



# New Title IX Rules and Regulations

## Investigators and Decision-Makers

Presented by:  
Holly Boyd Wardell and  
Jennifer A. Powell

July 30, 2020

**EICHELBAUM WARDELL**  
HANSEN POWELL & MUÑOZ, P.C.

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**AUSTIN**

4201 W. Parmer Lane, Suite A-100  
Austin, TX 78727  
(512) 476-9944

**D/FW METROPLEX**

5801 Tennyson Parkway, Suite 360  
Plano, TX 75024  
(972) 377-7900

(800) 488-9045 | [information@edlaw.com](mailto:information@edlaw.com) | [www.edlaw.com](http://www.edlaw.com)

# Investigators and Decision Makers

New Title IX Regulations



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## **DISCLAIMER:**

*These materials are intended to assist school officials in understanding and implementing the new Title IX regulations promulgated by the United States Department of Education that take effective August 14, 2020, and are not a substitute for specific legal advice from the school district's counsel. While we will attempt to thoroughly address the new grievance procedure requirements, it is not possible to include discussion of every aspect in this presentation. Thus, this information must be understood as a tool for addressing the latest requirements, rather than an exhaustive statement on legal obligations. Changes will, no doubt, be periodically incorporated into these materials, as school officials begin to implement this entirely novel process.*

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## TERMS

- **Complainant** is an individual alleged to be the victim of conduct that could be sexual harassment.
- **Respondent** is an individual alleged to have engaged in conduct that could be sexual harassment against the Complainant.
- **Formal Complaint** is a document filed by a Complainant (or parent/guardian) or signed by a Title IX Coordinator alleging sexual harassment against a Respondent and requesting that the school investigate the allegation.
- The **Grievance Process** applies “irrespective of whether the complainant or respondent is a student or employee.”

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## Review of Overview Points

- New regulations apply to all reports of sexual harassment\*
- Report v. Formal Complaint
- Investigations/Determinations of Responsibility are required for Formal Complaints
- All reports require a response (supportive measures)
  - Must respond “non-deliberatively indifferently” whether or not the grievance process is initiated.

\*Grievance process does not apply to other types of sex discrimination such as inequities in athletic opportunities and pregnancy. This process would apply to students with claims of sexual harassment based on sexual preference, gender identity.

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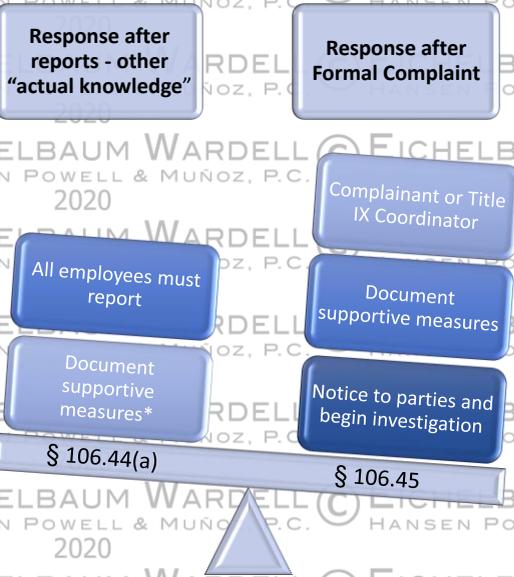
# Sexual Harassment\*

1. Quid pro quo
2. Hostile environment
3. Sexual assault, dating violence, domestic violence, stalking

**Severe, pervasive, and objectively offensive**

\*In a school program or activity in the United States

## BIFURCATED RESPONSE REQUIREMENTS



**\*Non-deliberately indifferent response:**

- 1) Intake form;
- 2) (Response to Report of Sexual Harassment & Supportive Measures – No Formal Complaint

# RESPONDING TO REPORTS

## Title IX Coordinator Responsibilities

- If the incident could be **child abuse**, it must be reported to CPS or law enforcement within 48 hours: FFG (LOCAL)
- The District may request, but not require, a written report.
- Local policy may require a campus administrator to put the report in written form and provide it to the Title IX Coordinator. See FFH (LOCAL).

