



# **2020 Title IX Regulations: Basic Compliance Training**

**August 5, 2020**

**Presented by Amy Dickerson**



**FRANCZEK**



# Ground Rules



The background of the slide features several black silhouettes of hands raised in the air, set against a light blue gradient background. The hands are positioned at various heights and angles, creating a sense of collective participation or inquiry.

# Ask Questions

Put away  
those cell  
phones  
(unless I ask  
you to use  
them!)



**TURN OFF  
CELL PHONES**



# Why Are We Here?



# Know the Rules

SEXUAL HARASSMENT  
complaint form

A close-up, high-resolution photograph of a human eye, showing the iris, pupil, and eyelashes. The eye is looking directly forward. The text is overlaid on the center of the eye.

# **Recognize Title IX Sexual Harassment**



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





# Why is this so important?

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1 in 4 women  
experiences sexual  
assault before age 18

10% of children are  
targets of educator  
sexual misconduct  
before high school  
graduation

48% of U.S. students are  
subject to sexual  
harassment or assault at  
school before graduating  
high school

In 2010-2011, 36% of  
girls, 24% of boys and  
30% of all students  
grades 7-12 experienced  
online sexual harassment

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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.

# THIS DOESN'T ADD UP:

79% of public schools reported **zero incidents** of sexual harassment or bullying.



AAUW research has shown that nearly half of students in grades 7-12 reported experiencing some form of sexual harassment, yet more than three-fourths of schools reported zero incidents for the 2015-16 school year.



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

# Effects on Individuals

Poor performance in school

Stress

Disengagement

Fear

Distraction

Anger

Mistrust

**Conflict**

Lost Opportunities

Acting out

Absenteeism

**Drop-out**

**Suicide**

**ANXIETY**

**PTSD**

**DEPRESSION**

# Effects on Teams

Decreased focus

Lost productivity

Withdrawal

Neglect

Absenteeism


Malingering

*Lack of trust in leadership*

**Turnover**







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

# Mattress Protest and Its Aftermath

Case of alleged rape at Columbia first yielded much sympathy for the accuser and protest, but ends with the university apologizing to the accused. The case has had on the discussion of sexual assault on campus.

By **Jeremy Bauer-Wolf** // July 24, 2017



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The New York Times Magazine

FEATURE

## The Accusations Were Lies. But Could We Prove It?

When the university told my wife about the sexual-harassment complaints against her, we knew they weren't true. We had no idea how strange the truth really was.



# Harassment Is Illegal

*Including Sexual Harassment*





You could be personally responsible.



# Ice Breaker



# Thumbs Up or Down

Have you been involved in a Title IX  
complaint during your time at the District?

# In the Zoom Chat

What is the most important question you would like answered today?





# What is Title IX?





# Title IX

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# What falls under Title IX?

Recruitment,  
Admissions, and  
Counseling

Financial  
Assistance

Athletics

Sex-Based  
Harassment

Treatment of  
Pregnant &  
Parenting Students

Discipline

Single-Sex  
Education

Employment

Retaliation

# 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."

# 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)
  - Many many requirements



# When Must the School Respond to Sexual Harassment?



# 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

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# **When must a school respond to Title IX sexual harassment?**

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A recipient with actual knowledge of [Title IX] sexual harassment in an education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent.



# Notice

ACTUAL knowledge

To Title IX  
Coordinator or  
"official with  
authority" (all K-12  
employees)



# 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



# Actual Knowledge

1. Sense
2. Report

# 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

# Key Word: “Allegation”

Once a school has notice of an **allegation** that, if true, would constitute 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 procedures

## Issue Spotting

**Order of protection:** Principal served with order of protection requiring 17 year old male student to have no contact with 16 year old female student due to alleged sexual assault off campus.

# Raise Your Hand

Is this notice under the new Title IX?



