

**TITLE IX**

# INVESTIGATING SEXUAL HARASSMENT ALLEGATIONS

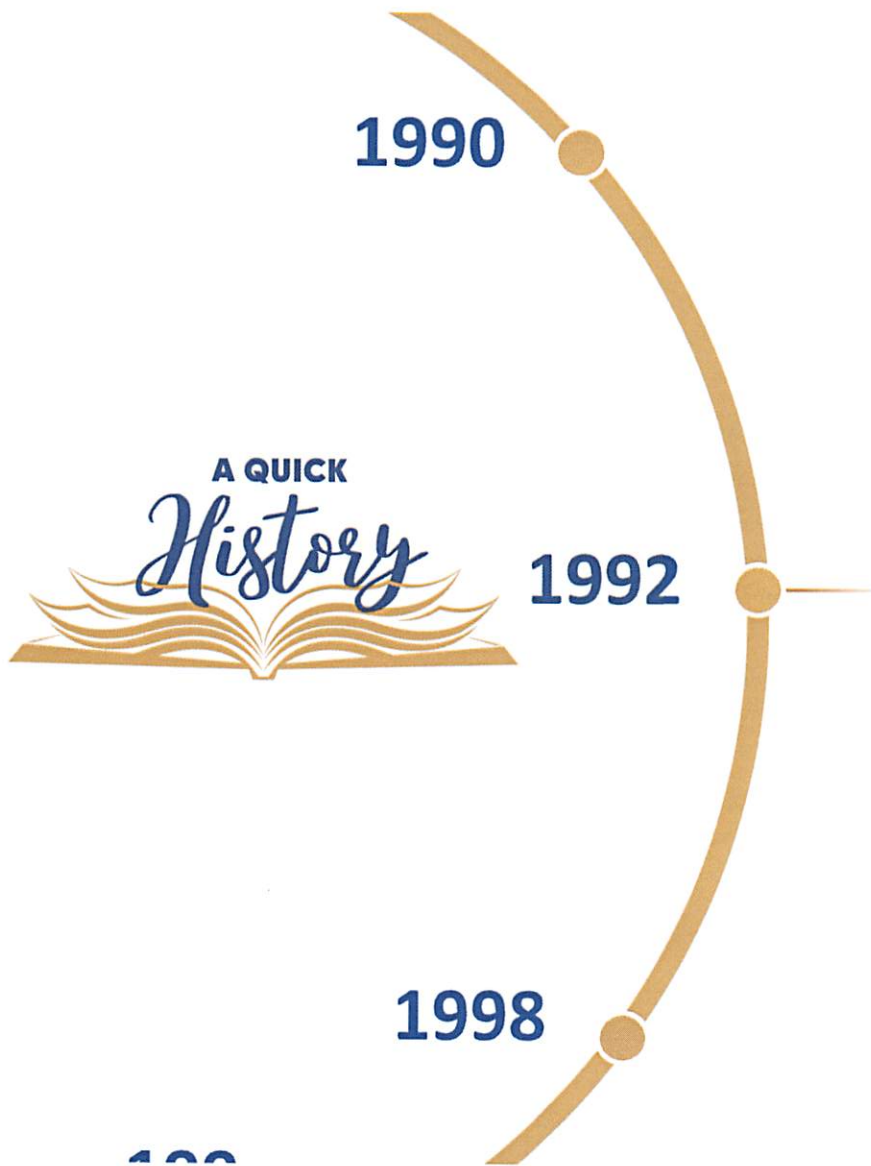


PRESENTED BY

**BRANDON CAREY**

OSSBA STAFF ATTORNEY



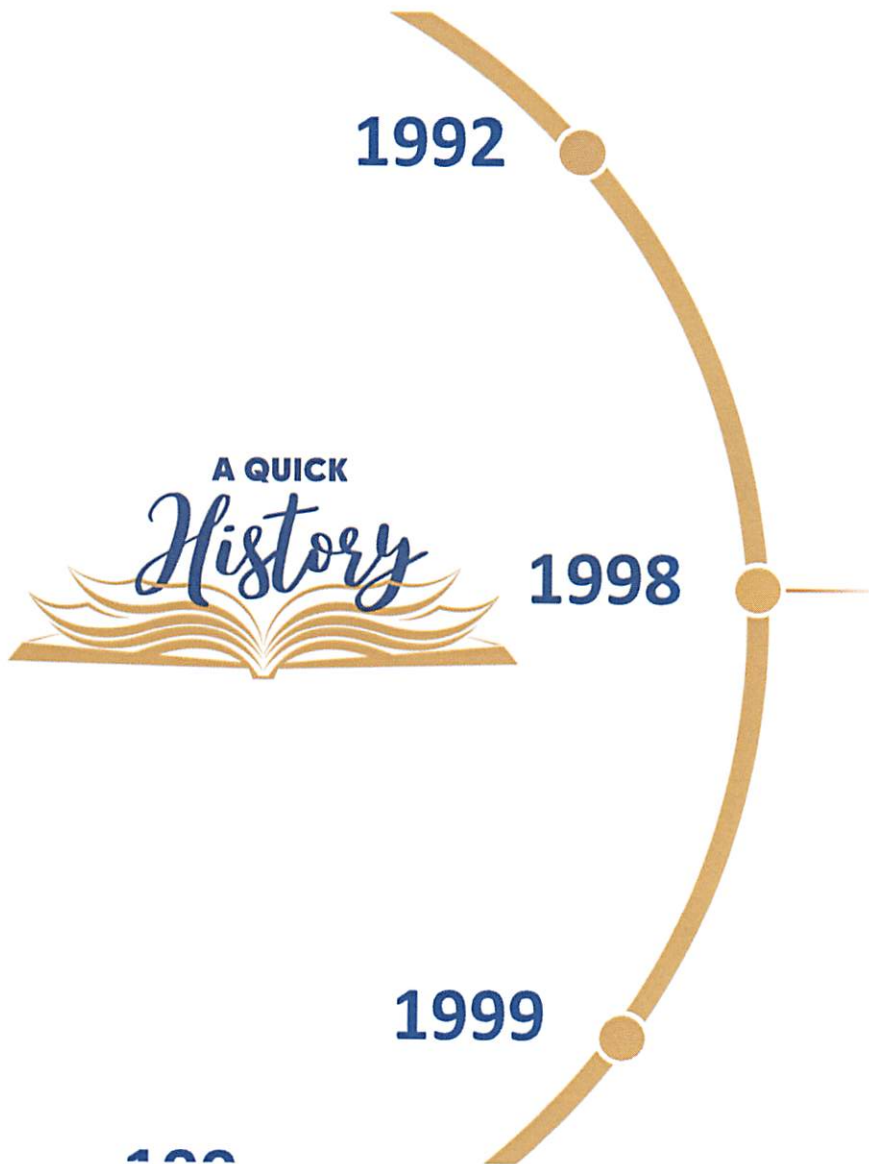


# Franklin v. Gwinnet County Public Schools

*Case of teacher-student harassment*

## Importance of the Case

- Sexual harassment constitutes sex discrimination under Title IX
- Private right for recovery of monetary damages

