiction Language

Allegations of sexual harassment pursuant to Title IX committed by District students and employees, and third parties (such as contractors, vendors, visitors, guests, patients and volunteers), and allegations of sexual harassment pursuant to Title IX committed against students, employees and third parties, are within the scope of this Policy when the conduct occurs:

1. on District property; or
2. in connection with District employment or in the context of a District employment or education program, activity or service conducted within the United States.

The District’s Title IX Coordinator has the responsibility to determine whether an allegation falls within the parameters of this Policy. If a determination is made that the Policy does not apply, the Title IX Coordinator is obligated to dismiss the complaint.

Allegations of sexual harassment pursuant to Title IX committed by or against District students, employees, or third parties, or against the same, which may not fall within the scope of this Policy may still be the basis for investigation and disciplinary or other consequences, based upon the District’s Code of Conduct and other relevant policies.
Sample Responding to Report Language

The District shall investigate all Title IX formal complaints made pursuant to this Policy. The District will provide prompt and effective supportive measures to the complainant and, as appropriate, respondent, whenever a complaint is made pursuant to this Policy, even if the alleged conduct is not investigated.

The District's response process is intended to provide prompt and equitable means to respond to allegations of unlawful gender discrimination, sexual harassment and assault, and sexual misconduct in accordance with federal and state due process requirements. All procedures, from initial investigation to a final disciplinary result, are intended to be prompt, fair, and impartial.

Allegations of violation of this Policy may be filed by the complainant or by anyone else with knowledge of the incident. If the District receives actual notice of an incident of sexual harassment or other violations of this Policy, it will investigate even in the absence of an allegation or complaint from an individual.

These procedures are not intended to substitute for criminal or civil complaints that may be initiated simultaneously. The District shall maintain memoranda of understanding (i.e., MOU's) with local law enforcement agencies for the sharing of information from incidents reported to law enforcement with the intent of relieving the complainant from unnecessary repetition of information that may be traumatic.

When a complainant or the Title IX Coordinator initiates a formal complaint, the Title IX Coordinator, on behalf of the District, will provide written notice to all known parties of:

a. The District’s grievance process;
b. The allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview;
c. A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process;
d. That the parties may have an advisor of their choice, who may be, but is not required to be, an attorney; and
e. If applicable, a statement that the District’s Code of Conduct prohibits any participant in the investigation from knowingly making false statements or knowingly submitting false information during the grievance process, and reference to the applicable section of the Code of Conduct.

Both during an investigation and upon a determination of findings, the District will offer supportive measures to the complainant and respondent, consistent with applicable complaint resolution and grievance procedures.
Sample Complaint Dismissal Language

The Title IX Coordinator is required to dismiss a formal complaint at any time when:

a. The conduct alleged does not meet the definition of a Prohibited Act, as set forth within this Policy;
b. The conduct alleged did not occur in the District’s education program or activity; or
c. The conduct alleged did not occur against a person in the United States.

The Title IX Coordinator may choose to dismiss a formal complaint at any time when:

a. The complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegations therein;
b. The respondent is no longer enrolled in or employed by the District; or
c. If specific circumstances prevent the investigator from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Dismissal of a formal complaint by the Title IX Coordinator does not preclude the District from investigating the conduct and taking appropriate action under its Code of Conduct, Education Law, collective bargaining agreement or other applicable Policy or procedures.

If the Title IX Coordinator dismisses a complaint, they will promptly send written notice of the dismissal and reasons therefore to the complainant and respondent, as well as their advisors, if any. All parties have an opportunity to appeal a dismissal of a formal complaint, pursuant to [reference to appeal process section].
Sample Investigation Time Frames

Note, where the time frames are in italics and underlined, the District has discretion to change the length of time. Time frames that are not italicized and underlined are required by regulation. In choosing alternative time frames, keep in mind that the Title IX regulations require that a District “promptly” resolve complaints.

All parties involved in a formal complaint are entitled to prompt resolution of the complaint. Extensions of the below time frames for formal complaint investigations may be granted by the Title IX Coordinator, investigator or decision maker(s) only for good cause and with written notice to both the complainant and respondent with explanation of the extension and the reasons therefor.

In the event the complainant or Title IX Coordinator elects to move forward with a formal complaint, the following time frames apply:

1. The Title IX Coordinator will appoint an appropriately trained investigator, if necessary, within five (5) business days following receipt of the formal complaint.
2. The Title IX Coordinator or investigator will provide written notice to all parties of the formal complaint within ten (10) business days following appointment of investigator, or receipt of formal complaint, as applicable.
3. The Title IX Coordinator or investigator will complete their investigation within sixty (60) business days following receipt of the formal complaint.
4. The Title IX Coordinator or investigator will provide copies of the draft investigation report, including a copy of all evidence relied upon in the report (in either electronic or hard copy format), to all parties and their respective advisors within twenty (20) business days following completion of investigation.
5. The parties and their respective advisors shall have ten (10) business days following receipt of the draft report to submit a written response to the draft report.
6. The Title IX Coordinator or investigator shall have ten (10) business days following receipt of the parties’ written responses to issue a final investigation report, and provide such report to all parties and their advisors simultaneously.
7. At least ten (10) business days and no more than sixty (60) business days following distribution of the final investigation report, the District shall schedule and hold a live hearing.
8. The parties will be provided at least ten (10) business days’ notice of the date and time of the scheduled hearing.
9. By no more than twenty (20) business days following the completion of the live hearing, the decision maker(s) will issue a written determination, which shall be provided to all parties and their advisors simultaneously.
10. Request to appeal the written decision of the decision maker(s) shall be received, in writing, by the Title IX Coordinator within five (5) business days following issuance of the written decision.
11. All parties will be provided an opportunity to submit a written statement in support of or challenging the written decision within fifteen (15) business days following notice of appeal.
12. A written final decision regarding appeal shall be issued to all parties and their advisors simultaneously within *forty-five (45)* business days following receipt of the parties’ written statements.
Sample Standard of Proof Language

*The Title IX regulations specify that a District must use either the preponderance of the evidence standard or the clear and convincing standard, and must clearly state in their policy which standard will be applied. The standard chosen must be the same for investigations involving employees as those involving students. We have provided two language options, depending on which standard your District chooses to apply:*

**Preponderance of the Evidence:**
The District shall apply the *preponderance of the evidence* standard throughout the investigation and hearing in making determinations regarding resolution and credibility assessments. Preponderance of the evidence means that it is more likely than not that the evidence is true. Often, this standard is represented as a percentage, where it is greater than 50% likely that the evidence is true.