# What is Sexual Harassment?





# 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



# Title IX Sexual Harassment

- Employee quid pro quo
- Hostile environment (newly defined)
- Clery/VAWA "Big 4"

QUID  
PRO  
QUO

# Quid Pro Quo

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Quid = Something

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Pro = For

---

Quo = Something

# Title IX Quid Pro Quo

**Definition:** An employee of the recipient conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct

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

**Codified:** Severity and harm presumed

# 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)



# Title IX Hostile Environment

# Title IX – What is Sexual Harassment?

## 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)

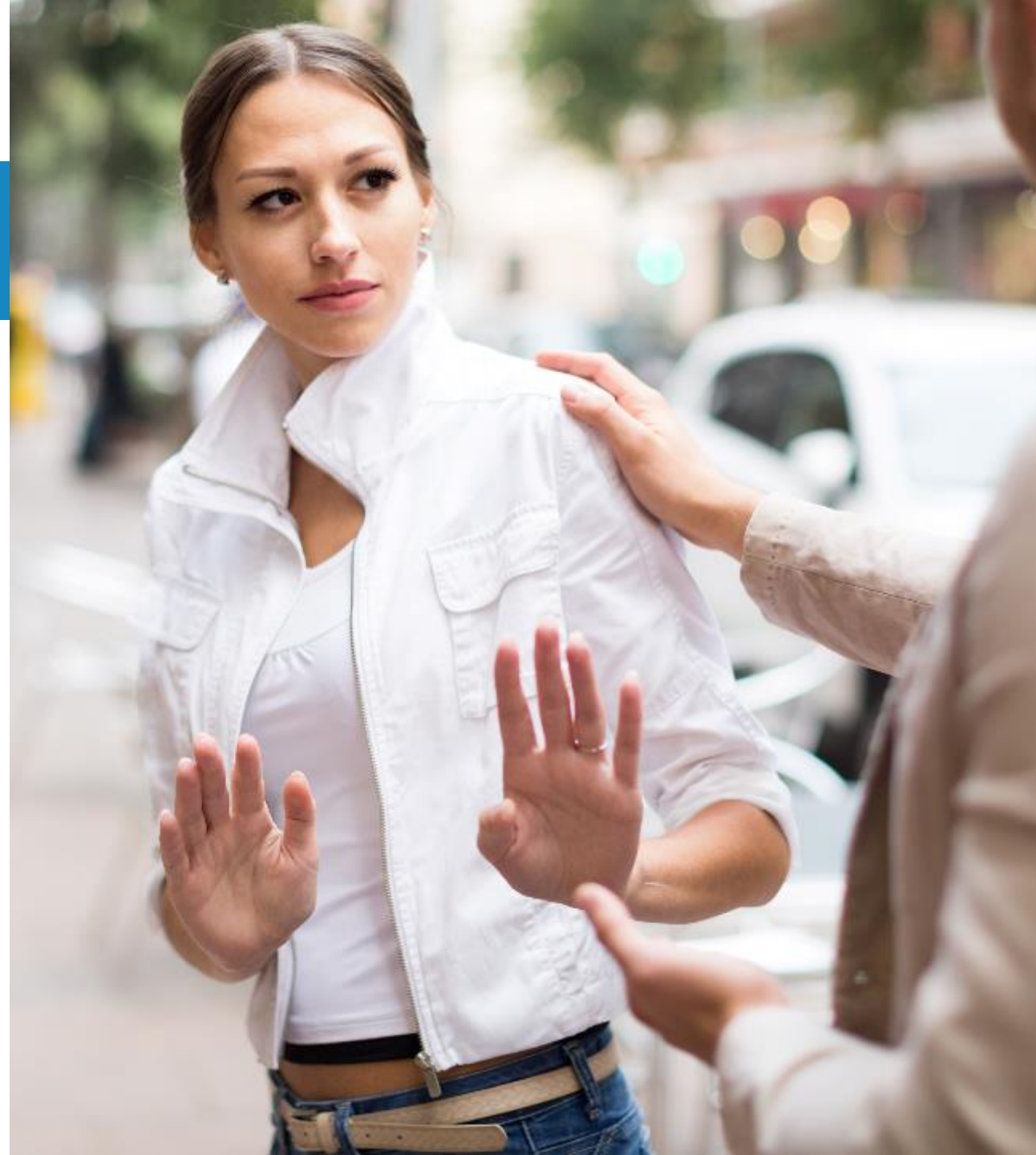
Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity**



# Unwelcome Conduct

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

\*\*reasonable person





- Severe, pervasive, and objectively offensive
- Constellation of surrounding circumstances, expectations, and relationships

**ACCESS DENIED**

# Hostile Environment Factors

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

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

# What about.... casual or isolated comments or conduct?



# Thumbs Up or Down

Is this severe, pervasive, and objectively  
offensive?

