

# TITLE IX

## SEXUAL HARASSMENT & DISCRIMINATION IN K-12 SCHOOLS AND POST-SECONDARY INSTITUTIONS

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# Introductions

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Brian J. Taylor, J.D. is Senior Counsel with KingSpry. He is a graduate of Franklin Marshall College, Temple University School of Law and the Wharton School of Business. He has served as trial counsel, Assistant Solicitor, general counsel and investigator with numerous school districts, charter schools, colleges and universities. He also serves as a Unit Investigator in the Office of the Executive Vice President at Princeton University. He has conducted or participated in nearly 200 investigations of Title VI, VII, IX, Code of Conduct, Breach of Policy, Denial of Tenure and Wrongful Termination complaints.



# Introductions

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Nikolaus A. Baikow, Esq. is an associate attorney with KingSpry. He is a graduate of the University of Pittsburgh School of Law and Pennsylvania State University. He serves as an investigator for numerous school districts, charter schools, colleges and universities. He also has experience advising school districts as a solicitor and as counsel in special education due process cases. He actively covers developments in education law, including Title IX regulations, for the firm.



# AGENDA FOR TODAY'S PROGRAM

Part I	The History Behind Sexual Harassment as a Legal Concept and Basis for Legal Liability
Part II	A Deep Analysis Into the Regulations: The Grievance Process
Part III	A Deeper Dive: Investigations
Part IV	Adjudication
Part V	Current Interpretation/Enforcement

# PART I

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The History Behind Sexual Harassment as a  
Legal Concept and Basis for Legal Liability

# EVOLUTION OF CIVIL RIGHTS LAW

- 1950's: Brown v. Board of Education: Elimination of Segregation
- 1960's: Title VI – Prohibits discrimination on the basis of race, color or national origin in any program receiving federal funds or assistance.
- 1960's: Title VII – Prohibits discrimination in terms and conditions of employment based on race, color, national origin, sex and religion. Must have 15 employees – a workplace focused statute.
- 1972: Gap Filler – Title IX – Education Amendments Act of 1972.

# What is Title IX?

Title IX of the Education Amendments of 1972 is a **federal civil rights law** which prohibits discrimination on the basis of sex in all federally-funded educational institutions

Title IX applies to basically **all K-12 schools and postsecondary educational institutions** which receive any kind of federal financial assistance



# Text of Title IX

Title IX states:

- *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. (28 U.S.C.A. §1681)*

❖ Exceptions – Military and private religious schools





# History of Title IX Enforcement

- 1972: Passage of Title IX - Applies to "recipients of federal financial assistance," including K-12 Public schools; Colleges and Universities.
- 1975: First Set of Regulations Under Title IX: No mention of harassment.
- 1980: Originally implemented as an Athletic Statute – Scholarships, Championships and Funding.
- 2000's: Obama Dear Colleague letters.
- 2020: Trump Era Part 1 – Formalization of grievance process and definitions.
- 2024: Biden Era – Aborted amended regulations.
- 2025: Trump Era Part 2 – Widespread use of executive orders.

## KEY U.S. SUPREME COURT RULINGS

- Individuals have standing as plaintiffs to sue. Cannon v. University of Chicago (1979).
- A plaintiff can recover **monetary damages**, and harassment is a form of discrimination. Franklin v. Gwinnet. (1992).
- A private cause of action will lie where a district had **actual notice** and was **indifferent** to the teacher's conduct. Gebser v. Lago Vista (1997).

## KEY RULINGS (cont'd)

- A private action may lie against a school under Title IX in cases of student-on-student harassment, where the funding recipient acts with deliberate indifference and the **harassment is so severe that it effectively bars the victim's access to an educational opportunity or benefit.** Davis v. Monroe County (1999).
- Retaliation for filing under Title IX is actionable. Jackson v. Birmingham (2005).
- Sex discrimination, including orientation and gender identity prohibited in the workplace. Not applicable to education. Bostock v. Clayton County (2020).

# Two Paths of Enforcing Title IX

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## **Judicially – In Court**

- Lawsuit in federal court against educational institution.
- Plaintiff must show that a school official had actual knowledge and was deliberately indifferent.
- Challenge: Fee shifting
- **The goal: money damages**

## **Administratively - Agency**

- By reporting to the Office for Civil Rights (OCR), subsidiary of DOE
- Where OCR/DOJ conducts compliance review.
- Challenge: Burdensome compliance
- **The goal: systemic change**





# THE STANDARD OF LIABILITY (For the institution: 2020 Regs)

A School Entity with actual knowledge of sexual harassment in an education program or activity of the School Entity against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

# PART II

A Deep Analysis Into the Regulations:  
The Grievance Process

# Examples of Discrimination under Title IX (include but are not limited to)

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Sexual harassment  
(quid pro quo and  
hostile  
environment)

Sexual assault

Domestic/Dating  
violence

Stalking


Pregnancy or  
related conditions

Equal athletic  
opportunities

Retaliation



# KEY DIRECTIVES/GOALS

- [1] promptly respond to individuals who are alleged to be victims of sexual harassment by
  - [2] providing supportive measures that;
  - [3] follow a fair grievance process to resolve sexual harassment allegations
    - [a] when a Complainant requests an investigation or
    - [b] a Title IX Coordinator determines an investigation is appropriate
  - [4] and provides remedies to victims of sexual harassment.
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# ROLES AND RESPONSIBILITIES