**Clear and Convincing:**
The District shall apply the *clear and convincing* standard of evidence throughout the investigation and hearing in making determinations regarding resolution and credibility assessments. Clear and convincing means the evidence is highly and substantially more likely to be true than untrue. Often, this standard is represented as a percentage, where it is greater than 75% likely that the evidence is true.
Sample Investigation Guidelines

When investigating a formal complaint, the Title IX Coordinator shall ensure:

a. The Title IX Coordinator, investigator, decision maker(s) and/or any person responsible for facilitating an informal resolution process will be free from conflicts of interest, bias for or against complainants and respondents (both individually and generally), and be appropriately trained in administering their role within the District’s Title IX program.

b. The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the District and not on the parties;

c. The District cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the District obtains voluntary, written consent from the party or their legal guardian to do so;

d. Parties are provided an equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

e. Parties are not restricted from discussing the allegation(s) under investigation or from gathering or presenting relevant evidence;

f. Parties are provided an equal opportunity to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding (although the Title IX Coordinator, investigator, and/or decision maker(s) may establish restrictions on the ability of advisors to participate in the proceedings, which must apply equally to all parties);

g. Written notice is provided to all parties invited or expected to participate 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;

h. Parties are provided an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations, including the evidence upon which the Title IX Coordinator or investigator does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that the party can meaningfully respond to the evidence prior to conclusion of the investigation;

i. Prior to completion of the investigative report, the Title IX Coordinator or investigator must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and a copy of the draft investigation report;

j. Parties shall have 10 business days to submit a written response to the draft investigation report and evidence, which the investigator will consider prior to completion of the investigative report;

k. The Title IX Coordinator or investigator will issue an investigation report that fairly summarizes all relevant evidence.
Sample Hearing Guidelines

The District will hold a live hearing at the completion of the investigation process for every formal complaint. The decision maker(s) at this hearing shall be persons trained in the administration of a hearing and familiar with Title IX and this Policy, and shall be different from the Title IX Coordinator or investigator.

At a hearing, the following shall apply:

a. The District shall bear the burden of proof in gathering evidence sufficient to reach a determination regarding responsibility rest on the District and not on the parties;
b. At the discretion of the decision maker(s) or at the request of either party, the hearing may occur with the parties located in separate rooms with technology enabling the decision maker(s) and parties to simultaneously see and hear the party or the witness answering questions;
c. Each party shall be provided the opportunity to have an advisor of their choosing, who may be, but is not required to be, an attorney, at the hearing;
d. If a party does not have an advisor present at the live hearing, the District will provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party;
e. Each party’s advisor shall be permitted to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility;
f. The decision maker(s) shall rule on the relevancy of each question prior to the party subjected to cross-examination answering, and must explain any decision to exclude a question as not relevant;
g. If a party or witness does not submit to cross-examination at the live hearing, the decision maker(s) will not rely on any statement of that party or witness in reaching a determination regarding responsibility;
h. The decision maker(s) will not draw any inference regarding responsibility solely based upon a party or witness’ absence from the live hearing or refusal to answer cross-examination or other questions;
i. An audio or audiovisual recording or transcript will be created for each hearing, and shall be made available to all parties for inspection and review.
j. The decision maker(s) will issue a written determination regarding responsibility at the conclusion of the hearing, within the time frames set forth in this policy. The written determination shall be transmitted to all parties and their advisors simultaneously.
Sample Language for Remedies and Disciplinary Consequences

A range of remedies and consequences may apply in the event that a decision maker establishes that a party has committed the conduct alleged in the formal complaint.

A comprehensive list of potential disciplinary consequences when the respondent is a student may be found in the District’s Code of Conduct. Consequences may range from [list lowest possible disciplinary consequence] to expulsion, depending on the severity of the conduct.

A comprehensive list of potential disciplinary consequences when the respondent is an employee may be found in the District’s Employee Policies, Education Code, and applicable collective bargaining agreements. Consequences may range from a verbal warning to termination, depending on the severity of the conduct.
Sample Appeal of Determination Language

Parties may seek an appeal of a decision maker(s) determination of responsibility, or the Title IX Coordinator’s dismissal of a formal complaint, provided the appeal is based upon either:

a. A procedural irregularity that affected the outcome of the matter;
b. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or
c. Conflict of interest or bias by the Title IX Coordinator, investigator, or decision maker(s) for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Written notice of appeal must be received by the Title IX Coordinator within five (5) business days following receipt of determination or notice of dismissal. The decision maker(s) of the appeal will be different from the individual reaching the determination that is being appealed, nor will the decision maker be the Title IX Coordinator or investigator of the allegations.

Following receipt of notice, the District will notify the other party of the appeal. All parties will be provided an opportunity to submit a written statement in support of or challenging the determination or dismissal. Written statements must be received by the decision maker(s) within fifteen (15) business days following notice of the appeal.