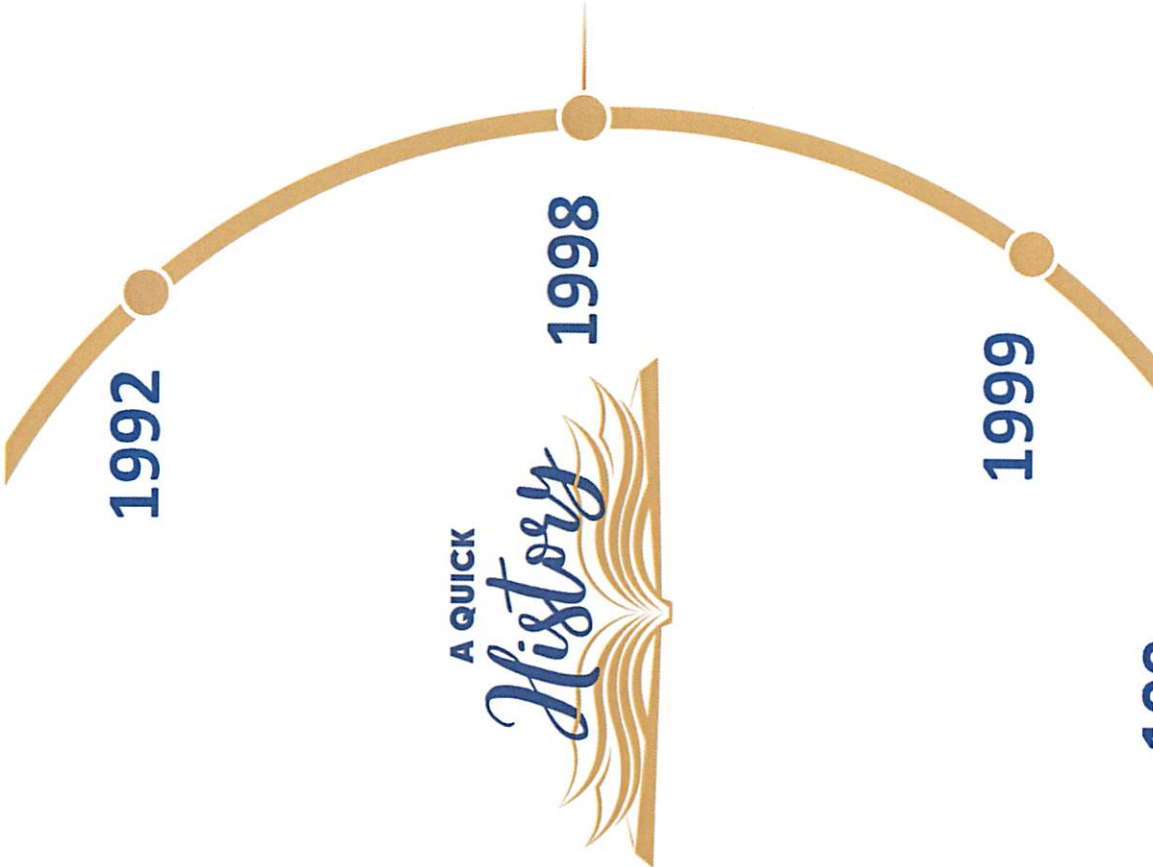


# Gebser V. Lago Vista Independent School

*Case involved teacher-student sexual harassment*

## Importance of the Case

U.S. Supreme Court created a high standard students must meet to prevail on a sexual harassment claim against institutions when an employee/student consensual relationship is the basis of a claim.

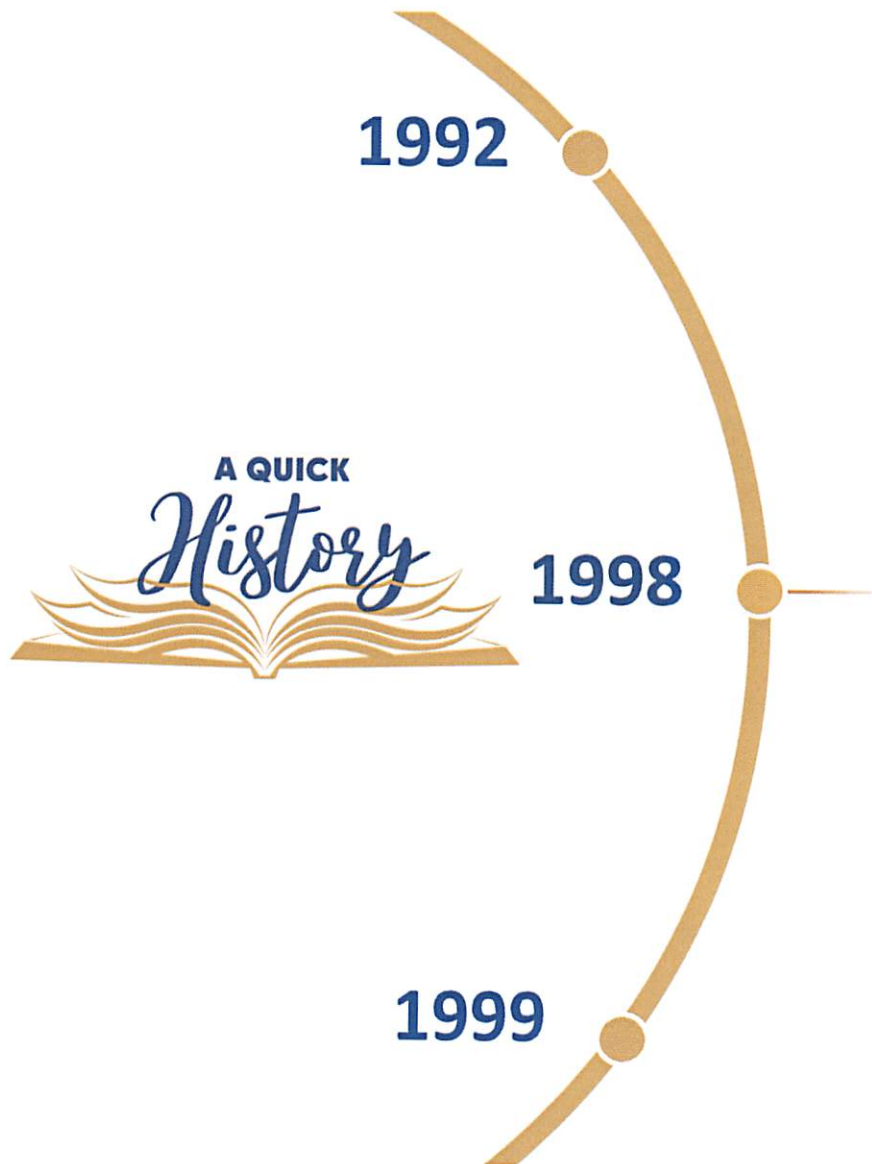


# Gebser V. Lago Vista Independent School

Case involved teacher-student sexual harassment

## Importance of the Case

The Court said you cannot recover monetary damages against the school unless the behavior has been reported to someone with power to alter the situation (“actual notice”) and “deliberate indifference” has been demonstrated by the school.



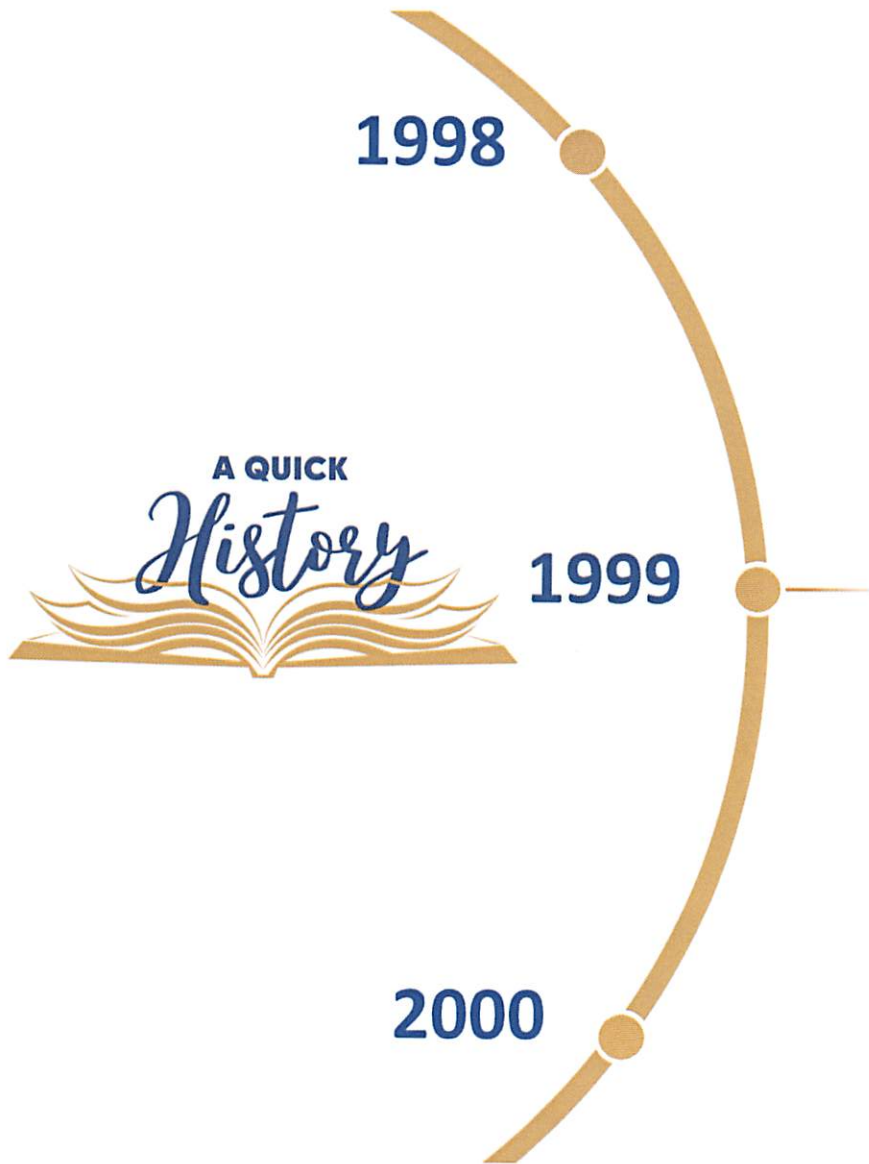
# Gebser V. Lago Vista Independent School

*Case involved teacher-student sexual harassment*

## The Three-part standard

An official of the educational institution must have:

1. Notice
2. Authority
3. Deliberate Indifference

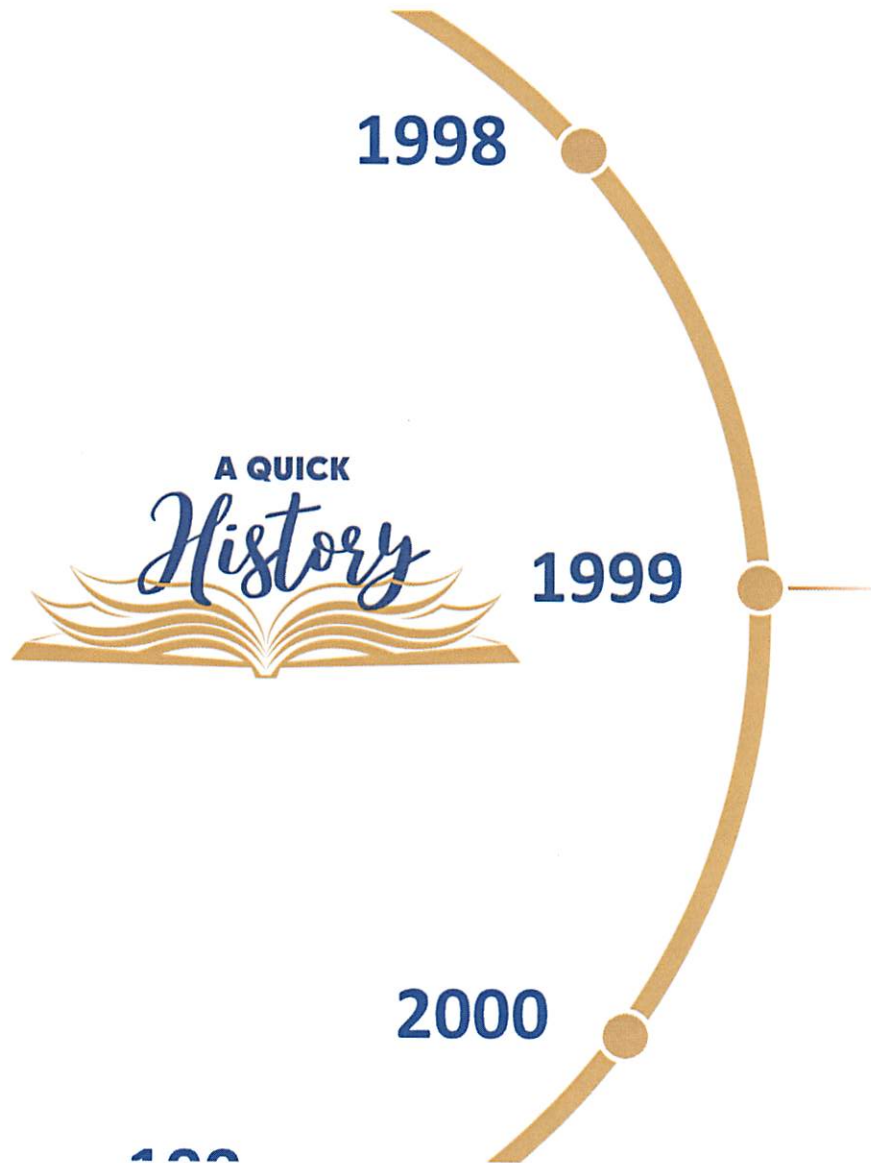


## Davis V. Monroe County Board Of Education

*Prolonged pattern of student/student sexual harassment of a fifth- grade girl by a classmate.*

### Importance of the Case

- Created a standard for harassment
- Defined “deliberate indifference”



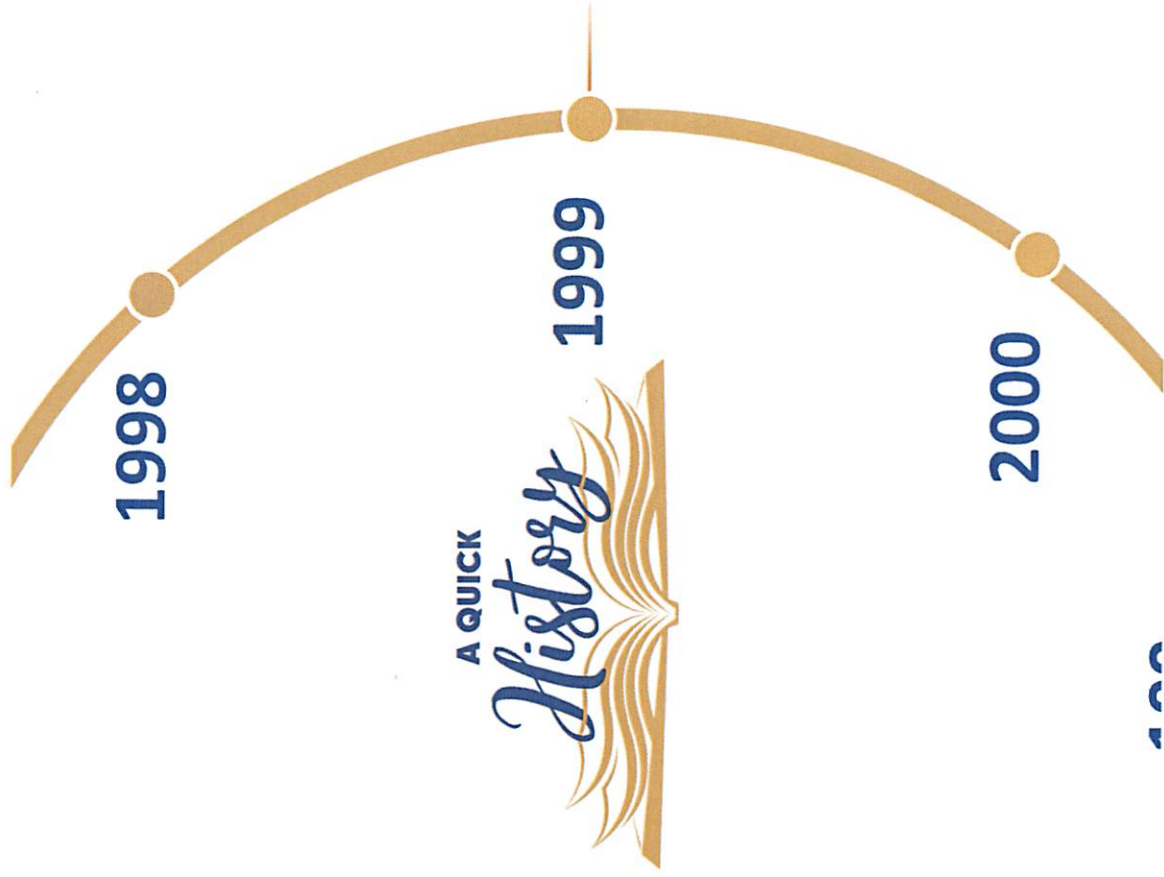
## Davis V. Monroe County Board Of Education

Finding in favor of Davis, the Supreme Court applied same standards as in the *Gebser* case. The institution must have:

- “Actual notice” of the harassment.
- Responded to the harassment with “deliberate indifference.”

### AND

- Harassment must be “severe, pervasive, and objectively offensive,” and the indifference “systemic,” to the extent that the victim is deprived of educational opportunities or services.



## Davis V. Monroe County Board Of Education

Justice Sandra Day O'Connor added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is **“clearly unreasonable in light of the known circumstances.”**



**And Then OCR Said,  
“Our Turn”**

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# OCR Released

## Updated Regulations

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May 6,  
2020

New regulations were released as final rules (34 C.F.R. Part 106)

Aug 14,  
2020

Deadline for districts were to implement new regulations

# Updated Regulations

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**The new regulations altered core aspects of Title IX regulatory law:**

- How OCR determines whether an institution has notice of sexual harassment.
- The required amount of due process to be provided to the responding party.
- Steps to take during an investigation.

# What are schools required to do?

Section  
106.8

**Coordinators**

**Policies**

**Section  
106.8**

**Procedures**

## Coordinators

Designate at least one employee to coordinate compliance with Title IX.

# Section 106.8

## Policies

*Adopt a policy & disseminate to applicants, students, parents & legal guardians, employees, etc.*

## Procedures

*Adopt a grievance procedure in compliance with regulations.*

# Posting Requirements

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**Must post the following information on school district website in a prominent location:**

- *Contact information* for the school's Title IX Coordinator(s) (the name or title of the Title IX Coordinator, an office address, a telephone number, and an email address).
- *Non-discrimination policy*
- *Training materials* used to train the school's Title IX personnel.

# Sexual Harassment

*Sex-based conduct that meets the following three definitions and criteria.*



## **Quid Pro Quo**

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.
- 

## **Hostile Environment**

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.
- 

3. Sexual Assault, dating violence, domestic violence or stalking (as defined in Clery Act/VAWA)



# Breaking Down

## “Hostile Environment”

Severe ● Pervasive ● Objectively Offensive

**SEVERE**

**Pervasive**

**Objectively Offensive**

## SEVERE

“The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical.”

Was it conduct accompanied by threats of violence?

Was it a series of “lesser” incidents that were repetitive?

Did it continue despite requests to stop?