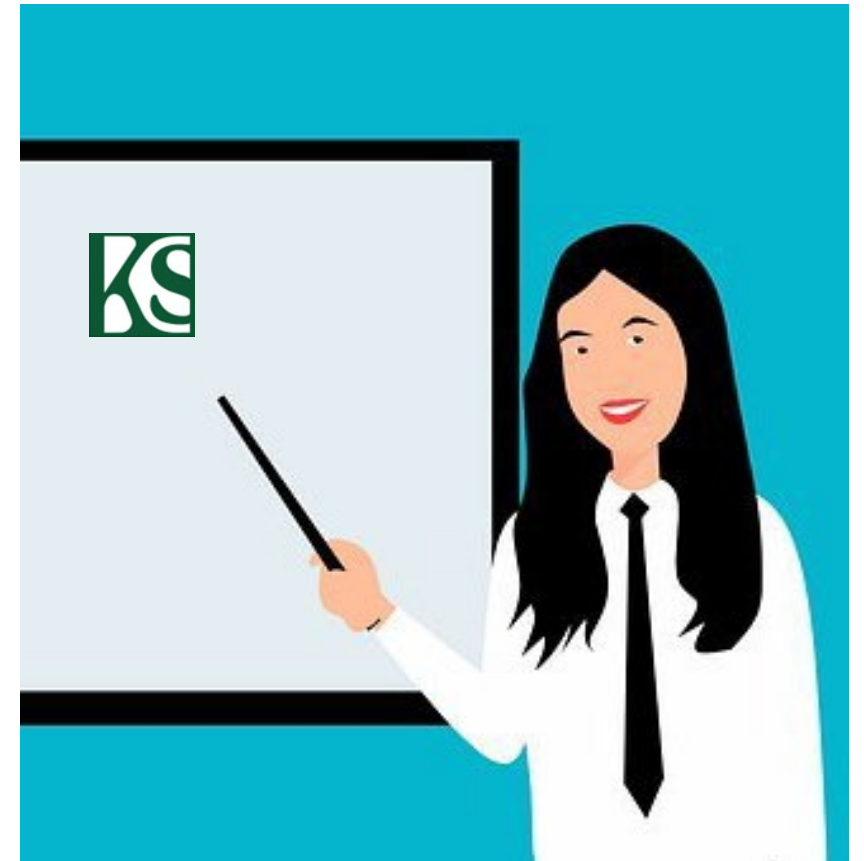
1. Title IX Coordinator
2. Investigator
3. Informal Resolution Facilitator
4. First-level Decisionmaker
5. Appeal Decisionmaker/Officer
6. Advisor

# TRAINING

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- 1) The school must ensure that Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators receive training on:
  - Title IX and the recipient's policies and grievance process
  - the definition of sex-based discrimination/harassment
  - the scope of the school's education program or activity
  - how to conduct an investigation and the grievance process
- 2) Schools must ensure that decision-makers receive training on technology, relevance, and serving impartially.
- 3) Informal Resolution Facilitators receive training on topics such as conflict resolution, mediation and restorative justice.

The 2020 rules do not offer guidance as to how much training is required, i.e., no specific time period, required credits, or continuing education mandate.





# THE FORMAL GRIEVANCE PROCESS - REQUIREMENTS

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Requires:

[1] objective evaluation of all relevant evidence including both:

[a] inculpatory and

[b] exculpatory evidence; and

[2] credibility determinations may not be based on a person's status as a:

[a] Complainant

[b] Respondent

[c] witness

# Updated Terminology

- The 2020 Regulations use the words:
  - “Complainant”
  - “Respondent”
  - “Determination of responsibility”
  - "Decision-Maker"
- Goals:
  - Decriminalize the process
  - Presumption of responsibility on the part of the Respondent
  - Distinguish the Rules from Obama Era guidance



THE GRIEVANCE  
PROCESS: BIAS OR  
CONFLICT OF INTEREST

*(Emphasis One)*



Requires that any individual designated by a school as a Title IX Coordinator, investigator, decision-maker, or an informal facilitator, not have a bias or conflict of interest for or against Complainants or Respondents generally or an individual Complainant or Respondent.

THE GRIEVANCE  
PROCESS: PRESUMPTION  
OF INNOCENCE

*(Emphasis Two)*



The grievance process must 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.

# THE GRIEVANCE PROCESS: TIMING

*(Emphasis Three)*



- The process must initiate and proceed in a timely manner
- The process may allow temporary delays 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 unavailability of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

# Complainant

- The alleged “victim”
- Must be participating in, or attempting to participate in, the school’s education program or activity
- In the United States, at the time of the alleged sexual harassment
- Complainant can be an employee or student
- A Title IX lawsuit is a lawsuit alleging that the educational institution is liable



# CONTACTING THE COMPLAINANT

The Title IX Coordinator must promptly contact the Complainant to:

- (1) 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.

# Respondent

- The formerly alleged “accused” or “perpetrator”
- “In locations, events, or circumstances where the school has substantial control over the harasser and substantial control over the context in which the harassment occurs”
- If the Respondent leaves school, graduates, resigns, or otherwise leaves, Title IX Coordinator has discretion to dismiss, dismissals are subject to an appeal (can still impose discipline under a code of conduct)
- Respondent can be employee or student

## INFORMAL RESOLUTION (Mediation or Restorative Justice)

1. Schools may not require any party to participate in informal resolution process.
2. Both parties must voluntarily agree
3. Schools cannot require anyone to waive the minimum rights;
4. Schools may not offer an informal resolution process unless a formal complaint is filed.
5. Informal resolution not allowable when an employee allegedly harassed a student.
6. The informal resolution may run concurrently with the investigation or may be suspended until the either the informal process fails or results in a signed agreement.

## INFORMAL RESOLUTION (Part 2)

6. The process must use a trained informal resolution facilitator who is neutral and without bias or conflict of interest. The facilitator should not be the Title IX coordinator, investigator, and/or anyone who may serve as Decision-Maker.
7. Either party may withdraw from the informal process at any time without providing a reason for doing so and return to or continue the formal investigation.
8. The recipient and/or Informal Resolution Facilitator can end the informal process at any time.
9. Recipients determine whether Informal Resolution is appropriate given the allegations and circumstances. If they believe it is not appropriate, informal resolution need not be offered.