The decision maker(s) will issue a written decision describing the result of the appeal and the rationale for the result within forty-five (45) business days following receipt of written statements, and will provide such decision simultaneously to both parties.
Sample Informal Resolution Language

Parties involved in a Title IX formal complaint may be offered the opportunity to engage in informal resolution prior to the issuance of a determination of responsibility. Informal resolution may include mediation, restorative justice, or another method of resolution which is appropriate based upon the allegations.

Parties are not required as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, to participate in informal resolution. Likewise, parties are not required to waive of the right to an investigation and adjudication of formal complaints of sexual harassment under Title IX as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right.

Informal resolution is not available when a District student is the complainant and a District employee is the respondent. Informal resolution is never available in the absence of a formal complaint.

Parties that choose to engage in informal resolution are choosing to waive their right to resuming the formal complaint. However, at any time prior to conclusion of the informal resolution, a party may withdraw from the informal resolution process and resume the formal complaint investigation process.

Parties that choose to engage in informal resolution must sign consent indicating that they are voluntarily engaging in this process.
Sample Title IX Nondiscrimination Statement

Pursuant to its obligations under Title IX and its implementing regulations, Title VII, the Americans with Disabilities Act and other applicable federal and state law, the District does not discriminate on the basis of race, religious creed, color, national origin, ancestry, ethnic group identification, physical disability, mental disability, medical condition, genetic condition, marital status, sex, gender, gender identity, gender expression, genetic information or sexual orientation in any of its policies, procedures or practices; nor does the District discriminate against any employees or applicants for employment on the basis of their age or sex. This nondiscrimination policy covers admission, access and treatment in District programs and activities including but not limited to academic admissions, financial aid, educational services and athletics and application for District employment.

The District is an equal opportunity employer. Inquiries regarding this statement or the District’s nondiscrimination practices may be directed to the Title IX Coordinator, to the Department of Education, or both.
K-12 Title IX Flowchart

1. Actual Knowledge
2. Title IX Coordinator Contact Complainant
3. Formal Complaint
   - Dismissal
   - Informal Resolution
4. Investigation
   - Decision
5. No Formal Complaint
   - Investigate pursuant to Code of Conduct, as applicable
6. Appeal
For the reasons discussed in the preamble, the Secretary amends part 106 of title 34 of the Code of Federal Regulations as follows:

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION

PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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

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

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

   §106.3 Remedial and affirmative action and self-evaluation.

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

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

   § 106.6 Effect of other requirements and preservation of rights.

   * * * * *

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

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

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

2008
(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

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

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

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

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

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4. Section 106.8 is revised to read as follows:

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

(a) Designation of coordinator. Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.” The recipient must notify applicants
for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

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

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

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

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

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

5. Section 106.9 is revised to read as follows:

§ 106.9 Severability.

If any provision of this subpart or its application to any person, act, or practice is held
invalid, the remainder of the subpart or the application of its provisions to any person, act, or
practice shall not be affected thereby.
6. Section 106.12 is amended by revising paragraph (b) to read as follows:

§ 106.12 Educational institutions controlled by religious organizations.

* * * * *

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

* * * * *

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

§ 106.18 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.
8. Add § 106.24 to subpart C to read as follows:

§ 106.24 Severability.

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

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

§ 106.30 Definitions.

(a) As used in this part:

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

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

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

2013
Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

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

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

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

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

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

(b) As used in §§ 106.44 and 106.45:

Elementary and secondary school means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.
Postsecondary institution means an institution of graduate higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), or an institution of vocational education as defined in § 106.2(o).

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

§ 106.44 Recipient’s response to sexual harassment.

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

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

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

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

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

§ 106.45 Grievance process for formal complaints of sexual harassment.

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

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

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

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

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

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

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the
temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

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

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

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

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

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

(2) Notice of allegations—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:
(A) Notice of the recipient’s grievance process that complies with this section, including any informal resolution process.

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

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

(3) Dismissal of a formal complaint—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient...
must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

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

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

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

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

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party’s records...
that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR 99.3);

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

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

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

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

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

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

(6) Hearings. (i) For postsecondary institutions, the recipient’s grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the
parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio
or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

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

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

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(9) Informal resolution. A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to
participate in an informal resolution process under this section and may not offer an informal 
resolution process unless a formal complaint is filed. However, at any time prior to reaching a 
determination regarding responsibility the recipient may facilitate an informal resolution process, 
such as mediation, that does not involve a full investigation and adjudication, provided that the 
recipient –

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

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

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

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

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

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and
(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

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

12. Add § 106.46 to subpart D to read as follows:

§ 106.46 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.
13. Add § 106.62 to subpart E to read as follows:

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

14. Subpart F is revised to read as follows:

Subpart F–Retaliation
Sec.
106.71 Retaliation
106.72 Severability

Subpart F–Retaliation
§ 106.71 Retaliation.
(a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or
filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

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

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

§ 106.72 Severability.

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

15. Add subpart G to read as follows:

Subpart G – Procedures

Sec.

106.81 Procedures

106.82 Severability
Subpart G – Procedures

§ 106.81 Procedures.

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

§ 106.82 Severability.

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

Subject Index to Title IX Preamble and Regulation [Removed]

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

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

Historic Recognition of Sexual Harassment as Sex Discrimination

For the first time, the Department’s Title IX regulations recognize that sexual harassment, including sexual assault, is unlawful sex discrimination. The Department previously addressed sexual harassment only through guidance documents, which are not legally binding and do not have the force and effect of law. Now, the Department’s regulations impose important legal obligations on school districts, colleges, and universities (collectively “schools”), requiring a prompt response to reports of sexual harassment. The Final Rule improves the clarity and transparency of the requirements for how schools must respond to sexual harassment under Title IX so that every complainant receives appropriate support, respondents are treated as responsible only after receiving due process and fundamental fairness, and school officials serve impartially without bias for or against any party.

