NEW TITLE IX REGULATIONS: NUTS & BOLTS FOR IMPLEMENTATION

September 2, 2021

Presented by:

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School and College Legal Services (SCLS) is a joint powers authority serving school districts, county offices of education, SELPAs, and community colleges in over fifteen counties in Northern California. Our primary focus, as a preventative law firm, is helping clients avoid future costly legal problems. We are a collaborative office, working to ensure our clients receive the most legally defensible advice in the most efficient manner possible.
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New Title IX Regulations: Nuts & Bolts for Implementation

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School & College Legal Services of California

I. Brief Overview of Title IX
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 TIX 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
• OCR July 2021 Q&A on the Title IX Regulations on Sexual Harassment

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
• President Biden’s January 20, 2021 Executive Order clarifies that Title IX prohibits discrimination on the basis of sexual orientation or gender identity (as does California law)
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, “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.”
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;

Appeals Process, Cont’d.

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. Ensure sexual harassment policy and regulation/procedure has been revised 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; ensure Coordinator information is posted on website
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
Questions?

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

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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.\(^\text{13}\)

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

**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\(^\text{15}\)**

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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\(^\text{13}\) 34 CFR § 106.30  
\(^\text{14}\) 34 CFR § 106.45  
\(^\text{15}\) 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**

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.

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\textsuperscript{30}

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

\textbf{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\textsuperscript{31}

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

\textbf{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\textsuperscript{32}

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

\textbf{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.

\textit{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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\textsuperscript{30} 34 CFR § 106.45(b)(10)(i)(D)
\textsuperscript{31} 34 CFR § 106.3
\textsuperscript{32} 34 CFR § 106.6(g)
May 20, 2020

To: Superintendents/Presidents/Chancellors, Member Community College Districts

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. 18-2020(CC)

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

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,

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.\(^{16}\) 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**\(^{17}\)

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**\(^{18}\)

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 complaints of sexual harassment.

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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**[^29]

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.

[^29]: 34 CFR § 106.45(b)(10)
TRAINING MATERIALS PUBLICATION REQUIREMENT 30

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 31

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 32

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.

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)
[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 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,

[NAME]

[TITLE]

Enclosures: [AMEND AS NECESSARY]

- Board Policy [_____] (Sexual Harassment)
- Administrative Regulation [_____] (Sexual Harassment)
- Board Policy [_____] (Nondiscrimination/Harassment)
- Administrative Regulation [_____] (Nondiscrimination/Harassment)
[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.
**AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE**

**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 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
[COMPLAINANT]
[ADDRESS]
[ADDRESS]

Via U.S.P.S. 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 [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:

**INITIAL LETTER TO COMPLAINANT (CCD)**

**AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE**

**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 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
**NOTICE OF ALLEGATIONS IN FORMAL COMPLAINT TO RESPONDENT (CCD)**

**AMEND BASED ON ALLEGATIONS AND COMPLAINT PROCEDURE**

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
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.
SUMMARY OF ALLEGATIONS, FINDINGS, & CONCLUSIONS

Allegation No. 1

Finding No. 1

Conclusion of Law

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]
[LETTER TO RESPONDENT RE: DETERMINATION REGARDING RESPONSIBILITY (K-12)]

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.
[ADMINISTRATIVE DETERMINATION REGARDING RESPONSIBILITY TO COMPLAINANT (CCD)]

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
CONFIDENTIAL

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

[RESPONDENT]
[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 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]
SAMPLE POLICY REVISION ITEMS FOR
COMMUNITY COLLEGE DISTRICTS

2020 Title IX Amendments as they apply to CCD’s Sexual Harassment/Sexual Violence Policy

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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 \textit{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
5. Decision
6. Appeal
7. No Formal Complaint
   - Investigate pursuant to Code of Conduct, as applicable
CCD Title IX Flowchart

Actual Knowledge

Title IX Coordinator
Contact Complainant

Formal Complaint

- Dismissal
- Informal Resolution
- Investigation
  - Live Hearing
  - Decision

No Formal Complaint

Investigate pursuant to Code of Conduct, as applicable

Appeal
February 12, 2021

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

From: Monica D. Batanero, Senior Associate General Counsel

Subject: Executive Order Clarifies that Title IX Prohibits Discrimination on the Basis of Gender Identity or Sexual Orientation

Memo No. 04-2021

On January 20, 2021, President Biden issued an executive order addressing last year’s U.S. Supreme Court decision, which held that Title VII prohibited employers from discriminating on the basis of sexual orientation and gender identity. The Bostock decision did not explicitly state that the legal reasoning applied under Title IX as well. As you may know, Title IX is a federal law that prohibits educational institutions that receive federal funds from discriminating on the basis of sex. Under the previous administration, the Department of Education ultimately took the position that it would not apply the reasoning of Bostock in the Title IX context.

Under the Biden Administration, the executive order made the issue much clearer, stating that under Bostock’s reasoning, Title IX and its implementing regulations prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.

The executive order further instructs federal agencies administering statutes or regulations that prohibit sex discrimination, such as the Department of Education, to consider in the next 100 days whether new guidance documents need to be issued or regulations need to be revised to comply with this new order.


This executive order further states that “children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports.” Therefore, it is anticipated that the Department of Education will be issuing guidance in line with guidance previously issued by the Obama Administration, which stated that students have the right to participate in athletics and sex-segregated activities and facilities consistent with their gender identity.

It is important to note that California law currently prevents gender discrimination. California Education Code section 220 states that “No person shall be subjected to discrimination on the basis…gender, gender identity, gender expression…in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.”

In addition, California law already explicitly prohibits local educational agencies from discriminating against students by prohibiting them from participating in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with their gender identity. Therefore, this executive order, practically speaking, does not and should not affect the protections under state law already afforded to students based on their gender identity and sexual orientation, but it does clarify that investigations be conducted in accord with Title IX processes for such complaints.

This office will keep you updated on any subsequent guidance issued as a result of this executive order.

Please contact our office with questions regarding this Legal Update or any other legal matter.
Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)
Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

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Ensuring equal access to education for all students—from pre-K through elementary and secondary schools and postsecondary institutions—is at the heart of the mission of the U.S. Department of Education’s Office for Civil Rights. This includes protecting rights of students and others to an educational environment free from discrimination based on sex, including discrimination in the form of sexual harassment and discrimination based on sexual orientation or gender identity, as guaranteed by Title IX of the Education Amendments of 1972.

This question-and-answer resource describes OCR’s interpretation of schools’ responsibilities under Title IX, and the Department’s current implementing regulations related to sexual harassment, as enforced by OCR. The focus here is on questions related to the most recent amendments to the regulations in 2020 (the 2020 amendments). The Department is undertaking a comprehensive review of its current Title IX regulations as amended in 2020, following President Biden’s Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity. While this review is ongoing and until any new regulations go into effect, the 2020 amendments remain in effect.

This Q&A does not address policies or procedures under Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment. As the 2020 amendments state: “Nothing in [these regulations] 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.” 34 C.F.R. § 106.6(f).

For additional information about Title IX, please also see OCR’s Title IX and Sex Discrimination Webpage and OCR’s Sex Discrimination FAQ Webpage. You can find the Department’s Title IX regulations, including the 2020 amendments, at 34 C.F.R. Part 106.

This Q&A has 17 sections and provides information on a variety of topics covered by the 2020 amendments, including the definition of sexual harassment, how a school can obtain notice of sexual harassment, a school’s response to allegations of sexual harassment, and how a school must process formal complaints of sexual harassment, including live hearings and cross-examination.

Preamble references: Please note that where appropriate, this Q&A refers to the preamble to the 2020 amendments, which clarifies OCR’s interpretation of Title IX and the regulations. You can find citations to specific preamble sections in the endnotes of this Q&A. The preamble itself does not have the force and effect of law.
➢ Q&A Appendix: OCR provides an appendix to accompany this Q&A, with examples of policy provisions from various schools. These examples may be helpful as schools continue their work to implement the requirements of the 2020 amendments.

Who can file a discrimination complaint – and how to file: Anyone can file a complaint with OCR, including students, parents and guardians, community members, and others who experience or observe discrimination in education programs or activities. To file a complaint, please use this online form. For more information, see How to File a Discrimination Complaint with the Office for Civil Rights and this short video on How to File a Complaint with the Office for Civil Rights.

Additional questions? Please note that this Q&A addresses many important issues but is not comprehensive. We recognize that you might have additional questions and invite you to send them to OCR at ocr@ed.gov.

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A mini-glossary for this Q&A:

This Q&A is geared towards recipients of federal financial assistance that are educational institutions and uses the term “schools” to refer to all such recipients, including school districts, colleges, and universities. It also includes several terms that are commonly used in Title IX grievance processes for formal complaints of sexual harassment. Here is information about what those terms mean in this document:

Allegation: An assertion that someone has engaged in sexual harassment.

Complainant: The person who has experienced the alleged sexual harassment. This person is considered a complainant regardless of whether they choose to file a formal complaint of sexual harassment under Title IX.
Respondent: The person accused of the alleged sexual harassment.

Reporter: The person who reports sexual harassment to the school. This may be the complainant but may also be someone else (also known as a “third party” reporter).

Title IX grievance process: This is the formal name used in the Title IX regulations for a school’s process for addressing formal complaints of sexual harassment under Title IX.

Actual knowledge: When a school receives notice of alleged misconduct that meets the definition of “sexual harassment” under the Title IX regulations, as described below, the school has “actual knowledge” and must respond appropriately. Additional information regarding how schools receive notice and have “actual knowledge” is discussed in Question 14.

I. General Obligations

Question 1: What did the 2020 amendments change about the Department’s Title IX regulations?

Answer 1: The Department’s Title IX regulations were first issued in 1975, reissued in 1980, and then amended after that, including in 2006 and 2020. Prior to 2020, the regulations set out requirements under Title IX for educational programs and activities that receive federal financial aid, but they did not include specific requirements related to sexual harassment. Instead, OCR had several guidance documents in place to assist schools in understanding how OCR interpreted the Department’s Title IX regulations. The 2020 amendments added specific, legally binding steps that schools must take in response to notice of alleged sexual harassment.

Question 2: Is a school permitted to take steps in response to reports of sexual harassment that go beyond those set out in the 2020 amendments?

Answer 2: Yes. The 2020 amendments set out the minimum steps that a school must take in response to notice of alleged sexual harassment. A school may take additional actions so long as those actions do not conflict with Title IX or the 2020 amendments. The preamble provides this additional guidance:

A school “remain[s] free to adopt best practices for supporting survivors and standards of competence for conducting impartial grievance processes, while meeting obligations imposed under the [2020 amendments].”²
Question 3: What does the Department expect from schools regarding prevention of sexual harassment?

Answer 3: The 2020 amendments focus on “setting forth requirements for [schools’] responses to sexual harassment.” However, the preamble also says that “the Department agrees with commenters that educators, experts, students, and employees should also endeavor to prevent sexual harassment from occurring in the first place.” OCR encourages schools to undertake prevention efforts that best serve the needs, values, and environment of their own educational communities.

Question 4: Are there any differences in the 2020 amendments’ requirements for elementary and secondary schools and postsecondary schools?

Answer 4: Yes. Although the 2020 amendments have many of the same requirements for elementary and secondary and postsecondary schools, there are two requirements that differ – notice and live hearings.

- Notice: Any time an elementary or secondary school employee has notice that sexual harassment might have occurred, the school must respond. Notice requirements are more limited for postsecondary school employees. See Section V for more information on notice requirements.

- Live hearing: Only postsecondary schools are required to provide for a live hearing with the opportunity for cross-examination to be conducted by each party’s advisor of choice. For more information on live hearings and cross-examination, see Section XII.

II. Definition of Sexual Harassment

Question 5: What is the definition of sexual harassment in the 2020 amendments?

Answer 5: The 2020 amendments define sexual harassment to include certain types of unwelcome sexual conduct, sexual assault, dating violence, domestic violence, and stalking. Here is the full definition in the regulations:

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

(1) An employee of the [school] 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 school’s education program or activity; or

For additional information, please see 34 C.F.R. § 106.30.

When unwelcome conduct on the basis of sex meets one or more of these three categories, the conduct is considered to be sexual harassment under the 2020 amendments. Here is some additional information about each category:

- The first category is commonly referred to as “quid pro quo” sexual harassment, meaning that a school employee offers something to an individual in exchange for sexual conduct.

- The second category incorporates the definition of sexual harassment set out by the Supreme Court in a case about when a school may be required to pay financial compensation in a lawsuit for sexual harassment by one student toward another student. The case is *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

- The third category refers to definitions in the Clery Act and the Violence Against Women Act (VAWA). The Clery Act is a federal law that requires colleges and universities that participate in the federal student financial aid programs to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies. VAWA is a federal law administered by the U.S. Departments of Justice (DOJ) and Health and Human Services (HHS) that supports comprehensive responses to domestic violence, sexual assault, dating violence, and stalking.

**Definitions under the Clery Act:** The Clery Act defines sexual assault as a forcible or nonforcible offense under the uniform crime reporting system of the Federal Bureau of Investigation. This system includes the National Incident-Based Reporting System (NIBRS), which defines forcible sex offenses to include any sexual act, including rape, sodomy, sexual assault with an object, or fondling “directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.” Please see Question 6 explaining that the 2020 amendments do not require schools to use a particular definition of consent. NIBRS also includes incest and statutory rape as “nonforcible” sex offenses. Conduct that fits within any of these definitions under NIBRS is considered a type of sexual harassment in the 2020 amendments.