# Is this TIX Sexual Harassment?



**A student makes insensitive sexual jokes to another student multiple times**



**A student asks another student out on a date once – she really doesn't like him**



**A female teacher repeatedly tells a male student how good he looks after losing weight**



**A student sends an email with a dirty joke to another student**

# Is this TIX Sexual Harassment?



**A male teacher once compliments the new haircut of his female student**



**A student twice "uses tongue" when kissing another student in a scene they are working on in class, after the teacher asks the student to stop**



**A group of male students make a Facebook post rating students in the school by attractiveness**



**A group of female students make fun of another female student for never wearing makeup**



# Is this TIX Sexual Harassment?



**A teacher tells a student he will give her a good grade if she gives him a backrub alone in his office after class**



**A female student attempts to grab another student's breasts during a soccer game**



**A student sends another student multiple notes calling her a slur used for lesbians, mocking her for having "boy" hair.**



**A student sends a naked picture to her boyfriend over Snapchat outside of school. What if he shares it with other students?**



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

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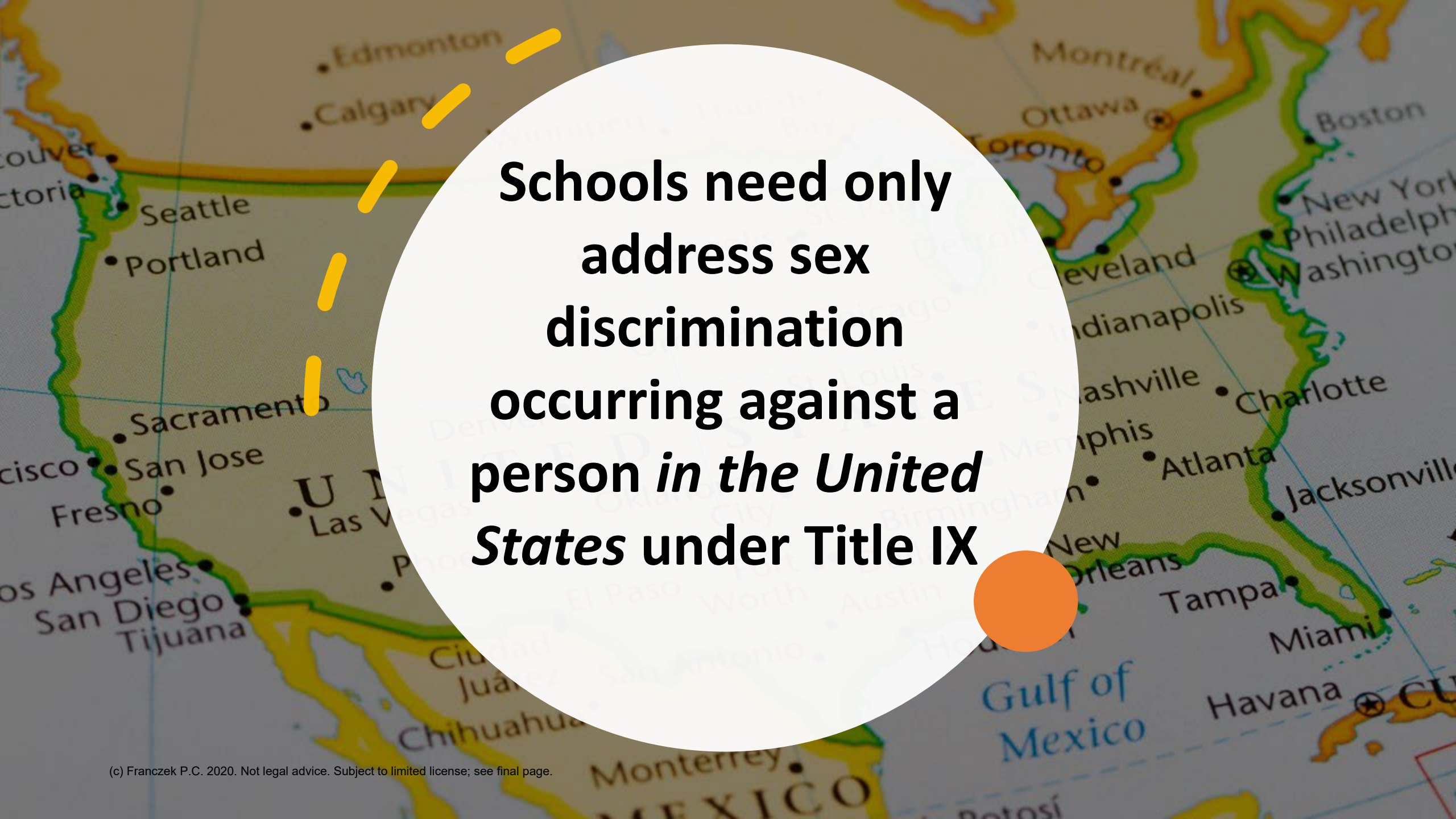


**Program or Activity:** Any location, events, or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred

# Online & Off Campus

Substantial control over the context?