Supporting Complainants & Respecting Complainants’ Autonomy

Under the Final Rule, schools must offer free supportive measures to every alleged victim of sexual harassment (called “complainants” in the Final Rule). Supportive measures are individualized services to restore or preserve equal access to education, protect student and employee safety, or deter sexual harassment. Supportive measures must be offered even if a complainant does not wish to initiate or participate in a grievance process. Every situation is unique, and individuals react to sexual harassment differently. Therefore, the Final Rule gives complainants control over the school-level response best meeting their needs. It respects complainants’ wishes and autonomy by giving them the clear choice to file a formal complaint, separate from the right to supportive measures. The Final Rule also provides a fair and impartial grievance process for complainants, and protects complainants from being coerced or threatened into participating in a grievance process.

Non-Discrimination, Free Speech, and Due Process

The Final Rule reflects core American values of equal treatment on the basis of sex, free speech and academic freedom, due process of law, and fundamental fairness. Schools must operate free from sex discrimination, including sexual harassment. Complainants and respondents must have strong, clear procedural rights in a predictable, transparent grievance process designed to reach reliable outcomes. The Final Rule ensures that schools do not violate First Amendment rights when complying with Title IX.

A SCHOOL’S RESPONSE TO SEXUAL HARASSMENT

Under the Final Rule, any of the following conduct on the basis of sex constitutes sexual harassment:

- A school employee conditioning an educational benefit or service upon a person’s participation in unwelcome sexual conduct (often called “quid pro quo” harassment);
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or
- Sexual assault, dating violence, domestic violence, or stalking (as those offenses are defined in the Clery Act, 20 U.S.C. § 1092(f), and the Violence Against Women Act, 34 U.S.C. § 12291(a)).
U.S. Department of Education Title IX Final Rule Overview

- Consistent with Supreme Court precedent and the text of Title IX, a school must respond when: (1) the school has actual knowledge of sexual harassment; (2) that occurred within the school’s education program or activity; (3) against a person in the United States. The Final Rule expands “actual knowledge” to include notice to any elementary or secondary school employee, and states that any person (e.g., the alleged victim or any third party) may report to a Title IX Coordinator in person or by e-mail, phone, or mail. The Final Rule also specifies that a school’s “education program or activity” includes situations over which the school exercised substantial control, and also buildings owned or controlled by student organizations officially recognized by a postsecondary institution, such as many fraternity and sorority houses.

- Consistent with Supreme Court precedent, a school violates Title IX when its response to sexual harassment is clearly unreasonable in light of the known circumstances, and the Final Rule adds mandatory response obligations such as offering supportive measures to every complainant, with or without a formal complaint.

- Schools must investigate every formal complaint (which may be filed by a complainant or by a school’s Title IX Coordinator). If the alleged conduct does not fall under Title IX, then a school may address the allegations under the school’s own code of conduct and provide supportive measures.

A FAIR GRIEVANCE PROCESS

The Final Rule requires schools to investigate and adjudicate formal complaints of sexual harassment using a grievance process that incorporates due process principles, treats all parties fairly, and reaches reliable responsibility determinations. A school’s grievance process must:

- Give both parties written notice of the allegations, an equal opportunity to select an advisor of the party’s choice (who may be, but does not need to be, an attorney), and an equal opportunity to submit and review evidence throughout the investigation;
- Use trained Title IX personnel to objectively evaluate all relevant evidence without prejudgment of the facts at issue and free from conflicts of interest or bias for or against either party;
- Protect parties’ privacy by requiring a party’s written consent before using the party’s medical, psychological, or similar treatment records during a grievance process;
- Obtain the parties’ voluntary, written consent before using any kind of “informal resolution” process, such as mediation or restorative justice, and not use an informal process where an employee allegedly sexually harassed a student;
- Apply a presumption that the respondent is not responsible during the grievance process (often called a “presumption of innocence”), so that the school bears the burden of proof and the standard of evidence is applied correctly;
- Use either the preponderance of the evidence standard or the clear and convincing evidence standard (and use the same standard for formal complaints against students as for formal complaints against employees);
- Ensure the decision-maker is not the same person as the investigator or the Title IX Coordinator (i.e., no “single investigator models”);
- For postsecondary institutions, hold a live hearing and allow cross-examination by party advisors (never by the parties personally); K-12 schools do not need to hold a hearing, but parties may submit written questions for the other parties and witnesses to answer;
- Protect all complainants from inappropriately being asked about prior sexual history (“rape shield” protections);
U.S. Department of Education Title IX Final Rule Overview

- Send both parties a written determination regarding responsibility explaining how and why the decision-maker reached conclusions;
- Effectively implement remedies for a complainant if a respondent is found responsible for sexual harassment;
- Offer both parties an equal opportunity to appeal;
- Protect any individual, including complainants, respondents, and witnesses, from retaliation for reporting sexual harassment or participating (or refusing to participate) in any Title IX grievance process;
- Make all materials used to train Title IX personnel publicly available on the school’s website or, if the school does not maintain a website, make these materials available upon request for inspection by members of the public; and
- Document and keep records of all sexual harassment reports and investigations.