**Definitions under VAWA:** The 2020 amendments refer to the following definitions of dating violence, domestic violence, and stalking in VAWA:

- Dating violence includes violence committed by a person who has been in a social relationship of a romantic or intimate nature with the complainant; the existence
of such a relationship shall be determined based on consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.\textsuperscript{7}

- Domestic violence includes felony or misdemeanor crimes of violence committed by: a current or former spouse or intimate partner of the complainant, a person with whom the complainant shares a child, a person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner, a person similarly situated to a spouse of the complainant under the jurisdiction’s domestic or family violence laws, or any other person against a complainant who is protected under the domestic or family violence laws of the jurisdiction.\textsuperscript{8}

- Stalking is defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their own safety or the safety of others or to suffer substantial emotional distress.\textsuperscript{9} The 2020 amendments cover instances of stalking based on sex—including stalking that occurs online or through messaging platforms, commonly known as cyber-stalking—when it occurs in the school’s education program or activity.\textsuperscript{10}

**Question 6:** Do schools need to adopt a particular definition of consent for determining whether conduct is “unwelcome” under the definition of sexual harassment in the 2020 amendments?

**Answer 6:** No. The preamble states that the Department will not require a school to adopt a particular definition of consent.\textsuperscript{11} The preamble explains that a school has the flexibility to choose a definition of consent that “best serves the unique needs, values, and environment of the [school’s] own educational community.”\textsuperscript{12}

**Question 7:** May a school respond to alleged sexual misconduct that does not meet the definition of sexual harassment in the 2020 amendments?

**Answer 7:** Yes. The preamble makes clear that “Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students.”\textsuperscript{13} A school has discretion to respond appropriately to reports of sexual misconduct that do not fit within the scope of conduct covered by the Title IX grievance process.\textsuperscript{14} This may include, for example, reported sexual misconduct that a) occurs outside of a school’s education program or activity; b) occurs outside of the United States; or c) causes harm in the school environment that does not fit within the definition set out above in Question 5.\textsuperscript{15}

The preamble also says that “nothing in the final regulations precludes [a school] from vigorously addressing misconduct (sexual or otherwise) that occurs outside the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma.”\textsuperscript{16}
Put simply, Title IX’s sexual harassment regulation need not replace a school’s more expansive code of conduct and does not prohibit a school from enforcing that code to address misconduct that does not constitute sexual harassment under the 2020 amendments. OCR encourages schools to develop and enforce their codes as an additional tool for ensuring safe and supportive educational environments for all students. OCR does not enforce school codes of conduct but may investigate complaints that a school’s code of conduct treated students differently based on sex, including sexual orientation or gender identity.\textsuperscript{17}

For examples of school codes that address sexual misconduct not covered by Title IX, please see Q&A Appendix Section XVI.

**Question 8:** How can a school determine whether sexual harassment “effectively denies a person’s right to equal access to its education program or activity” under the “unwelcome conduct” category in the definition of sexual harassment in the 2020 amendments? (See the definition in Question 5.)

**Answer 8:** The preamble explains that to determine whether a person has been effectively denied equal access to a school’s education program or activity, a school must evaluate “whether a reasonable person in the complainant’s position would be effectively denied equal access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.”\textsuperscript{18}

The preamble provides this additional guidance to schools:

- An effective denial of equal access to educational opportunities may include skipping class to avoid a harasser, a decline in a student’s grade point average, or having difficulty concentrating in class.\textsuperscript{19}

- Examples of specific situations that likely constitute effective denial of equal access to educational opportunities also include “a third grader who starts bed-wetting or crying at night due to sexual harassment, or a high school wrestler who quits the team but carries on with other school activities following sexual harassment.”\textsuperscript{20}

- A complainant does not need to have “already suffered loss of education before being able to report sexual harassment.”\textsuperscript{21}

- Effective denial of equal access to education does not require “that a person’s total or entire educational access has been denied.”\textsuperscript{22}

- While these examples help illustrate an effective denial of access, “[n]o concrete injury is required” to prove an effective denial of equal access.\textsuperscript{23}
Complainants do not need to have “dropped out of school, failed a class, had a panic attack, or otherwise reached a ‘breaking point’” or exhibited specific trauma symptoms to be effectively denied equal access.24

“School officials turning away a complainant by deciding the complainant was ‘not traumatized enough’ would be impermissible.”25

Schools may wish to include these and other examples in their internal policies, training, and communications to students and employees to help illustrate this concept.

III. Where Sexual Harassment Occurs

Question 9: Which settings are covered by the 2020 amendments?

Answer 9: The 2020 amendments apply to reports of sexual harassment in education programs and activities in the United States, including in the following settings:

1. Buildings or other locations that are part of the school’s operations, including remote learning platforms;

2. Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred (e.g., a school field trip to a museum); and

3. Off-campus buildings owned or controlled by a student organization officially recognized by a postsecondary school, such as a building owned by a recognized fraternity or sorority.26

For additional information, please see 34 C.F.R. § 106.44(a). For more information on how a school can determine whether it has substantial control over the respondent and context in an off-campus setting, see Question 10.

The 2020 amendments require that schools provide training to their Title IX personnel to “accurately identify situations that require a response under Title IX.”27 OCR also encourages schools to include examples of their programs and activities in each of the three areas described above in their policies, staff training, and student-oriented communications.

Please note that sexual harassment that takes place in settings outside of the United States is not covered under the 2020 amendments.28

Schools should also note that, under the 2020 amendments, a school may still offer “supportive measures to a complainant who reports sexual harassment that occurred outside the [school’s] education program or activity, and any sexual harassment that does occur in an education program or activity must be responded to even if it related to, or happens subsequent to, sexual harassment that occurred outside the education program or activity.”29
Question 10: How should a school determine whether it has substantial control over the respondent and context in an off-campus setting?

Answer 10: The school must make a fact-specific determination. The preamble says that it “may be helpful or useful for a [school] to consider factors applied by Federal courts to determine the scope of a [school’s] education program or activity”—such as “whether the [school] funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred”—but also that “no single factor is determinative” in concluding whether the school has substantial control over the respondent and the context in which the reported harassment occurred.\(^\text{30}\)

In making this fact-specific determination, the preamble also says:

A school “must consider whether, for example, a sexual harassment incident between two students that occurs in an off-campus apartment” or house is a “situation over which the [school] exercised substantial control [and], if so, the [school] must respond [to notice] of sexual harassment or allegations of sexual harassment that occurred there.”\(^\text{31}\)

If an incident of sexual harassment between two students in a private hotel room occurs in a context related to a school-sponsored activity, such as a school field trip or travel with a school athletics team, the school would need to consider whether it exercised substantial control over the context in which the sexual harassment occurred.\(^\text{32}\)

The preamble adds that a school may have substantial control over an incident that occurred in a student’s home, such as where “a teacher employed by a school visits a student’s home ostensibly to give the student a book but in reality to instigate sexual activity with the student.”\(^\text{33}\)

Question 11: How do the 2020 amendments apply to alleged sexual harassment that takes place electronically or on an online platform used by the school?

Answer 11: In discussing Title IX and online platforms used by a school, the preamble provides this guidance to schools:

- The operations of a school “may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the [school].”\(^\text{34}\)

- “[T]he factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity.”\(^\text{35}\)

The preamble adds that the definition of “education program or activity” in the 2020 amendments “does not create a distinction between sexual harassment occurring in person versus online.”\(^\text{36}\)
**Question 12:** How do the 2020 amendments apply to alleged sexual harassment that is perpetrated by a student using a personal electronic device during class?

**Answer 12:** The preamble explains that “a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the [school] exercises substantial control.” As with in-person harassment, “the factual circumstances of online harassment must be analyzed to determine if it occurred” in circumstances “over which a school exercised substantial control over the respondent and the context.”

**IV. When Harassment Occurred**

**Question 13:** What is the appropriate standard for evaluating alleged sexual harassment that occurred before the 2020 amendments took effect?

**Answer 13:** The 2020 amendments took effect on August 14, 2020, and are not retroactive. This means that a school must follow the requirements of the Title IX statute and the regulations that were in place at the time of the alleged incident; the 2020 amendments do not apply to alleged sexual harassment occurring before August 14, 2020. This is true even if the school’s response was on or after this date. In other words, if the conduct at issue in the complaint took place prior to August 14, 2020, the 2020 amendments do not apply even if the complaint was filed with a school on or after August 14, 2020.

Before August 2020, the Title IX regulations did not have specific requirements for schools related to sexual harassment. Instead, OCR had several guidance documents in place to assist schools in understanding how OCR interpreted the Department’s Title IX regulations. Although the guidance documents issued in 2011 and 2014 were rescinded in 2017, and the 2001 and 2017 guidance documents were rescinded in 2020, these documents remain accessible on OCR’s website for historical purposes to the extent they are helpful to schools when responding to earlier allegations of sexual harassment.

**V. Notice of Sexual Harassment**

**Question 14:** Which school employees must be notified about allegations of sexual harassment for a school to be put on notice that it must respond?

**Answer 14:** In elementary and secondary school settings, a school must respond whenever any school employee has notice of sexual harassment. This includes notice to a teacher, teacher’s aide, bus driver, cafeteria worker, counselor, school resource officer, maintenance staff worker, coach, athletic trainer, or any other school employee.

In postsecondary school settings, notice may be more limited in scope. The institution must respond when notice is received by the Title IX Coordinator or another official who has authority to institute corrective measures on the institution’s behalf. The Department is unable to
provide examples of types of individuals who have this authority because the determination of whether a person is an official who has authority to institute corrective measures on behalf of the institution depends on facts specific to that institution. A school “may, at its discretion, expressly designate specific employees as officials with this authority for purposes of Title IX sexual harassment and may inform students of such designations.”

The preamble explains that “the Department does not limit the manner in which [a school] may receive notice of sexual harassment.” This means that the employees described above “may receive notice through an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, through a newspaper article, through an anonymous report, or through various other means.”

The 2020 amendments refer to this notice of sexual harassment as “actual knowledge.”

For additional information, please see 34 C.F.R. § 106.30.

Question 15: If a school trains or requires non-employees who interact with the school’s students to report sexual harassment incidents, are those individuals (for example, volunteers, alumni, independent contractors) automatically considered “officials with authority to institute corrective measures” on the school’s behalf?

Answer 15: No. The 2020 amendments state that at any school level—elementary, secondary, or postsecondary—“[t]he 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 [such as a volunteer parent, or alumnus] as one who has authority to institute corrective measures on behalf of the [school].”

The preamble explains that “the Department does not wish to discourage [schools] from training individuals who interact with the [school’s] students about how to report sexual harassment.” It also says that “the Department will not assume that a person is an official with authority solely based on the fact that the person has received training on how to report sexual harassment.”

Similarly, the preamble says that “the Department will not conclude that volunteers and independent contractors are officials with authority, unless the [school] has granted the volunteers or independent contractors authority to institute corrective measures on behalf of the [school].”

For additional information, please see 34 C.F.R. § 106.30.
Question 16: May a school accept reports of sexual harassment from individuals who are not associated with the school in any way?

Answer 16: Yes. A school may receive actual knowledge of sexual harassment from any person. There is no requirement that the person be participating in or attempting to participate in a school program or activity to report sexual harassment.

Question 17: Is a school required to respond to allegations of sexual harassment if the only employee or school official who has notice of the harassment is the alleged harasser?

Answer 17: Not under the 2020 amendments. At any school level—elementary, secondary, or postsecondary—the school does not have notice for purposes of Title IX if the only official or employee of the school with actual knowledge is the respondent. The preamble explains the reason for this is that the school “will not have [an] opportunity to appropriately respond if the only official or employee who knows [of the alleged misconduct] is the respondent.”

For additional information, please see 34 C.F.R. § 106.30.

Question 18: Is a school required to respond if it has notice of alleged misconduct that could meet the definition of sexual harassment but is not certain whether the harassment has occurred?

Answer 18: Yes. At any school level—elementary, secondary, or postsecondary—actual knowledge refers to notice of conduct that could constitute sexual harassment. A complainant is “an individual who is alleged to be the victim of conduct that could constitute sexual harassment” and the definition of actual knowledge refers to “allegations of sexual harassment.” Thus, the preamble explains that a school must respond promptly and appropriately when it receives notice of alleged facts that, if true, could be considered sexual harassment under the 2020 amendments.

For additional information, please see 34 C.F.R. § 106.30.

Question 19: Does a postsecondary school have discretion to require additional employees to report allegations of sexual harassment to the school?

Answer 19: Yes. The preamble says that a postsecondary school may empower as many officials as it wishes to institute corrective measures on its behalf, including coaches and athletic trainers. If any of these officials receives notice of sexual harassment allegations, the school must respond as the 2020 amendments require (see Question 20). The preamble also provides this guidance:

- A postsecondary school has discretion to determine which of their employees should be mandatory reporters, and which employees may keep a student’s disclosure about sexual
harassment confidential (e.g., counselors, therapists, other mental health providers, victim advocates). \(^{58}\)

- Nothing in the 2020 amendments prevents a postsecondary school “from instituting [its] own polic[y] to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment.” \(^{59}\) However, the Department will not hold a postsecondary school responsible for responding to such sexual harassment unless an employee “actually did give notice to the [school’s] Title IX Coordinator” or other official with authority to institute corrective measures. \(^{60}\)

- A postsecondary school may also “empower as many officials as it wishes with the requisite authority to institute corrective measures on the [school’s] behalf, and notice to these officials with authority constitutes the [school’s] actual knowledge.” \(^{61}\) A postsecondary school “may also publicize [a list[] of officials with this authority,]” and OCR encourages postsecondary schools to do so, as this will assist students and others to understand which reports will require the school to respond. \(^{62}\)

VI. **Response to Sexual Harassment**

**Question 20: How must a school respond to allegations of sexual harassment?**

**Answer 20:** When a school has actual knowledge of sexual harassment in any of its programs or activities that take place in the United States, it must “respond promptly in a manner that is not deliberately indifferent.” \(^{63}\) This includes schools that serve any age, grade, or level of students, from pre-K through postsecondary.

