



Title IX Basic Training for K-12 Administrators

August 9, 2021
Amy Dickerson and Kendra Yoch

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1



Ask Questions

2

Why are we here?

3



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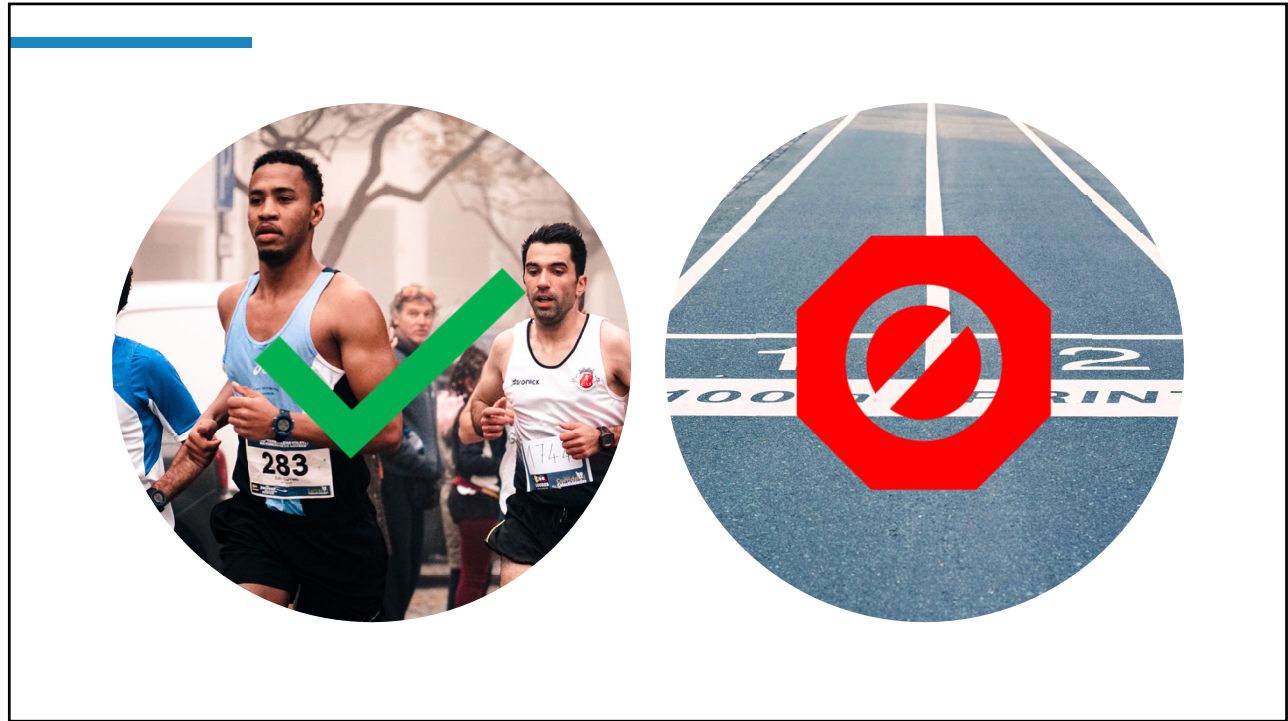


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But not just any action, the right action for
the conduct at issue!

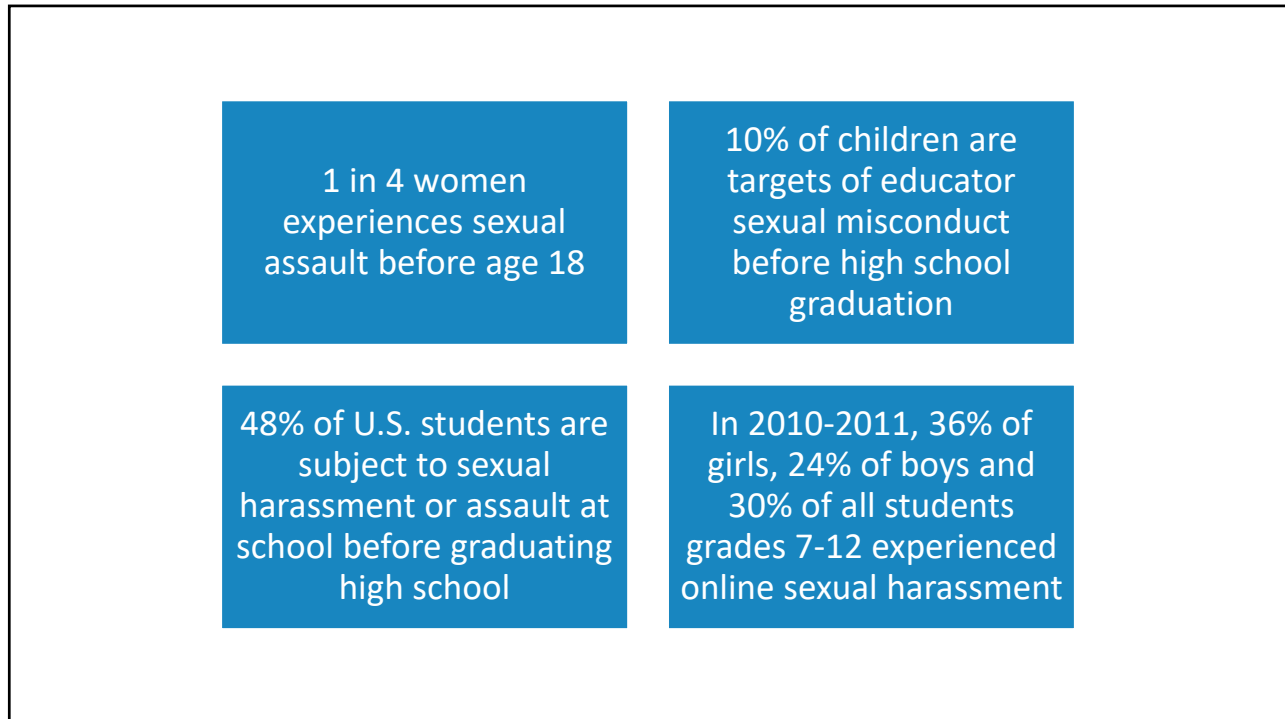
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7

Why is this so important?

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According to a **2017 report from the Justice Department**, only

23 percent

of all sexual assaults are reported to the police.

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11

*Harassment
and assault can have
long lasting,
detrimental effects on
victims*

12

Effects on Individuals

Poor performance in school

Stress Disengagement Fear

Distraction Anger Mistrust Conflict

Acting out Absenteeism Drop-out

Suicide ANXIETY PTSD

DEPRESSION

Lost Opportunities

13

Effects on Teams

Decreased focus

Lost productivity

Withdrawal

Absenteeism Neglect

Lack of trust in leadership Malingering

Turnover



14

*Unfair processes can
have
long lasting,
detrimental effects on
the parties*

15



Responding to
Harassment

Is required by the law

16

ED Office for Civil Rights (OCR)

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18

What is Title IX?