## Responding to Reports – Local Procedures

- Require employees to report to their supervisors all suspected sexual harassment. FFH(LOCAL) [Immediately/**Promptly**]
- Add requirement that supervisor/campus administrator notify the Title IX Coordinator's office within a specified time.
- Make a decision regarding emergency removal of a student or administrative leave for an employee.

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## Emergency Removal

- Individualized safety and risk analysis to determine whether an immediate threat to the physical health and safety of others, arising from the alleged sexual harassment, justifies removal.
- **Title IX Coordinator/Campus Administration/Threat Assessment Personnel**
- Title IX does not modify the rights of students with disabilities regarding protections under the IDEA and Section 504.

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## Contact Alleged Victim/Complainant

The Title IX Coordinator must promptly contact the Complainant to discuss:

1. The availability of supportive measures;
2. Consider the Complainant's wishes regarding supportive measures;
3. Inform the Complainant of the availability of supportive measures with or without filing a Formal Complaint; and
4. Explain the process for filing a Formal Complaint.

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## Confidentiality

Prior OCR guidance instructed schools to investigate even when the Complainant did not want the school to investigate.

The new regulations obligate schools to initiate the grievance process when a Complainant files or a Title IX Coordinator signs a formal complaint, so that the Title IX Coordinator takes into account the wishes of a complainant and only initiates a grievance process against the complainant's wishes if doing so is not clearly unreasonable in light of the known circumstances.

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## No Formal Complaint - Document Supportive Measures

DISTRICT LETTERHEAD

*\*This letter may be sent to adult students or parents of minor students after initial verbal contact by school officials about a report of alleged sexual harassment involving their child when no Formal Complaint is filed.*

[Date]

[Adult Student Complainant/Parent/Guardian]  
[Address]

Re: Title IX Complaint – Response to Sexual Harassment Report  
Supportive Measures

Dear Mr./Ms. \_\_\_\_\_:

This letter is to confirm receipt of a report of alleged sexual harassment involving your child. It is our understanding that, at this time, you do not wish to file a Formal Complaint and pursue this matter further. If you change your mind, please contact my office immediately.

Even though you have not filed a Formal Complaint, the District is implementing the

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## Confidentiality of Complainant's Identity

- A Complainant can report anonymously.
- A Complainant cannot file a Formal Complaint anonymously.
- Filing a Formal Complaint means that the Respondent will know the Complainant's identity.
- People outside the grievance process should not know of the Complainant's identity, unless disclosure is permitted by FERPA, required by law, or as necessary to conduct the grievance process.

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# FORMAL COMPLAINT

Grievance Process: Investigation & Determination of Responsibility

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## INITIAL DETERMINATIONS

- Title IX Coordinator – notice to parties upon receipt of written Formal Complaint
- Initial supportive measures for parties
- Emergency Removal
- Administrative Leave
- Dismissal?

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# DISMISSAL

## MANDATORY

1. Conduct would not constitute sexual harassment even if proved;
2. Did not occur in a District program or activity; or
3. Did not occur in the U.S.

## DISCRETIONARY

1. Complainant withdraws the allegations or complaint in writing;
2. Respondent is no longer enrolled in the District; or
3. Specific circumstances prevent the District from gathering evidence sufficient to make a determination.

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# DISMISSAL

Dismissal does not preclude the District from taking disciplinary measures against Respondents for non-sexual harassment violations of the Code of Conduct.

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# NOTICE TO PARTIES

Upon receipt of a Formal Complaint, the Title IX Coordinator sends the parties notice:

- Grievance process
- Informal resolution options
- Details of allegations
- Identity of the parties
- Date/location of alleged incident(s)
- Statement that Respondent presumed not responsible
- Right to an Advisor, who may be, but is not required to be, an attorney

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# NOTICE TO PARTIES\*

\*Must be supplemented if new allegations opened for investigation

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# ASSIGN AN INVESTIGATOR

- Someone other than Title IX Coordinator, Decision Maker, Facilitator of Voluntary Resolution
- Campus administrators
  - Central administrators
  - Outside investigator
- Train more than one
- Can assign more than one investigator/team

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# WHO SHOULD INVESTIGATE?