The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, regardless of whether a formal complaint is filed, and to explain the process for filing a formal complaint. \(^{64}\) For more on supportive measures, see Questions 32-34.

In addition, if a formal complaint is filed, either by the complainant or the Title IX Coordinator, a school must:

- offer supportive measures to the respondent, and
- follow the Title IX grievance process specified by the 2020 amendments. \(^{65}\) For more on this process, including the requirement to offer supportive measures to the respondent, see Question 26 and Section IX.

In addition to setting out these requirements, the regulations provide that a school is deliberately indifferent “only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.” \(^{66}\)

For more information on the obligations described in this section, please see 34 C.F.R. § 106.44(a).
Question 21: Is a school required to impose particular remedies when a respondent is found responsible for sexual harassment?

Answer 21: No. The 2020 amendments do not dictate that a school provide any particular remedies for the complainant or disciplinary sanctions for the respondent after a finding of responsibility. Each school is free to make disciplinary and remedial decisions that it “believes are in the best interest of [its] educational environment.”

When a school finds a respondent responsible for sexual harassment under its Title IX grievance process, the school must provide remedies to the complainant that are “designed to restore or preserve equal access to the [school’s] education program or activity.” These remedies may include the same individualized services that the school provided to the complainant as supportive measures, additional services, or different services. These remedies can be disciplinary or punitive and can burden the respondent. Schools are required to “[d]escribe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies,” however the preamble clarifies that this requirement “is not intended to unnecessarily restrict a [school’s] ability to tailor disciplinary sanctions to address specific situations.”

For additional information, please see 34 C.F.R. § 106.45(b)(1)(i), 34 C.F.R. § 106.45(b)(1)(vi), and 34 C.F.R. § 106.45(b)(7)(ii)(E).

VII. Formal Complaints

Question 22: What is a “formal complaint” under the 2020 amendments?

Answer 22: A “formal complaint” is a document filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment. It may be a hard copy document or an electronic document submitted via email or an online portal. Whether it is a hard copy document or an electronic document, it must contain the complainant’s physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint. For example, an email from a student to the Title IX Coordinator that ends with the student signing their name would suffice.

A formal complaint may be filed with the school’s Title IX Coordinator in person, by mail, or by email using the contact information provided by the school. A formal complaint may also be filed by any additional method designated by the school. A parent or guardian who has a legal right to act on behalf of an individual may also file a formal complaint on that individual’s behalf. In addition, a Title IX Coordinator may initiate a formal complaint as described in Question 24.

For additional information, please see 34 C.F.R. § 106.30.
Question 23: Is a school required to accept a formal complaint of sexual harassment from a complainant who is not currently enrolled in or attending the school?

Answer 23: Yes, but only if the complainant is attempting to participate in the school’s education program or activity at the time they file the formal complaint. Individuals who are currently participating in the school’s education program or activity may also file formal complaints. When a formal complaint is filed, the school must respond as described in Question 20.

The preamble gives several examples of situations of a complainant “attempting to participate” in a school’s education program, including when a complainant:

1. has withdrawn from the school due to alleged sexual harassment and expresses a desire to re-enroll if the school responds appropriately to the allegations,
2. has graduated but intends to apply to a new program or intends to participate in alumni programs and activities,
3. is on a leave of absence and is still enrolled as a student or intends to re-apply after the leave of absence, or
4. has applied for admission.

It is important to keep in mind that this requirement concerns a complainant’s status at the time a formal complaint is filed and is not affected by a complainant’s later decision to remain or leave the school.

Question 24: If a complainant has not filed a formal complaint and is not participating in or attempting to participate in the school’s education program or activity, may the school’s Title IX Coordinator file a formal complaint?

Answer 24: Yes. A Title IX Coordinator may file a formal complaint even if the complainant is not associated with the school in any way.

In some cases, a school may be in violation of Title IX if the Title IX Coordinator does not do so. For example, the preamble explains that if a school “has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority,” OCR may find the school to be deliberately indifferent (i.e., to have acted in a clearly unreasonable way) if the school’s Title IX Coordinator does not sign a formal complaint, “even if the complainant . . . does not wish to file a formal complaint or participate in a grievance process.” Put simply, there are circumstances when a Title IX Coordinator may need to sign a formal complaint that obligates the school to initiate an investigation regardless of the complainant’s relationship with the school or interest in participating in the Title IX grievance process. This is because the school has a Title IX obligation to provide all students, not just the complainant, with an educational environment that does not discriminate based on sex.
Question 25: If a complainant is not participating in or attempting to participate in the school’s education program or activity, may a school respond to reports of sexual harassment under its own code of conduct?

Answer 25: Yes. As discussed in Question 7, a school has discretion to use its own student-conduct process to address alleged misconduct not covered by the 2020 amendments. This includes situations where a complainant is not participating in or attempting to participate in the school’s education program or activity. There are also circumstances when a Title IX Coordinator may need to file a formal complaint that obligates the school to initiate an investigation regardless of the complainant’s relationship with the school or interest in participating in the Title IX grievance process. See Question 24.

Question 26: Is a school required to take action even if the respondent has left the school prior to the filing of a formal complaint with no plans to return?

Answer 26: Yes. As explained in the preamble, a school must always respond promptly to a complainant’s report of sexual harassment when it has actual knowledge. (For more on actual knowledge, see Question 14.) The Title IX Coordinator must inform the complainant about the availability of supportive measures, with or without the filing of a formal complaint, and consider the complainant’s wishes regarding supportive measures.

Question 27: Is a school required to dismiss a formal complaint if a respondent leaves the school?

Answer 27: No. Although a school may dismiss a formal complaint if, at any time during the grievance process, the respondent is “no longer enrolled or employed” by the school, dismissal is not required. The preamble explains that a school has discretion to assess the facts and circumstances of a case before deciding whether to dismiss the complaint because the respondent has left the school.

A school may consider, for example, “whether a respondent poses an ongoing risk to the [school’s] community,” or “whether a determination regarding responsibility provides a benefit to the complainant even where the [school] lacks control over the respondent and would be unable to issue disciplinary sanctions, or other reasons.”

Proceeding with the grievance process could potentially allow a school to determine the scope of the harassment, whether school employees knew about it but failed to respond, whether there is a pattern of harassment in particular programs or activities, whether multiple complainants experienced harassment by the same respondent, and what appropriate remedial actions are necessary.
Question 28: May a school use trauma-informed approaches when responding to a formal complaint?

Answer 28: Yes. A school may use trauma-informed approaches to respond to a formal complaint of sexual harassment. The preamble clarifies that the 2020 amendments do not preclude a school “from applying trauma-informed techniques, practices, or approaches,” but notes that the use of such approaches must be consistent with the requirements of 34 C.F.R. § 106.45, particularly 34 C.F.R. § 106.45(b)(1)(iii).93

VIII. Handling Situations in Which a Party or Witness May be Unable to Participate in the Title IX Grievance Process in Person

Question 29: May a school stop offering its Title IX grievance process due to the COVID-19 pandemic?

Answer 29: No. A school must follow its policies for receiving and responding to reports of sexual harassment and may not adopt a policy of putting investigations or proceedings on hold due to COVID-19.94

For additional discussion of schools’ ongoing Title IX obligations during the COVID-19 pandemic, please see OCR’s Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment.

Question 30: How should a school proceed in the Title IX sexual harassment grievance process when a party or a witness is temporarily unable to participate due to a disability?

Answer 30: A school has “discretion to apply limited extensions of time frames during the grievance process for good cause, which may include, for example, a temporary postponement of a hearing to accommodate a disability.”95 However, when deciding whether to grant a delay or extension, a school must balance the interests of promptness, fairness to the parties, and accuracy of adjudications. The school also must promptly notify all parties of the reason for the delay and the estimated length of the delay, in addition to important updates about the investigation.96

Additionally, a school must not delay investigations or hearings solely because in-person interviews or hearings are not feasible. Instead, a school must use technology, as appropriate, to conduct activities remotely, in a timely and equitable manner, and consistent with the applicable law.

For additional information, please see 34 C.F.R. § 106.45(b)(1)(v).
Question 31: May a school use technology to permit participants to appear virtually in its Title IX grievance process?

Answer 31: Yes. The 2020 amendments grant a school discretion to allow participants, including witnesses, to appear at a live hearing virtually; however, technology must enable all participants to see and hear other participants, with appropriate accommodations for individuals with disabilities.

For additional information, please see 34 C.F.R. § 106.45(b)(6)(i).

IX. Supportive Measures and Temporary Removal of Respondents from Campus

Question 32: Does a school have to offer supportive measures to a complainant who has not filed a formal complaint of sexual harassment?

Answer 32: Yes. The 2020 amendments specify that the school must contact the complainant to discuss the availability of, and to offer, supportive measures, regardless of whether a formal complaint is filed. A school must also consider the complainant’s wishes with respect to supportive measures.

For additional information, please see 34 C.F.R. § 106.30 and 34 C.F.R. § 106.44(a).

Question 33: What are the supportive measures a school must offer to complainants?

Answer 33: A school must offer supportive measures that “are designed to restore or preserve equal access to the [school’s] education program or activity.” The 2020 amendments add that these include “measures designed to protect the safety of all parties or the [school’s] educational environment, or deter sexual harassment.” A school also must consider the complainant’s wishes in determining which supportive measures to provide and may not provide supportive measures that “unreasonably burden[] the other party.”

A school has discretion and flexibility to determine which supportive measures are appropriate. The preamble states that a school must consider “each set of unique circumstances” to determine what individualized services would be appropriate based on the “facts and circumstances of that situation.”

Examples of supportive measures 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.”

For additional information, please see 34 C.F.R. § 106.30 and 34 C.F.R. § 106.44(a).
Question 34: Is a school still required to provide supportive measures during the COVID-19 pandemic?

Answer 34: Yes. COVID-19-related disruptions do not relieve a school of its obligation to comply with Title IX. A school must continue to offer academic adjustments and supports to complainants and respondents in Title IX sexual harassment complaints.

In light of the COVID-19 pandemic, “the facts and circumstances” of a given situation may require a school to provide remote counseling, or similar teletherapy option, as a supportive measure to students who are unable to access on-campus counseling services. Similarly, in a remote learning environment, supportive measures may include ensuring that parties to a complaint do not share the same online classes.

For additional discussion of schools’ ongoing Title IX obligations during the COVID-19 pandemic, please see OCR’s Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment.

Question 35: May a school remove a respondent from campus while a Title IX grievance process is pending if the school determines that the respondent is a threat to others?

Answer 35: Yes. The 2020 amendments specify that a school may remove a respondent from its education program or activity on an emergency basis. The school must “undertake[] an individualized safety and risk analysis, determine[] that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provide[] the respondent with notice and an opportunity to challenge the decision immediately following the removal.” A school must also meet its obligations to students under federal disability laws.

A school may also place non-student employee respondents on administrative leave while a Title IX grievance process is pending. Again, the school must comply with federal disability laws, as applicable.

For additional information, please see 34 C.F.R. §§ 106.44(c)-(d).

X. Presumption of No Responsibility

Question 36: The 2020 amendments require schools to presume that the respondent is not responsible for the alleged misconduct. Does this mean the school also must assume the complainant is lying or that the alleged harassment did not occur?

Answer 36: No. A school should never assume a complainant of sexual harassment is lying or that the alleged harassment did not occur.
The 2020 amendments require a school to include in its Title IX grievance process “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.” However, the preamble explains that “[t]he presumption does not imply that the alleged harassment did not occur,” or that the respondent is truthful or a complainant is untruthful. Instead, the preamble says that the presumption is designed to ensure that investigators and decision-makers serve impartially and do not prejudge that the respondent is responsible for the alleged harassment. Schools that have relied on this presumption to decline services to a complainant or to make assumptions about a complainant’s credibility have done so in error.

For examples of language related to this issue, please see Q&A Appendix Section XI.

XI. **Time Frames**

**Question 37:** What is the appropriate length of time for a school’s investigation into a complaint of sexual harassment?

**Answer 37:** The 2020 amendments require that a school’s grievance process for formal complaints of sexual harassment include reasonably prompt time frames for concluding the process, including filing and resolving appeals and for any informal resolution processes the school offers. The preamble states that because the 2020 amendments specify that “the time frames designated by the [school] must account for conclusion of the entire grievance process, including appeals and any informal resolution process,” no part of the process “is subject to an open-ended time frame.”

The preamble also explains that “the reasonableness of the time frame is evaluated in the context of the [school’s] operation of an education program or activity.” Additionally, the preamble says that “the conclusion of the grievance process must be reasonably prompt, because students (or employees) should not have to wait longer than necessary to know the resolution of a formal complaint of sexual harassment; any grievance process is difficult for both parties, and participating in such a process likely detracts from students’ ability to focus on participating in the [school’s] education program or activity.” The preamble adds that because “victims of sexual harassment are entitled to remedies to restore or preserve equal access to education, . . . prompt resolution of a formal complaint of sexual harassment is necessary to further Title IX’s nondiscrimination mandate.”

The preamble explains that each school “is in the best position to balance promptness with fairness and accuracy based on [its] own unique attributes and [its] experience with its own student disciplinary proceedings,” and thus, each school has discretion to determine its own reasonably prompt time frames. A school must resolve each formal complaint of sexual harassment according to the time frames the school has committed to in its grievance process.
The Department had previously identified, but not required, a 60-day time frame, prior to appeal, for resolving sexual harassment complaints. Although that guidance is no longer in place, nothing in the 2020 amendments prohibits a school from adopting the 60-day time frame.121

The 2020 amendments permit a temporary delay of the grievance process or the limited extension of time frames, with good cause.122 The 2020 amendments provide illustrations of good cause, including 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.123

For additional information, please see 34 C.F.R. § 106.45(b)(1)(v).