**SEX DISCRIMINATION REGULATIONS**

Relating to sex discrimination generally, and not only to sexual harassment, the final regulations also:

- Affirm that the Department may require schools to take remedial action for discriminating on the basis of sex or otherwise violating the Department’s Title IX regulations;
- Expressly state that in response to any claim of sex discrimination under Title IX, schools are never required to deprive an individual of rights guaranteed under the U.S. Constitution;
- Account for the interplay of Title IX, Title VII, and FERPA, as well as the legal rights of parents or guardians to act on behalf of individuals with respect to exercising Title IX rights;
- Update the requirement for schools to designate and identify a Title IX Coordinator, disseminate their non-discrimination policy and the Title IX Coordinator’s contact information to ensure accessible channels for reporting sex discrimination (including sexual harassment), and notify students, employees, parents, and others of how the school will respond to reports and complaints of sex discrimination (including sexual harassment); and
- Clarify that an institution controlled by a religious organization is not required to submit a written statement to the Department to qualify for the Title IX religious exemption.
## Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<table>
<thead>
<tr>
<th>Issue</th>
<th>The Title IX Final Rule: Addressing Sexual Harassment in Schools</th>
</tr>
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<tbody>
<tr>
<td>1. Notice to the School, College, University (“Schools”): Actual Knowledge</td>
<td>The Final Rule requires a K-12 school to respond whenever <em>any</em> employee has notice of sexual harassment, including allegations of sexual harassment. Many State laws also require all K-12 employees to be mandatory reporters of child abuse. For postsecondary institutions, the Final Rule allows the institution to choose whether to have mandatory reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office. For all schools, notice to a Title IX Coordinator, or to an official with authority to institute corrective measures on the recipient’s behalf, charges a school with actual knowledge and triggers the school’s response obligations.</td>
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<tr>
<td>2. Definition of Sexual Harassment for Title IX Purposes</td>
<td>The Final Rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect: Any instance of <em>quid pro quo</em> harassment by a school’s employee; any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).</td>
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<td>- The Final Rule prohibits sex-based misconduct in a manner consistent with the First Amendment. <em>Quid pro quo</em> harassment and Clery Act/VAWA offenses are not evaluated for severity, persuasiveness, offensiveness, or denial of equal educational access, because such misconduct is sufficiently serious to deprive a person of equal access.</td>
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<td>- The Final Rule uses the Supreme Court’s <em>Davis</em> definition (<em>severe and pervasive and objectively offensive conduct</em> as one of the three categories of sexual harassment, so that where unwelcome sex-based conduct consists of speech or expressive conduct, schools balance Title IX enforcement with respect for free speech and academic freedom.</td>
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<td>- The Final Rule uses the Supreme Court’s Title IX-specific definition rather than the Supreme Court’s Title VII workplace standard (<em>severe or pervasive conduct creating a hostile work environment</em>). First Amendment concerns differ in educational environments and workplace environments, and the Title IX definition provides First Amendment protections appropriate for educational institutions where students are learning, and employees are teaching. Students, teachers, faculty, and others should enjoy free speech and academic freedom protections, even when speech or expression is offensive.</td>
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</tbody>
</table>
### 3. Sexual Harassment Occurring in a School’s “Education Program or Activity” and “in the United States”

The Title IX statute applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance. Under the Final Rule, schools must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States.

- The Title IX statute and existing regulations contain broad definitions of a school’s “program or activity” and the Department will continue to look to these definitions for the scope of a school’s education program or activity.
- Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).
- Title IX applies to all of a school’s education programs or activities, whether such programs or activities occur on-campus or off-campus. A school may address sexual harassment affecting its students or employees that falls outside Title IX’s jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.

### 4. Accessible Reporting to Title IX Coordinator

The Final Rule expands a school’s obligations to ensure its educational community knows how to report to the Title IX Coordinator.

- The employee designated by a recipient to coordinate its efforts to comply with Title IX responsibilities must be referred to as the “Title IX Coordinator.”
- Instead of notifying only students and employees of the Title IX Coordinator’s contact information, the school must also notify applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and all unions, of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator.
- Schools must prominently display on their websites the required contact information for the Title IX Coordinator.
- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.
- Such a report may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

### 5. School’s Mandatory Response Obligations: The Deliberate Indifference Standard

Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means a response that is not clearly unreasonable in light of the known circumstances. Schools have the following mandatory response obligations:

- Schools must offer supportive measures to the person alleged to be the victim (referred to as the “complainant”).
**Summary of Major Provisions of the Department of Education’s Title IX Final Rule**

- The Title IX Coordinator must promptly contact the complainant confidentially to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

- Schools must follow a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent.

- Schools must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX.

- The Final Rule requires a school to investigate sexual harassment allegations in any formal complaint, which can be filed by a complainant, or signed by a Title IX Coordinator.

- The Final Rule affirms that a complainant’s wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.

- If the allegations in a formal complaint do not meet the definition of sexual harassment in the Final Rule, or did not occur in the school’s education program or activity against a person in the United States, the Final Rule clarifies that the school must dismiss such allegations for purposes of Title IX but may still address the allegations in any manner the school deems appropriate under the school’s own code of conduct.

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**6. School’s Mandatory Response Obligations:**

- **Defining “Complainant,” “Respondent,” “Formal Complaint,” “Supportive Measures”**

  When responding to sexual harassment (e.g., by offering supportive measures to a complainant and refraining from disciplining a respondent without following a Title IX grievance process, which includes investigating formal complaints of sexual harassment), the Final Rule provides clear definitions of complainant, respondent, formal complaint, and supportive measures so that recipients, students, and employees clearly understand how a school must respond to sexual harassment incidents in a way that supports the alleged victim and treats both parties fairly.

  The Final Rule defines “complainant” as an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

  - This clarifies that any third party as well as the complainant may report sexual harassment.

  - While parents and guardians do not become complainants (or respondents), the Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters.

  The Final Rule defines “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
The Final Rule defines “formal complaint” as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment and states:
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.
- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method designated by the school.
- The phrase “document filed by a complainant” means a document or electronic submission (such as by e-mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
- Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or a party during a grievance process, and must comply with requirements for Title IX personnel to be free from conflicts and bias.