## Pervasive

## Objectively Offensive

## SEVERE

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Did it continue despite requests to stop?

## Pervasive

“Harassment is pervasive when it occurs either in concert or with regularity.”

Pattern or practice

Widespread

Well-known among students and employees (Source – ATIXA: PreK-12 Title IX Course)

Occurring in public spaces

## Objectively Offensive

## SEVERE

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Occurring in public spaces

## Objectively Offensive

To determine whether conduct is objectively offensive, many factors may be considered, including:

Age

Claimant/Respondent Relationship

Number of Persons Involved

Frequency

Severity

Humiliation

Intimidation

Abuse

**SEVERE**

**Pervasive**

**Objectively Offensive**

## **When breaking down different hostile environments, consider all relevant circumstances:**

- Degree to which conduct affected one or more students' education
- Type, frequency and duration of the conduct
- Relationship between alleged harasser and victim(s)
- Number of individuals involved
- Age and sex of the alleged harasser and victim(s)
- Size of the school, location of the incidents, and context in which they occurred
- Other similar incidents not involving the same individuals
- Incidents of gender-based, but nonsexual harassment

# Denial of Equal Access

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Does not require complete exclusion from an education, but rather denial of “equal’ access.”

Signs may include:

- Skipping class to avoid a harasser
- A decline in a student’s GPA
- Having difficulty concentrating in class

However, **no concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant’s position of the ability to access the recipient’s education program or activity on an equal basis with persons who are not suffering such harassment.**

Let's take a closer look...

# Sexual Harassment Definition 3



## *Quid Pro Quo*

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.
- 

## *Hostile Environment*

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.
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3. Sexual Assault, dating violence, domestic violence or stalking (as defined in Clery Act/VAWA)



*Let's take a closer  
look....*

# Sexual Harassment Definition 3

3. Sexual Assault, dating violence, domestic violence or stalking (as defined in Clery Act/VAWA)

# Definition 3:

## Sexual Assault

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**An offense that meets the definition of:**

- Rape
- Fondling
- Incest or statutory rape as used in the FBI's Crime Reporting System

# Definition 3:

## Domestic Violence

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**A felony or misdemeanor crime of violence committed by:**

- Current/former spouse or intimate partner
- A person with whom the victim shares a child.
- A person who is cohabitating with, or has cohabitated with, the victim as a spouse/intimate partner.
- A person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
- 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 in which the crime of violence occurred.

# Definition 3:

## Dating Violence

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**Violence committed in a social relationship of a romantic or intimate nature. The existence of such a relationship shall be based upon the reporting party's statement with consideration of the following factors:**

- The length of the relationship.
- The type of relationship.
- The frequency of interaction between those involved.
- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

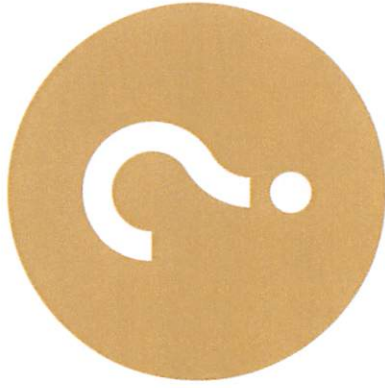
# Definition 3:

## Stalking

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**Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:**

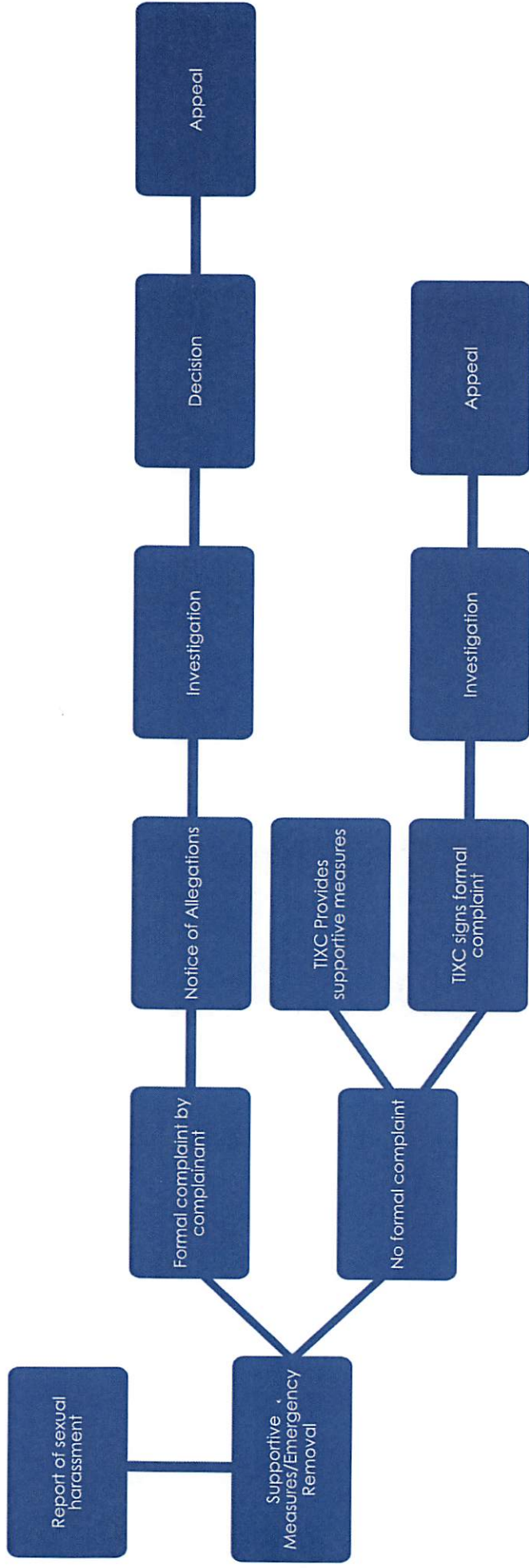
- Fear for the person's safety or the safety of others.
- Suffer substantial emotional distress.



**What process do districts follow when a violation occurs?**

# Overview of Allegation & Investigation Process

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Report of sexual harassment

Supportive Measures/Emergency Removal

# 1. DISTRICT RECEIVES NOTICE

(Actual Notice or Actual Knowledge)

## *K-12 Schools*



Any school district employee having knowledge of the notice.

## *Postsecondary Schools*



Use the Gebser definition.



# Critical – A Different Path

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When a district has notice of possible sexual harassment, the school must take a different path than any other (i.e., non-sexual harassment) disciplinary incidents.

# Critical – A Different Path

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## Steps Upon Notice:

- Notify the Title IX Coordinator
- Take non-disciplinary steps to ensure conduct does not continue and both parties are safe. DO NOT discipline yet!
- Facilitate discussion between complainant and Title IX Coordinator as quickly as possible (will determine your next steps).

Report of sexual harassment

Supportive Measures/Emergency Removal

## 2. INITIAL DISCUSSION & SUPPORTIVE MEASURES

**Title IX coordinators must contact the alleged victim to:**

- Explain how to file a formal Title IX complaint.
- Offer supportive measures, **regardless of whether a complaint is filed.**

**Supportive/Interim Measures:**

- Must be offered upon actual notice.
- May be offered during or in lieu of a formal complaint.
- To restore or preserve access to program without unreasonably burdening other party.

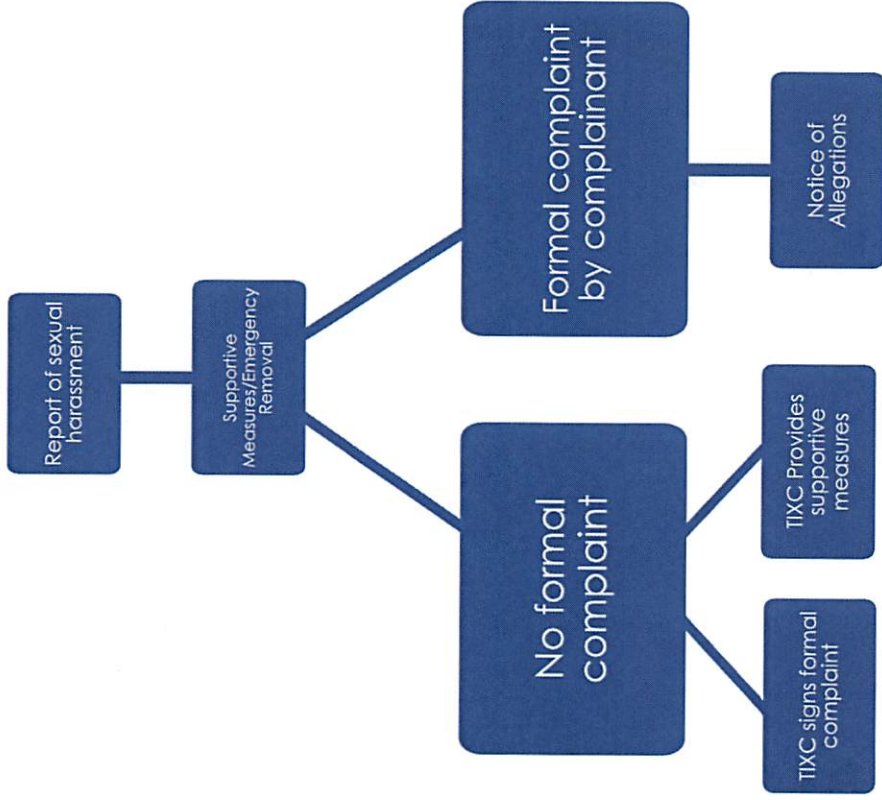
Report of sexual harassment

Supportive Measures/Emergency Removal

### 3. LAW ENFORCEMENT & DHS REFERRAL



If the allegations could constitute a crime or child abuse, immediately contact law enforcement and/or DHS.