# Significant Change in Definition (2020 Regulations)

## A New Definition of Sexual Harassment:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct; also called *quid pro quo* harassment. (Single incident sufficient)

(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

(3) Sexual assault, dating violence, domestic violence, or stalking. (Single incident sufficient)

# ACTUAL KNOWLEDGE

Notice to any of the following constitutes notice to the school:

1. Title IX Coordinator;
2. Any official of the school who has the authority to institute corrective measures on behalf of the school; or
3. Any employee of an elementary and secondary school, including custodians, bus drivers, cafeteria workers, etc.
4. Who can report: student, parent, employee, friend, witness, or anonymous.
5. Duties of reporters: Mandatory Reporters under Pennsylvania Law have specific responsibilities, i.e., Childline.



# FORMAL COMPLAINT

- Formal complaint means:
  - (1) a document filed by a Complainant or signed by the Title IX Coordinator;
  - (2) alleging sexual harassment/discrimination against a Respondent; and
  - (3) requesting that the school investigate the allegation of sexual harassment.

Note: Verbal reports can be made but should be followed up with a written formal complaint.

An illustration on the left side of the slide shows a person's hands. One hand is holding a white sheet of paper with a red horizontal line. The other hand is holding a yellow pencil and writing on a purple spiral-bound notepad. The background of the illustration is a light blue circle.

# FILING OF THE FORMAL COMPLAINT

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A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.S(a), and by any additional method designated by the school.

## When there is a formal complaint:

1. Notify insurance broker/agent and district Solicitor of a possible claim
2. Implement litigation hold procedures
3. Offer supportive measures immediately (including threat assessment if necessary)
4. Do an initial assessment to determine if Title IX is applicable
5. Begin investigation, issue a Notice of Allegations and Investigation (NOIA) to the parties
6. Practice tip: Take similar steps even if there is no formal complaint



# SUPPORTIVE MEASURES MEANS:

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- [1] non disciplinary
- [2] non-punitive
- [3] individualized services offered
- [4] as appropriate, as reasonably available, and without fee or charge, and
- [5] to the Complainant or the Respondent before or after the filing of a formal complaint or where no formal complaint has been filed



## GOAL OF SUPPORTIVE MEASURES

Supportive measures are designed to:

[l] restore or preserve equal access to the school's education program or activity without unreasonably burdening the other party, including measures designed to:

[a] protect the safety of all parties or the school's educational environment, or

[b] deter sexual harassment/discrimination

# SUPPORTIVE MEASURES



The school 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 school to provide the supportive measures.

## EXAMPLES OF SUPPORTIVE MEASURES

- [1] institute safety plan
- [2] counseling;
- [3] extensions of deadlines or other course-related adjustments;
- [4] modifications of work or class schedules;
- [5] school/campus escort services;
- [6] mutual restrictions on contact between the parties;
- [7] changes in work locations;
- [8] leaves of absence;
- [9] increased security; and
- [10] monitoring of certain areas of the school/campus, and other similar measures.

## OTHER PRELIMINARY MEASURES

- Special Education programming must continue
- Emergency Removal are authorized pending a Title IX policy investigation (see next slide)
- Paid leave pending investigation for employees including Garrity Warnings and Weingarten Rights if they are interviewed.



# EMERGENCY REMOVAL

"Emergency Removal": This is allowed: "provided that the [school]:

(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.

## THE GRIEVANCE PROCESS: NOTICE OF ALLEGATIONS

Upon receipt of a “formal complaint”, school must provide the following written notice to the Complainant(s) and Respondent(s) who are known:

1. Notice of grievance process
2. Notice of informal resolution process (if an option)
3. Notice of the allegations potentially constituting sexual harassment “including sufficient details known at the time.”

# THE GRIEVANCE PROCESS: CONTENTS OF THE NOTICE OF ALLEGATIONS

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The written notice must inform the parties that:

1. They may have an advisor of their choice, who may be, but is not required to be, an attorney.
2. They may inspect and review evidence.
3. Prohibition against knowingly making false statements.
4. Respondent is presumed not responsible for the alleged conduct.
5. That a determination regarding responsibility is made at the conclusion of the grievance process.



## THE GRIEVANCE PROCESS: AMENDED NOTICE OF ALLEGATIONS

If, in the course of an investigation, the school decides to investigate allegations about the Complainant or Respondent that are not included in the original notice, the school must provide notice of the additional allegations to the parties whose identities are known.

# MANDATORY DISMISSAL OF COMPLAINT

Complaint must be dismissed:

1. If the conduct alleged in the formal complaint would not constitute sexual harassment/discrimination even if proven.
2. Did not occur in the school's education program or activity.
3. Did not occur against a person in the United States.

Note: Dismissal of a formal complaint does not preclude action under another provision of the school's code of conduct or other district policy.