- No axe to grind with the Complainant or Respondent
- No bias
- Must be trained
  - Not involved in any incidents that prompted the investigation
  - Not someone under the supervision of the Respondent, if employee
- **The more serious the allegation, the more experienced and well-trained the investigator needs to be.\***

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# ASSIGN AN INVESTIGATOR

## Training:

- impartial investigations
- standards of evidence
- how to equitably and meaningfully include both parties in the process including inculpatory and exculpatory evidence
- how to write an investigative report
- the role of expert witnesses
- legal privileges

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# IMPARTIALITY

- Unbiased, disinterested
- No conflict of interest: a real or seeming incompatibility between one's private interests and one's public duties

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## STANDARDS FOR RECUSAL OF JUDGES

1. Personal bias or prejudice concerning a party
2. Personal knowledge of disputed evidentiary facts
3. Material witness in the matter in controversy
4. Spouse or minor child residing in household has a financial interest in the subject matter in controversy or in a party
5. Any other interest that could substantially affect the outcome of the proceeding
6. Relative is a party

28 U.S.C. §455  
(Disqualification of federal justice, judge, or magistrate).

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## STANDARDS FOR RECUSAL OF JUDGES

*Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.*

*Rippo v. Baker*, 137 S.Ct. 905 (2017).

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# STANDARDS OF EVIDENCE

- The degree or level of proof demanded in a specific case.
- District choice: preponderance of evidence, clear and convincing evidence

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# STANDARDS OF EVIDENCE

The burden of proof and the burden of gathering evidence sufficient to reach a determination of responsibility rests on the District and not on the parties.

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## **PREPONDERANCE OF EVIDENCE**

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

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## **CLEAR AND CONVINCING EVIDENCE**

Evidence indicating that the thing to be proved is highly probably or reasonably certain.

This is a greater burden than preponderance of evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.

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# EQUITABLE TREATMENT OF PARTIES

- Providing remedies to Complainants where a determination of responsibility for sexual harassment has been made
- Following a grievance process before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a Respondent
- Presumption that Respondent is not responsible for the alleged conduct until the conclusion of the grievance process

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# EQUITABLE TREATMENT OF PARTIES

- Not making credibility determinations based on a party's status as a Complainant, Respondent, or Witness
- Not restrict the ability of either party to discuss "the allegations under investigation" or to gather and present relevant evidence

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# EQUITABLE TREATMENT OF PARTIES

- Equal opportunities for supportive measures
- Equal opportunity to review evidence
- Equal opportunity to present witnesses and other evidence
- Considering inculpatory and exculpatory evidence
- Objective evaluation of evidence

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# EVIDENCE: INCULPATORY & EXCULPATORY

**Inculpatory evidence:** showing or tending to show one's involvement in a crime or wrong

**Exculpatory evidence:** tending to establish a person's innocence

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## EXPERT WITNESSES

A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact finder.

E.g., medical doctor, psychologist, law enforcement officer/investigator

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## LEGAL PRIVILEGES

The new regulations ensure that the grievance process respects information protected by legally recognized privilege (e.g., attorney-client, doctor-patient, spousal privilege, priest-penitent).

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# LEGAL PRIVILEGES

The District cannot require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

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# WRITING INVESTIGATIVE RPTS



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## INVESTIGATOR: Initial Steps

- Confirm whether allegation reported to CPS/law enforcement, if appropriate
- Find out whether there is an on-going criminal/juvenile investigation

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## LAW ENFORCEMENT INVESTIGATION



- The District may abate\* its investigation temporarily, if request by law enforcement officials.
- Document the request.
- Get a timeframe.
- Check with law enforcement on a weekly basis to determine status of investigation.

\*May also want to temporarily abate for voluntary informal resolution process.