19



20

Title IX Statute

(20 U.S.C. §§ 1681–1688)

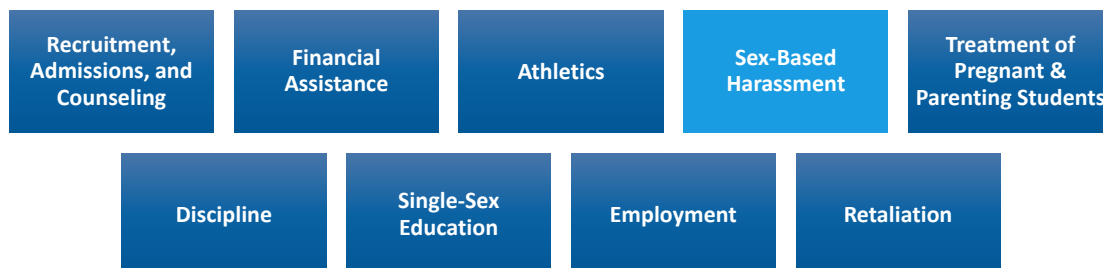
"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

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What falls under Title IX?



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Title IX Regulations

(34 C.F.R. Part 106 – Amended as of 8/14/2020)

- Prohibit discrimination on the basis of sex
- Establish procedural requirements
 - Policy + detailed grievance procedure
 - Designation of Title IX coordinator(s)
 - And many more requirements!

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When Must the School Respond to Sexual Harassment?

24

**It Depends
Who [Well,
Which Law]
You Ask**

Employment

- Illinois Human Rights Act
- Title VII
- Title IX

Students

- Illinois Human Rights Act
- Illinois Sex Equity Regulations
- Title IX

25

When must a school respond to Title IX sexual harassment?

A school with actual knowledge of [Title IX] sexual harassment in an education program or activity against a person in the United States must respond

26

When must a school respond to Title IX sexual harassment?

A school **with actual knowledge** of [Title IX] sexual harassment in an education program or activity against a person in the United States must respond

27



Actual Knowledge

1. Sense
2. Report

28

Official with Authority



- Title IX Coordinator
- Any other officials who have been given authority to institute corrective measures by the school district
- K-12: All employees

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Reporting Sexual Harassment: Who, How and When?

- Any person may report sex discrimination, regardless of whether the person is the alleged victim of the reported conduct
- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator
- Or by any means that results in the Title IX Coordinator receiving the person's report
- Such a report may be made at any time, including during non business hours, by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator

30

Key Word: "Allegation"

Once a school has notice of **an allegation** that, **if true**, would constitute Title IX Sexual Harassment, it must respond

"Well, we didn't believe there was enough evidence it happened" does not get you past your responsibility to use your Title IX Sexual Harassment grievance process

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Issue Spotting

Order of protection: Principal served with order of protection requiring student to have no contact with another student due to alleged sexual assault

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33

What is Sexual Harassment?

34

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- Title IX

35

Title IX – What is Sexual Harassment?

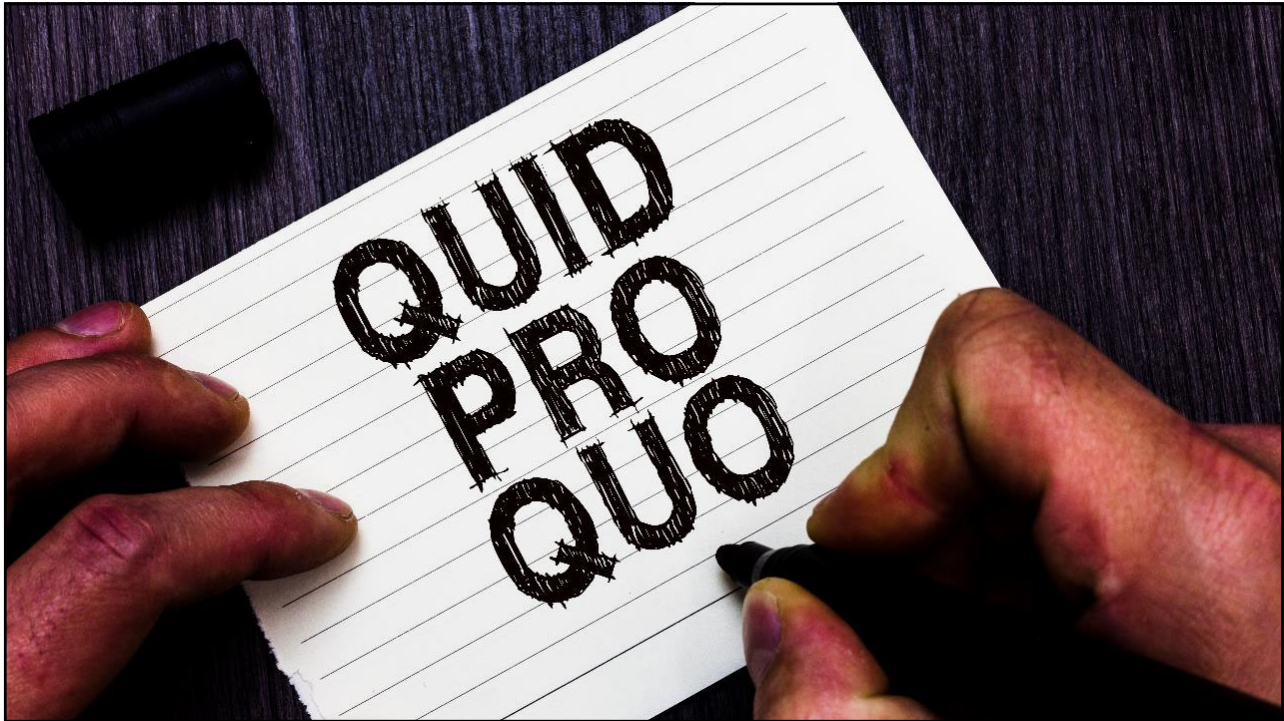
Hostile Environment

Quid pro quo by an employee

Sexual Assault
Domestic Violence
Dating Violence
Stalking

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37

Quid Pro Quo

Quid = Something

Pro = For

Quo = Something

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Title IX Quid Pro Quo

Definition: An employee of the educational institution conditioning an aid, service, or benefit of the educational institution on participation in unwelcome sexual conduct

New: Only an employee (not a volunteer, another student, etc.)

Codified: Severity and harm presumed

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Clery Act/VAWA "Big Four"

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

Domestic Violence 34 U.S.C. 12291(a)(8)

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

Stalking 34 U.S.C. 12291(a)(30)

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41

Title IX – What is a Hostile Environment

Old Definition Unwelcome conduct determined by a reasonable person to be severe, pervasive or persistent as to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities	New Definition (8/14) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the school's education program or activity
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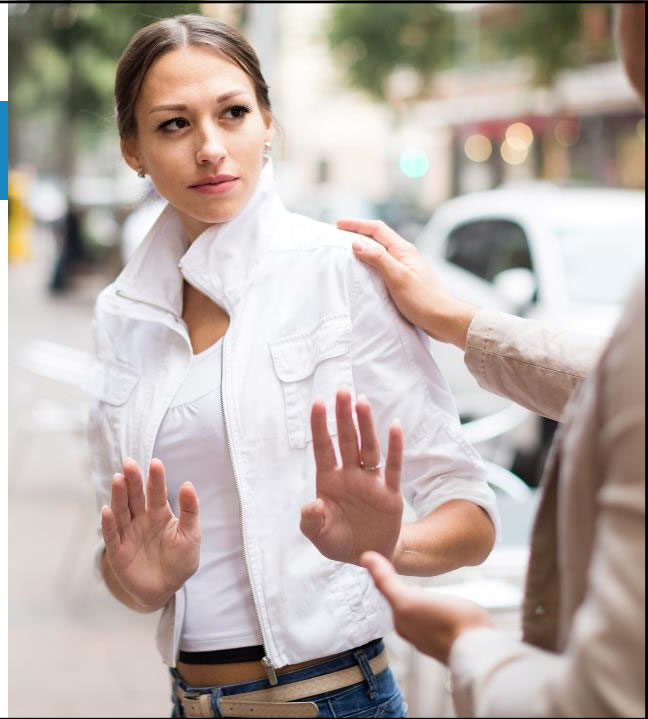
42