# PERMISSIVE DISMISSAL OF COMPLAINT

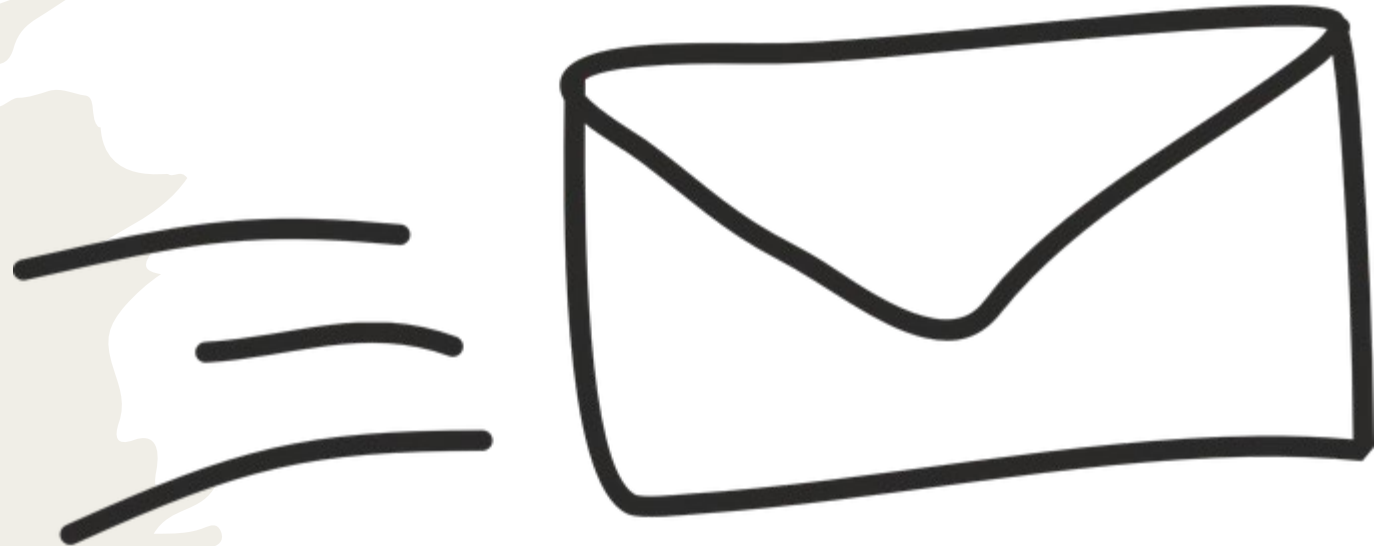
A complaint may be dismissed if:

1. A Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein. (Note: the Title IX Coordinator can decide to move forward with the investigation)
2. The Respondent is no longer enrolled or employed by the school.
3. Specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

# THE GRIEVANCE PROCESS: DISMISSAL

Upon a dismissal, the school must promptly send a written notice of the dismissal and reasons therefor simultaneously to the parties.

If a complaint is dismissed for either a mandatory or permissive reason, both parties must receive notice and be given an opportunity to appeal the dismissal.



A hand holding a magnifying glass over a blue background with the word 'facts' repeated diagonally. The magnifying glass is positioned over the word 'facts' in the center of the image.

## PART III

# A Deeper Dive: Investigations

# EFFECT OF CRIMINAL PROCEEDINGS ON INVESTIGATION

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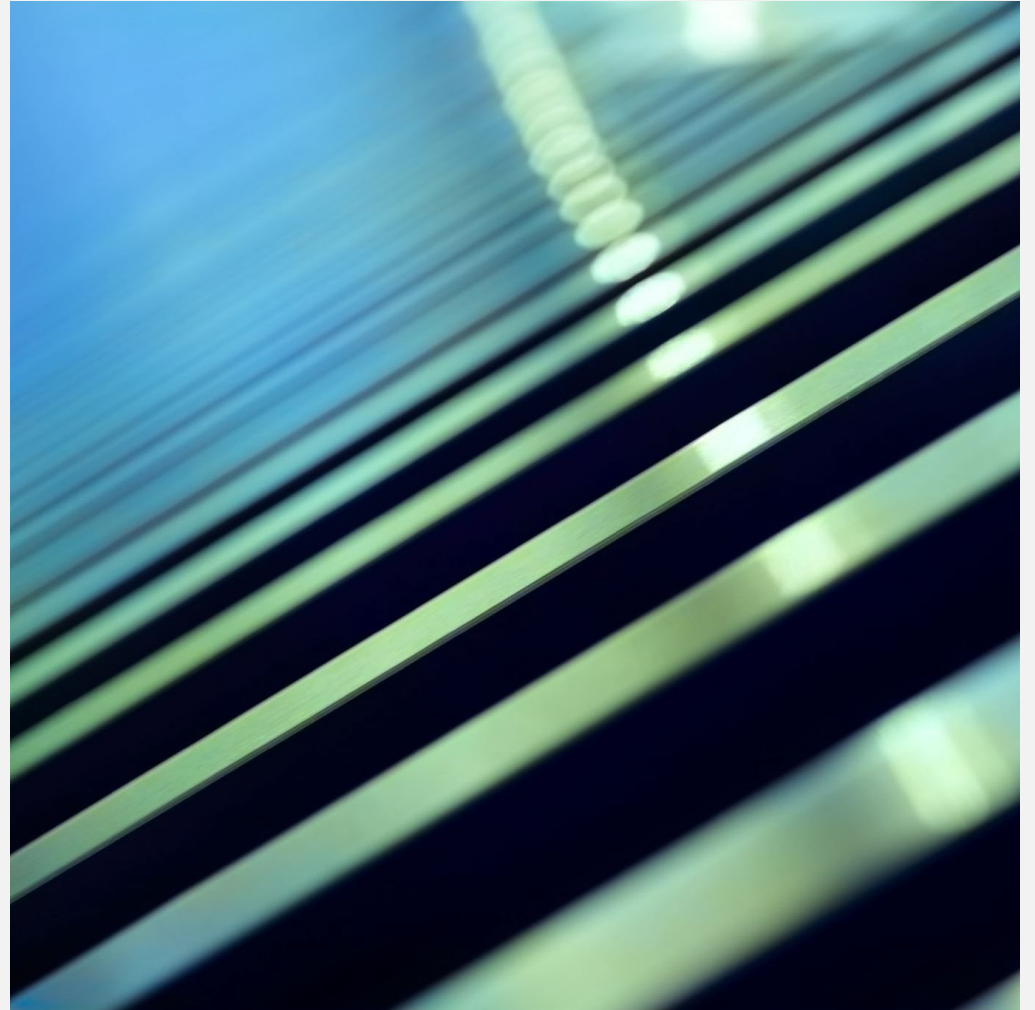
Does not relieve school of its duties under Title IX - you must investigate promptly, decide promptly, provide supportive measures promptly, and take appropriate action based on decision.

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Decision of police is not determinative of whether there was unlawful harassment, unless there is a guilty plea or verdict of an offense whose elements establish "sexual harassment".