# 4. FORMAL COMPLAINTS

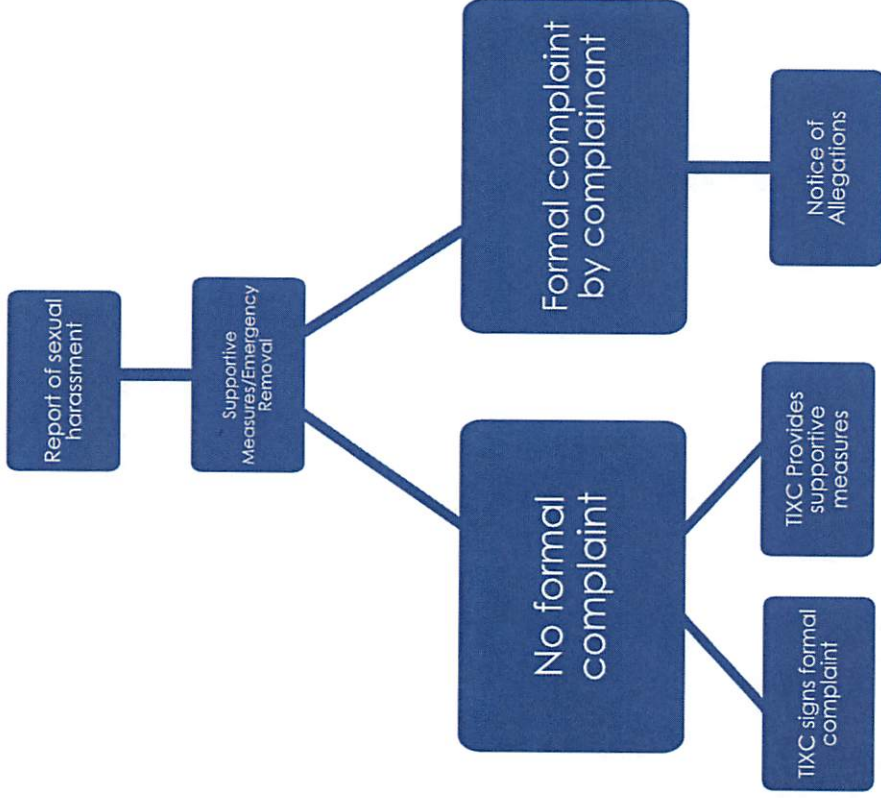
(Only responsible for investigating a formal complaint)

## Formal Complaint – Written Document:

- Signed by either the complainant (definition limited to the alleged victim), the complainant’s parents or the Title IX coordinator.
- Alleges sexual harassment against a respondent.
- Requesting an investigation.

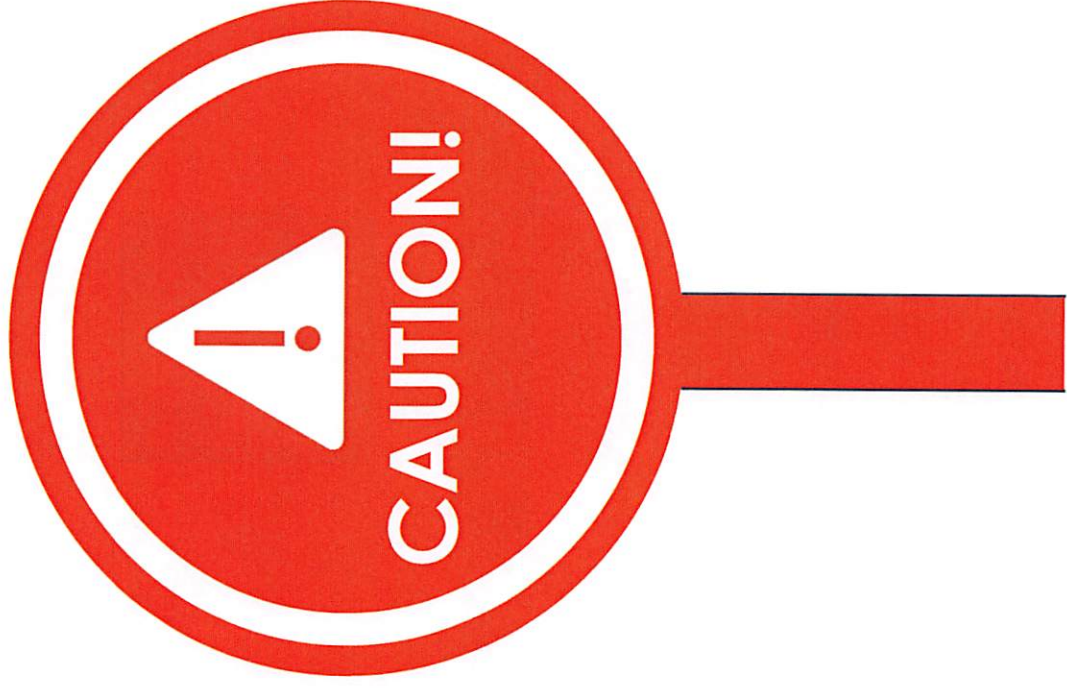
## A formal complaint may be filed:

- In person
- By mail
- Email
- Any additional method designated by the recipient



# NO FORMAL COMPLAINTS

1. Provide supportive measures if alleged conduct covered under Title IX.
2. Title IX Coordinator initiates Title IX complaint.
3. If alleged conduct would not be covered under Title IX, address under student code of conduct.



**This is a dangerous phase of the process.**

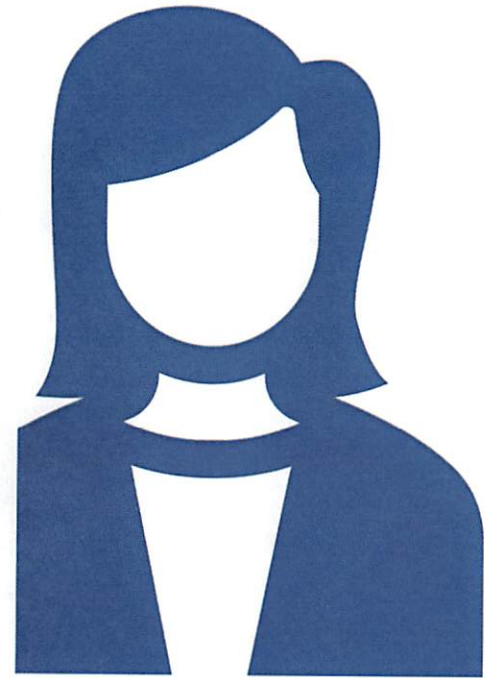
If you believe the alleged conduct would be a Title IX violation, and a complaint is not filed, **you may need to file on behalf of the alleged victim.**

# FORMAL COMPLAINTS

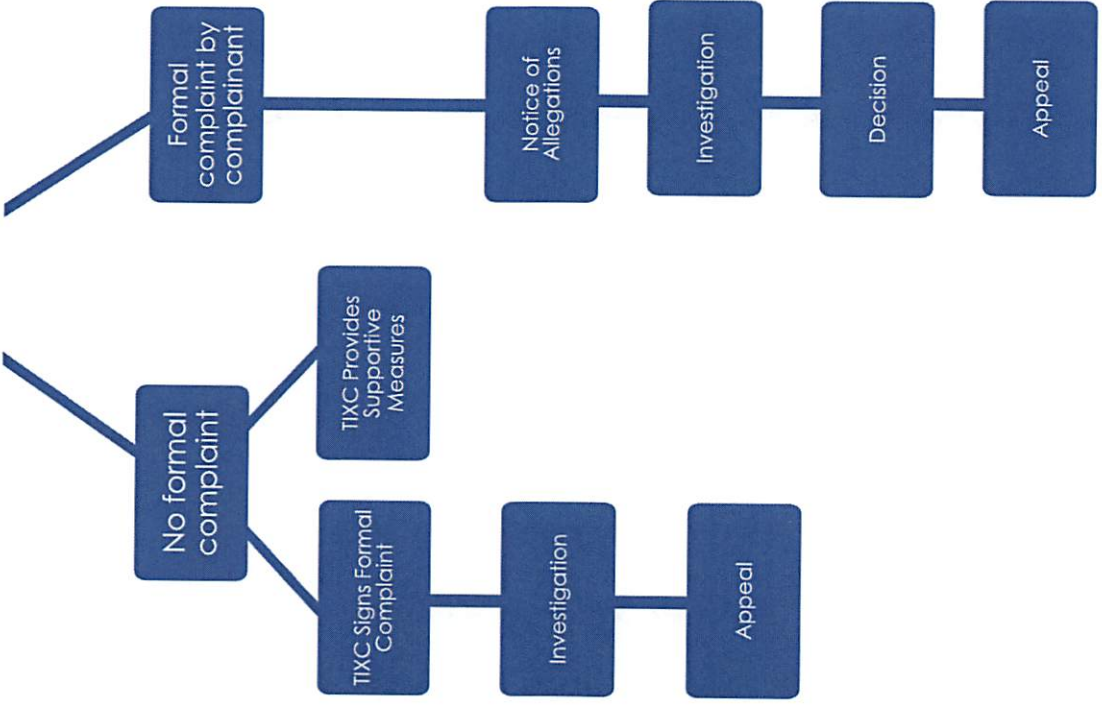
## — Coordinator Initiated —

Title IX coordinators may file a formal complaint when they determine that “a non-deliberately indifferent response to the allegations requires an investigation...” (Final Rule, pg. 386).