A map of the United States is shown in the background, with various cities labeled. A large white circle is centered over the map, containing the text. To the left of the white circle, there are several yellow dashed lines. At the bottom right of the white circle, there is a solid orange circle.

**Schools need only  
address sex  
discrimination  
occurring against a  
person *in the United  
States* under Title IX**

# DISMISSALS



## **Mandatory if conduct alleged:**

- Not sexual harassment if true
- Did not occur in the school's program or activity
- Did not occur in the United states

## **Permissive if:**

- Complainant requests to withdraw in writing
- Respondent's enrollment or employment ends
- Specific circumstances prevent recipient from gathering evidence sufficient to reach a determine (e.g., passage of time, lack of cooperation by complainant)

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**\*\*can still address under non-Title IX policy**

# Board Policies on Harassment

Option 1: NEW Board Policy 2:265 Title IX Sexual Harassment (for TIX Sexual Harassment *only*)

Option 2: Board Policy 2:260 Uniform Grievance Procedure (for any other violation of law, including other types of “sexual harassment”)

Option 3: Other Board policies prohibiting conduct, e.g., bullying, sex equity policies

# DOUBLE JEOPARDY



an individual can **NOT**  
be tried twice for the  
same crime.



NEW Policy 2:265

Policy 2:260

BUT ALWAYS consider whether another non-“sexual harassment” policy or procedure applies

Conduct that, if true, would be “Title IX Sexual Harassment”  
  
REMEMBER: If you find no responsibility, no other sexual harassment policy should be used

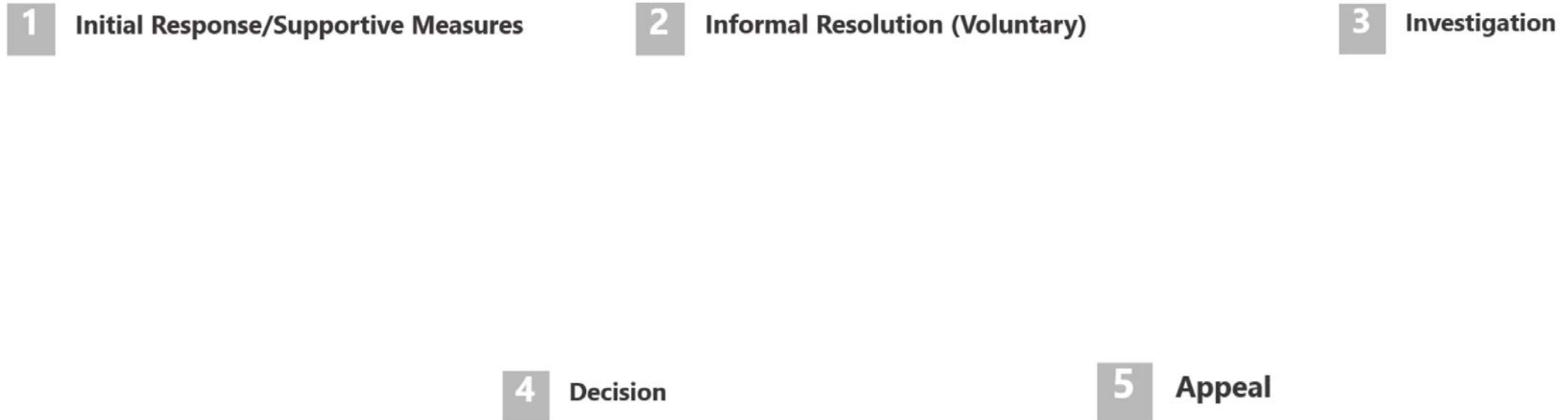
Dismissal under Title IX Process  
OR  
Conduct that, even if true, would not “Title IX Sexual Harassment”



# How Must You Respond?



# Adequate Response



**1**

# **Initial Response/Supportive Measures**

# Title IX Coordinator

- Must be called Title IX Coordinator
- Must meet with alleged victims of sexual harassment (the Title IX Complainant) covered by the new Title IX regulations (can delegate)