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May have to coordinate with law enforcement including release of the report and evidence. i.e. subpoena



# STANDARD OF REVIEW

State whether the standard of evidence to be used to determine responsibility is the:

[a] preponderance of the evidence standard or the

[b] clear and convincing evidence standard, apply the same standard throughout the process

Note: Should be stated clearly in the policy





# THE INVESTIGATION

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1. The burden of proof rests on the school.

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2. The burden of gathering evidence rests on the school.

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3. The school cannot use a party's medical records developed for treatment purposes without consent of party, or party's parent if party is under 18.



# THE INVESTIGATION

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

Do not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence; i.e. no gag orders.

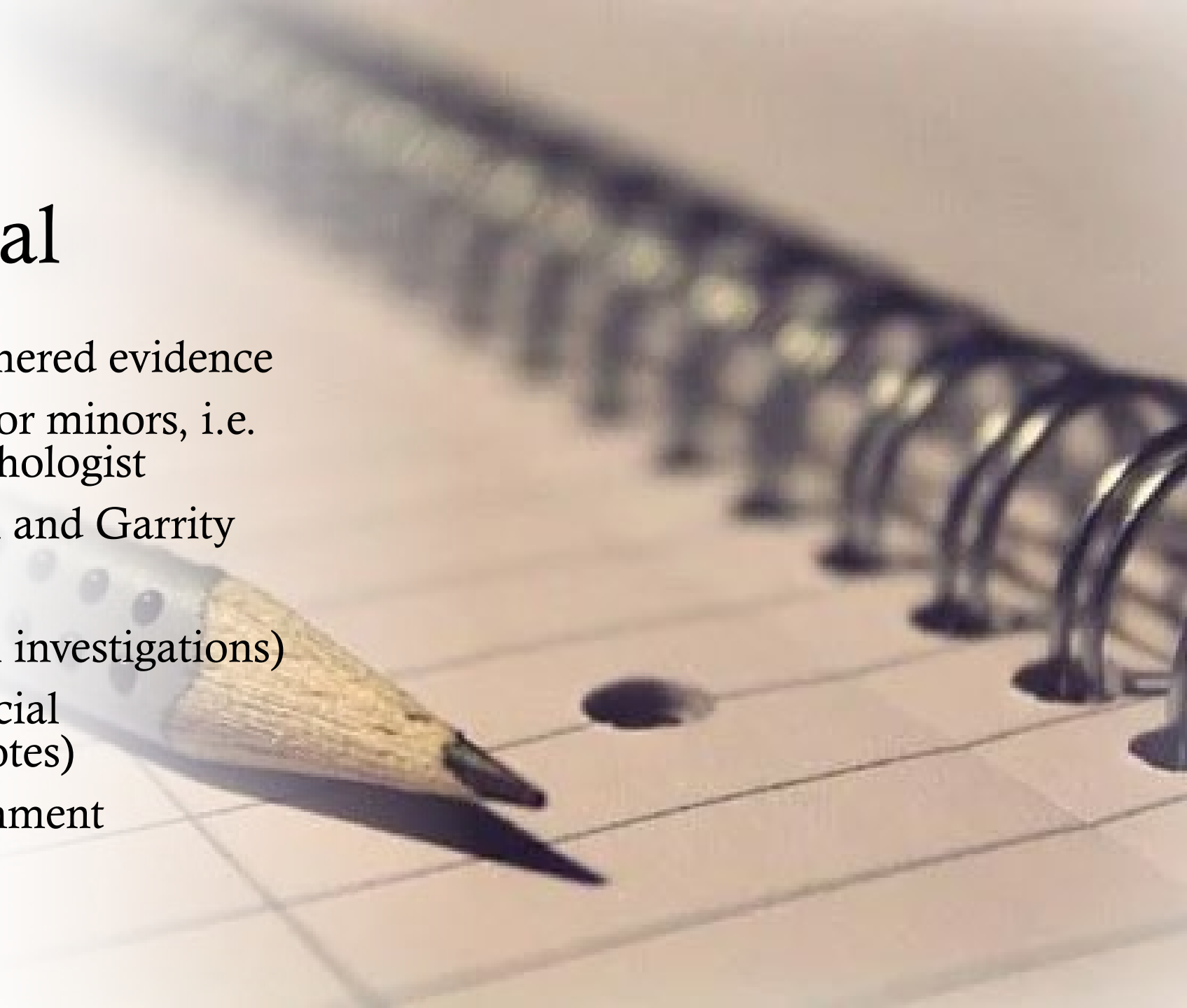
# Interview Considerations

- Prepare a written notice of interview
- Note: Have a witness/2<sup>nd</sup> note-taker present (ID themselves)  
Students – mindful of their age and emotional fragility
- Recording – some Title IX Institutions record via audio or Zoom
- Remember, in PA, recording without permission is prohibited
- Do not preconceive responsibility
- Try to avoid yes/no questions to elicit as much information as possible
- Start the interview with questions about background
- Stay factual
- Stay non-judgmental
- Confidentiality- do not promise – only reveal to those who need to know
- Begin by explaining the process and the expectation of honesty and completeness
- Complainant first, otherwise management, administration, teacher or counselor, then the Respondent followed by witnesses
- Review the Interview if necessary
- Explain that retaliation is prohibited



# Statements: Written & Oral

- The most commonly gathered evidence
- Specialized questioners for minors, i.e. counselors, forensic psychologist
- Employees – Weingarten and Garrity
- Signatures (preferred)
- Reinterviews (of internal investigations)
- Limitations (minors/special education/transcribed notes)
- Consistency, i.e. impeachment