Unwelcome Conduct

- Not **Participation**
- Not **Silence**
- Age Matters
- Intoxication Matters
- Culture Matters
- Ability Matters

**subjective + reasonable person

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Severe

- Something more than juvenile behavior
- Something more than antagonistic, non-consensual, and crass conduct
- Simple acts of teasing and name-calling are not enough, even when comments are based on sex
- It is not enough to show that a student has been teased or called offensive names

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Pervasive

- Systemic or widespread
- Multiple incidents of harassment
- One incident is not enough, even if very severe

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Objectively Offensive

- Behavior that would be offensive to a reasonable person under the circumstances
- Not just offensive to the victim, personally or subjectively
- Consider ages, numbers, relationships

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Constellation of surrounding circumstances, expectations, and relationships

47

Hostile Environment Factors

Context, Nature, Scope, Frequency, Duration, and Location of the Incidents

Identity, Number, Ages, and Relationships of the Persons involved

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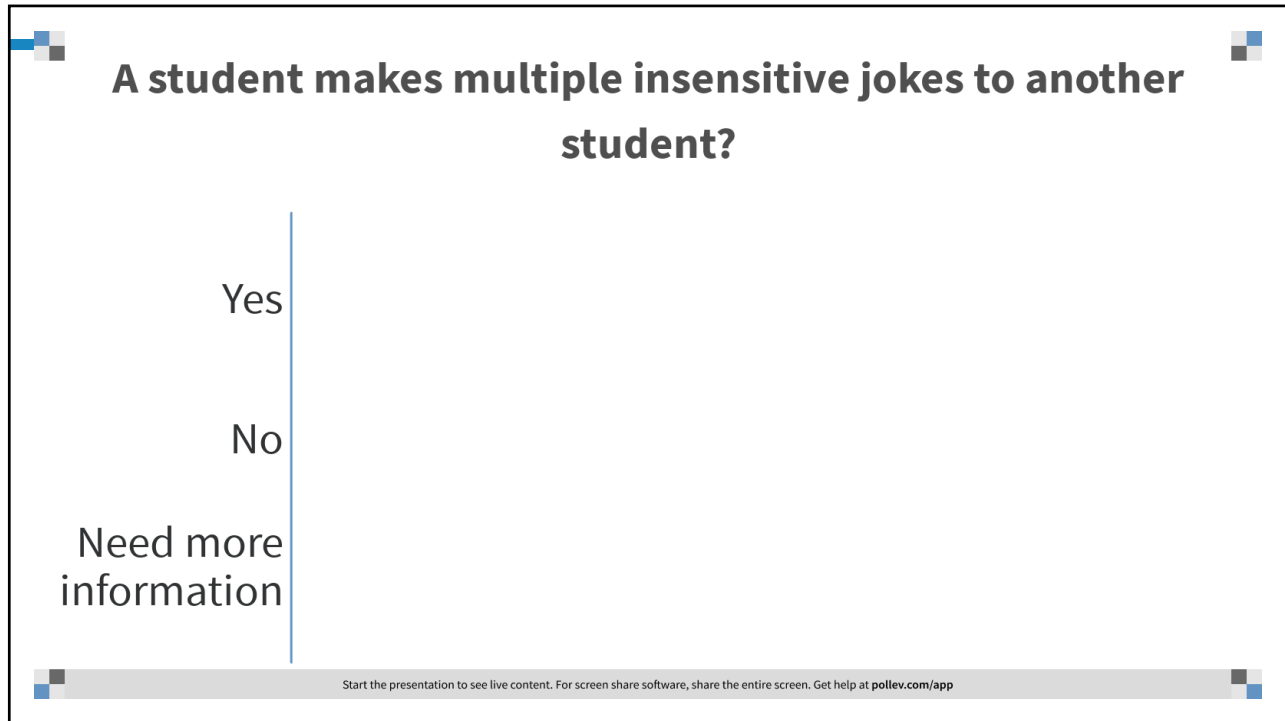
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49

Yes or No?
Is this "Title IX Sexual Harassment"?

50



51



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One student grabs another student's breasts during a soccer game.

Yes

No

Need more information

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A student "uses tongue" during an acting scene without the other student's permission.

Yes

No

Need more information

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A group of students (one sex) make a Facebook post rating students (another sex) by attractiveness and share with school community

Yes

No

Need more information

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A teacher (one sex) tells a student (another sex) to trade a back rub in the classroom for a good grade on a test