XII. Live Hearings and Cross-Examination

Question 38: Are all schools required to hold live hearings as part of their Title IX grievance processes?

Answer 38: Postsecondary schools must have a live hearing under the 2020 amendments.124 A live hearing may occur virtually “with technology enabling the decision-maker[] and parties to simultaneously see and hear the party or the witness answering questions.”125 Elementary and secondary schools are not required to have a live hearing.126

For additional information, please see 34 C.F.R. § 106.45(b)(6).

Question 39: What is cross-examination?

Answer 39: At a live hearing, “each party’s advisor [must be permitted to] to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”127 The 2020 amendments refer to this process of questioning as cross-examination.

The 2020 amendments explain that a party may not conduct cross-examination, but instead the party’s advisor must ask the questions on their behalf.128 The amendments also require a postsecondary school to provide an advisor to conduct cross-examination for any party who does not have their own advisor.129

For additional information, please see 34 C.F.R. § 106.45(b)(6).

Question 40: Since elementary and secondary schools are not required to provide a live hearing, what kind of process are they required to provide?

Answer 40: The 2020 amendments state that elementary and secondary schools “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.”130 In addition, the decision-maker “must explain to the party proposing the questions any decision to exclude a question as not relevant.”131
The preamble also explains that a school may exclude as not relevant questions that are duplicative or repetitive.\textsuperscript{132}

The 2020 amendments permit a parent or legally authorized guardian to act on behalf of the complainant or respondent.\textsuperscript{133} Whether a parent or guardian has the legal right to act on behalf of a complainant or respondent “would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians.”\textsuperscript{134} If a parent or guardian has a legal right to act on a complainant or respondent’s behalf, this authority applies throughout all aspects of the Title IX matter, including throughout the grievance process.\textsuperscript{135}

For additional information, please see 34 C.F.R. § 106.45(b)(6)(ii) and 34 C.F.R. § 106.30.

**Question 41:** Is a postsecondary school required to provide complainants and respondents with an advisor for a live hearing?

**Answer 41:** Yes. The 2020 amendments require a postsecondary school to provide an advisor to conduct cross-examination for any party who does not have their own advisor.\textsuperscript{136} The amendments also require all schools to provide the parties with the same opportunities to be accompanied by an advisor of their choice in other parts of the grievance process, but do not require a school to provide an advisor for any part of the process other than the requirement that a postsecondary school provide one for cross-examination.\textsuperscript{137}

The preamble explains that the parties are in the best position to decide which individuals should serve as their advisors and notes that advisors may be friends, family members, an attorney, or other individuals chosen by the party or provided by the school if the party does not choose one.\textsuperscript{138}

For additional information, please see 34 C.F.R. § 106.45(b)(5)(iv) and 34 C.F.R. § 106.45(b)(6)(i).

**Question 42:** Are parties and witnesses required to participate in the Title IX grievance process, including submitting to cross-examination during a live hearing at the postsecondary school level?

**Answer 42:** No. Parties and witnesses are not required to submit to cross-examination or otherwise participate in the Title IX grievance process.\textsuperscript{139} For information on the consequences of not submitting to cross-examination, see Question 51.

The 2020 amendments do require schools to offer complainants supportive measures regardless of whether they participate in a grievance process and to prohibit retaliation against individuals based on their decision to participate, or not participate, in a grievance process.\textsuperscript{140}

**Question 43:** May a school create its own rules for conducting a live hearing?

**Answer 43:** Yes. The preamble states that a school may implement rules regarding how the live hearing is conducted as long as those rules are applied equally to both parties.\textsuperscript{141} For
example, a school “may decide whether or how to place limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing.”

The preamble also explains that a school may adopt rules on “whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, [and] place reasonable time limitations on a hearing.” The preamble adds that a school may adopt a rule stating that duplicative questions are irrelevant.

In addition, the preamble says that an advisor’s cross-examination role “is satisfied where the advisor poses questions on a party’s behalf, which means that an assigned advisor could relay a party’s own questions to the other party or witness.” Thus, for example, a postsecondary school could limit the role of advisors to relaying questions drafted by their party.

For examples of language related to this issue, please see Q&A Appendix Sections V-VII.

**Question 44:** May a school put in place rules of decorum or other rules for advisors, parties, and witnesses to follow during a live hearing?

**Answer 44:** Yes. The preamble says that a school may “adopt rules of decorum” and notes that a school is “in a better position than the Department to craft rules of decorum best suited to [its] educational environment.”

For example, a school may prohibit advisors from questioning parties or witnesses in an abusive, intimidating, or disrespectful manner.

A school also may require a party to use a different advisor if the party’s advisor refuses to comply with the school’s rules of decorum. For example, the preamble explains that if a party’s advisor of choice yells at others in violation of a school’s rules of decorum, the school may remove the advisor and require a replacement. The school has this authority even when the advisor is asking a question that is relevant to the hearing. If the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (e.g., advisor yells, screams, or comes too close to a witness), the preamble explains that a school may enforce a rule requiring that relevant questions must be asked in a respectful, non-abusive manner.

For examples of language related to this issue, please see Q&A Appendix Section VI.

**Question 45:** Are all parties required to be physically present in the same location during the live hearing?

**Answer 45:** No. The 2020 amendments state that, “at the [school’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.” Additionally, the preamble states that even if a school does not regularly hold virtual hearings, any party may request that the entire hearing, including cross-examination, be held virtually, and the school
must grant that request. The party does not need to provide a reason for making this request.

In addition, nothing in the 2020 amendments prohibits schools from holding virtual hearings or from having the parties participate in separate locations even if no party makes such a request, particularly in light of the operational challenges posed by the COVID-19 pandemic.

For additional information, please see 34 C.F.R. § 106.45(b)(6)(i).

For examples of language related to this issue, please see Q&A Appendix Section V.

**Question 46:** Is a school permitted to limit the questions that may be asked by each party of the other party or witnesses?

**Answer 46:** Yes, and in fact the 2020 amendments require certain limitations, whether in a hearing or as part of an exchange of written questions at the elementary and secondary school level. Note that the 2020 amendments do not require a hearing at the elementary and secondary school level.

Questions must be relevant. More specifically, the 2020 amendments state that questions about the complainant’s prior sexual behavior are not relevant, subject to certain limitations. The preamble states that any school may exclude as not relevant questions that are duplicative or repetitive. For more information regarding other limitations on questioning, see Question 48.

Further, the 2020 amendments state that during cross-examination at the postsecondary school level, “only relevant cross-examination questions and other questions may be asked of a party or witness” and the decision-maker must determine the relevance of a question before a party or a witness answers.

For additional information, please see 34 C.F.R. § 106.45(b)(6).

For examples of language related to this issue, please see Q&A Appendix Sections VIII and IX.

**Question 47:** Are questions and evidence about the complainant’s sexual history relevant?

**Answer 47:** The 2020 amendments state that “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” or 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 preamble explains that the term “prior sexual behavior” refers to “sexual behavior that is unrelated” to the alleged conduct. The preamble also addresses questions and evidence about sexual behavior after an alleged incident, saying that the regulations do not imply that these kinds of questions are relevant. Whether sexual behavior between the complainant and
respondent might be relevant to prove consent regarding the particular allegations at issue
“depends in part on a [school’s] definition of consent.” Some schools’ definitions of consent
“require a verbal expression of consent,” and other schools’ definitions of consent “inquire
whether based on circumstances the respondent reasonably understood that consent was
present (or absent).”

For additional information, please see 34 C.F.R. § 106.45(b)(6).

For examples of language related to this issue, please see Q&A Appendix Section IX.

Question 48: Can cross-examination include questions about an individual’s medical or
mental-health records?

Answer 48: Questions that seek information about any party’s medical, psychological, and
similar records are not permitted unless the party has given written consent. Questions about
other records protected by a legally recognized privilege are also not permitted unless waived by
the party. The preamble also explains that “[schools] (and, as applicable, parties) must follow
relevant State and Federal health care privacy laws throughout the grievance process.”

These protections apply throughout the investigation as well as the hearing.

Question 49: May a school put measures in place to protect the well-being of the parties
during the cross-examination?

Answer 49: Yes. For example, the preamble notes that a school is permitted to grant breaks
to the parties during a live hearing. Also, as discussed in Question 46, the 2020 amendments
require a pause in the cross-examination process each time before a party or witness answers a
cross-examination question in order for the decision-maker to determine if the question is
relevant. The preamble explains that this is to help ensure that the cross-examination includes
only relevant questions and that the pace of the cross-examination does not place undue
pressure on a party or a witness to answer immediately.

Question 50: How do the 2020 amendments address the manner in which a decision-maker
should evaluate answers to cross-examination questions?

Answer 50: The 2020 amendments do not require that answers to cross-examination
questions “be in linear or sequential formats” or that any party “must recall details with certain
levels of specificity.” The preamble adds that the 2020 amendments “protect against a party
being unfairly judged due to inability to recount each specific detail of an incident in sequence”
because “decision-makers must be trained to serve impartially without prejudging the facts.”

For examples of language related to this issue, please see Q&A Appendix Section VIII.

Question 51: What are the consequences if a party or witness does not participate in a live
hearing or submit to cross-examination?
Answer 51: Postsecondary schools, which are required to provide for cross-examination at a live hearing, should keep in mind that, under the 2020 amendments, if a party or a witness does not submit to cross-examination, that individual’s statements cannot be relied on by the decision-maker in determining whether the respondent engaged in the alleged sexual harassment.\textsuperscript{171}

The preamble explains that even if a party is unable to participate at a hearing “due to death or post-investigation disability,” the school’s decision-makers may not rely on any statements from that individual in their decision-making about whether the respondent has committed sexual harassment in violation of school policy.\textsuperscript{172} As discussed in Question 37, a school has “discretion to apply limited extensions of time frames during the grievance process for good cause, which may include, for example, a temporary postponement of a hearing to accommodate a disability.”\textsuperscript{173}

The decision-maker also may not draw any inference from a decision of a party or witness not to participate at the hearing, including not to submit to cross-examination.\textsuperscript{174} This means, for example, that the decision-maker may not make any decisions about a party’s credibility based on their decision not to participate in a hearing or submit to cross-examination.

Note that “police reports, medical reports and other documents and records may not be relied on to the extent they contain the statements of a party or witness who has not submitted to cross-examination.”\textsuperscript{175}

For examples of language related to this issue, please see Q&A Appendix Section X.

For additional information, please see 34 C.F.R. § 106.45(b)(6)(i).

Question 52: May a decision-maker at a postsecondary school rely on non-statement evidence, such as photographs or video images, if a party or witness does not submit to cross-examination?

Answer 52: Yes. Although a decision-maker may not rely on any statement of a party or witness who does not submit to cross-examination, other relevant evidence can still be considered to determine whether the respondent is responsible for the alleged sexual harassment.\textsuperscript{176} The preamble explains that the term “statements” should be interpreted using its ordinary meaning, but does not include evidence, such as a videos of the incident itself, where the party or witness has no intent to make an assertion regarding whether or not the alleged harassment occurred or discuss factual details related to the alleged harassment, or where the evidence does not contain such factual assertions by the party or witness.\textsuperscript{177} Thus, the decision-maker may rely on non-statement evidence related to the alleged prohibited conduct that is in the record, such as photographs or video images showing the underlying incident.\textsuperscript{178}

For examples of language related to this issue, please see Q&A Appendix Section X.
Question 53: May a decision-maker at a postsecondary school rely on statements of a party, such as texts or emails, even if the party does not submit to cross-examination?

Answer 53: It depends. The decision-maker may consider certain types of statements by a party where the statement itself is the alleged harassment, even if the party does not submit to cross-examination. For example, the decision-maker may consider a text message, email, or audio or video recording created and sent by a respondent as a form of alleged sexual harassment even if the respondent does not submit to cross-examination. Similarly, if a complainant alleges that the respondent said, “I’ll give you a higher grade in my class if you go on a date with me,” the decision-maker may rely on the complainant’s testimony that the respondent said those words even if the respondent does not submit to cross-examination.

In these types of situations, the decision-maker is evaluating whether the statement was made or sent. In second example above, the complainant’s testimony was about the fact that the respondent made the offer, and not about what the respondent intended or whether the respondent took an additional action based on the statement, such as changing the student’s grade after a date.

In contrast, evidence in which a party or witness comments on the interaction between the parties without engaging in harassment (e.g., email or text exchanges leading up to the alleged harassment or an admission, an apology, or other comment about the alleged harassment), would be considered statements that could not be considered unless the party or witness is cross-examined.

For examples of language related to this issue, please see Q&A Appendix Section X.

Question 54: May a decision-maker rely on a video, text message, or other piece of evidence that includes statements by multiple parties or witnesses if some of them do not submit to cross-examination?

Answer 54: Yes. The preamble explains that in such cases, even if a party or witness in a text message, email, or video does not submit to cross-examination, the decision-maker may still rely on the statements by other people in that text message, email, or video who do submit to cross-examination.

Question 55: May a decision-maker rely on the statements of a party or witness who submits to cross-examination, but does not answer questions posed by the decision-maker?

Answer 55: Yes. The preamble explains that cross-examination differs from questions posed by a neutral fact-finder and that if a party or witness submits to cross-examination by a party’s advisor, but does not answer a question posed by the decision-maker, the decision-maker may still rely on all of that person’s statements. The preamble also explains that “the decision-maker still may not draw any inference about the party’s credibility in making the responsibility
determination based solely on a party’s refusal to answer questions posted by the decision-maker” because 34 C.F.R. § 106.45(b)(6)(i) states that no inference may be drawn based on the refusal to answer cross-examination or other questions.\textsuperscript{185}

XIII. Standard of Proof

Question 56: What standard of proof must a school use when deciding whether a respondent is responsible for committing sexual harassment?