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# INVESTIGATION TIMELINES

- The regulations do not dictate any timelines for initiating or completing investigations.
- They should be initiated and completed **promptly**.
- It will depend on the nature of the allegations and scope of the investigation.

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# NOTICE TO PARTIES

The parties will have been sent a notice from the Title IX Coordinator:

- Grievance process
- Informal resolution options
- Details of allegations
- Identity of the parties
- Date/location of alleged incident(s)
- Statement that Respondent presumed not responsible
- Right to an Advisor, who may be, but is not required to be, an attorney

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# NOTICE TO PARTIES\*

\*Must be supplemented if new allegations opened for investigation

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# NOTICE OF INTERVIEWS

Parties are entitled to written notice of the following for any meeting in the grievance process, including interviews, with sufficient time to prepare:

- Date
- Time
- Location
- Participants
- Purpose of meeting



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# NOTICE OF INTERVIEWS

- Parties may be accompanied by an advisor to interviews/any meeting in the grievance process that they are expected to participate.
- Students may have a parent and an additional advisor.

# ROLE OF ADVISORS IN INTERVIEWS

The District may establish rules limiting the participation and role of advisors in interviews and other meetings in the grievance process, as long as any restrictions are applied equally to both parties.

# ROLE OF ADVISORS IN INTERVIEWS

- Advisors may observe but cannot answer questions for the student.
- Advisors may not question students or staff at interviews.

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# CONFIDENTIALITY OF PROCESS - PARTIES

- Schools cannot prohibit parties from discussing the “allegations under investigation” or from gathering their own evidence.
- This does not apply to information that does not consist of “the allegations under investigation,” (e.g., the evidence provided to the parties or the investigative report).

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## PARTY EVIDENCE

- Parties have the right to submit their own evidence (e.g., text messages, photographs, medical reports, psychological reports).
- Parties should be told that any evidence submitted will be shared with the other party.

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## INTERVIEWING WITNESSES

- No one can be required to participate in an investigation.
- The regulations prohibit retaliation against any person for participating or refusing to participate in a Title IX proceeding.

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# WITNESSES

Witnesses are not entitled to written notice before being interviewed or to be accompanied by a parent/advisor.

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# RESEARCH BEFORE INTERVIEWING

- Review the policy and be familiar with the burden of proof and definition of sexual harassment
- **Who are the parties?**
  - **Employee? History....time with the District?**
  - **Student disciplinary history?**
  - **Relationship between the parties?**
- **Prior complaints?**
- **Prior claims made by others?**

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But avoid prejudgment of the facts at issue

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## LOOK AT DOCUMENTS YOU HAVE

- Discipline records
- Academic records
- Personnel records
- Correspondence between Complainant and Respondent

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## MAKE DECISIONS ON NOTE-TAKING AND RECORDING

- Who takes the notes?
- Do we sign the notes?
- Do we want to record?
- Be consistent.
- Test your equipment.

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## OPEN YOUR FILE

- Assign a case number, if not already
- All notes, memoranda, written statements, letters, policies, and other matters related to the investigation should be in the file.
- File should be marked as **“CONFIDENTIAL.”**
- Access must be limited.



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# INTERVIEWING

- **Generally, meet with the Complainant first.**
- **Provide enough time.**
- **Make it a neutral area.**
- **Do not rush. Remember this may be embarrassing.**
- **You want as much detail as possible. Provide time to think and opportunity to return.**
- **Tell them there will be no retaliation and to report any retaliation to you immediately.**

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# WRITTEN STATEMENT

**Determine whether age/developmentally appropriate to obtain a written statement from a student.**

**Written statements:**

- **Shows seriousness**
- **Helps assure later testimony**
- **Solidifies testimony**
- **Helps determine requested outcome**

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# QUESTIONS FOR THE COMPLAINANT

- What happened – exactly?
- When – date and time?
- Where – specific (room, trip, outdoor)?
- Happen online?
- Why were you and this other person together?
- What happened or was said just before?

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# QUESTIONS

- What exactly was said?
- What was the tone?
- Expression when said?
- Gestures or motions?
- Touch you in anyway?
- Did you touch them?