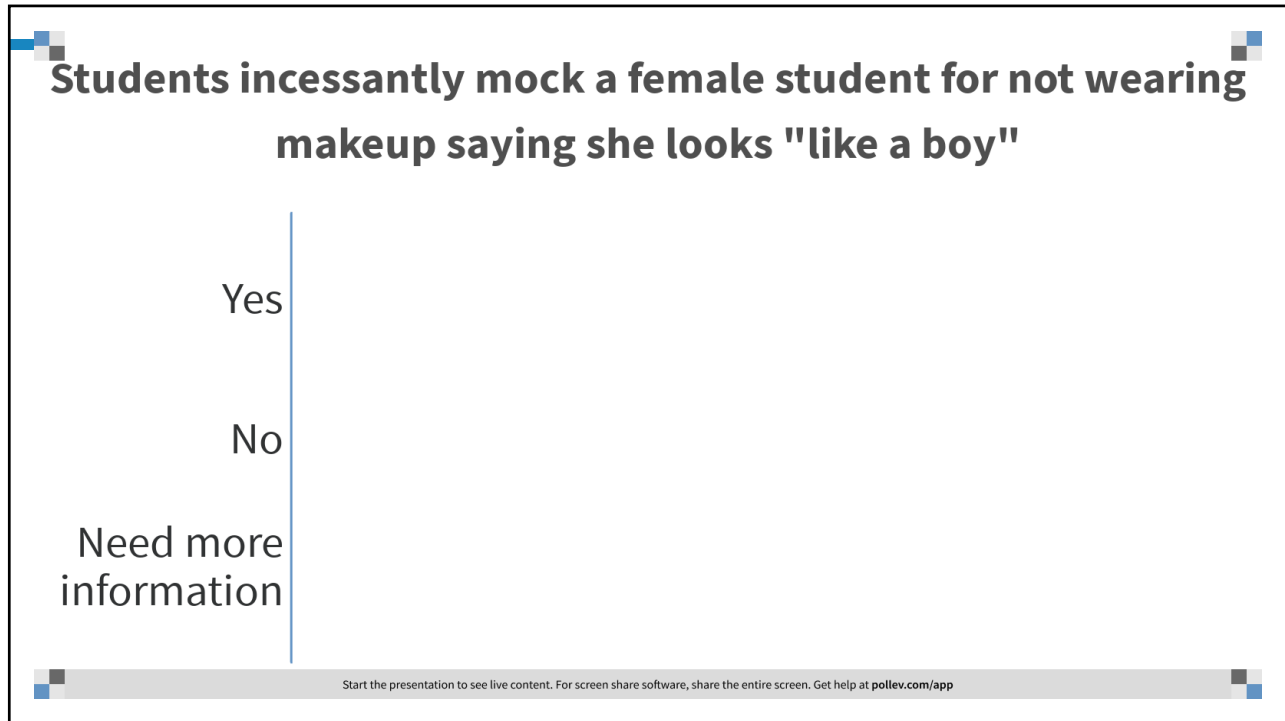
Yes

No

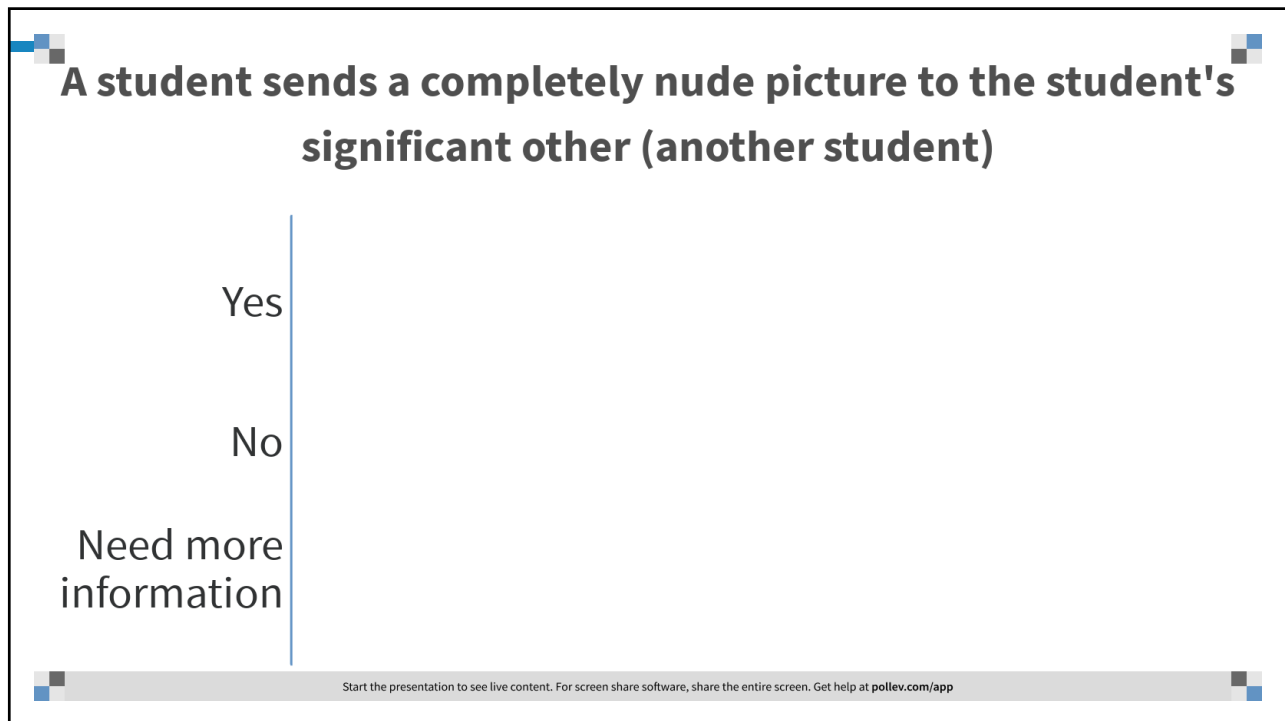
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57



58

The recipient student forwards the photo to 20 classmates

Yes

No

Need more information


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When must a school respond to Title IX sexual harassment?

A school with actual knowledge of [Title IX] sexual harassment **in an education program or activity** against a person in the United States must respond

60



Title IX Sexual
Harassment
Must Be “In a
Program or
Activity”



61



Program or Activity: Any location, events, or circumstance over which the school exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred

62



63

When must a school respond to Title IX sexual harassment?

A school with actual knowledge of [Title IX] sexual harassment in an education program or activity **against a person in the United States** must respond

64



65



DISMISSALS

<p>Mandatory if conduct alleged:</p> <ul style="list-style-type: none">Not Title IX Sexual HarassmentDid not occur in the school's program or activityDid not occur in the United States <p>**can still address under non-Title IX policy</p>	<p>Permissive if:</p> <ul style="list-style-type: none">Complainant requests to withdraw in writingRespondent's enrollment or employment endsSpecific circumstances prevent school from gathering evidence sufficient to reach a determine (e.g., passage of time, lack of cooperation by complainant)
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How Must You Respond?

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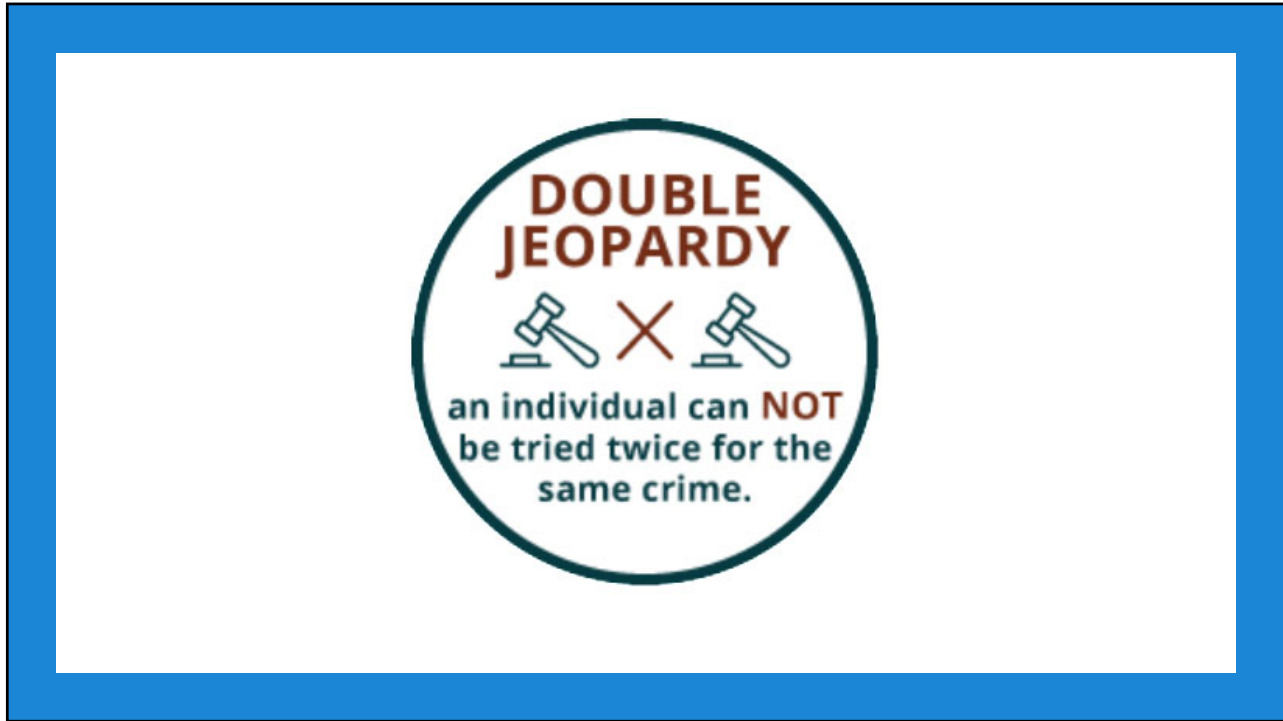
Board Policies on Harassment