Answer 56: Under the 2020 amendments, a school’s grievance process must state whether the standard of evidence or proof to be used to determine responsibility is the preponderance-of-the-evidence standard or the clear-and-convincing-evidence standard.\textsuperscript{186} The preamble explains that the preponderance-of-the-evidence standard means the decision-maker must determine whether alleged facts are more likely than not to be true.\textsuperscript{187} It also explains that the clear-and-convincing-evidence standard means the decision-maker must determine whether it is “highly probable” that the alleged facts are true.\textsuperscript{188}

For additional information, please see 34 C.F.R. § 106.45(b)(1)(vii).

Question 57: May a school use a different standard of proof for formal complaints of sexual harassment involving students and employees?

Answer 57: No. Regardless of which standard of proof is used, a school must apply the same standard of proof to all formal complaints of sexual harassment made by a student, employee, or faculty member.\textsuperscript{189} The preamble explains that if a school has a collective bargaining agreement in place that requires the school to use the clear-and-convincing standard for sexual harassment investigations involving employees, it is required under the 2020 amendments to use only the clear-and-convincing standard for sexual harassment investigations involving students as well.\textsuperscript{190} In those cases, the preamble indicates that the school may work cooperatively with its employee unions to renegotiate the standard of proof used in employee sexual harassment investigations.\textsuperscript{191}

For additional information, please see 34 C.F.R. § 106.45(b)(1)(vii).

XIV. Informal Resolution

Question 58: May a school offer an informal resolution process, including restorative justice or mediation, as a way to resolve a sexual harassment complaint?

Answer 58: Yes. The 2020 amendments state that a school is not required to offer an informal resolution process but may facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, subject to certain conditions.\textsuperscript{192} A school is not permitted to offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.\textsuperscript{193}
The 2020 amendments explain that they leave the term “informal process” undefined to allow a school the discretion to adopt whatever process best serves the needs of its community. The amendments do not require that the parties interact directly with each other as part of an informal resolution process; mediations are often conducted with the parties in separate rooms and the mediator conversing with each party separately. The parties’ participation in mediation or restorative justice, if offered, should remain a decision for each individual party to make in a particular case, and neither party should be pressured to participate in the process. Schools may exercise discretion to make fact-specific determinations about whether to offer informal resolution in response to a complaint. The Department will not require the parties to attempt mediation in its enforcement of Title IX.

For additional information, please see 34 C.F.R. § 106.45(b)(9).

For examples of language related to this issue, please see Q&A Appendix Section XV.

**Question 59:** If a school chooses to offer an informal resolution process, are there any requirements under Title IX?

**Answer 59:** Yes. If a school chooses to offer an informal process, the 2020 amendments require that the school obtains the complainant’s and the respondent’s voluntary, written consent before using any kind of “informal resolution” process, such as mediation or restorative justice. With the parties’ consent, schools have the freedom to allow the parties to choose an informal resolution mechanism that best suits their needs. If those needs change, however, the 2020 amendments also make clear that either party may withdraw from the informal resolution process and resume the formal grievance process at any time prior to agreeing to a resolution.

A school’s discretion to offer an informal resolution process is also limited by the school’s obligation to ensure that all persons who facilitate informal resolutions are free from conflicts of interest and bias, and are trained to serve impartially without prejudging the facts at issue. For example, schools that choose to offer restorative justice as a means of an informal resolution should ensure that the restorative justice facilitators are well-trained in effective processes. A school may use trauma-informed techniques during the informal resolution process.

For additional information, please see 34 C.F.R. § 106.45(b)(9).

**XV. Retaliation and Amnesty**

**Question 60:** What is retaliation, and is it prohibited under the 2020 amendments?

**Answer 60:** The 2020 amendments prohibit retaliation. Retaliation is defined as “[i]ntimidation, 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 purposes of interfering with any right or privilege secured by [the] Title IX [statute or regulations].”

For additional information, please see 34 C.F.R. § 106.71.

**Question 61:** May a school discipline a complainant, respondent, or witness for violating the school’s COVID-19 or other policy during a reported incident of sexual harassment?

**Answer 61:** No, unless the school has a policy that always imposes the same punishment for violating the COVID-19 or other policy regardless of the circumstances. The 2020 amendments prohibit “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 formal complaint of sexual harassment [i.e., collateral conduct], for the purpose of interfering with any right or privilege secured by Title IX or [its implementing regulations].”

The preamble explains that if a school punishes an individual for violations of other school policies, it will be considered retaliation if the punishment is for the purpose of interfering with any right or privilege secured by Title IX. The preamble adds that if a school has a zero-tolerance policy that always imposes the same punishment for such conduct regardless of the circumstances, imposing that punishment would not be for the purpose of interfering with any right or privilege secured by Title IX and thus, would not be considered retaliation.

For additional information, please see 34 C.F.R. § 106.71.

**Question 62:** Is a school permitted to have an amnesty policy as a way to encourage reporting of sexual harassment?

**Answer 62:** Yes. The preamble notes that “[t]he Department is aware that some schools have adopted ‘amnesty’ policies designed to encourage students to report sexual harassment.” Under these policies, “students who report sexual misconduct (whether as a victim or witness) will not face charges for school code of conduct violations relating to the sexual misconduct incident (e.g., underage drinking at the party where the sexual harassment occurred).” “Nothing in the [2020 amendments] precludes a [school] from adopting such amnesty policies,” and schools retain broad discretion to adopt such amnesty policies or to otherwise define retaliation more broadly than in the regulations.

More generally, schools should keep in mind that the 2020 amendments require that a school’s Title IX grievance process treat complainants and respondents equitably.

**Question 63:** May a school punish a complainant for filing a complaint if the decision-maker finds that the respondent did not engage in the alleged sexual harassment?

**Answer 63:** Not without a finding of bad faith. The 2020 amendments state that “a determination regarding responsibility, alone, is not sufficient to conclude that any party made
a materially false statement in bad faith.” To the contrary, it might be considered retaliation for a school to penalize a student for bringing a complaint, depending on the circumstances. However, if a school believes a student made a materially false statement in bad faith in the course of a Title IX grievance proceeding, it would not constitute retaliation for a school to charge that individual with a code-of-conduct violation.

For additional information, please see 34 C.F.R. § 106.71.

XVI. Forms of Sex Discrimination Other Than Sexual Harassment as Defined by the 2020 Amendments

Question 64: How should a school respond to complaints alleging sex discrimination that do not include sexual harassment allegations?

Answer 64: The 2020 amendments explain that the grievance process required for formal sexual harassment complaints does not apply to complaints alleging discrimination based on pregnancy, different treatment based on sex, or other forms of sex discrimination.

Instead, the 2020 amendments state that schools must respond to these complaints using the “prompt and equitable” grievance procedures that schools have been required to adopt and publish since 1975, when the original Title IX regulations were issued. The 1975 regulations, which are still in place today, require schools to have a Title IX Coordinator to receive complaints of sex discrimination and require schools to respond promptly and equitably to such complaints.

For additional information, please see 34 C.F.R. § 106.8(c).

Question 65: What constitutes a prompt and equitable grievance procedure under Title IX for responding to complaints of sex discrimination that do not include sexual-harassment allegations?

Answer 65: OCR has historically looked to whether and how schools have communicated information about their procedures, including where to file complaints, to students, parents/caregivers (for elementary and secondary school students), and employees. In addition, OCR has considered whether the procedures have provided for adequate, reliable, and impartial investigation of complaints; designated and reasonably prompt time frames for the complaint and resolution process; and notice to the parties of the outcome of a complaint.

OCR also has historically explained that a grievance procedure cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school’s students, easily understood, and widely disseminated.
XVII. Religious Exemptions

Question 66: Are all schools that receive federal financial assistance required to comply with Title IX?

Answer 66: Title IX does not apply to an educational institution that is controlled by a religious organization to the extent that application of Title IX would be inconsistent with the religious tenets of the organization. This religious exemption was in the text of Title IX when it was enacted in 1972. The religious exemption does not apply to public schools or to colleges or universities run by state or local governments.

A school may, at its discretion, seek an assurance of a Title IX religious exemption at any time by submitting a letter from the highest ranking official of the institution to the Assistant Secretary for Civil Rights in the Department of Education. The letter must identify the provisions of the Title IX regulations that conflict with specific tenets of the religious organization. A religious exemption is not a blanket exemption from Title IX, and a school’s religious exemption extends only as far as the conflict between the Title IX regulations and the religious tenets of the controlling religious organization. A school must comply with the Title IX regulations to the extent that compliance would not conflict with the tenets of the controlling religious organization.

The 2020 amendments state that a school is not required to seek a written assurance of its religious exemption under Title IX before claiming the exemption, and the regulations state that a school can invoke a religious exemption after OCR has received a complaint regarding the school. This is consistent with OCR’s handling of religious exemption requests dating back more than two decades.

For additional information, please see 34 C.F.R. § 106.12.

Please visit OCR’s website for additional information about religious exemptions.

Question 67: May a student file a complaint with OCR against a school that has obtained an assurance of a religious exemption from OCR?

Answer 67: Yes. Students may always file a complaint with OCR if they believe their school has violated their rights under Title IX, even if OCR has previously provided assurance to the school of a religious exemption under Title IX. After receiving the complaint, OCR would first evaluate whether the allegation is appropriate for investigation. If yes, and if the school has previously asserted a religious exemption, then OCR would determine whether the exemption applies to the alleged discrimination. If the exemption applies, OCR would dismiss the complaint. If the alleged discrimination does not fall within the school’s religious exemption from Title IX, then OCR would proceed with the investigation, following OCR’s Case Processing Manual.
You can read the 2020 amendments, entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” at 85 Fed. Reg. 30,026 (May 19, 2020), https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf. The amendments begin on page 30,572. The Federal Register notice also includes a preamble, at pages 30,026-30,570, that clarifies OCR’s interpretation of Title IX and the Title IX regulations. As discussed above, please note that the preamble itself does not have the force and effect of law.

2. Id.
3. Id.
4. Id.
8. Id. § 12291(a)(8).
9. Id. § 12291(a)(30).
12. Id.
13. Id. at 30,199.
14. Id.
15. Id.
16. Id.
17. 34 C.F.R. § 106.31.
18. 85 Fed. Reg. at 30,170. See also 34 C.F.R. § 106.30(a) (definition of sexual harassment).
20. Id.
21. Id. at 30,169.
22. Id.
23. Id. at 30,170.
24. Id.
25. Id.
27. 85 Fed. Reg. at 30,093. See also 34 C.F.R. § 106.45(b)(1)(iii).
28. 34 C.F.R. § 106.8(d).
30. Id. at 30,197.
31. Id. at 30,199 n.875.
32. Id. at 30,200 n.877.
33. Id. at 30,200.
34. Id. at 30,202.
35. Id.
36. Id. at 30,203.
37. Id. at 30,202.
38. Id.
guidance documents, even prior to their withdrawal, do not have the force and effect of law, and are not meant to bind the public or regulated entities in any way.

34 C.F.R. §§ 106.30(a) (definition of actual knowledge), 106.44(a).


34 C.F.R. § 106.30(a) (definition of actual knowledge).


Id. at 30,115.

34 C.F.R. § 106.30(a) (definition of actual knowledge); 85 Fed. Reg. at 30,043.


Id.

34 C.F.R. §§ 106.8(a), 106.30(a) (definition of actual knowledge).


34 C.F.R. § 106.30(a)


Id. at 30,192.

Id. See also 34 C.F.R. § 106.30(a) (definition of complainant).


Id. at 30,107, 30,115, 30,523.

Id. at 30,107.

Id. at 30,523.

Id. at 30,107.

Id. at 30,115, 30,523.

Id. at 30,107.

Id.

34 C.F.R. § 106.44(a).

Id.

Id.

Id.


34 C.F.R. § 106.45(b)(1)(i).

Id.

Id.

Id. § 106.45(b)(1)(vi).


34 C.F.R. § 106.30(a) (definition of formal complaint).

Id.

Id.

Id.

Id.

Id. § 106.6(g); 85 Fed. Reg. at 30,453.

Id. § 106.30(a) (definition of formal complaint).

Id.

Id.

Id.

34 C.F.R. § 106.30(a) (definition of formal complaint).

Id.