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# QUESTIONS

- Can you describe the type of touching?
- What did you say in response to any touching?
- How did the words or conduct make you feel?
- Have you had conversations or interactions with this person before?
- Was the tone or atmosphere different?

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# QUESTIONS

- How long have you known the person?
- Was anyone else present?
- Who?
- Have you told anyone else about this?
- Who, and when, and what did you say?
- Has anything similar happened before?
- If yes, ask the same type of questions about each prior incident.

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# QUESTIONS

- **Do you have any written documentation?**
- **Anything on social media such as Instagram, Snapchat, Facebook, Twitter, or other evidence for me to review?**
- **Are there any other individuals you would like me to interview?**

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# REMEMBER:

**Do not ask about prior sexual behavior or sexual predisposition, unless to establish that another person committed the alleged conduct or that the conduct was consensual**

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# THOROUGHNESS

- Do not interview only the Complainant and the Respondent.
- Who else was there? [Corroboration]
- Who else knows about this? How? [Contemporaneous discussions]
- Is there anyone else you would like me to interview about this? [Thoroughness; other victims]
- Are there any other documents you would like me to review?
- Must thoroughly document procedures

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# QUESTIONS FOR CORROBORATING WITNESSES

- Where were you at on (fill in the date and time of the incident as alleged)?
- If online – have you seen the online material?
  - Who else was there at the time, or does anyone else know about this?
  - Did you see the parties in that place or at that time?
  - Did you see or hear any interactions/conversations between the parties?

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## **QUESTIONS FOR CORROBORATING WITNESSES**

- **Please tell me in your own words what you saw or heard.**
- **What exactly did you hear – the precise words?**
- **What exactly did you see – and from how far/angle/obscured?**
- **How did alleged victim look?**
- **Did the subject make any motions or gestures?**
- **What response did you see or hear from the alleged victim?**

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## **QUESTIONS FOR CORROBORATING WITNESSES**

- **What impressions do you have about what you saw or heard?**
- **Do you have personal knowledge of prior interactions?**
- **Do you know either party? How well, and in what capacity?**
- **How long have you known either?**
- **Is there any current or former relationship with either?**
- **Do you have opinions about trustworthiness? What led you to that opinion?**

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## **QUESTIONS FOR CORROBORATING WITNESSES**

- **Do you know either of the parties?**
  - **How well do you know them?**
  - **How do you know?**
- **Is there an official relationship?**
  - **Description of their character, personality, nature?**
- **Know of any similar past events?**

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## **QUESTIONS FOR CORROBORATING WITNESSES**

- **Have you observed either or both interact with persons of different (sex, race, age, size, religion)?**
- **What were your observations or impressions?**
- **Do you know if either is generally truthful or deceptive?**
- **Do you know anyone else that may know about any of these issues?**
- **Have you heard others talking about it – who?**

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# ISSUES FOR STUDENTS

- Do not need parental consent to interview
- Written consent is needed when recording (A/V) a student interview related to an investigation. See Tex. Educ. Code §26.009.

\*Including recording a video conference that is not related to a regular classroom purpose.

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# ISSUES FOR STUDENTS

- Consider interviewing in environment comfortable to them
- Classroom or library, other than office
- Who will be present?

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## ISSUES FOR STUDENTS

- **Involve the professionals on campus when appropriate and able.**
- **Do not ask leading questions: Isn't it true that you did X because of Y?**
- **What did you do? Why did you do it?**
- **Consider audio recording with consent if child cannot write statement.**

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## ISSUES FOR STUDENTS

- **Never interview together**
- **Always take students one at a time - protects against duplication, false memories**
- **Provides a clearer picture of events**
- **If parents present, set the ground rules – silent observer, cannot lead.**

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## ISSUES FOR STUDENTS

- Start with small talk\* – developing trust
- Learn what the student has told others about incident
- Determine how others have reacted
- Ask questions many times in different ways
- Don't have an agenda. Students often say what they think you want to hear.

\*The Investigator should assess the credibility of witnesses, so observe how witnesses respond to simply questions to learn the baseline of behavior of a witness.