Option 1: Policy 2:265 Title IX Sexual Harassment Procedure and related administrative procedures (for Title IX Sexual Harassment)

Option 2: Policy 2:260 Uniform Grievance Procedure (other sexual harassment, other violations of law and of board policy)

Option 3: Other rules or policies not related to SH

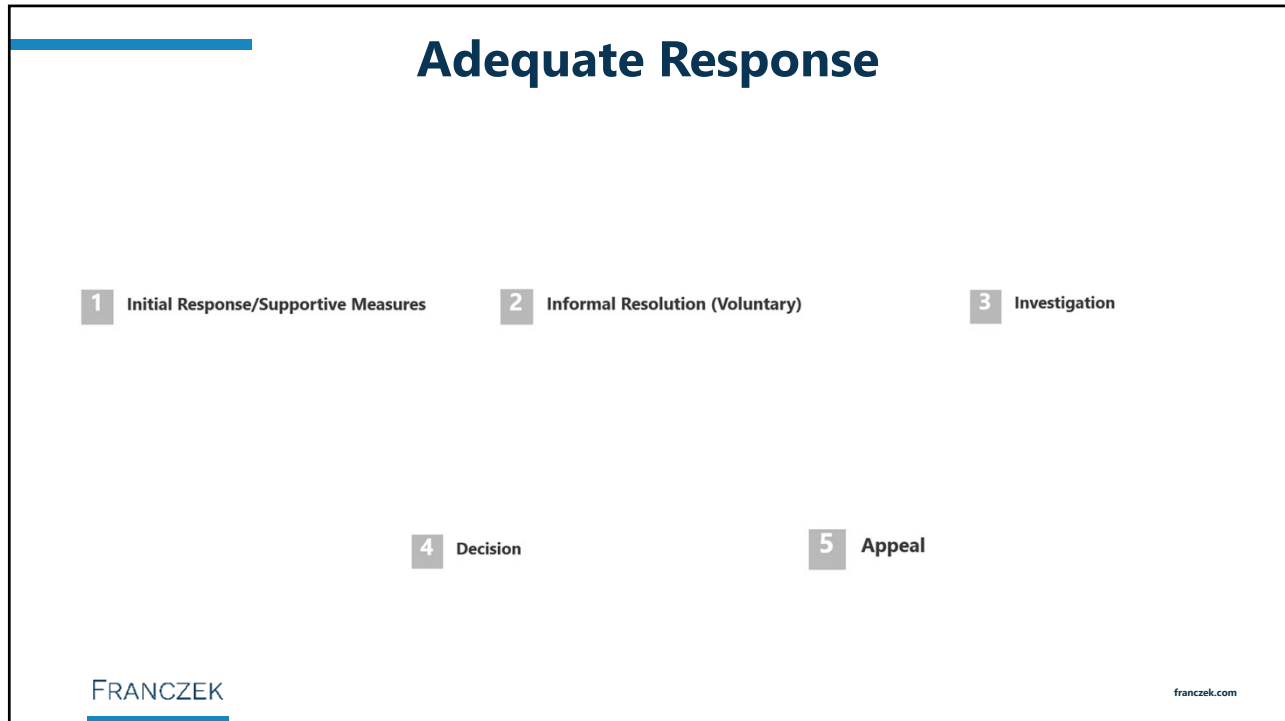
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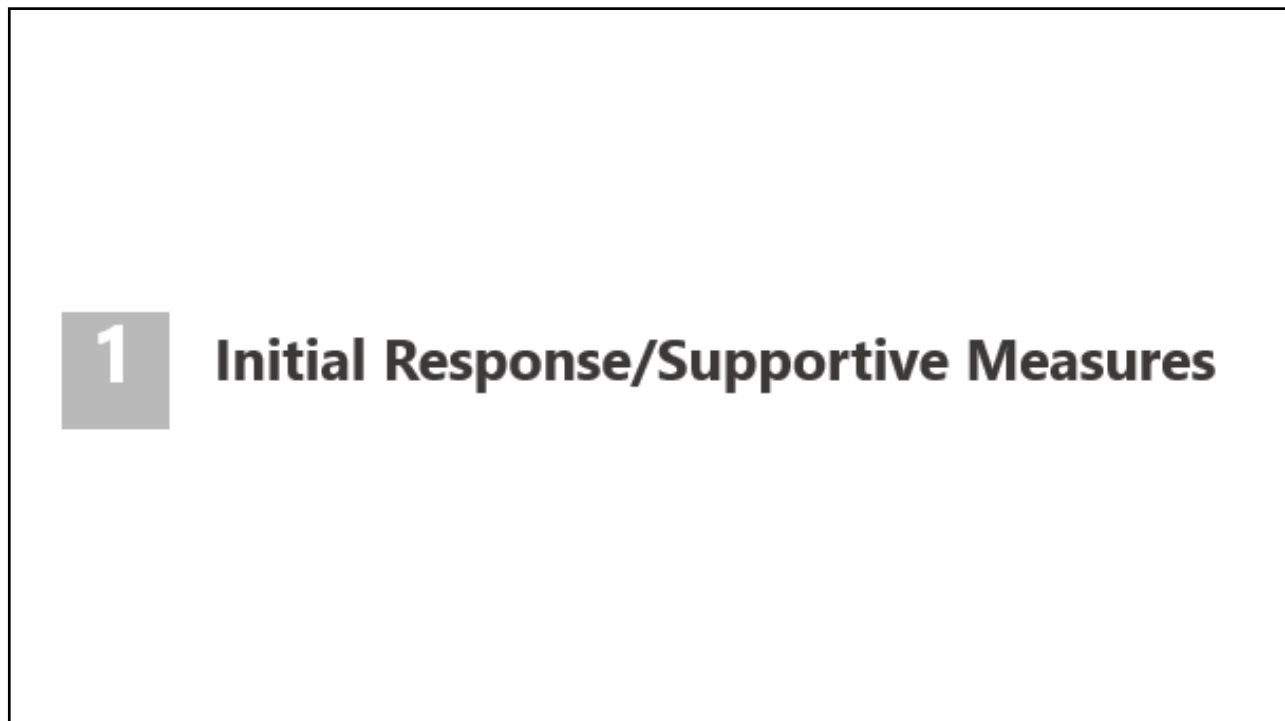
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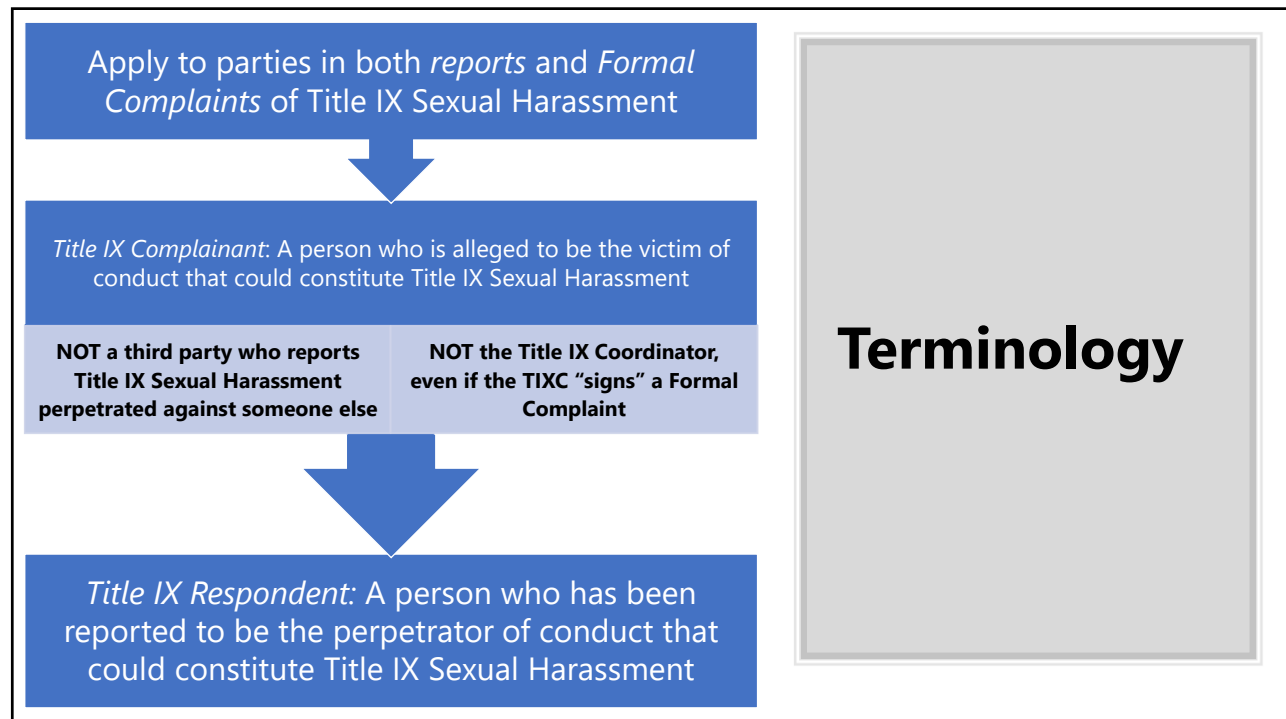
72