34 C.F.R. §§ 106.30(a) (definition of formal complaint), 106.44(a).


88 34 C.F.R. § 106.44(a).
89 Id.
90 Id. § 106.45(b)(3)(ii). See also 85 Fed. Reg. at 30,290.
92 Id.
93 Id. at 30,187.
94 See 34 C.F.R. § 106.45(b)(1)(v).
95 85 Fed. Reg. at 30,348. See also 34 C.F.R. § 106.45(b)(1)(v).
96 34 C.F.R. § 106.45(b)(1)(v).
98 34 C.F.R. § 106.44(a).
99 Id.
100 Id. § 106.30(a) (definition of supportive measures). See also 34 C.F.R. § 106.44(a).
101 34 C.F.R. § 106.30(a) (definition of supportive measures).
102 Id.
104 Id. at 30,401.
105 Id. at 30,182.
106 34 C.F.R. § 106.44(c).
107 Id.
108 Id. (referencing the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act).
109 Id. § 106.44(d).
110 Id. (referencing Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act).
111 Id. § 106.45(b)(1)(iv).
113 Id.
114 34 C.F.R. § 106.45(b)(1)(v).
116 Id.
117 Id.
118 Id.
119 Id.
120 Id.
121 Id.
122 34 C.F.R. § 106.45(b)(1)(v).
123 Id.
124 Id. § 106.45(b)(6)(i).
125 Id.
126 Id. § 106.45(b)(6)(ii).
127 Id. § 106.45(b)(6)(i).
128 Id.
129 Id.
130 Id. § 106.45(b)(6)(ii).
131 Id.
133 34 C.F.R. § 106.6(g).
135 Id. at 30,122.
136 34 C.F.R. § 106.45(b)(6)(1).
137 Id. § 106.45(b)(5)(iv).
139 34 C.F.R. § 106.45(b)(6)(i).
140 Id. §§ 106.44(a), 106.71. See also 85 Fed. Reg. at 30,324.
141 85 Fed. Reg. at 30,360. These rules would be in addition to any rules required under 34 C.F.R. § 106.45.
142 Id. at 30,360.
143 Id. at 30,361.
144 Id. at 30,331.
145 Id. at 30,340.
146 Id. at 30,319. See also 34 C.F.R. § 106.45(b)(5)(iv).
148 Id. at 30,320, 30,324, 30,342.
149 Id.
150 34 C.F.R. § 106.45(b)(6)(i).
151 Id. See also 85 Fed. Reg. at 30,324, 30,355-56.
152 34 C.F.R. § 106.45(b)(6)(i).
154 34 C.F.R. § 106.45(b)(6)(ii).
155 Id.
157 34 C.F.R. § 106.45(b)(6)(i).
158 Id.
160 Id.
161 Id. at 30,353.
162 Id.
164 34 C.F.R. § 106.45(b)(1)(x).
166 Id. at 30,323.
167 Id. at 30,323-24.
168 Id.
169 Id. at 30,323.
170 Id.
171 34 C.F.R. § 106.45(b)(6)(i).
173 Id.
174 34 C.F.R. § 106.45(b)(6)(i).
178 Id. at 30,328, 30,345, 30,349, 30,361.
179 Id. at 30,349.
180 Id.
181 See, e.g., id. at 30,142 n.625 (acknowledging that speech, when not protected under the U.S. Constitution, may constitute actionable harassment under 34 C.F.R. § 106.30 even when speech is part of the misconduct at issue). See also id. at 30,349.
183 Id.
184 Id.

36
See also 85 Fed. Reg. at 30,349 n.1341.

34 C.F.R. § 106.45(b)(6)(i).


Id. at 30,386 n.1473.


34 C.F.R. § 106.45(b)(9).


Id. at 30,361.

34 C.F.R. § 106.45(b)(1)(i).

Id. § 106.45(b)(1)(iii).


Id. at 30,403.

Id. at 30,388.


34 C.F.R. § 106.45(b)(9).


34 C.F.R. § 106.71(a).

Id.

Id. at 30,536.

Id.

Id.

Id.

Id.

34 C.F.R. § 106.45(b)(1)(i).

Id. § 106.71(b)(2). See also 85 Fed. Reg. at 30,537.

34 C.F.R. § 106.71(b)(2).

Id.

Id. §§ 106.8(c), 106.45. See also 85 Fed. Reg. at 30,095, 30,129, 30,471, 30,473.

34 C.F.R. §§ 106.8(c), 106.45. See also 85 Fed. Reg. at 30,095, 30,129, 30,461, 30,473.

34 C.F.R. §§ 106.8(a)-(c).

U.S. Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Sexual Harassment of Students by School Employees, Other Students, or Third Parties at 19-20 (Jan. 19, 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. This guidance was rescinded in 2020 but remains accessible on the Department’s website for historical reference.

Id. at 20.


34 C.F.R. § 106.12(b).

Id.

Id. § 106.12(a).

Id.

Id. § 106.12(b).

Appendix to
Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)

This Appendix accompanies Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) from the U.S. Department of Education’s Office for Civil Rights. This Appendix responds to schools’ requests for examples of Title IX procedures that may be adaptable to their own circumstances and helpful in implementing the 2020 amendments to the Department’s Title IX regulations. Schools that receive federal funds are obligated to implement these regulations, with some limited exceptions described in the statute and regulations.

The Appendix includes examples for elementary and secondary schools and postsecondary schools. It is not comprehensive but addresses many areas in which questions arise.

Important notes:

- Schools may use the example policy language in this Appendix to guide the creation of their own policies but are not required to do so. The Department does not endorse these provisions in particular, nor does it prefer or support these examples as compared with others that schools may use.
- Other than any statutory and regulatory requirements included below, the contents of this Appendix do not have the force and effect of law and are not meant to bind the public. This Appendix is intended only to provide clarity to the public regarding how OCR interprets existing requirements under the law or agency policies.
- Adoption of one or more of the examples from this Appendix alone does not demonstrate compliance with Title IX. If OCR investigates a discrimination complaint, OCR will make a fact-specific determination regarding whether a school’s Title IX policies and procedures, and their implementation, complies with the law.
- The example policy language does not address policies or procedures that may be required to comply with Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment. As the 2020 amendments state: “Nothing in [these regulations] 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.” 34 C.F.R. § 106.6(f).

Please also note that this Appendix focuses on procedures for addressing reports and complaints of sexual harassment, including sexual violence, because the regulations themselves focus on procedures.

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1 The Department issued the regulations to implement Title IX of the Education Amendments Act of 1972. The Department’s current Title IX regulations are in 34 C.F.R. Part 106, which is available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=f12a46d66326f0c23de5edac094d253d&mc=true&n=pt34.1.106&r=PART&ty=HTML.
The examples are excerpted from the policies at a variety of schools across the United States, and OCR has edited them for readability and consistency.

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Many of the sections below include multiple examples to illustrate choices that different schools have made about communicating their procedures to students and their communities. The 2020 amendments do not necessarily require the approaches in the examples here and, again, the Department does not endorse these provisions in particular, nor does it prefer or support these examples as compared with others that schools may use.

The 2020 amendments impose some different requirements for elementary and secondary schools, as compared to postsecondary schools. In light of this, we have noted where examples track requirements for elementary and secondary schools, postsecondary schools, or both. For more information on these differences, please see the Title IX Q&A.

I. Receiving and Responding to Reports of Sexual Harassment

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: When a complaint or report of sexual harassment is made under this school’s policy, the Title IX Coordinator (or designee) will: (1) confidentially contact the complainant to offer supportive measures, consider the complainant’s wishes with respect to supportive measures, and inform them of the availability of supportive measures with or without filing a formal complaint; (2) explain the process for how to file a formal complaint; (3) inform the complainant that any report made in good faith will not result in discipline; and (4) respect the complainant’s wishes with respect to whether to investigate unless the Title IX Coordinator determines it is necessary to pursue the complaint in light of a health or safety concern for the community.

- Example Policy 2: Choosing to make a report, file a formal complaint, and/or meet with the Title IX Coordinator after a report or formal complaint has been made, and deciding how to proceed, can be a process that unfolds over time. You do not have to decide whether to pursue a formal complaint or to name the other party/ies at the time of the report. Reporting does not mean you wish to pursue a formal complaint—it may mean you would like help accessing resources and supportive measures. You do not have to pursue a formal complaint to take advantage of the supportive measures available to you.

Example Policy Used by Elementary and Secondary Schools

- Example Policy 1: The district must respond whenever any District employee has been put on actual notice of any sexual harassment or allegations of sexual harassment as
defined in this district’s policy. This mandatory obligation is in addition to the child abuse mandatory reporting obligation under state law.

II. Supportive Measures

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: Supportive measures are short-term measures that are designed to restore or preserve access to the school’s education program or activity. Examples of supportive measures 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.

- Example Policy 2: Supportive measures are available regardless of whether the complainant chooses to pursue any action under this school’s policy, including before and after the filing of a formal complaint or where no formal complaint has been filed. Supportive measures are available to the complainant, respondent, and as appropriate, witnesses or other impacted individuals. The Title IX Coordinator will maintain consistent contact with the parties to ensure that safety and emotional and physical well-being are being addressed. Generally, supportive measures are meant to be short-term in nature and will be re-evaluated on a periodic basis. To the extent there is a continuing need for supportive measures after the conclusion of the resolution process, the Title IX Coordinator will work with appropriate school resources to provide continued assistance to the parties.

- Example Policy 3: Supportive measures are provided based on an individualized assessment of the needs of the individual. They may include, but are not limited to: facilitating access to medical and counseling services, assistance in arranging the rescheduling of exams and assignments, academic support services, assistance in requesting long-term academic accommodations if the individual qualifies as an individual with a disability, allowing either a complainant or respondent to drop a class in which both parties are enrolled, a mutual “no contact order,” and any other reasonably supportive measure that does not unreasonably burden the other party’s access to education and that serves the goals of this policy.

- Example Policy 4: The school will make available supportive measures with or without the filing of a formal complaint. These supports will be available to both parties, free of charge. These supports are non-disciplinary and non-punitive individualized services designed to offer support without being unreasonably burdensome. They are meant to restore access to education, protect student and employee safety, and/or deter future acts of sexual harassment. Supportive measures are temporary and flexible, based on
the needs of the individual and may include counseling, extensions of deadlines or course-related adjustments, restrictions on contact between parties (must be applied equally to both parties), leaves of absence, and increased security and monitoring of certain areas of the school.

III. Investigations

*Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools*

- **Example Policy 1:** Once a formal Title IX complaint is filed, an investigator will be assigned and the parties will be treated equitably, including in the provision of supportive measures and remedies. They will receive notice of the specifics of the allegations as known, and as any arise during the investigation. The investigator will be unbiased and free from conflicts of interest and will objectively review the complaint, any evidence, and any information from witnesses, expert witnesses, and the parties. If the investigator conducts interviews, the parties will be provided time to prepare and will receive notice of the time/date/location/participants/purpose for the interviews.

- **Example Policy 2:** Upon receipt of a formal Title IX complaint, the Title IX Coordinator will appoint an Investigator to investigate the allegations subject to the formal grievance process. The investigation may include, among other things, interviewing the complainant, the respondent, and any witnesses; reviewing law enforcement investigation documents if applicable; reviewing relevant student or employment files (preserving confidentiality wherever necessary); and gathering and examining other relevant documents, social media, and evidence.

*Example Policies Used by Elementary and Secondary Schools*

- **Example Policy 1:** The Investigator will attempt to collect all relevant information and evidence. While the Investigator will have the burden of gathering evidence, it is crucial that the parties present evidence and identify witnesses to the Investigator so that they may be considered during the investigation. While all evidence gathered during the investigative process and obtained through the exchange of written questions will be considered, the decision-maker may in their discretion grant lesser weight to last-minute information or evidence introduced through the exchange of written questions that was not previously presented for investigation by the Investigator.

- **Example Policy 2:** The decision-maker will facilitate a written question and answer period between the parties. Each party may submit their written questions for the other party and witnesses to the decision-maker for review. The questions must be relevant to the case. The decision-maker will determine if the questions submitted are relevant and will then forward the relevant questions to the other party or witnesses for a response. The decision-maker can then review all the responses, determine what is relevant or not
relevant, and issue a decision as to whether the Respondent is responsible for the alleged sexual harassment.

IV. The Role of the Advisor

Example Policies Used by Postsecondary Schools

- Example Policy 1: The role of the advisor is narrow in scope: the advisor may attend any interview or meeting connected with the grievance process that the party whom they are advising is invited to attend, but the advisor may not actively participate in interviews and may not serve as a proxy for the party. The advisor may attend the hearing and may conduct cross-examination of the other party and any witnesses at the hearing; otherwise, the advisor may not actively participate in the hearing.

- Example Policy 2: During meetings and hearings, the advisor may talk quietly with the student or pass notes in a non-disruptive manner. The advisor may not intervene in meetings with the school. In addition, while advisors may provide guidance and assistance throughout the process, all written submissions must be authored by the student.

- Example Policy 3: The advisor may provide advice and consultation to the parties or parties’ witnesses outside of the conduct of the live hearing to assist parties in handling the formal resolution process.

V. The Live Hearing Process

Example Policies Used by Postsecondary Schools

A. Before the hearing

- Example Policy 1: In order to promote a fair and expeditious hearing, the parties and their advisors will attend a pre-hearing conference with the decision-maker. The pre-hearing conference assures that the parties and their advisors understand the hearing process and allows for significant issues to be addressed in advance of the hearing.

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2 While elementary and secondary schools may choose to permit parties to have an advisor, the 2020 amendments only require an advisor at the postsecondary school level due to the cross-examination requirement. See the Question 41 in the Q&A for more information.

3 While elementary and secondary schools may choose to use a live hearing, the 2020 amendments only require a live hearing with cross-examination at the postsecondary school level. See Section XII in the Q&A for more information.
B. Hearing Format

- **Example Policy 1:** While the hearing is not intended to be a repeat of the investigation, the parties will be provided with an equal opportunity for their advisors to conduct cross-examination of the other party and of relevant witnesses. A typical hearing may include: brief opening remarks by the decision-maker; questions posed by the decision-maker to one or both of the parties; cross-examination by either party’s advisor of the other party and relevant witnesses; and questions posed by the decision-maker to any relevant witnesses.

- **Example Policy 2:** The parties and witnesses will address only the decision-maker, and not each other. Only the decision-maker and the parties’ advisors may question witnesses and parties.

- **Example Policy 3:** When it is an individual’s turn to appear before the decision-maker, that person will appear separately before the panel and may bring notes for their reference. The decision-maker may ask any individual for a copy of or to inspect their notes. The complainant and respondent may be accompanied by or may otherwise be in contact with their advisor at all times. If the hearing is conducted wholly or partially through video conference, an administrator will ensure that each party has the opportunity to appear before or speak directly to the hearing panel and to appropriately participate in the questioning process.

- **Example Policy 4:** At the request of either party, the decision-maker will allow the parties and/or witnesses to be visually separated during the hearing. This may include, but is not limited to, the use of videoconference and/or any other appropriate technology. To assess credibility, the decision-maker must have sufficient access to the complainant, respondent, and any witnesses presenting information; if the decision-maker is sighted, then the decision-maker must be able to see them.