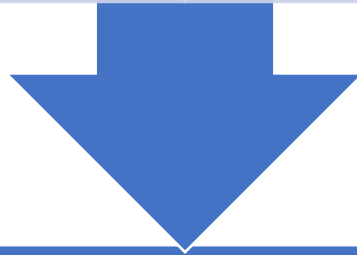
Apply to parties in both *reports* and *Formal Complaints* of sexual harassment



*Title IX Complainant*: A person who is alleged to be the victim of conduct that could constitute sexual harassment

**NOT a third party who reports Title IX Sexual Harassment perpetrated against someone else**

**NOT the Title IX Coordinator, even if the TIXC "signs" a Formal Complaint**



*Title IX Respondent*: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment

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# Terminology

## Title IX Coordinator 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**

# Formal Complaint

Defined as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).





# Signing a Complaint

Factors to consider

# Supportive Measures

## What Changed?

### OLD TERM (OCR Guidance)

- 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

### NEW TERM (Final Rule)

- **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**



# Examples of Supportive Measures

- Counseling
- Course modifications
- Schedule changes
- Increased monitoring or supervision

A supportive measure that completely removes a respondent from an activity would likely be considered punitive, except for "emergency removals" for students and "administrative leaves" for employees

# 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., SB100,**  
“change in placement” under IDEA

## Employee administrative leave

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

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

# Confidentiality

- Not required to maintain anonymity of Complainant after formal complaint is filed
- Both parties must be identified (if identity is known) in written notice of allegations
- Using party initials or withholding Complainant's identity is insufficient

# 2

## **Informal Resolution (Voluntary)**

# Informal Resolution

## INFORMAL RESOLUTION IS NOT PERMITTED UNDER THE FOLLOWING CONDITIONS:

- Cannot condition enrollment, employment, or any right on waiver of right to investigation and adjudication of formal complaints under grievance procedure
- Cannot require use of informal resolution process
- Cannot offer informal resolution process until formal complaint is filed
- Not available to resolve allegations that employee sexually harassed a student

## INFORMAL RESOLUTION MAY MOVE FORWARD UNDER THE FOLLOWING CONDITIONS:

- Any time prior to reaching a determination, either party may request informal resolution
- Requires voluntary, written consent from both parties
- Any party has a right to withdraw prior to agreement



# Informal Resolution Facilitators

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





## Written Notice: Required

- To both parties
- In writing
- Allegations
- Requirements of informal resolution process (including circumstances under which the party cannot resume a formal complaint arising from the allegations)
- Resulting consequences of participating (e.g., records)

**3**

# **Investigation**

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*New:*  
Formal  
Complaint  
Response