The Final Rule defines “supportive measures” as individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.
- The Final Rule evaluates a school’s selection of supportive measures and remedies based on what is not clearly unreasonable in light of the known circumstances, and does not second guess a school’s disciplinary decisions, but requires the school to offer supportive measures, and provide remedies to a complainant whenever a respondent is found responsible.

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<tr>
<th>7. Grievance Process, General Requirements</th>
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<td>The Final Rule prescribes a consistent, transparent grievance process for resolving formal complaints of sexual harassment. Aside from hearings (see Issue #9 below), the grievance process prescribed by the Final Rule applies to all schools equally including K-12 schools and postsecondary institutions. The Final Rule states that a school’s grievance process must:</td>
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<td>- Treat complainants equitably by providing remedies any time a respondent is found responsible, and treat respondents equitably by not imposing disciplinary sanctions without following the grievance process prescribed in the Final Rule.</td>
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<td>- Remedies, which are required to be provided to a complainant when a respondent is found responsible, must be designed to maintain the complainant’s equal access to education and may include the same individualized services described in the Final Rule as supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.</td>
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<tr>
<td>- Require objective evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person’s status as a complainant, respondent, or witness.</td>
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Summary of Major Provisions of the Department of Education’s Title IX Final Rule

- Require Title IX personnel (Title IX Coordinators, investigators, decision-makers, people who facilitate any informal resolution process) to be free from conflicts of interest or bias for or against complainants or respondents.
- Training of Title IX personnel must include training on the definition of sexual harassment in the Final Rule, the scope of the school’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- A school must ensure that decision-makers receive training on any technology to be used at a live hearing.
- A school’s decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants.
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Recipients must post materials used to train Title IX personnel on their websites, if any, or make materials available for members of the public to inspect.
- Include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frames.
- Describe the range, or list, the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility.
- State whether the school has chosen to use the preponderance of the evidence standard, or the clear and convincing evidence standard, for all formal complaints of sexual harassment (including where employees and faculty are respondents).
- Describe the school’s appeal procedures, and the range of supportive measures available to complainants and respondents.
- A school’s grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- Any provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complaints of sexual harassment, must apply equally to both parties.
| **8. Investigations** | The Final Rule states that the school must investigate the allegations in any formal complaint and send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint. During the grievance process and when investigating:
- The burden of gathering evidence and burden of proof must remain on schools, not on the parties.
- Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no “gag orders”).
- Parties must have the same opportunity to select an advisor of the party’s choice who may be, but need not be, an attorney.
- Schools must send written notice of any investigative interviews, meetings, or hearings.
- Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence.
- Schools must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond.
- Schools must dismiss allegations of conduct that do not meet the Final Rule’s definition of sexual harassment or did not occur in a school’s education program or activity against a person in the U.S. Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate.
- Schools may, in their discretion, dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled or employed by the school, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination.
- Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal.
- Schools may, in their discretion, consolidate formal complaints where the allegations arise out of the same facts.
- The Final Rule protects the privacy of a party’s medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party’s voluntary, written consent to do so. |
| **9. Hearings:** | The Final Rule adds provisions to the “live hearing with cross-examination” requirement for postsecondary institutions and clarifies that hearings are optional for K-12 schools (and any other recipient that is not a postsecondary institution). |
### Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<table>
<thead>
<tr>
<th>(a) Live Hearings &amp; Cross-Examination (for Postsecondary Institutions)</th>
<th>(a) For postsecondary institutions, the school’s grievance process must provide for a live hearing:</th>
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<tr>
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<td>- At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.</td>
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<td>- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally.</td>
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<td>- At the request of either party, the recipient must provide for the entire live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other.</td>
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<td>- Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the party’s advisor asking cross-examination questions any decision to exclude a question as not relevant.</td>
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<td>- If a party does not have an advisor present at the live hearing, the school must provide, without fee or charge to that party, an advisor of the school’s choice who may be, but is not required to be, an attorney to conduct cross-examination on behalf of that party.</td>
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<td>- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.</td>
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<td>- Live hearings may be conducted with all parties physically present in the same geographic location or, at the school’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually.</td>
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<td>- Schools must create an audio or audiovisual recording, or transcript, of any live hearing.</td>
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<td>(b) Hearings are Optional, Written Questions Required (for K-12 Schools)</td>
<td>(b) For recipients that are K-12 schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a hearing:</td>
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<td>- With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.</td>
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<tr>
<td>(c) Rape Shield Protections for Complainants</td>
<td>(c) The Final Rule provides rape shield protections for complainants (as to all recipients whether postsecondary institutions, K-12 schools, or others), deeming irrelevant questions and evidence about a complainant’s prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.</td>
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</tbody>
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### 10. Standard of Evidence & Written Determination

The Final Rule requires the school’s grievance process to state whether the standard of evidence to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard. The Final Rule makes each school’s grievance process consistent by requiring each school to apply the same standard of evidence for all formal complaints of sexual harassment whether the respondent is a student or an employee (including faculty member).

- The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant.
- The written determination must be sent simultaneously to the parties along with information about how to file an appeal.

### 11. Appeals

The Final Rule states that a school must offer both parties an appeal from a determination regarding responsibility, and from a school’s dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity that affected the outcome of the matter, newly discovered evidence that could affect the outcome of the matter, and/or Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter.

- A school may offer an appeal equally to both parties on additional bases.