- **Example Policy 5:** Parties will be able to see and hear (or, if deaf or hard of hearing, to access through auxiliary aids or services) all questioning and testimony at the hearing, if they choose to. Witnesses (other than the parties) will attend the hearing only for their own testimony.

- **Example Policy 6:** The school will ensure that students with disabilities have an equal opportunity to participate in, and benefit from the school’s Title IX grievance process, consistent with the requirements of Section 504 of the Rehabilitation Act of 1973. The school will also ensure that English learner students can participate meaningfully and equally in the school’s Title IX grievance process, as required by Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974.
C. Evidence

- Example Policy 1: The hearing is an opportunity for the parties to address the decision-maker. The parties may address any information in the investigative report, submit supplemental statements in response to the investigative report, or, at the time of any sanction, provide verbal impact and mitigation statements. The school will make all evidence gathered available to the parties at the hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination. In reaching a determination, the decision-maker will meet with the complainant, respondent, investigator, and any relevant witnesses, but the decision-maker may not conduct their own investigation.

- Example Policy 2: The parties will have the opportunity to present the evidence they submitted, subject to any exclusions determined by the decision-maker. Generally, the parties may not introduce evidence, including witness testimony, at the hearing that they did not identify during the pre-hearing process. However, the decision-maker has discretion to accept or exclude additional evidence presented at the hearing. In addition, the parties are expected not to spend time on undisputed facts or evidence that would be duplicative.

- Example Policy 3: Courtroom rules of evidence and procedure will not apply. The decision-maker will generally consider, that is rely on, all evidence that they determine to be relevant and reliable. Throughout the hearing, the decision-maker will: (1) Exclude evidence including witness testimony that is, for example, irrelevant in light of the policy violation(s) charged, relevant only to issues not in dispute, or unduly repetitive, and will require rephrasing of questions that violate the rules of conduct; (2) Decide any procedural issues for the hearing; and/or (3) Make any other determinations necessary to promote an orderly, productive, and fair hearing that complies with the rules of conduct.

D. Confidentiality

- Example Policy 1: All live hearings will be closed to the public and witnesses will be present only during their testimony. For live hearings that use technology, the decision-maker shall ensure that appropriate protections are in place to maintain confidentiality.

- Example Policy 2: The hearing is a closed proceeding and is not open to the public. All participants involved in a hearing are expected to respect the seriousness of the matter and the privacy of the individuals involved. The school’s expectation of privacy during the hearing process should not be understood to limit any legal rights of the parties during or after the resolution. The school may not, by federal law, prohibit the
complainant from disclosing the final outcome of a formal complaint process (after any appeals are concluded). All other conditions for disclosure of hearing records and outcomes are governed by the school’s obligations under the Family Educational Rights and Privacy Act (FERPA), any other applicable privacy laws, and professional ethical standards.

E. Decision-makers asking questions of the parties or witnesses

- Example Policy 1: The decision-maker may question the parties and witnesses, but they may refuse to respond.

VI. **Behavior During the Live Hearing/Rules of Decorum**

*Example Policies Used by Postsecondary Schools*

- Example Policy 1: The school will require all parties, advisors, and witnesses to maintain appropriate decorum throughout the live hearing. Participants at the live hearing are expected to abide by the decision-maker’s directions and determinations, maintain civility, and avoid emotional outbursts and raised voices. Repeated violations of appropriate decorum will result in a break in the live hearing, the length of which will be determined by the decision-maker. The decision-maker reserves the right to appoint a different advisor to conduct cross-examination on behalf of a party after an advisor’s repeated violations of appropriate decorum or other rules related to the conduct of the live hearing.

- Example Policy 2: The hearing will be conducted in a respectful manner that promotes fairness and accurate factfinding and that complies with the rules of conduct.

- Example Policy 3: The school (including any official acting on behalf of the school such as an investigator or a decision-maker) has the right at all times to determine what constitutes appropriate behavior on the part of an advisor and to take appropriate steps to ensure compliance with this policy.

- Example Policy 4: Parties and advisors may take no action at the hearing that a reasonable person would see as intended to intimidate that person (whether party, witness, or official) into not participating in the process or meaningfully modifying their participation in the process.
VII. Protecting the Well-Being of the Parties During the Live Hearing/Investigation

Example Policies Used by Postsecondary Schools

• Example Policy 1: Each participating individual will have access to a private room for the duration of the hearing if the hearing is in person and may choose to participate in the proceedings via video conference.

• Example Policy 2: The decision-maker will discuss measures available to protect the well-being of parties and witnesses at the hearing. These may include, for example, use of lived names and pronouns during the hearing, including names appearing on a screen; a party’s right to have their support person available to them at all times during the hearing (in addition to their advisor); and a hearing participant’s ability to request a break during the hearing, except when a question is pending.

Example Policy Used by Elementary and Secondary Schools

• Example Policy 1: To the greatest extent possible, and subject to Title IX, the school will make reasonable accommodations in an investigation to avoid potential re-traumatization of a child and to avoid any potential interference with an investigation by the Department of Child and Family Services or a law enforcement agency.

• Example Policy 2: The school will ensure that students with disabilities have an equal opportunity to participate in, and benefit from the school’s Title IX grievance process, consistent with the requirements of Section 504 of the Rehabilitation Act of 1973. The school will also ensure that English learner students can participate meaningfully and equally in the school’s Title IX grievance process, as required by Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974.

VIII. The Cross-Examination Process

Example Policies Used by Postsecondary Schools

A. Explaining Cross-Examination

• Example Policy 1: The parties’ advisors will have the opportunity to cross examine the other party (and witnesses, if any). Such cross-examination must be conducted directly, orally, and in real time by the party’s advisor and never by a party personally.

• Example Policy 2: Each party’s advisor may pose relevant questions to the opposing party and witnesses (including the Investigative Team).

• Example Policy 3: Each party will prepare their questions, including any follow-up questions, for the other party and witnesses, and will provide them to their advisor. The advisor will ask the questions as the party has provided them, and may not ask questions that the advisor themselves have developed without their party.
- Example Policy 4: The role of the advisor at the live hearing is to conduct cross-examination on behalf of a party. The advisor is not to represent a party, but only to relay the party’s cross-examination questions that the party wishes to have asked of the other party and witnesses. Advisors may not raise objections or make statements or arguments during the live hearing.

B. Relevant questions only/Decision-maker reviews all questions

- Example Policy 1: Only relevant questions may be asked of a party or witness. Before a complainant, respondent, or witness responds to a question, the decision-maker will first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

- Example Policy 2: When a party’s advisor is asking questions of the other party or a witness, the decision-maker will determine whether each question is relevant before the party or witness answers it, will exclude any that are not relevant or unduly repetitive, and will require rephrasing of any questions that violate the rules of conduct. If the decision-maker determines that a question should be excluded as not relevant, they will explain their reasoning.

- Example Policy 3: Only relevant cross-examination questions and follow-up questions, including those that challenge credibility, may be asked. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker first must determine whether the question is relevant or cumulative and must explain any decision to exclude a question that is not relevant or is cumulative.

IX. Restrictions on Considering a Complainant’s or Respondent’s Sexual History

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: The investigator will not, as a general rule, consider the sexual history of a complainant or respondent. However, in limited circumstances, sexual history may be directly relevant to the investigation. As to complainants: While the investigator will never assume that a past sexual relationship between the parties means the complainant consented to the specific conduct under investigation, evidence of how the parties communicated consent in past consensual encounters may help the investigator understand whether the respondent reasonably believed consent was given during the encounter under investigation. Further, evidence of specific past sexual encounters may be relevant to whether someone other than respondent was the source of relevant physical evidence. As to respondents: Sexual history of a respondent might be relevant to show a pattern of behavior by respondent or resolve another issue of importance in
the investigation. Sexual history evidence that is being proffered to show a party’s reputation or character will never be considered relevant on its own.

- Example Policy 2: An individual’s character or reputation with respect to other sexual activity is not relevant and will not be considered as evidence. Similarly, an individual’s prior or subsequent sexual activity is typically not relevant and will only be considered as evidence under limited circumstances. For example, prior sexual history may be relevant to explain the presence of a physical injury or to help resolve other questions raised in the investigation. It may also be relevant to show that someone other than the respondent committed the conduct alleged by the complainant. The investigator will determine the relevance of this information, and both parties will be informed in writing if evidence of prior sexual history is deemed relevant.

- Example Policy 3: Where the parties have a prior sexual relationship and the existence of consent is at issue, the sexual history between the parties may be relevant to help understand the manner and nature of communications between the parties and the context of the relationship, which may have bearing on whether consent was sought and given during the incident in question. Even in the context of a relationship, however, consent to one sexual act does not, by itself, constitute consent to another sexual act; in addition, consent on one occasion does not, by itself, constitute consent on a subsequent occasion. The investigator will determine the relevance of this information and both parties will be informed if evidence of prior sexual history is deemed relevant.

X. Situations in Which a Party or Witness Does Not Participate in a Live Hearing or in Cross-examination

Example Policies Used by Postsecondary Schools

- Example Policy 1: If the complainant, the respondent, or a witness informs the school that they will not attend the hearing (or will attend but refuse to be cross-examined), the school’s Title IX Coordinator may determine that the hearing may still proceed. The decision-maker may not, however: (a) rely on any statement or information provided by that non-participating individual in reaching a determination regarding responsibility; or (b) draw any adverse inference in reaching a determination regarding responsibility based solely on the individual’s absence from the hearing (or their refusal to be cross-examined).

- Example Policy 2: Neither the complainant nor the respondent is required to participate in the resolution process outlined in these procedures. The school will not draw any adverse inferences from a complainant’s or respondent’s decision not to participate or
to remain silent during the process. An investigator or decision-maker, in the investigation or the hearing respectively, will reach findings and conclusions based on the information available.

- Example Policy 3: If a party does not submit to cross-examination, the decision-maker cannot rely on any prior statements made by that party in reaching a determination regarding responsibility, but may reach a determination regarding responsibility based on evidence that does not constitute a statement by that party. The decision-maker may also consider evidence created by the party where the evidence itself constituted the alleged prohibited conduct. Such evidence may include, by way of example but not limitation, text messages, e-mails, social media postings, audio or video recordings, or other documents or digital media created and sent by a party as a form of alleged sexual harassment, or as part of an alleged course of conduct that constitutes stalking. The decision-maker cannot draw an inference about the responsibility for a policy violation based solely on a party’s absence from the hearing or refusal to answer cross-examination or other questions.

- Example Policy 4: A statement is a person’s intent to make factual assertions, including evidence that contains a person’s statement(s). Party or witness statements, police reports, Sexual Assault Nurse Examiner (SANE) reports, medical reports, and other records may not be relied upon in making a final determination after the completion of a live hearing to the extent that they contain statements of a party or witness who has not submitted to cross-examination. However, the decision-maker cannot draw any inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or their refusal to answer cross-examination questions.

XI. Presumptions about Complainants, Respondents, and Witnesses

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: The school presumes that reports of prohibited conduct are made in good faith. A finding that the alleged behavior does not constitute a violation of this school’s policy or that there is insufficient evidence to establish that the alleged conduct occurred as reported does not mean that the report was made in bad faith.

- Example Policy 2: All formal sexual misconduct complaints are assumed to be made in good faith. However, if the evidence establishes that the formal complaint was intentionally falsely made, corrective/disciplinary action may be taken, up to and including suspension, expulsion, or termination. This does not include allegations
that are made in good faith but are ultimately shown to be erroneous or do not result in a policy violation determination.

- Example Policy 3: The respondent is presumed to be not responsible for the alleged conduct until a determination regarding responsibility is made by the decision-maker.

- Example Policy 4: An individual’s status as a respondent will not be considered a negative factor during consideration of the grievance. Respondents are entitled to, and will receive the benefit of, a presumption that they are not responsible for the alleged conduct until the grievance process concludes and a determination regarding responsibility is issued. Similarly, credibility determinations will not be based on a person’s status as a complainant, respondent, or witness.

XII. Determination Regarding Responsibility

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: The school will review the evidence provided by all parties and will make a final determination of responsibility after the investigation. The decision-maker will not be the Title IX Coordinator, the investigator, or any other individual who may have a conflict of interest. The final determination will be provided to the parties at the same time, with appeal rights provided. It will explain if any policies were violated, the steps and methods taken to investigate, the findings of the investigation, conclusions about the findings, the ultimate determination and the reasons for it, any disciplinary sanctions that will be imposed on the respondent, and any remedies available to the complainant to restore or preserve equal access.

- Example Policy 2: The decision-maker will issue a written determination following the review of evidence. The written determination will include: (1) identification of allegations potentially constituting sexual harassment as defined in 34 C.F.R. § 106.30; (2) a description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather evidence; (3) findings of fact supporting the determination, conclusions regarding the application of this formal grievance process to the facts; (4) a statement of, and rationale for, the result as to each allegation, including any determination regarding responsibility, any disciplinary sanctions the decision-maker imposed on the respondent that directly relate to the complainant, and whether remedies designed to restore or preserve equal access to the school’s education program or activity will be provided to the complainant; and (5) procedures and permissible bases for the parties to appeal the determination. The written determination will be provided to the parties simultaneously. Remedies and supportive measures that do not impact the respondent should not be disclosed in the
written determination; rather the determination should simply state that remedies will be provided to the complainant.

XIII. **Sanctions and Remedies**

*Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools*

- **Example Policy 1:** The school will take reasonable steps to address any violations of this policy and to restore or preserve equal access to the school’s education programs or activities. Sanctions for a finding of responsibility depend upon the nature and gravity of the misconduct, any record of prior discipline for similar violations, or both. The range of potential sanctions and corrective actions that may be imposed on a student includes, but is not limited to the following: [list of possible sanctions decided on by the school].