# QUESTIONING THE PARTIES

- Outline the issues; the disputed and undisputed facts
- Draft a preliminary list of questions
- Do not begin with hostile questions
- Start with “broad” questions and use follow-up questions as needed
- Ask who, what, where, when, why witnesses and how
- Ask open-ended questions; avoid compound questions
- Do not put words into the interviewee’s mouth – don’t lead
- Save unfriendly or embarrassing questions until the end of the interview
- Review your understanding of what you have been told
- Ask for any other information or documentation that might help
- Include exculpatory evidence as well – (otherwise malicious prosecution claim is a possibility)





# TRAUMA INFORMED INTERVIEWS



**A Trauma Informed Response takes into account the effects of trauma on the brain and integrates this knowledge into policies, procedures and practices.**



**When a person is experiencing a traumatic event, “fight or flight” hormones and neurotransmitters flood the body, affecting the way the brain encodes memories.**



**So much so that they tend to be disjointed and out of chronological order.**



**Researchers say the traumatized brain can go into survival mode, capturing vivid sensory details of a life-threatening event.**



# TRAUMA INFORMED INTERVIEWS: FUNNEL APPROACH

- General, broad questions requiring narrative responses, then more narrow subject area questions based on information provided in the response.
- For example:
  - What? Where? When? How? Why?
  - Explain to us what you meant. . .
  - Describe for us . . .
  - Can you tell me more about. . . ?
  - What happened next?
  - What else?
  - How did you feel about. . . ?
  - What else would you want us to know?



# TRAUMA INFORMED INTERVIEWS: DEMEANOR

- Speak with individuals with information about Reporting Individual's demeanor at earlier times.
- Take note of the demeanor, changes in the demeanor, of the Parties and witnesses during interviews.
  - Reporting Individual/Respondent may be affected by the emotional component of sexual assault allegations
  - Range of behaviors and emotional reactions vary
    - May be confrontational or hostile
    - May engage in nervous laughter, inappropriate smiling
    - May be absence of tears or emotion

# QUESTIONS TO ASK WITNESSES

- What did you observe?
- Who was present or may have observed?
- What did that person say or do?
- What did you say or do?
- Did you tell anyone?
- Do you know of any similar incidents?
- Do you know of any other evidence, such as documents and witnesses?
- Is there anything you think I should know?
- Probe for bias, motive and conflict of interest.

Note: Investigator must determine relevance.

# CREDIBILITY CONSIDERATIONS

- Plausibility?
  - Does the story make sense? Is it believable? Logical? Consistent?
  - What is the interviewee's source (direct or second-hand knowledge)?
  - Did the interviewee give detail? What was the interviewee's reaction if asked to provide detail?
- Corroboration?
  - Is there witness testimony such as eyewitness or people who discussed the incident around the time it is alleged to have occurred?
  - Is there physical evidence? Document ASAP
- Contradictions?
  - Did the interviewees' statements contradict each other?
- Motive to lie? Potential for bias, look for remarkably consistent language
- Past record?
- Demeanor?
  - Was there an emotional reaction to the questions?
- No single factor is determinative





# ITEMS/RECORDS REVIEW AND OTHER EVIDENCE

- Policies, manuals and handbooks
- Emails, direct messages and texts
- Photos and video surveillance
- Electronic records/data, including phone logs or browser history
- Notes of any other source
- Sites Visits
- Specialized – i.e. rape test kits, police reports,

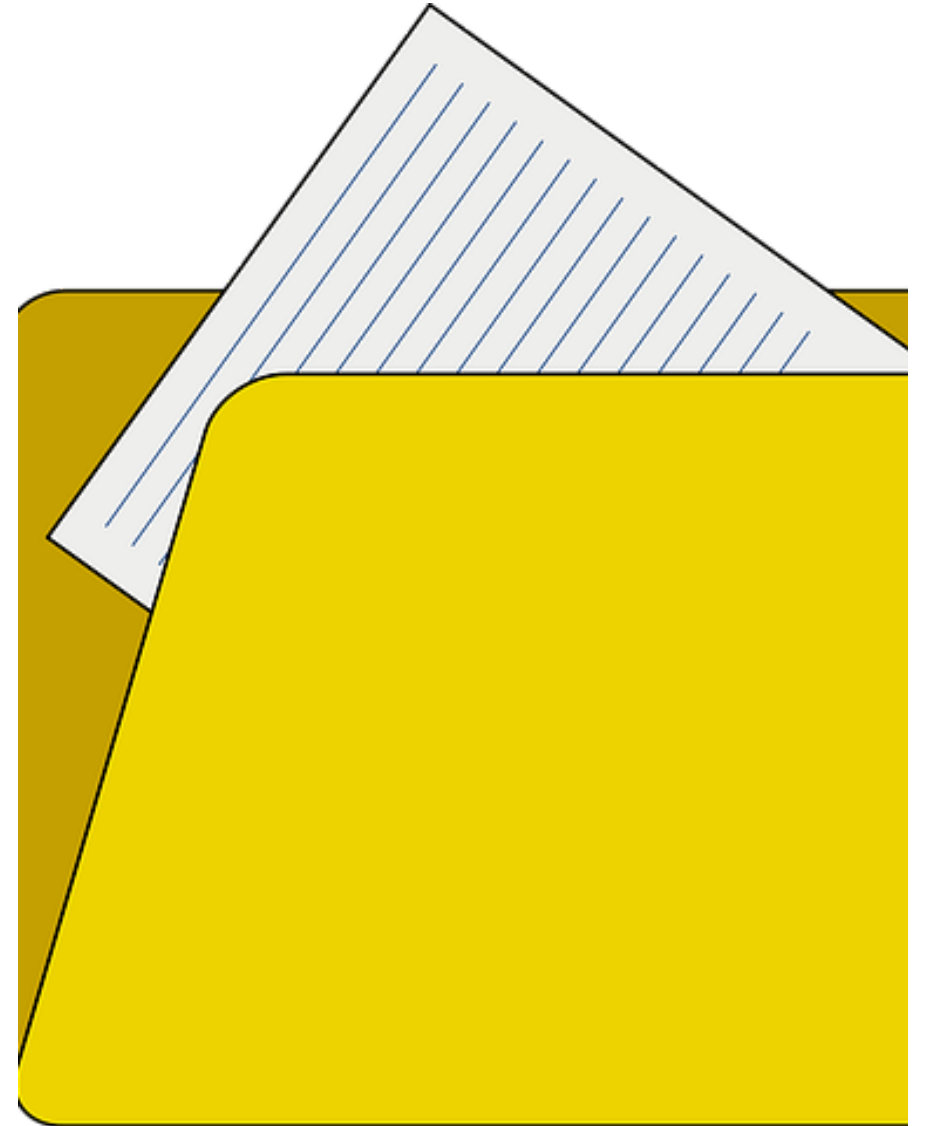
Amazon.com?