If a grievance process is initiated against the wishes of the complainant, that decision should be reached thoughtfully and intentionally by the Title IX Coordinator, **“not as an automatic result that occurs any time a recipient has notice that a complainant was allegedly victimized by sexual harassment...”** (Final Rule, pg. 387).







# 5. JURISDICTIONAL DETERMINATION

(Must have jurisdiction to investigate under Title IX)

Respond when having actual knowledge of sexual harassment in:

1. An education program or activity of the recipient
2. Against a person in the U.S.

What is an education program or activity?

### Subject Matter

- Do the alleged facts violate any definitions under sexual harassment (106.30(a))?

### People

- Claimant/Respondent

### Place, Event or Activity

- Does the school have **substantial control** over the context of where the harassment occurred?
- For example: on campus, off-campus locations owned by the district, school-sponsored activities, etc.



## Complainant

- Must be participating, or attempting to participate, in the district's programs or activities.
- Could be a student, faculty or staff, or at least attempting to be (may also need to investigate if complainant is a volunteer or contractor working on school grounds).
- If no, no jurisdiction.



## Respondent

- Does the district have substantial control over the respondent?
  - Student
  - Employee,
  - Volunteer on Campus
  - Contractor Working on Campus
  - Etc.
- If no, no jurisdiction (although may need to provide supportive measures).

# Downstream Effects

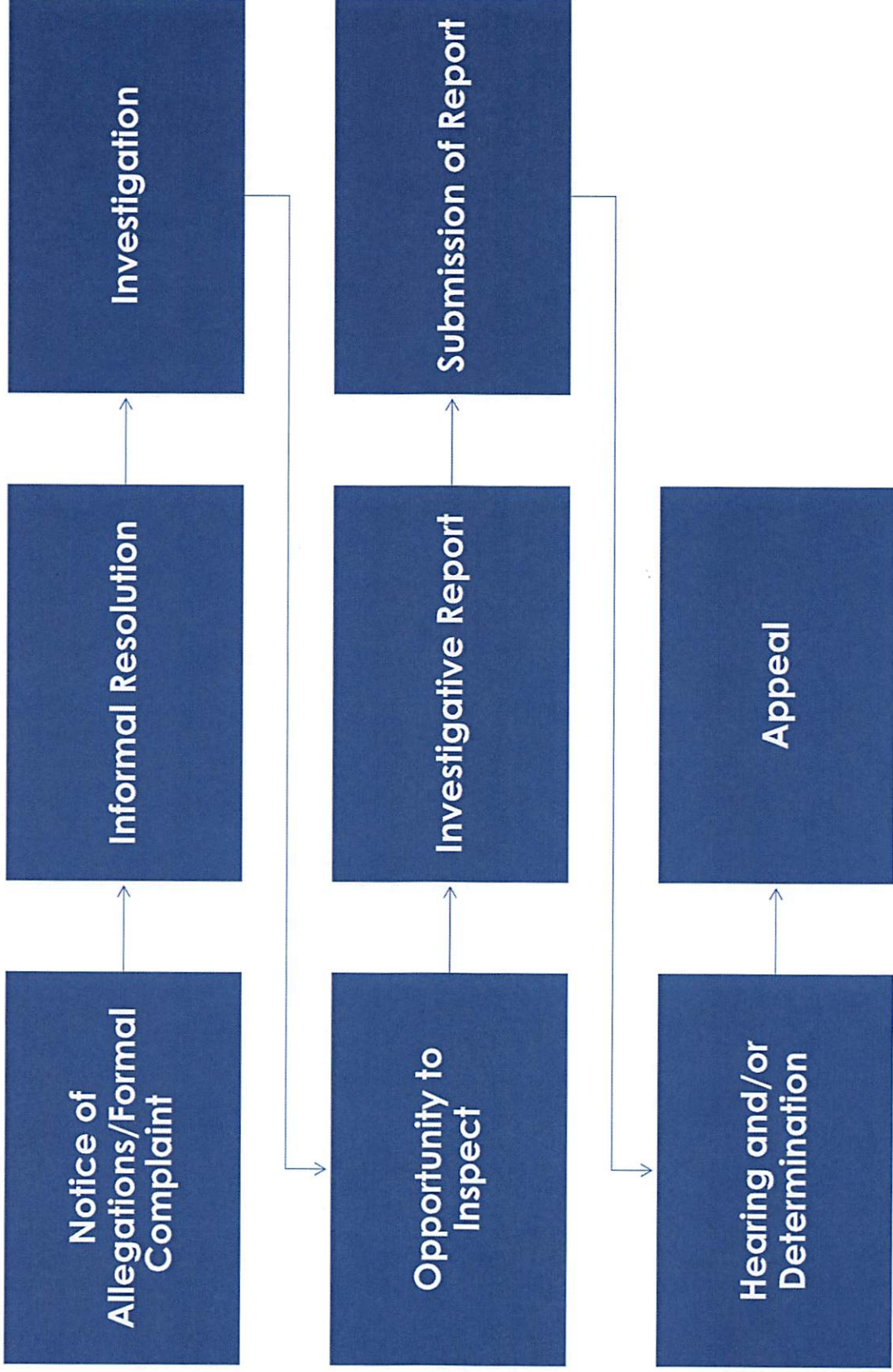
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 What about the “**downstream effects**” of harassment that occurred off-campus?

Although districts cannot address behavior over which they do not have substantial control (e.g., at someone’s home on a weekend), they may be responsible for addressing any carryover of the behavior that occurs in areas in which it does have jurisdiction.

# You're Now In A New Zone

The Investigation ● Grievance Procedures



# Title IX

## Grievance Procedures

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- If the district answers the jurisdictional questions in the affirmative, the complaint must be investigated in accordance with the grievance process outlined in 34 U.S.C 106.45.
- If the institution follows OCR's procedures, then it will not be found "deliberately indifferent."

# The Basics of Grievance Procedures

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- Treat complainant and respondent equitably, including providing supportive measures to both parties, if necessary.
- Objective evaluation of all evidence, “both inculpatory and exculpatory evidence,” prior to making a determination.
- The Title IX Coordinator, investigator or person making the decision must be free of bias against the complainant/respondent, and appropriately trained on the definition of sexual harassment and how to conduct an investigation.
- Have “reasonably prompt timeframes” for the completion of the investigation (106.45(b)(1)(ii)).

# Standard of Proof

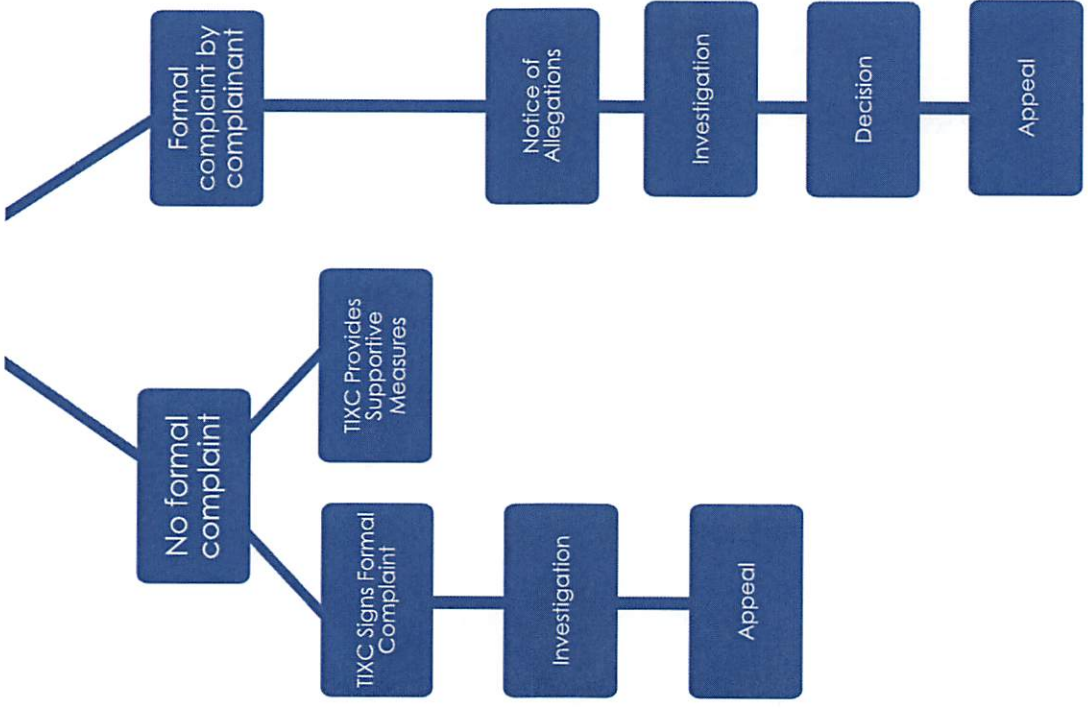
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Can only use preponderance of the evidence if that standard is used for other violations in the code of conduct with the same maximum penalty.