- **Example Policy 2:** When a respondent is found responsible for the prohibited behavior as alleged, sanctions are based on the severity and circumstances of the behavior. Disciplinary actions or consequences can range from a conference with the respondent and a school official through suspension or expulsion. When a respondent is found responsible for the prohibited behavior as alleged, remedies must be provided to the complainant. Remedies are designed to maintain the complainant’s equal access to education and may include supportive measures or remedies that are punitive or would pose a burden to the respondent.

- **Example Policy 3:** Whatever the outcome of the investigation, hearing, or appeal, the complainant and respondent may request ongoing or additional supportive measures. Ongoing supportive measures that do not unreasonably burden a party may be considered and provided even if the respondent is found not responsible.

- **Example Policy 4:** The role of the Title IX Coordinator following the receipt of the written determination from the decision-maker is to facilitate the imposition of sanctions, if any, the provision of remedies, if any, and to otherwise complete the formal resolution process. The appropriate school official, after consultation with the Title IX Coordinator, will determine the sanctions imposed and remedies provided, if any. The Title IX Coordinator must provide written notice to the parties simultaneously. The school must disclose to the complainant the sanctions imposed on the respondent that directly relate to the complainant when such disclosure is necessary to ensure equal access to the school’s education program or activity.

- **Example Policy 5:** For students with disabilities: If a decision-maker has determined that the respondent has engaged in sexual harassment and prior to consideration of imposing a long-term suspension, reassignment, or recommendation for expulsion, the following shall occur, and timelines will be extended accordingly: (1) For any student with an Individualized Education Program (IEP), or that a school has knowledge may be a child with a disability, the decision-maker will make a referral to the school to conduct a
manifestation determination review (MDR). The MDR team meeting shall convene as soon as reasonably possible and make available to the decision-maker the MDR decision and written rationale in no later than ten school days; (2) For any student with a disability covered by Section 504, the decision-maker will make a referral to have a knowledgeable committee convene a Section 504 Causality Review. The causality review meeting shall convene as soon as reasonably possible and make available to the decision-maker the causality review decision and written rationale in no later than ten school days; (3) Before a student with a disability is suspended, reassigned, or recommended for expulsion, the principal of the school will consult with the student’s case manager, review the student’s IEP, and take into account any special circumstances regarding the student. The IEP team will consider the parents’ views and any preference for the reassignment location along with any location proposed by school staff at the meeting. It is the duty of the IEP team at its meeting to discuss, propose, and decide upon the educational placement, consistent with the disciplinary decision. Accordingly, the IEP team will consider the views of all members, including the parents, at the meeting.

XIV. Appeals

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

• Example Policy 1: Each party may appeal (1) the dismissal of a formal complaint or any included allegations and/or (2) a determination regarding responsibility. To appeal, a party must submit their written appeal within five business days of being notified of the decision, including the grounds for the appeal. The grounds for appeal are as follows: Procedural irregularity that affected the outcome of the matter (i.e., a failure to follow the institution’s own procedures); 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; The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against an individual party, or for or against complainants or respondents in general, that affected the outcome of the matter. The submission of an appeal stays any sanctions for the pendency of an appeal. Supportive measures and remote learning opportunities remain available during the pendency of the appeal. If a party appeals, the school will as soon as practicable notify the other party in writing of the appeal; however the time for appeal shall be offered equitably to all parties and shall not be extended for any party solely because the other party filed an appeal. Appeals will be decided by an individual, who will be free of conflict of interest and bias, and will not serve as investigator, Title IX Coordinator, or decision-maker in the same matter.

• Example Policy 2: Appeals are available after a complaint dismissal or after a final determination is made. Appeals can be made due to procedural irregularities in the
investigation affecting the outcome, new evidence becoming available, or due to bias or a conflict of interest by Title IX personnel that may have affected the outcome. Appeal requests must be made within 30 days of the school’s final determination and include the rationale for the appeal. Parties will be given an opportunity to submit a written statement in support of or against the final determination. A new decision-maker will issue the final decision at the same time to each party.

- Example Policy 3: The complainant and respondent have an equal opportunity to appeal the policy violation determination and any sanctions. The school administers the appeal process, but is not a party and does not advocate for or against any appeal. A party may appeal only on the following grounds and the appeal should identify the reason(s) why the party is appealing: (1) there was a procedural error in the hearing process that materially affected the outcome; procedural error refers to alleged deviations from school policy, and not challenges to policies or procedures themselves; (2) there is new evidence that was not reasonably available at the time of the hearing and that could have affected the outcome; (3) the decision-maker had a conflict of interest or bias that affected the outcome; (4) the determination regarding the policy violation was unreasonable based on the evidence before the decision-maker; this ground is available only to a party who participated in the hearing; and (5) the sanctions were disproportionate to the hearing officer’s findings. The appeal must be submitted within 10 business days following the issuance of the notice of determination. The appeal must identify the ground(s) for appeal and contain specific arguments supporting each ground for appeal. The school will notify the other party of the appeal, and that other party will have an opportunity to submit a written statement in response to the appeal, within three business days. The school will also inform the parties that they have an opportunity to meet with the appeal officer separately to discuss the proportionality of the sanction. The appeal officer, who will not be the same person as the Title IX Coordinator, investigator, or decision-maker, will decide the appeal considering the evidence presented at the hearing, the investigation file, and the appeal statements of both parties. In disproportionate sanction appeals, they may also consider any input the parties provided during the meeting. The appeal officer will summarize their decision in a written report that will be sent to the complainant and respondent within 10 business days of receiving the appeal.

XV. Informal Resolution

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: Informal resolution is available only after a formal complaint has been filed, prior to a determination of responsibility, and if the complainant and respondent voluntarily consent to the process in writing. Informal resolution is not available in cases in which an employee is alleged to have sexually harassed a student. Informal resolution
may involve agreement to pursue individual or community remedies, including targeted or broad-based educational programming or training; supported direct conversation or interaction with the respondent; mediation; indirect action by the Title IX Coordinator; and other forms of resolution that can be tailored to the needs of the parties. With the voluntary consent of the parties, informal resolution may be used to agree upon disciplinary sanctions. Disciplinary action will only be imposed against a respondent where there is a sufficient factual foundation and both the complainant and the respondent have agreed to forego the additional procedures set forth in this school’s policy and accept an agreed upon sanction. Any person who facilitates an informal resolution will be trained and free from conflicts of interest or bias for or against either party.

- Example Policy 2: The informal resolution process is only available where the complainant has filed a formal sexual harassment complaint that involves parties of the same status (e.g., student-student or employee-employee) and the parties voluntarily request in writing to resolve the formal complaint through the informal resolution process. Within five workdays of receiving a written request to start the informal resolution process, the school will appoint an official to facilitate an effective and appropriate resolution. The Title IX Coordinator may serve as the facilitator. Within five workdays of such appointment, the parties may identify to the Title IX Coordinator in writing any potential conflict of interest or bias posed by such facilitator to the matter. The Title IX Coordinator will consider the information and appoint another facilitator if a material conflict of interest or bias exists. The facilitator will request a written statement from the parties to be submitted within 10 workdays. Each party may request that witnesses are interviewed, but the school shall not conduct a full investigation as part of the informal resolution process. The facilitator will hold a meeting(s) with the parties and coordinate the informal resolution measures. Each party may have one advisor of their choice during the meeting, but the advisor may not speak on the party’s behalf. The informal resolution process should be completed within 30 workdays in most cases, unless good cause exists to extend the time. The parties will be notified in writing and given the reason for the delay and an estimated time of completion. Any resolution of a formal complaint through the informal resolution process must address the concerns of the complainant and the responsibility of the school to address alleged violations of its policy, while also respecting the due process rights of the respondent. Informal resolution process remedies include mandatory training, reflective writing assignment, counseling, written counseling memorandum by an employee’s supervisor, suspension, termination, or expulsion, or other methods designed to restore or preserve equal access to the school’s education programs or activities. At the conclusion of meetings, interviews, and the receipt of statements, the facilitator will write an informal resolution report and provide the parties with the informal resolution report simultaneously. At any time prior to resolving a formal complaint through the informal resolution process,
either party may withdraw in writing from the informal resolution process and resume or begin the formal resolution process.

- Example Policy 3: The Title IX Coordinator will determine whether it is appropriate to offer the parties informal resolution in lieu of a formal investigation of the complaint. In the event that the Title IX Coordinator determines that informal resolution is appropriate, the parties will be provided 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. Both parties must provide voluntary, written consent to the informal resolution process.

XVI. **Addressing Conduct That the School Deems to be Sexual Harassment but Does Not Meet the Definition of Sexual Harassment Under the Title IX Regulations**

*Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools*

- Example Policy 1: It is important to note that conduct that does not meet the criteria under Title IX may violate other federal or state laws or school policies regarding student misconduct or may be inappropriate and require an immediate response in the form of supportive measures and remedies to prevent its recurrence and address its effects.

- Example Policy 2: This school adopts a “two-pronged” approach. All conduct not covered under the current definition of sexual harassment, including sexual misconduct, will be addressed by the principal under the student code of conduct. Title IX procedures will be reserved only for those alleged actions that fall under the Title IX definition of sexual harassment.

- Example Policy 3: The Title IX Coordinator shall investigate the allegations in all formal complaints. The Title IX Coordinator must dismiss the formal complaint if the conduct alleged in the formal complaint would not constitute sexual harassment as defined in this school’s policy even if proved, or is outside the jurisdiction of the school, i.e., the conduct did not involve an education program or activity of the school, or did not occur against a person in the United States. The Title IX Coordinator shall forward the formal complaint to an appropriate school official that will determine whether the conduct alleged in the formal complaint violates a separate policy or code of conduct.
• Example Policy 4: In May of 2020, the U.S. Department of Education issued new regulations for colleges and universities that address sexual assault and other sexual misconduct. These regulations cover certain specific forms of sexual misconduct. To comply with these regulations, this school has revised its existing policy for those types of misconduct. In addition, this school maintains its existing Sexual Misconduct Policy for other types of sexual misconduct that are not covered by the new regulations. Both policies are important to creating and supporting a school community that rejects all forms of sexual misconduct.

• Example Policy 5: The Title IX regulations direct the school’s response to some, but not all, of the forms of prohibited behavior in this school’s Title IX policy. Allegations in a Title IX formal complaint related to behavior that occurs outside of the education program or activity or outside the United States, or behavior that would not meet the definition of Title IX sexual harassment as defined in this school’s Title IX policy, must be dismissed. Both the complainant and respondent may appeal the dismissal of any allegations under Title IX. However, in keeping with the school’s educational mission and commitment to fostering a learning, living, and working environment free from discrimination, harassment, and retaliation, this school will still move forward with an investigation or formal resolution under the same resolution process for all forms of prohibited behavior under this school’s Title IX policy. In this instance, this school is using its Title IX policy as a code of conduct to address behavior that occurred outside of the education program or activity or outside of the United States, even though the behavior falls outside of Title IX jurisdiction under the Department of Education’s 2020 amendments.

XVII. **Parent and Guardian Rights**

*Example Policy Used by Elementary and Secondary Schools*

• Example Policy 1: Consistent with the applicable laws of the jurisdiction in which the school is located, a student’s parent or guardian must be permitted to exercise the rights granted to their child under this school’s policy, whether such rights involve requesting supportive measures, filing a formal complaint, or participating in a grievance process. A student’s parent or guardian must also be permitted to accompany the student to meetings, interviews, and hearings, if applicable, during a grievance process in order to exercise rights on behalf of the student. The student may have an advisor of choice who is a different person from the parent or guardian.
Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

JANUARY 20, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.

These principles are reflected in the Constitution, which promises equal protection of the laws. These principles are also enshrined in our Nation’s anti-discrimination laws, among them Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e et seq.). In Bostock v. Clayton County, 590 U.S. ___ (2020), the Supreme Court held that Title VII's prohibition on discrimination “because of . . . sex” covers discrimination on the basis of gender identity and sexual orientation. Under Bostock's reasoning, laws that prohibit sex discrimination — including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations — prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.

Discrimination on the basis of gender identity or sexual orientation manifests differently for different individuals, and it often overlaps with other forms of prohibited discrimination, including discrimination on the basis of race or disability. For example, transgender Black
Americans face unconscionably high levels of workplace discrimination, homelessness, and violence, including fatal violence.

It is the policy of my Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation. It is also the policy of my Administration to address overlapping forms of discrimination.

Sec. 2. Enforcing Prohibitions on Sex Discrimination on the Basis of Gender Identity or Sexual Orientation. (a) The head of each agency shall, as soon as practicable and in consultation with the Attorney General, as appropriate, review all existing orders, regulations, guidance documents, policies, programs, or other agency actions ("agency actions") that:

(i) were promulgated or are administered by the agency under Title VII or any other statute or regulation that prohibits sex discrimination, including any that relate to the agency’s own compliance with such statutes or regulations; and

(ii) are or may be inconsistent with the policy set forth in section 1 of this order.

(b) The head of each agency shall, as soon as practicable and as appropriate and consistent with applicable law, including the Administrative Procedure Act (5 U.S.C. 551 et seq.), consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this order.

(c) The head of each agency shall, as soon as practicable, also consider whether there are additional actions that the agency should take to ensure that it is fully implementing the policy set forth in section 1 of this order. If an agency takes an action described in this subsection or subsection (b) of this section, it shall seek to ensure that it is accounting for, and taking appropriate steps to combat, overlapping forms of discrimination, such as discrimination on the basis of race or disability.

(d) Within 100 days of the date of this order, the head of each agency shall develop, in consultation with the Attorney General, as appropriate, a plan to carry out actions that the agency has identified pursuant to subsections (b) and (c) of this section, as appropriate and consistent with applicable law.

Sec. 3. Definition. "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).
Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,
January 20, 2021.