# THE INVESTIGATION EVIDENCE REVIEW

1. Prior to completion of the investigative report, the school 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. (draft report)
2. The parties must have at least 10 days to submit a written response. (Can include a request to interview additional witnesses, submission of questions for follow-up or commentary about the previously gathered interview statements).
3. The investigator must consider the response(s) prior to the completion of the investigative report.

(Retaliation watch)



# Sample Details of Investigative Report



- Date of complaint and who reported.
- Do you have the signed complaint form(s)?
- Date of the incident(s) that were investigated.
- Why was the investigation started and what was being investigated?
- Who performed the investigation?
- When did the investigation begin?
- Summary of parties' reports.
- Summary of witnesses' reports.
- What documents were gathered?
- Where were the evidence/documents found and who produced them?
- What policy/procedure was applied?
- Who were the witnesses?
- What facts were gathered from parties/witnesses?
- Summary of factual evidence.



# PART IV

## ADJUDICATION



## THE GRIEVANCE PROCESS: ADJUDICATION – INDEPENDENT DECISION-MAKER (OR LIVE HEARING)

- A written determination must be issued after the investigative report is finalized (minimum 10 day waiting period) (2<sup>nd</sup> waiting period)
- Analyze the relevant evidence from the report as well as any other evidence in the file, make credibility determinations and analyze the established findings of facts against applicable policy.
- Written determination must be made by the “Decision-Maker”
- Decision-Maker cannot be the Title IX Coordinator or the Investigator.



# THE GRIEVANCE PROCESS: DECISION-MAKER FINAL REPORT

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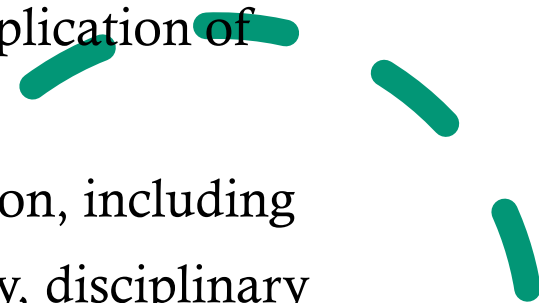
Must include:

1. Allegations potentially constituting sexual harassment
2. Description of the procedural steps from receipt of formal complaint to written determination, including:
  - a) Notifications to parties
  - b) Interviews
  - c) Site visits
  - d) Methods used to gather evidence
  - e) Hearings held.
3. Findings of fact supporting determination





## THE GRIEVANCE PROCESS: FINAL DECISION-MAKER REPORT (Cont'd)

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4. Conclusions regarding the application of policies to facts;
  5. The rationale for each allegation, including determination of responsibility, disciplinary sanctions and whether remedies will be provided to victim to restore or preserve equal access;
  6. Procedures for appeal;
  7. Timeline for appeal;
  8. Bases for appeal by complainant and respondent.
  9. The Written Determination must be provided to the parties simultaneously and becomes final after the waiting period for the appeal expires or the date of the appeal determination is issued where a timely appeal is taken.

# Higher Ed Application

- 1) Widespread use of informal resolution – must use a trained informal mediator. Parties must voluntarily agree to the process in writing, Parties as well as the college may withdraw at any time and return to investigation, can include discipline but usual relief given is a stay away order.
- 2) Notice must go to the Title IX Coordinator vs. K-12 where notice can be given to any employee or official.
- 3) May have advisors who are fellow students or faculty members.
- 4) Interviews are almost always recorded, with transcript.
- 5) Some colleges use Rights and Responsibility rules to ensure compliance.
- 6) Can be difficult to determine jurisdiction, i.e fraternity or sorority houses.



# The Grievance Process: Adjudication Post K-12

## Live Hearings Required

- ✓ Recommend that college has a policy or regulation to set the decorum rules.
- ✓ Must be recorded and transcripts made available.
- ✓ Usually presided over by a panel with the chair often being a retired judge.
- ✓ Parties can be represented by a lawyer or non-lawyer.
- ✓ Issues to be decided
  - Use of opening statements
  - Use of direct testimony by the Parties
  - Presence of the investigator as a witness
  - Submission of questions in advance to the panel
  - Identification and calling of witnesses
- ✓ Issue written report to both Parties simultaneously





# THE GRIEVANCE PROCESS: BASES OF APPEAL

The following bases for an appeal are required:

1. Procedural irregularity that affected the outcome of the matter.
2. New evidence that was not reasonably available at the time the determination was made or of dismissal and that would have affected the outcome of the matter.
3. 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 parties specifically.
4. Schools may add other bases for appeal if they choose to do so. A common added basis is that sanctions are too severe or too lenient.



# THE GRIEVANCE PROCESS: THE APPEAL

When an appeal is filed, school must:

1. Notify the other party in writing and implement appeal procedures equally for both parties.
2. Assign a new Decision-Maker/Appeal Officer without knowledge or involvement in the matter.
3. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
4. Issue a written decision describing the result of the appeal and the rationale for the result.
5. Provide the written decision simultaneously to both parties.