34 C.F.R. 106.45(b)

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

# ANATOMY OF AN INVESTIGATION

Written notice to the parties

Choosing an investigator

Required elements of an investigation

- 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**

- 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**



## 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



## 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.





# Who should investigate?

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

# Who should investigate?

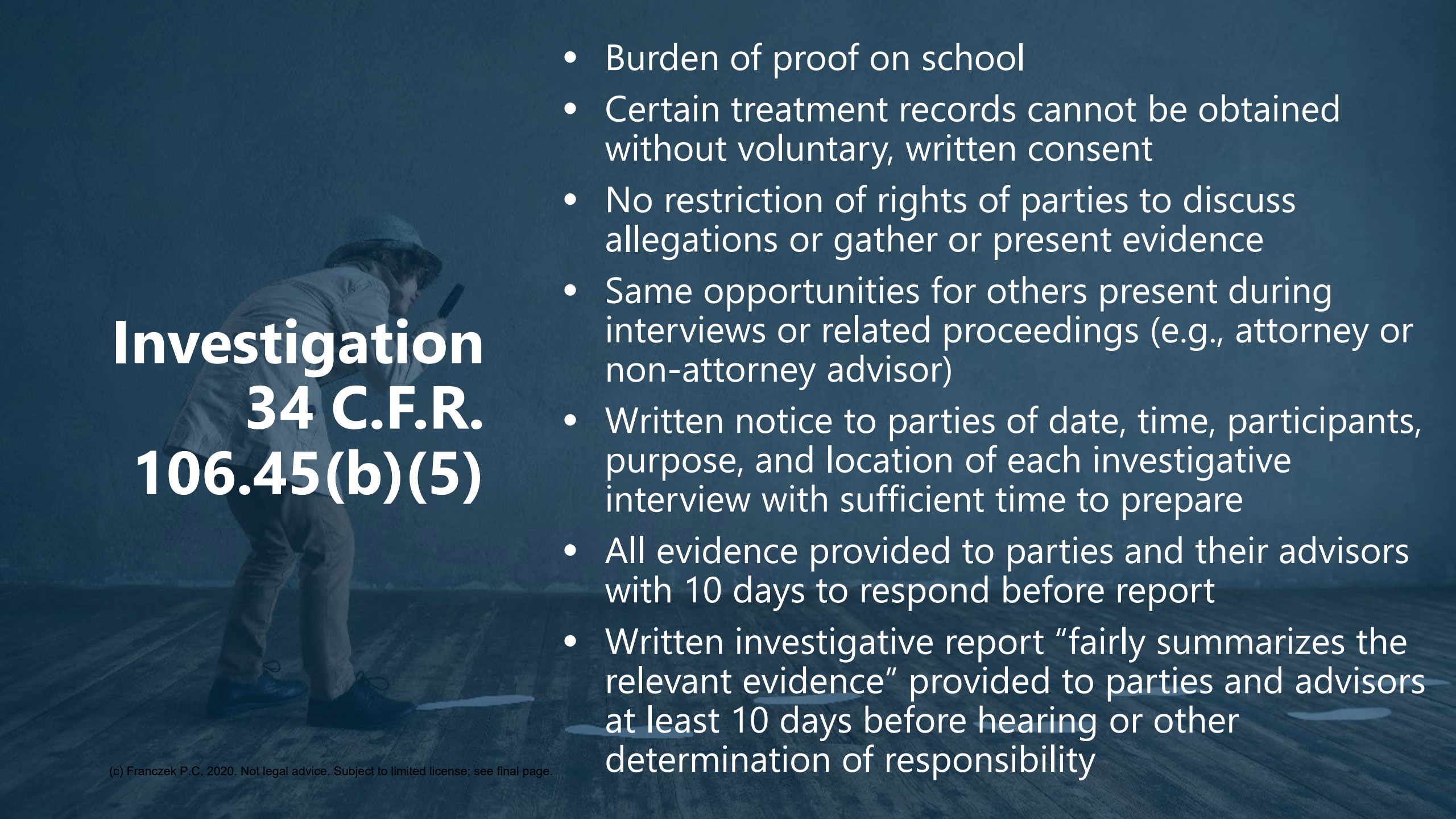
- Trained, unbiased investigator
  - No actual or perceived conflict of interest
  - Check “institutional interests”
  - Presumption that Respondent is not responsible

# Who should investigate?

- No “one size fits all” approach
- May need to designate
- Consider the perception of bias
  - Your friendship or other relationship with the accused or their family
  - Your sex/gender identity
  - Your personal conflicts (even if just perceived)
  - Personality conflicts

A woman with long dark hair, wearing a red sweater, is sitting at a desk. She is looking at a laptop screen with a thoughtful expression, her hand resting on her face. The desk has a laptop, a smartphone, and some potted plants. The background is slightly blurred, showing a window and some indoor plants.

# Contents of an Investigation

A person wearing a white lab coat and a white cap is leaning over, looking at a smartphone in their hand. They are standing on a wooden floor. The background is a dark, textured wall.

# 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 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

# Investigation Best Practices

- Investigation plan
- Follow steps in policies closely
- Coordinate with law enforcement as required by policy and District practice
- Remember that both complainants and respondents may be experiencing trauma and other strong emotions
- Consult with Title IX Coordinator and/or counsel as needed

# Interviewing Best Practices

- Explain your role as a neutral
- Open-ended questions followed by more tailored follow up
- Allow ample time, don't interrupt or rush
- Ask "Is there anything else?"
- Ask for other witnesses, evidence, incidents