### 12. Informal Resolution

The Final Rule allows a school, in its discretion, to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal resolution. Any person who facilitates an informal resolution must be well trained. The Final Rule adds:

- A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment. Similarly, a school may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed.
- At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.
- Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.
## Summary of Major Provisions of the Department of Education’s Title IX Final Rule

- Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.  
- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.  
- Complaints alleging retaliation may be filed according to a school’s prompt and equitable grievance procedures.  
- The exercise of rights protected under the First Amendment does not constitute retaliation.  
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement. |
### Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<table>
<thead>
<tr>
<th>Issue</th>
<th>Provisions in Final Rule</th>
<th>Provisions in NPRM</th>
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</thead>
<tbody>
<tr>
<td>1. Notice to Schools, Colleges, Universities, and other Recipients of Federal Funds (&quot;Schools&quot;); Actual Knowledge</td>
<td>Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a school’s Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the school, or to any employee of an elementary and secondary school. Note: &quot;Notice&quot; includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in the Final Rule.</td>
<td>Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a school’s Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the school, or to a teacher in the elementary and secondary context with regard to student-on-student harassment.</td>
</tr>
<tr>
<td>2. Definition of Sexual Harassment for Title IX Purposes</td>
<td>Sexual harassment means <strong>conduct on the basis of sex that satisfies one or more of the following:</strong> (i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., <em>quid pro quo</em>); or (ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or (iii) Sexual assault (as defined in the Clery Act), <strong>dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).</strong></td>
<td>Sexual harassment means: (i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., <em>quid pro quo</em>); or (ii) Unwelcome conduct <strong>on the basis of sex,</strong> that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or (iii) Sexual assault (as defined in the Clery Act regulations).</td>
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### Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

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<th>3. Sexual Harassment Occurring in a School’s “Education Program or Activity” and “in the United States”</th>
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<th>School must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States.</th>
</tr>
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</table>
| 4. Accessible Reporting to Title IX Coordinator; Adoption & Publication of Title IX Procedures | The Final Rule expands a school’s obligations to ensure its educational community knows how to report to the Title IX Coordinator by stating:  
- Each school must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities, **which employee must be referred to as the “Title IX Coordinator.”**  
- The school must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator.  
- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. | The NPRM stated:  
- Each school must designate at least one employee to coordinate its efforts to comply with its Title IX responsibilities.  
- The school must notify all its students and employees of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated pursuant to this paragraph. |
Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

| 5. School’s Mandatory Response Obligations: | A school must respond **promptly** to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances. A school’s mandatory response must include:

- **Offering supportive measures to the complainant** (i.e., the person alleged to be the victim).
- **The Title IX Coordinator promptly contacting the complainant to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.**
- **Following a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent.**
- **Must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, as a way of responding in a non-deliberately indifferent manner.**

|  | A school must respond to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances.

The NPRM offered postsecondary institutions a “safe harbor” against a finding of deliberate indifference where, in the absence of a formal complaint, a postsecondary institution implemented supportive measures for the complainant. **This “safe harbor” has been removed in the Final Rule.** The Final Rule requires all schools to offer supportive measures to every complainant, eliminating the need to incentivize supportive measures through a safe harbor.
6. **School’s Mandatory Response Obligations:**

**Investigating a Formal Complaint**

The Final Rule requires schools to investigate formal complaints of sexual harassment and does not offer schools any safe harbors against the Department finding that a school responded deliberately indifferently or otherwise in a manner that constitutes sex discrimination or violates Title IX or Title IX regulations. In response to a formal complaint, a recipient must follow a grievance process that complies with the Final Rule. With or without a formal complaint, a recipient must comply with all the mandatory response obligations described in Issue #5 above.

The NPRM required schools to investigate and adjudicate formal complaints of sexual harassment consistent with the grievance procedures described in § 106.45.

- The NPRM offered schools a “safe harbor” against a finding of deliberate indifference (or other finding that the school committed sex discrimination) if schools followed procedures consistent with § 106.45 in response to a formal complaint. This “safe harbor” has been removed in the Final Rule.

- The NPRM required a school’s Title IX Coordinator to file a formal complaint any time the school had notice of multiple reports of sexual harassment against a particular respondent (and then offered a “safe harbor” for following procedures consistent with § 106.45). This mandate for the Title IX Coordinator to file a formal complaint, and corresponding “safe harbor,” have been removed in the Final Rule.
### Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<table>
<thead>
<tr>
<th>7. School’s Mandatory Response Obligations: Defining “Complainant,” “Respondent,” “Formal Complaint” and “Supportive Measures”</th>
<th>When responding to sexual harassment (e.g., by offering supportive measures to a complainant, refraining from disciplining a respondent without following a Title IX grievance process, or investigating formal complaints of sexual harassment), the Final Rule clarifies the definitions of complainant, respondent, and formal complaint so that schools, students, and employees clearly understand how a school must respond to sexual harassment incidents in a way that supports the alleged victim and treats both parties fairly.</th>
<th>The NPRM defined complainant, respondent, formal complaint, and supportive measures as follows:</th>
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<tbody>
<tr>
<td>“Complainant”</td>
<td>The Final Rule defines “complainant” as an individual who is alleged to be the victim of conduct that could constitute sexual harassment.</td>
<td>The NPRM defined “complainant” as an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint. For purposes of this definition, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the school’s actual knowledge.</td>
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<tr>
<td>“Respondent”</td>
<td>The Final Rule defines “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</td>
<td>The NPRM defined “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</td>
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<td>“Formal Complaint”</td>
<td>The Final Rule defines “formal complaint” as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.</td>
<td>The NPRM defined “formal complaint” as a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the school’s grievance procedures consistent with § 106.45.</td>
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Page 5 of 12
### Supportive Measures