# DISCIPLINARY SANCTIONS

- May be decided by the Decision-Maker or the recipient school district, varies by district policy.
- The range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the school may implement following any determination of responsibility.
- Act 110 – Section 1318:  
K-12 public schools are required to remove, transfer or reassign students who are adjudicated delinquent or convicted of sexual assault when the offending student and victim are enrolled in same school.  
(1321)
- Special Education is not a defense (but may be considered when applying discipline and remedies).



# RECORDKEEPING

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Must maintain for a minimum of 7 years the following:

1. Each sexual harassment investigation, including:
  - a) Determinations
  - b) Recordings and transcripts
  - c) Disciplinary sanctions
  - d) Remedies
  - e) Appeals

# RECORDKEEPING (cont'd)

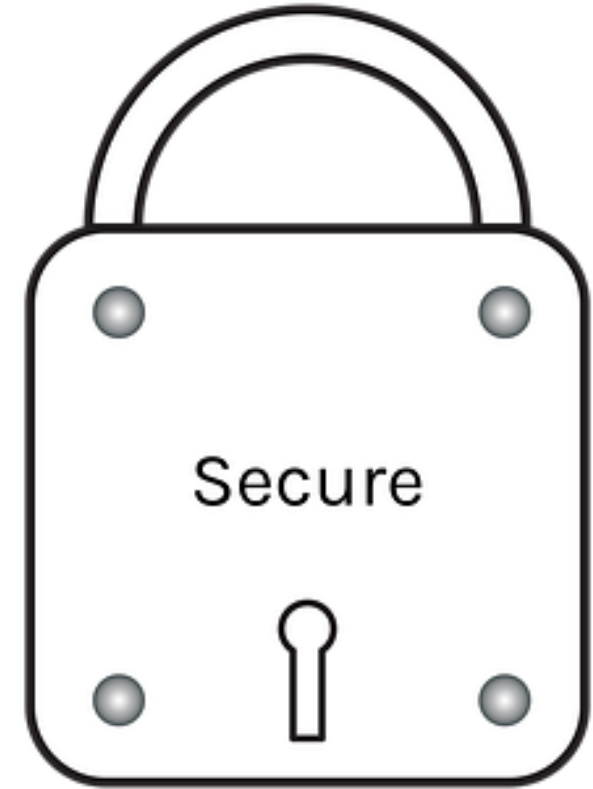
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2. For each response to known sexual harassment, the school must create records of actions, including supportive measures
  - a) Basis for conclusion that response was not deliberately indifferent
  - b) Measures designed to restore and preserve equal access
  - c) Reasons why the Parties were not provided with supportive measures.

# SCHOOLS MUST KEEP CONFIDENTIAL:

1. Identity of any individual who has made a report or complaint of sex discrimination
2. Any Complainant or Respondent
3. Any witness

Note: Respondent has a right to know who the Complainant is and who the witness(es) are against him/her. Never guarantee confidentiality.





# EXCEPTIONS TO CONFIDENTIALITY

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Disclosure can be made under the following circumstances:

1. As permitted by the FERPA;
2. As required by law; and
3. To carry out the purposes of 34 CFR, Part 106, including conducting an investigation, hearing, or judicial proceeding.



# RETALIATION PROHIBITED - GENERALLY

No school or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or the new Title IX Regulations.



# PART V

Current Interpretation/Enforcement & Legal Backdrop

# 2025 TRUMP (PART II) ERA REGULATIONS

- Numerous lawsuits and injunctions filed to prevent the implementation of the 2024 Biden Era Regulations in 26 states.
- U.S. District in Kentucky (January 9, 2025) – 2024 regulations declared unconstitutional and voided in their entirety.
- Trump Executive Orders
  - Reversion to the 2020 regulations (January 31, 2025)
  - Definition of gender limited to male or female (January 20, 2025)
- Trump Era enforcement
  - Special Investigations Team (SIT) with a focus on transgender participation in sports.
  - Decimation of OCR. Closure of half of the regional offices.
  - Maine/UPenn – attempts to cut federal funding and enforcement agreements.



# Third Circuit (Federal) & Pennsylvania Law

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- Transgender protection – protection of bathroom and locker room usage based on chosen gender identity (Doe v. Boyertown (3rd circuit)).
- PA Constitution (Article I, Section 8) "Benefits and burdens cannot be conferred based upon sex".
- PHRC (January 2025) Affirmed that gender identity is included in PHRA protections.
- PIAA – Removed transgender protection

# Legal Backdrop

WHY COUNSEL IS STILL  
IMPORTANT





# Types of Claims

1. Title IX – Against the Institution (No Individual Capacity Claims)
2. State-Created Danger – Against the Institution and Individual Including Administrators and Teachers
3. Assault and Battery – Individual Respondent
4. Sexual Harassment Claims Against All
5. Title IX Retaliation – Against all (Protected Activity, Adverse Action and Causal Connection)
6. Emotional Distress Claims Against All
7. Claims – Failure to investigate, delay in investigation, failure to offer supportive measures, failure to remedy



# **DEFENSES/IMMUNITIES**

## **Qualified Immunity (Federal)**

- Well Established Constitutional right that employees should have known
- Competing issues – Hold officials accountable while shielding them from harassment and distraction
- Covers your individual actions

## **Monell (Federal)**

- Protects the District must establish custom or policy, i.e. failure to train or failure to supervise.

## **Tort Claims Act (State) 42 Pa.C.S.A. §8542(b)(9)**

- Permits suits based on claims of sexual abuse to waive sovereign immunity for public entities guilty of covering up childhood sexual abuse – even where the officials were not the perpetrators of the sexual assault.

## **Punitive Damages**

- Not available against municipalities

## **Special Education**

- Not a defense to responsibility, but is a basis for reasonable accommodations.

# Potential Costs

## Recent Case:

- Abraham v. Jefferson Hospital (E.D.Pa 2020)
- 15 Million Dollar verdict for failure to investigate claims against a colleague (12/18/23)



# QUESTIONS?

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