Title IX Coordinator

- Must be called Title IX Coordinator
- Must meet with alleged victims of sexual harassment (the Title IX Complainant) *upon actual knowledge of TIX SH even if no formal complaint filed*
- Can delegate responsibilities

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73



74

Title IX Coordinator (or designee) must promptly, **even if no Formal Complaint is filed:**

- Contact the Title IX Complainant to discuss the availability of “supportive measures”
- Consider the Title IX Complainant’s wishes with respect to supportive measures
- Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a Formal Complaint

**New:
Initial
Response**

75



76



77

<p>Supportive Measures</p> <p>What Changed?</p>	<p>OLD TERM (OCR Guidance)</p> <ul style="list-style-type: none">• Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access• Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents	<p>NEW TERM (Final Rule)</p> <ul style="list-style-type: none">• Non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed (34. C.F.R.106.30(a)).• Should be designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party• Should be confidential
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78

Emergency Removal/ Admin Leave

Immediate emergency removal

(34 C.F.R. 106.44(c))

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat to physical health or safety**
- **Notice, opportunity to challenge** provided "immediately" provided the removal
- Consider other laws, e.g., expulsion laws (SB100), "change in placement" under IDEA or 504

Employee administrative leave

(34 C.F.R. 106.44(d))

- Not prohibited
- Consider state law, board policy, handbooks, and bargaining agreements

79

2

Informal Resolution (Voluntary)

80

Informal Resolution

INFORMAL RESOLUTION IS NOT REQUIRED	NOT ALLOWED FOR EMPLOYEE -STUDENT	TIMING
<ul style="list-style-type: none">• Cannot condition enrollment, employment, or any right on waiver of right to investigation and adjudication of formal complaints under grievance procedure• Both parties must voluntarily consent in writing	<ul style="list-style-type: none">• Not available to resolve allegations that employee sexually harassed a student	<ul style="list-style-type: none">• Cannot offer informal resolution process until formal complaint is filed• Any time prior to reaching a determination, either party may request informal resolution• Any party has a right to withdraw prior to agreement

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Informal Resolution Facilitators

- We do not recommend using the Title IX Coordinator or investigator(s) or decisionmakers (complaint and appeal)

82

3 Investigation

83

New: Formal Complaint Response

34 C.F.R. 106.45(b)

- Requires a number of specific steps for investigating
- Major shift from previous, more deferential stance toward specific policies and practices for complaint resolution

84



Who should investigate?

- Can be the Title IX Coordinator
- But should it?

85

- Written notice to known parties “upon receipt of written complaint”
- In sufficient time to allow respondent to prepare a response before any **initial** interview
- Must include:
 - Notice of grievance process, including any informal resolution process
 - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known)