<table>
<thead>
<tr>
<th>“Supportive Measures”</th>
<th>The Final Rule retains the NPRM’s definition of “supportive measures” but clarifies that the purpose of supportive measures is equal access to education.</th>
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<tbody>
<tr>
<td>- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method the school designates.</td>
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<td>- The phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.</td>
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<td>- Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during a grievance process, and must comply with requirements for all Title IX personnel to be free from conflicts and bias.</td>
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<td>The NPRM defined “supportive measures” to mean:</td>
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<td>- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge, to the complainant or respondent, before or after the filing of a formal complaint or where no formal complaint has been filed.</td>
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<td>- Such measures are designed to restore or preserve access to the recipient’s education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient’s educational environment; and deter sexual harassment.</td>
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<td>- Supportive measures may include counseling, course-related adjustments, modifications of work or class schedules, campus escort services, increased security and monitoring of certain areas of campus, and mutual restrictions on contact between the parties.</td>
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<td>filed, so that the school and complainant clearly understand when a complainant desires the school to investigate sexual harassment allegations, and complainants (including parents and guardians, as applicable) have accessible options for filing a formal complaint.</td>
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</table>
Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

| 8. Investigations | Similarly to the NPRM, the Final Rule states that the school must investigate the allegations in any formal complaint, send written notice to both parties of the allegations upon receipt of a formal complaint. The Final Rule adds the following privacy protection for parties during a Title IX sexual harassment investigation: - The Final Rule states that the school cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school obtains that party’s voluntary, written consent to do so. | The NPRM required school to investigate the allegations in a formal complaint, send written notice of the allegations to both parties upon receipt of a formal complaint, and investigate under specified procedures. The Final Rule retains those required procedures and adds protection against using a party’s treatment records during a grievance process. |
| 9. Hearings: | The Final Rule adds provisions to the “live hearing with cross-examination” requirement for postsecondary institutions, and clarifies that hearings are optional for K-12 schools (and any other recipient that is not a postsecondary institution). | Under the NPRM, adjudication of formal complaints differed for postsecondary institution recipients, and K-12 schools. The Final Rule retains this approach with clarifications. |
| (a) Live Hearings & Cross-Examination (for Postsecondary recipients) | (a) For postsecondary institution recipients, the school’s grievance process must provide for a live hearing: - At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the | (a) For institutions of higher education the school’s grievance procedure must provide for a live hearing: - At the hearing the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. - Such cross-examination must be conducted by the party’s advisor of choice; if a party does not have an advisor present at the hearing, the school must provide that party |
Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party answering questions.
- Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the school’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

The Final Rule removes the “aligned with that party” language. If a school must provide a party with an advisor, such a provided advisor need not be an attorney providing legal representation to the party. No training or qualification is necessary for a person to serve as a provided advisor. Parties retain the opportunity to select their own advisor of choice. If a party does not exercise that opportunity then the school must provide an advisor of the school’s own choosing, to that party, merely for the purpose of relaying the party’s cross-examination questions to the other party and witnesses so that a party never personally conducts cross-examination.

- If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.
- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the school’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with

an advisor aligned with that party to conduct cross-examination.

- At the request of either party the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.

- If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

| (b) Hearings are Optional, Written Questions Required (for K-12 schools) | technology enabling participants simultaneously to see and hear each other.  
- Schools must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.  
(b) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the school’s grievance process may, but need not, provide for a hearing:  
- With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.  
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude questions as not relevant.  
(c) The Final Rule keeps the rape shield protections for complainants (as to all recipients whether postsecondary, K-12 or others), clarified to state: Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the | (b) For recipients that are elementary and secondary schools the school’s grievance procedure may require a live hearing:  
- With or without a hearing, the decision-maker must, after the school has incorporated the parties’ responses to the investigative report, ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witness. If no hearing is held, the decision-maker must afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions.  
- The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant.  
(c) The NPRM provided rape shield protections for complainants in postsecondary institutions and K-12:  
All questioning must exclude evidence of the complainant’s sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant’s |
### 10. Standard of Evidence

The Final Rule requires the school’s grievance process to state whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty.

- The Final Rule removes the NPRM’s restriction on use of the preponderance of the evidence standard.

The NPRM proposed that to reach the determination regarding responsibility, the decision-maker must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the school uses that standard for conduct of code violations that do not involve sexual harassment but carry the same maximum sanction.

### 11. Appeals

The Final Rule states that a school must offer both parties an appeal from a determination regarding responsibility, and from a school’s dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity that affected the outcome of the matter; new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter.

- A school may offer an appeal equally to both parties on additional bases.

The NPRM provided that a school may choose to offer an appeal:
- If a school offers an appeal, it must allow both parties to appeal.
- Although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant’s access to the school’s education program or activity, a complainant is not entitled to a particular sanction against the respondent.

- The Final Rule removes the NPRM’s restriction on complainants appealing the severity of sanctions.

### 12. Informal Resolution

The Final Rule retains a school’s discretion to choose to offer informal resolution options, if both parties give voluntary, informed, written consent. The Final Rule adds:

- A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints.

The NPRM allowed schools to choose to offer informal resolution options, only with the voluntary, informed, written consent of all parties.
### Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<table>
<thead>
<tr>
<th>Provision</th>
<th>Description</th>
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<tr>
<td>- A school may not require the parties to participate in informal resolution and may not offer informal resolution unless a formal complaint is filed.</td>
<td>- At any time prior to agreeing to a resolution, any party has the right to withdraw from informal resolution and resume the grievance process with respect to the formal complaint.</td>
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<tr>
<td>- Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.</td>
<td>- The Final Rule expressly prohibits retaliation against any individual for exercising Title IX rights:</td>
</tr>
<tr>
<td>13. Retaliation Prohibited</td>
<td>- No school or 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 a Title IX investigation, proceeding, or hearing.</td>
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<td>- 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, constitutes retaliation.</td>
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<td>- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, or as required by law, or as necessary to carry out a Title IX proceeding.</td>
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<td>- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination that schools must adopt and publish.</td>
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</table>
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation; provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.