**AND**

Must use same standard for employees and students.





## 6. NOTICE TO PARTIES & ASSIGN INVESTIGATOR

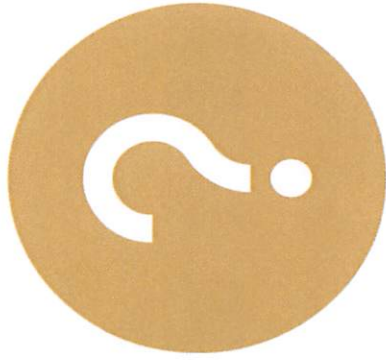
(Written notice provided before discussions/interviews)

### Written notice must include:

- Citations to relevant grievance procedures.
- Allegations with sufficient details.
- A statement indicating the responding party is "presumed not responsible" until a determination is made.
- The right to an advisor of their choice who may be an attorney.
- That parties may request to inspect and review relevant evidence.
- Reminder of the institution's policy not to make false statements or intentionally submit false information.

### Notice must also be provided for:

- Reasonable delays for "good cause"
- Additional allegations to be investigated that weren't in the original complaint



The district has completed steps 1-6  
of the process – **what happens next?**



# The district has completed steps 1-6 of the process – what happens next?

## 7. Supportive Measures

Now that you have more information, determine whether initial measures were adequate.

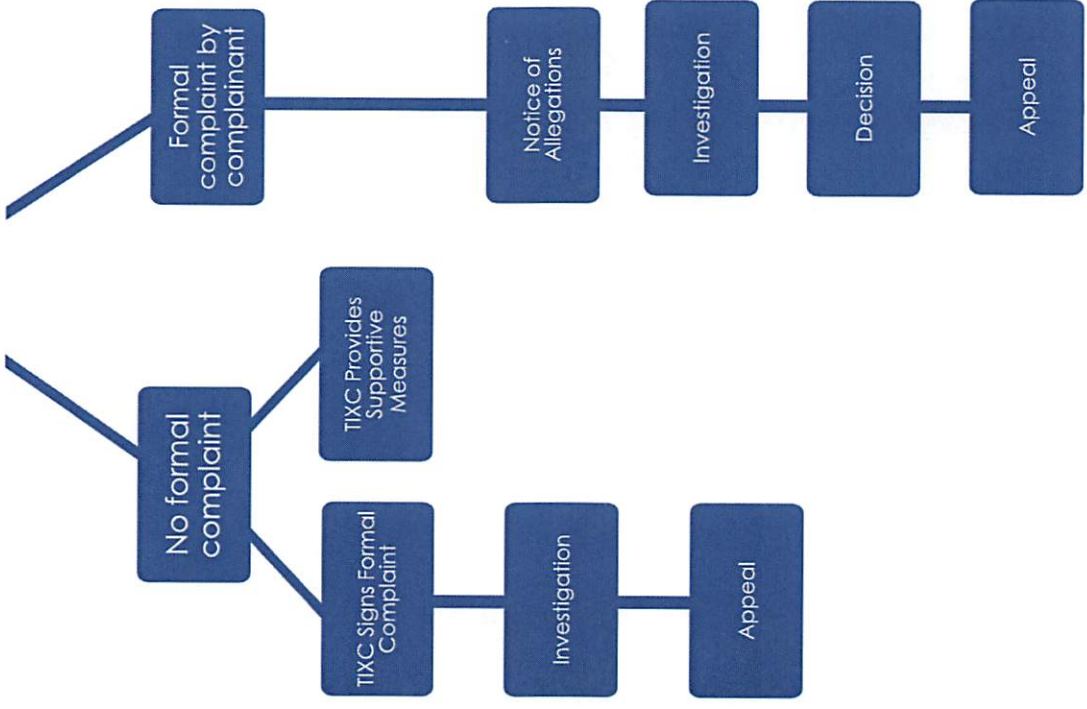
## 8. Emergency Removal

Before emergency removal of a student, district must:

- Perform individualized risk analysis.
- Determine that an immediate threat to the health or safety of students or employees justifies removal.
- Provide respondent with notice and an opportunity to challenge the decision immediately following removal.

## 9. Informal Resolution

- School and parties will determine if appropriate
- Allowed at any time prior to a final determination
- Must obtain voluntary, written consent
- Cannot be used if allegation of an employee harassing a student
- Must provide detailed notice to parties of – allegations, requirements of the process, circumstances which would preclude formal resolution & consequences of participation.



# 10. THE INVESTIGATION

(Written notice provided before discussions/interviews)

## In general:

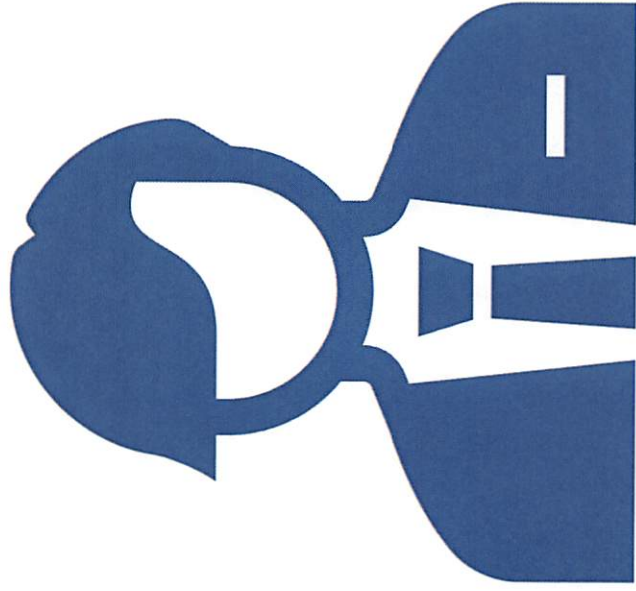
- The burden of gathering evidence is on the institution
- Equal opportunity to present witnesses and evidence
- No restrictions on discussing allegations or gathering and presenting evidence
- Equal opportunities to have others present during the grievance process

## Advisors:

- Cannot restrict either party's ability to have an advisor present at all proceedings.
- The advisor can be anyone chosen by the party.

# Assign Investigator

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Once an investigation begins, ensure an investigator is assigned to investigate the allegations.

# Delays or Extensions

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- Temporary delays in the investigation will only be allowed for “good cause”
- Provide notice to parties explaining reasons for action.

# Law Enforcement Investigation

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## **Must be**

- Reasonably short – preferably no longer than two weeks.
- Only for the time it takes law enforcement to quickly complete necessary interviewing and evidence gathering.

Also, when such a delay occurs, the institution must provide written notice to the parties of the delay and the reasons for it.

# THE INVESTIGATION – GATHERING EVIDENCE

**INTERVIEWS**

**EVIDENCE**

**SEARCHES**



# THE INVESTIGATION – GATHERING EVIDENCE

## INTERVIEWS

Written notice must be provided far enough in advance to give the parties sufficient time to prepare to participate.

Notice of:

Date

Time

Location

Participants

Purpose of all hearings, investigative interviews or other meetings.

Attach as an exhibit – take notes, record or both to create a usable transcript.

## EVIDENCE

## SEARCHES

# THE INVESTIGATION – GATHERING EVIDENCE

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## EVIDENCE

When gathering any possible evidence be deliberate to help in making a determination.

## SEARCHES

# THE INVESTIGATION – GATHERING EVIDENCE

## INTERVIEWS

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Purpose of all hearings, investigative interviews or other meetings.

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## EVIDENCE

When gathering any possible evidence be deliberate to help in making a determination.

## SEARCHES

Searching personal electronics devices or other belongings:

- Only after establishing and documenting reasonable suspicion for the search.
- Should comply with any state law or local policy limitations on such searches.