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## INTERVIEWING RESPONDENTS

- Do you know the Complainant?
- How and for how long?
  - What type of relationship, conversations, interactions in the past?
  - Where were you on the date and time alleged?
    - Why were you there?
    - Who else was there?

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## **INTERVIEWING RESPONDENTS**

- **Was the Complainant there?**
- **Did you do or say anything in relation to the alleged victim?**
- **What exactly did you say or do?**
- **Tone of voice?**
- **Did you make any gestures or motions while speaking? What type? Show me.**

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## **INTERVIEWING RESPONDENTS**

- **What did the Complainant say or do then?**
- **Did they make any gestures or motions? What? Demonstrate.**
- **Did they say or do anything in response to your statements or actions? What?**
- **Expression on his/her face?**
- **Did you touch them in any way? Demonstrate how.**

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## **INTERVIEWING RESPONDENTS**

- How did the words or conduct overall make you feel?
- Have you talked to anyone else about this matter?
- Who, when, where? Do you mind if I talk to them?
- Do you have anything else that you feel is important for me to know?
- Would you do the same thing if you were in front of your parent/grandparent/the principal?
- How would you feel if something similar happened to your younger sister/brother?

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## **THINGS TO TELL ALL WITNESSES\***

**We will try to keep this confidential, but we cannot guarantee. You should not speak to others about what we have discussed.**

**Remind all about the anti-retaliation provisions.**

**\*Remember that parties cannot be prohibited from discussing the allegations raised in the Complaint.**

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# BODY LANGUAGE

- Read the body language and demeanor
- Rate of speaking
- Volume of speaking
- Stuttering
- Getting sidetracked
- Avoiding questions



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# BODY LANGUAGE

- Not answering the question asked
- Hands – moving, still, tapping?
- Feet?
- Playing with anything?
- Arms crossed?
- Standing up? Moving around?



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# BODY LANGUAGE

- Eye contact?
- Head movement when speaking?
- Changes in patterns when changes in subjects or persons?
- Off the baseline?



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# DEALING WITH HOSTILE PEOPLE



- People become hostile or confrontational when talking about uncomfortable things.
- Appreciate and respect hostility – especially in parents.
- Understand where their concern comes from.
- Also understand that such behavior is ultimately counter-productive.

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# DEALING WITH HOSTILE PEOPLE

- Do not respond in kind
- Think and talk positively
- First impressions are critical
- Show you are listening by repeating
- Speak softly, and they may do the same
- Give praise where you can

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# DEALING WITH HOSTILE PEOPLE

- Acknowledge frustration
- Take time-outs
- Don't allow things to get personal
- Walk away when you need to

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# DEALING WITH HOSTILE PEOPLE

- Acknowledge frustration
- Take time-outs
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- Walk away when you need to

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## EVIDENCE & INVESTIGATIVE REPORT

Parties' opportunity to inspect and review evidence and draft investigative report

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## RIGHT TO INSPECT EVIDENCE

Prior to completion of the investigative report, the investigator must send an electronic or hard copy of the relevant evidence\* gathered to the parties and the parties' advisors, if any. The parties must be provided at least 10 days to submit a written response that the investigator must consider before completing the investigative report.

\*Includes evidence not relying on for determination.

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## RIGHT TO REVIEW DRAFT INVESTIGATIVE REPORT

The parties also have the right to see a draft of the investigative report and 10 days to provide a written response before it is finalized and sent to the Decision Maker.

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# FERPA

- The Family Educational Rights & Privacy Act
- The U.S. Department of Education administers both FERPA and Title IX.
- The Department does not interpret compliance with its regulations under Title IX to violate requirements in its regulations under FERPA.

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# FERPA – Mixed Records

- The Department does not think that evidence obtained as part of an investigation pursuant to these final regulations that *is directly related to the allegations raised in a Formal Complaint* can be segregated and redacted because the evidence directly relates to allegations by a Complainant against a Respondent and, thus, constitutes an education record of both the Complainant and a Respondent.
- A Formal Complaint that raises allegations against a Student-Respondent is directly related to that student. The Department is bound by the U.S. Constitution and must interpret Title IX and FERPA in a manner that does not violate a person's due process rights, including notice and an opportunity to respond.