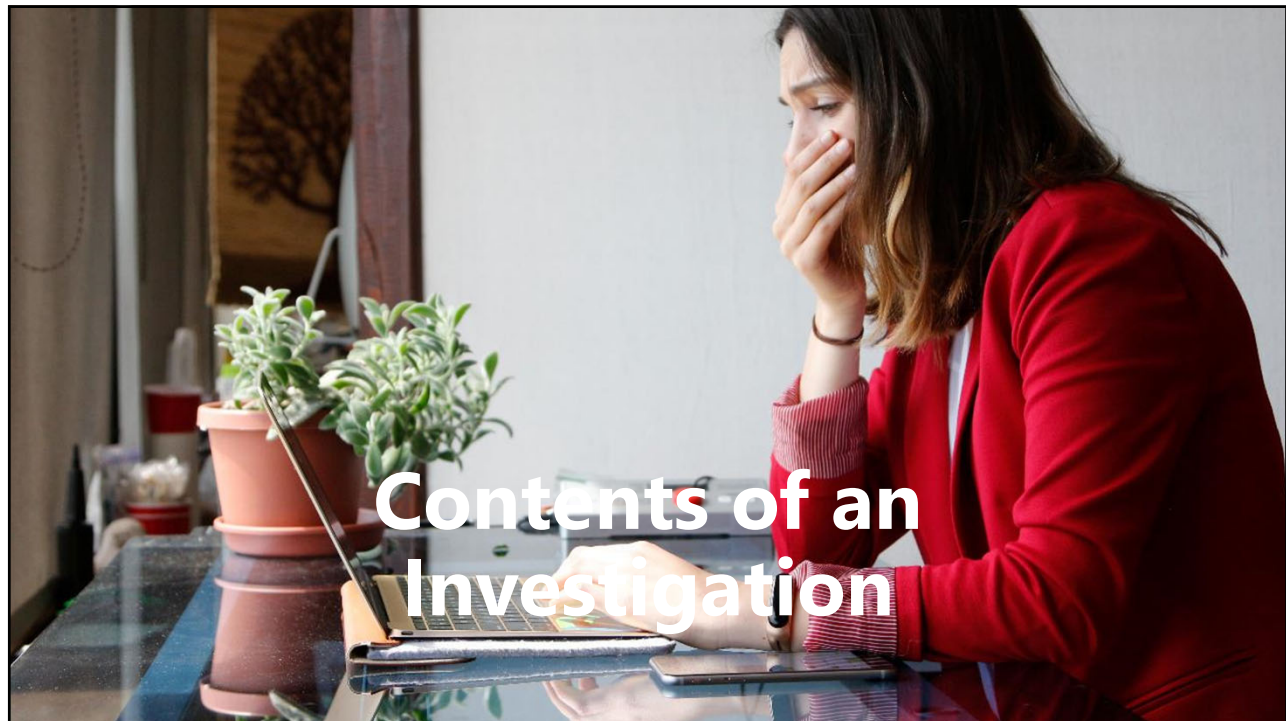
**More
Steps:
Written
Notice**

86

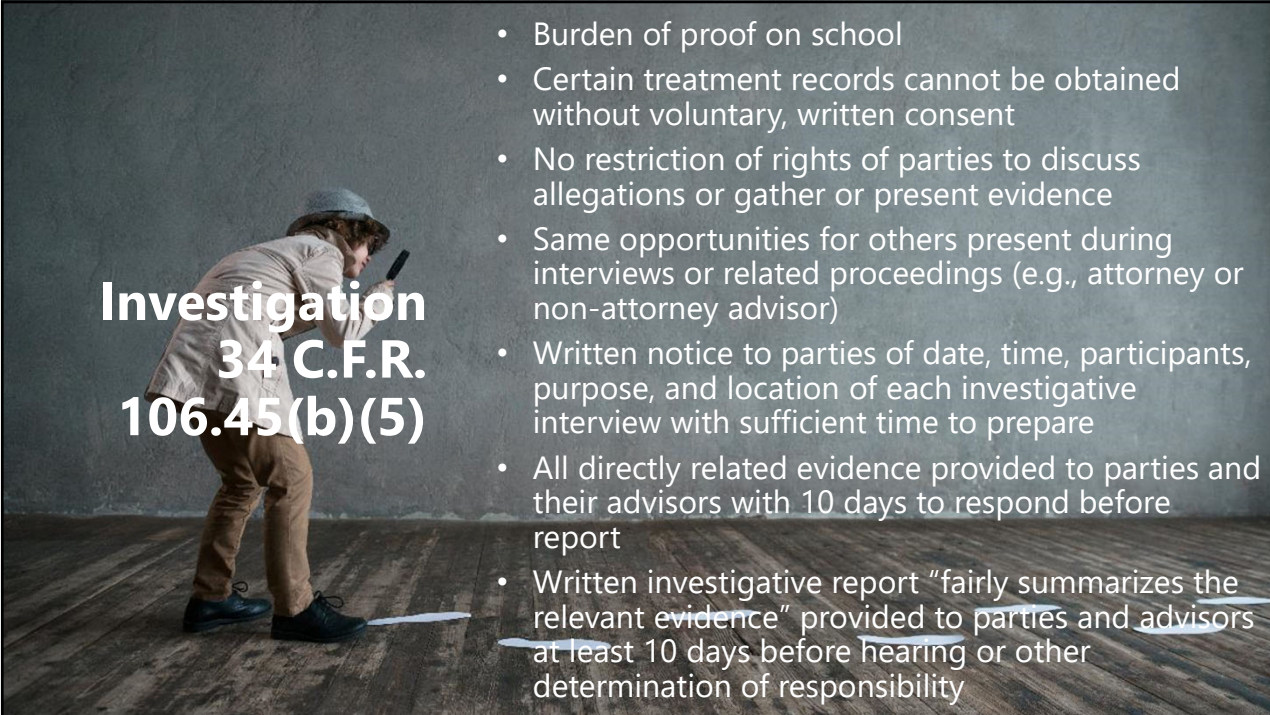
- Must include:
 - Statement that respondent presumed not responsible and that responsibility determined at conclusion of grievance process
 - Notice of parties' rights to have an attorney or non-attorney advisor and to inspect and review evidence
 - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during the grievance process
- Must be supplemented if new allegations opened for investigation

More Steps: Written Notice

87



88



Investigation
34 C.F.R.
106.45(b)(5)

- Burden of proof on school
- Certain treatment records cannot be obtained without voluntary, written consent
- No restriction of rights of parties to discuss allegations or gather or present evidence
- Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)
- Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
- All directly related evidence provided to parties and their advisors with 10 days to respond before report
- Written investigative report "fairly summarizes the relevant evidence" provided to parties and advisors at least 10 days before hearing or other determination of responsibility

89

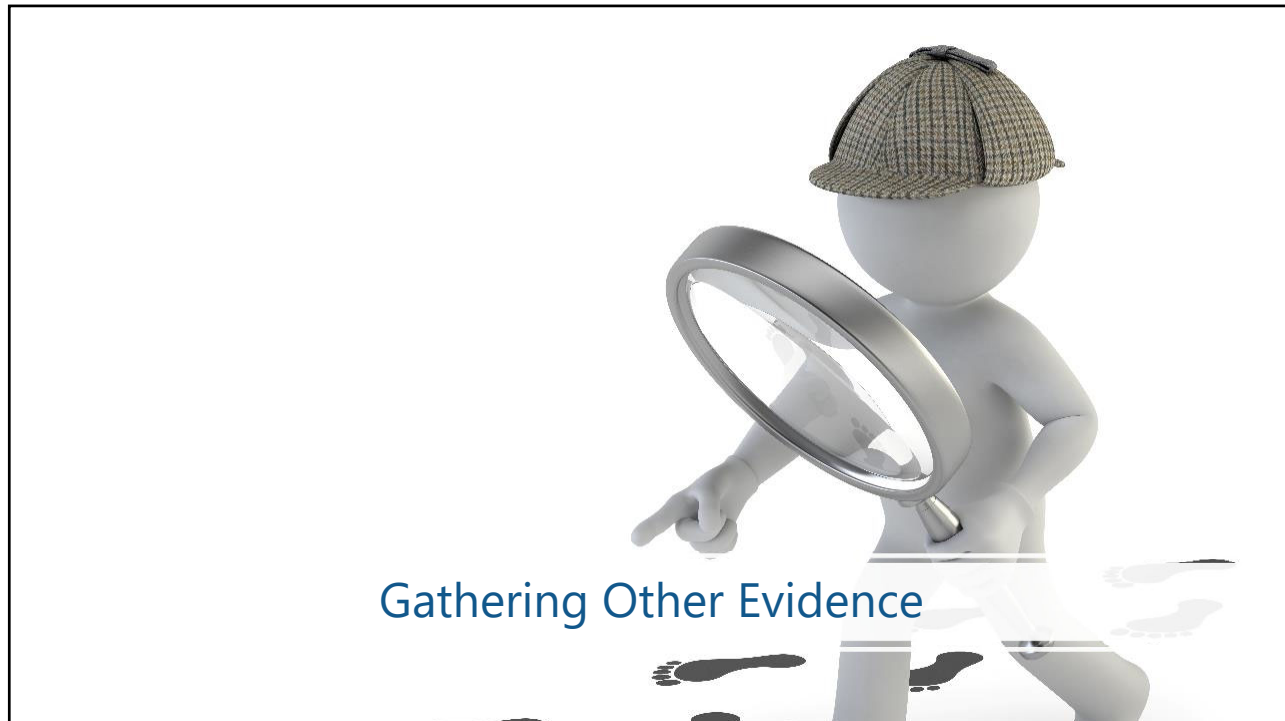
Investigation Plans Aren't Static

Reassess plan for investigation frequently



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91

Warning! Hands off

- Rape shield (for CP)
 - Unless
 1. Used to prove someone other than respondent committed the conduct or
 2. Specific incidents related to the RP to show consent
- Medical records (treatment)
- Privileged information