# 11. Opportunity to Inspect

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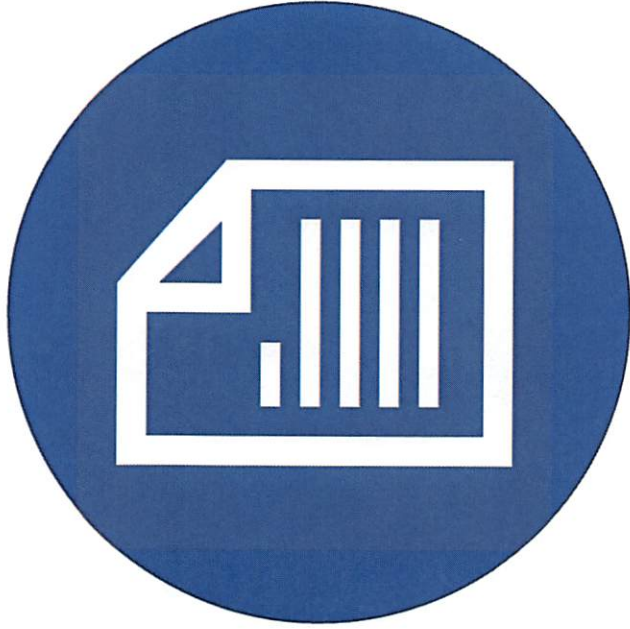
Prior to the completion of the report, must provide both parties:

- An equal opportunity to inspect all evidence directly related to the allegations, even if the institution does not intend to rely on the evidence; and
- An opportunity to “meaningfully respond” to the evidence after inspection.

Parties must have at least 10 days to submit written responses to the evidence, which must be considered prior to completion of the final report

# 12. Investigative Report

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The regulations also require the creation of a written investigatory report that “fairly summarizes relevant evidence.”

# 12. Investigative Report

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- Party Information
- Jurisdiction
- Allegations
- A description of the procedural steps taken from the receipt of the formal complaint through the determination (notices, interviews, methods of evidence gathering, hearings, etc.);
- Analysis of allegations
- Attach exhibits

# 13. Submit Investigative Report to Parties & Decision-Maker

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- The report must be submitted to the parties and their advisors at least 10 days prior to a hearing or determination.
- The parties may provide responses to the report, and the decision-maker should consider the responses prior to making a decision.

## 14. Live Hearings & Follow Up Questions

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### K-12 Schools

*Live hearings are optional.*

### Postsecondary Schools

*Live hearings and follow up questions are mandatory.*



## 14. Live Hearings & Follow Up Questions

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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.

34 C.F.R. 106.45(b)(6)(i).

# 14. Live Hearings & Follow Up Questions

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- At either party's request, parties can be in separate rooms with technology that has audio and visual feeds.
- At institution's discretion, any or all parties or witnesses may appear virtually.
- Must create an audio or audiovisual recording, or transcript, of hearing and make available to parties.

## 14. Live Hearings & Follow Up Questions

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With or without a live hearing, the decision-maker must ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses.

# Inappropriate Follow Up Questions

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**With or without a hearing, all questioning must exclude evidence of the complainant's sexual behavior or predisposition, except in limited circumstances:**

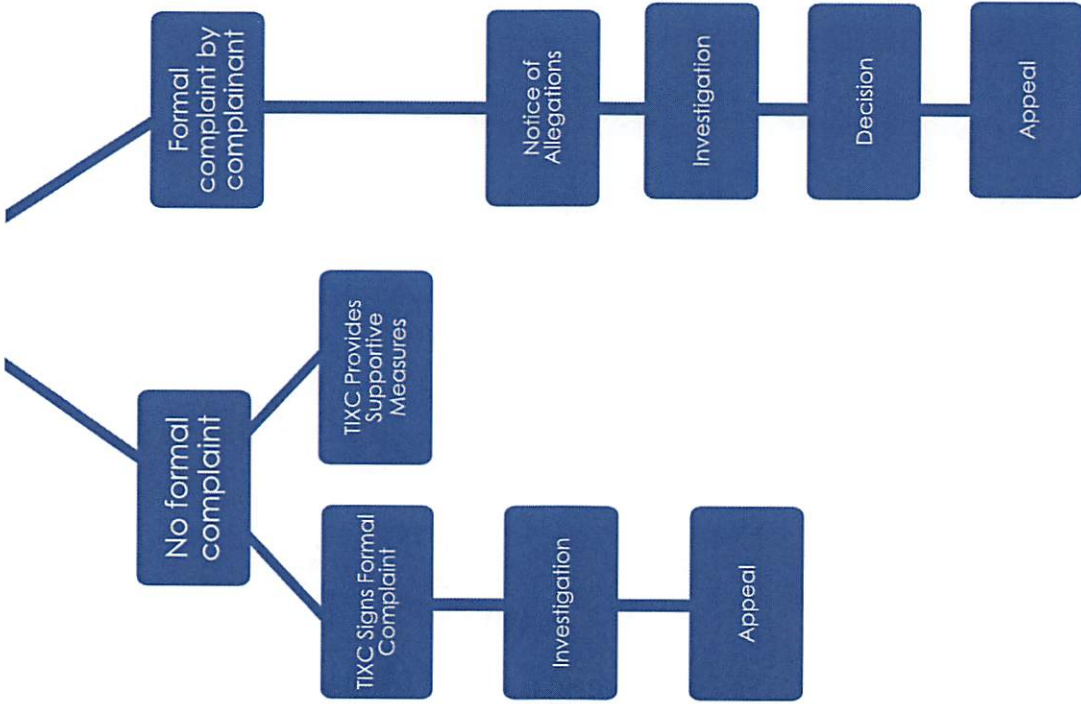
- To prove that someone other than the respondent committed the alleged conduct.
- When specific incidents of reporting party's sexual behavior with responding party are offered to prove consent.

# 15. Written Determinations

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**School must issue written determination that includes the following:**

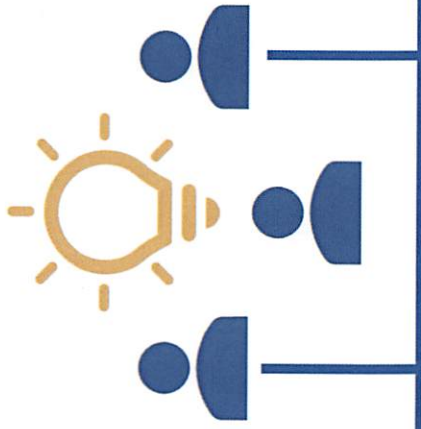
- A list of the allegations
- A description of the procedural steps taken from the receipt of the formal complaint through the determination (notices, interviews, methods of evidence gathering, hearings, etc.)
- Findings of fact supporting the determination
- Conclusions
- The rationale for the determination regarding each allegation, which should include the disciplinary sanctions imposed and remedies to be provided, if any
- Rights of Appeal.



## 16. THE APPEAL

**Opportunity for appeal must be offered to either party on, at the least, the following bases:**

- A procedural irregularity.
- New evidence that was not reasonably available at the time the determination was made and that could affect the outcome.
- The Title IX Coordinator, investigator or decision-maker had a conflict of interest or bias against one of the parties that affected the outcome



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# A SCHOOL DISTRICT'S OBLIGATIONS

— **TITLE IX EDUCATION** —

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# Title IX Training

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**Specifically, Title IX Coordinators, investigators and decision-makers, and any individual that facilitates an informal resolution process, must receive training on the following:**

- The definition of sexual harassment;
- All activities included in the institution's programs or activities;
- How to properly conduct an investigation pursuant to the grievance process listed in the regulation, including appeals and informal resolution processes;
- Investigating allegations impartially, conflicts of interest, etc.;



# Title IX Training

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- Technology that may be used to conduct a live hearing (in the institution conducts live hearings).
- Issues of relevance with regard to questions, including being able to determine when questions about the reporting parties' sexual predisposition or prior sexual behavior are irrelevant.
- How to create a report that "fairly summarizes the relevant evidence"

# Title IX

## Public Resources

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The regulation also requires that all materials used to implement the trainings above must be made available on the institution's website or, if the institution does not maintain a website, upon request "for inspection by members of the public."

# Retaliation

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The new regulation prohibits retaliation for filing complaints or otherwise participating, or refusing to participate, in the investigation of an allegation of sexual harassment

It also indicates that it is not considered retaliation for an institution to provide disciplinary consequences when an individual makes “a materially false statement in bad faith in the course of a grievance proceeding.” Must have evidence that it is false and made in bad faith (in other words, knew it was false).

# Record Keeping

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## **The following must be created and maintained for seven years:**

- Investigation documents including written finding, disciplinary sanctions and remedies implemented.
- Appeal and related results.
- Informal resolution/s implemented.
- Supportive measures implemented.

**THANK YOU FOR ATTENDING  
TODAY'S WORKSHOP!**



**THE NEXT SESSION WILL BEGIN SOON**



**BRANDON CAREY**  
OSSBA STAFF ATTORNEY



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