# Interview Notes

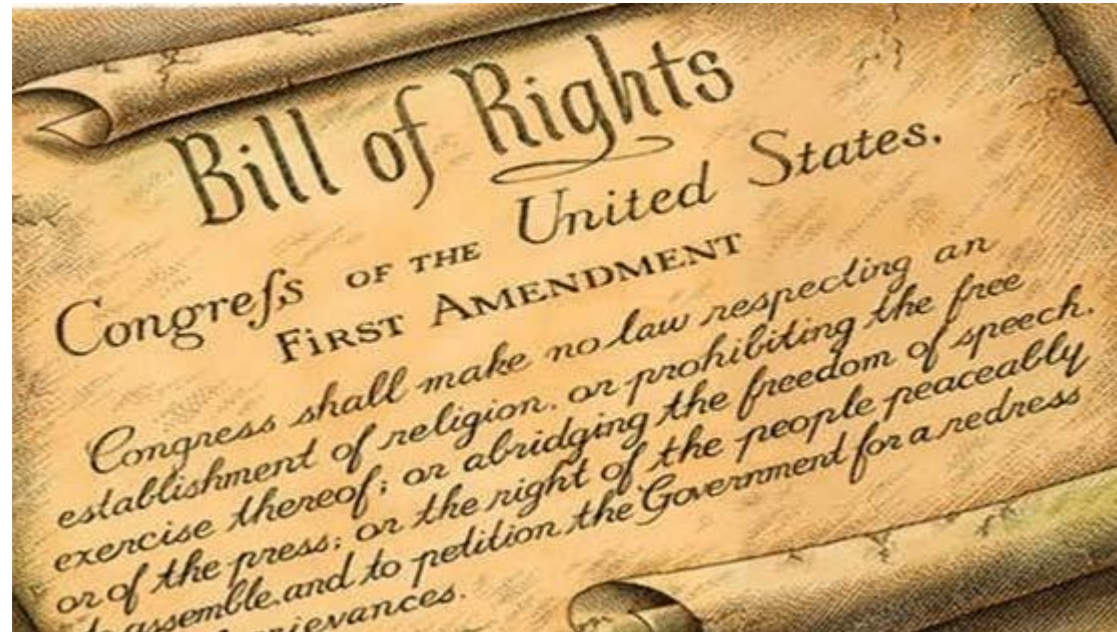
- Include: Facts + Statements (consider quotes, but be careful)
- Don't Include: Conclusions + Judgements
- Label: Name of Witness, Date, Time, Interviewer, Location, Method, Those Present



# Notice to Parties in Interviews

- What to expect about future contact (timing, updates, encourage follow-up to you)
- Written copy of policies/procedures
- Notify of retaliation rights – provide specific examples
- No “Gag” order but can warn of retaliation risks

# First Amendment Rights



# Investigation Plans Aren't Static

Reassess plan for  
investigation  
frequently





# Gathering Other Evidence

# Warning! Medical Records

- Notice of allegations should not divulge either party's medical information
- Prohibited from accessing or using medical, psychological, or similar records in grievance process without a party's (or parent's) voluntary, written consent

# 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 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

# Investigation Report Writing

- Fairly summarizes the 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

# Investigation Report Should Include

Applicable policies and  
procedures

Timeline of investigation

Description of allegations

Unbiased summary of evidence  
gathered, including interviews

Credibility determination(s)



**4**

# **Decision**



## **Decisionmaker(s) (Complaint)**

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- Cannot be the Title IX Coordinator or the investigator(s)
- Live hearing not required

# 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, with 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

# Relevance

- Rape shield laws
- Treatment records
- Legally privileged information

# Rulings on Relevance in Written “Cross”

- Provide reasoning for irrelevance
- Admit and consider all relevant evidence
- Exceptions
  - Sexual behavior (except in limited situations)
  - Legal privilege
  - Treatment records



# The Decision

# 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

# Factual Findings

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Separate findings for each alleged policy violation

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Focus on material facts (i.e., those that affect outcome)

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Can describe undisputed and disputed facts separately

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For any facts in dispute, show your work and reasoning





**Remember the  
Standard of  
Proof**

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**Preponderance  
of the Evidence**

# Remedies

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- Disciplinary action against perpetrator
- Counseling for perpetrator/victim
- Changes to services or policies
- Remedies for complainant and others
- Etc.!!

**5**

**Appeal**

# Appeal Process

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



# Decisionmaker(s) (Appeal)

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



# **Bias, Conflicts of Interest, and Other Fairness Concerns**



# Bias

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.

# In the Chat

What do these words mean to you:

*Prejudgment*

*Conflict of Interest*

*Bias*



# 5 Min Guided Breakout

What steps can you take to avoid:

*Prejudgment*

*Conflict of Interest*

*Bias*



# Recordkeeping



# 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

# Recordkeeping

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

- The basis for the recipient's conclusion that its response was not deliberately indifferent
- Documentation that it has taken measures designed to restore or preserve equal access to the recipient'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

# Questions



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