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Opportunity to Review Evidence

- Before the investigatory report is completed, evidence relating to the allegations must be sent to each party and advisor and should include all directly related evidence (including that which the school does not intend to rely upon and exculpatory and inculpatory evidence)
- Parties have 10 days to provide a written response

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Investigation Report Should Include

Applicable policies and procedures

Timeline of investigation

Description of allegations

Unbiased summary of evidence gathered, including interviews

Credibility determination(s)

94

Investigation Report Writing

- Fairly summarizes all relevant evidence
- Provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility

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4

Decision

96



Decisionmaker(s) (Complaint)

- Cannot be the Title IX Coordinator or the investigator(s)

97

Determinations of Responsibility 34 C.F.R. 106.45(b)(6)

- Live hearing with live cross by party advisors required for higher ed, **not K-12**; Hearings permitted for K-12
- Each party allowed to submit written, **relevant** questions to be asked of another party or witness to the decisionmaker, who will provide each party with the answers and the opportunity for follow-up questions

98

Warning! Hands off

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- Medical records (treatment)
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Rulings on Relevance in Written "Cross"

- Provide reasoning for irrelevance
- Admit and consider all relevant evidence
- Questions must be appropriate
- Identify exceptions

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Written Determination

Identify	Identify the allegations
Describe	Describe procedural steps taken
Cite	Cite potential policy violations
Summarize	Fairly summarize all relevant evidence
Provide	Provide statement of result, with rationale, for each allegation
Appeal	Appeal procedures

102



**Remember the
Standard of
Proof**

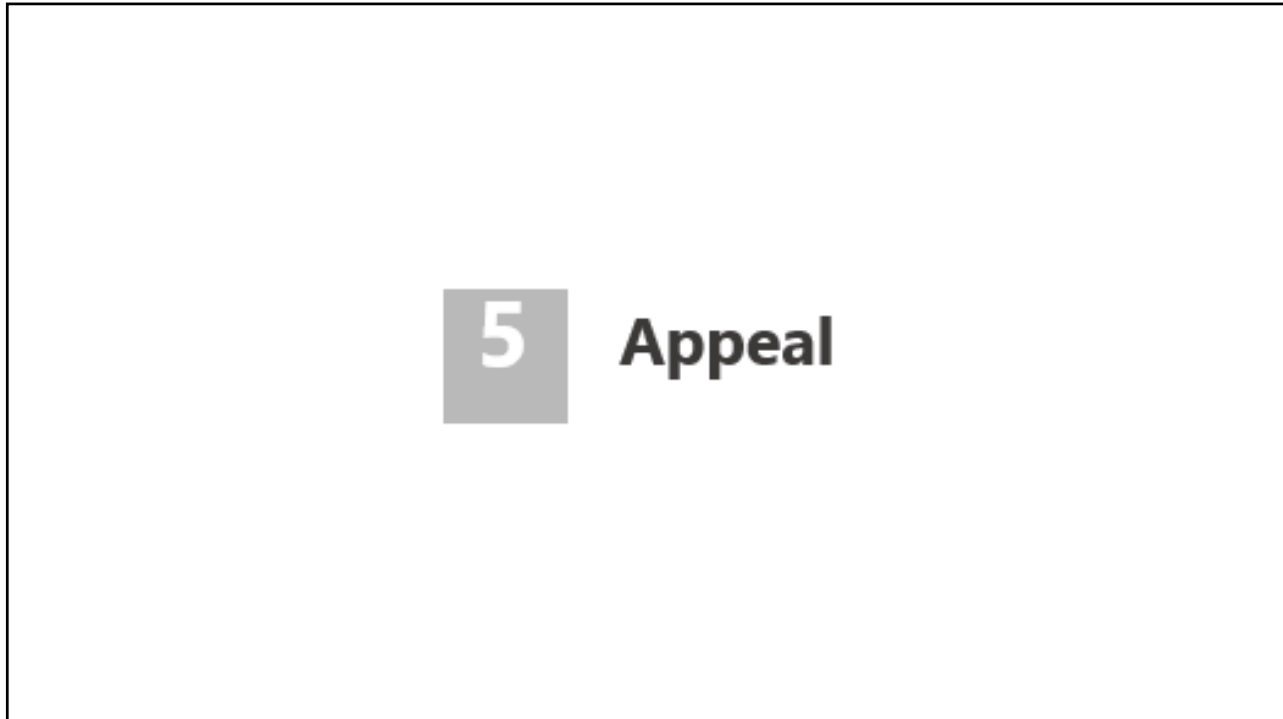
**Preponderance
of the Evidence**

103

Remedies

- Can be punitive/disciplinary
- Can be supportive measures or similar actions as well
- Can address individuals or larger community

104



105

Appeal Process	
Process	Bases for appeal (must impact outcome)
<ul style="list-style-type: none">• Available to both parties• Appeal dismissal or determination	<ul style="list-style-type: none">• Procedural issue• New evidence• Bias/conflict of interest

106

Appeal Process

- Notify party of appeal in writing
- Apply procedures equally for both parties
- Opportunity to submit written statement
- Issue written decision to both parties

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Decisionmaker(s) (Appeal)

Cannot be the Title IX
Coordinator or the
investigator(s) or the
decisionmaker (complaint)

108

Bias, Conflicts of Interest, and Other Fairness Concerns

109

Bias, Conflict, Prejudgment

The Title IX Coordinator, investigator, decision-maker, or informal resolution facilitator must not have a conflict of interest or bias for or against Complainants or Respondents generally or for or against any individual Complainant or Respondent. And that they not prejudge any matter before them.

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Bias, Conflict, Prejudgment

- Consider perceptions, not just reality
 - Institution bias
 - Your friendship or other relationship with the accused or their family
 - Your personal characteristics
 - Your personal conflicts (even if just perceived)
 - Personality conflicts

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112

Go Back and Think

What steps can you take to avoid:

Prejudgment

Conflict of Interest

Bias

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What steps can you take to avoid "bias"?

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What steps can you take to avoid "conflict of interest"?

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What steps can you take to avoid "prejudgment"?

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Recordkeeping

116



Written Notice: Required

- Informal resolution notice
- Notice at start of investigation
- Dismissal notice
- Interview notices
- Report
- Notice why proposed questions not asked on cross and why
- Written determination and notice of appeal rights

117



Written Notice: Recommended

- Document information to complainant at initial meeting, including supportive measures requested/provided
- Document that review of evidence provided to both parties
- Document opportunity to ask questions, answers, follow-up questions, etc.

118

Recordkeeping

Must maintain the following for 7 years:

- Sexual harassment investigation documents, including:
 - Determination regarding responsibility
 - Recordings or transcripts of live hearing
 - Disciplinary sanctions imposed on Respondent
 - Remedies provided to Complainant
- Appeal and result
- Informal resolution and result
- Actions taken in response to a report of sexual harassment
- Actions taken in response to a formal complaint of sexual harassment

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Recordkeeping

Responses to formal and informal complaints and actions taken in response should include:

- The basis for the school's conclusion that its response was not deliberately indifferent
- Documentation that it has taken measures designed to restore or preserve equal access to the school's education program or activity
- Supportive measures or if no supportive measures are provided, document the reasons why such a response was not clearly unreasonable in light of the known circumstances

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Questions



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