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## FERPA – Sharing Sensitive Records

- If a Complainant or Respondent provides sensitive records such as medical records as part of an investigation, then the parties must have an equal opportunity to inspect and review information that constitutes evidence directly related to the allegations raised in a Formal Complaint.
- If some of the information in the medical records is not directly related to the allegations raised in a Formal Complaint, then these final regulations do not require a school to share the information that is not directly related to the allegations raised in the Formal Complaint.

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## FERPA – Medical Records

Accordingly, a school would not have access to a party's medical records unless that party gave the recipient voluntary, written consent to do so for a grievance process under § 106.45(b).

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# FERPA – IEP/504 Plan

When a party offers an IEP or Section 504 plan as part of the evidence that a school should consider or has granted the school consent to use those records in a Title IX grievance process, then the other party should be able to inspect and review this evidence, if that evidence is directly related to the allegations raised in a Formal Complaint.

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## RIGHT TO REVIEW DRAFT INVESTIGATIVE REPORT

The district can provide the evidence and investigative report using a platform that prevents copying and downloading to protect confidentiality.

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**WRITING INVESTIGATIVE RPTS**

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**Grievance Process: Investigative Reports  
34 C.F.R. 106.45(b)(5)**

Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility

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# Investigative Reports

- Can include proposed findings of fact
- Should follow format of requirements for decision

# DETERMINATION OF RESPONSIBILITY

34 C.F.R. 106.45(b)(7)

# ASSIGN A DECISION MAKER

- Someone other than Title IX Coordinator, Investigator, Facilitator of Voluntary Resolution
- Central administrators
- Train more than one

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# DECISION = DETERMINATION OF RESPONSIBILITY

- Decisionmaker makes determination of responsibility
  - Must provide the written determination to the parties simultaneously
  - Title IX Coordinator is responsible for effective implementation of any remedies

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## Opportunity for Parties to Submit Questions

• Live hearing with live cross by party advisors required for higher ed, optional for K-12

• **We recommend NO live hearing.**

• With or without a hearing, after the investigative report has been sent and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

• Questions about a complainant's prior sexual behavior or sexual predisposition only possible to establish that another person committed the alleged conduct or that the conduct was consensual.

## THE QUESTIONS

• Who asks the questions of the parties?

• If the Decision Maker refuses to ask a question, because it is improper or not relevant, he/she must provide written rationale to the party proposing the question why the question is being excluded.

# THE QUESTIONS

- The Decision Maker may not draw any inference from a party's or witness's refusal to answer the questions.
- Where a party or witness refuses to answer the questions, the Decision Maker must disregard statements of that party or witness but must reach a determination without drawing any inferences regarding responsibility based on the party or witness's refusal to answer.

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# THE QUESTIONS

For example, where a Complainant refuses to answer the questions but video evidence exists showing the underlying incident, a Decision Maker may still consider the available evidence in making a determination.

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# ELEMENTS OF DECISION

The Decision Maker must issue a written determination addressing:

- Allegations
- Procedural steps taken
- Findings of fact
- Application of code of conduct to facts

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# ELEMENTS OF DECISION

The Decision Maker must issue a written determination addressing:

- Statement of and rationale for result **as to each allegation** including
  - Determination of responsibility
  - Any disciplinary sanctions
  - *Whether* remedies to restore or preserve equal access to the educational program or activity will be provided
- Procedures and permissible bases for either party to appeal.

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# FERPA – Sanctions and Remedies

The result at the end of a grievance process under § 106.45, including any sanctions and whether remedies will be provided to a Complainant, impact both parties and can, and should, be part of the written determination simultaneously sent to both parties. The Complainant should know what sanctions the Respondent receives, because knowledge of the sanctions may impact the Complainant’s equal access to the school district’s education program and activity.

# FERPA – Remedies to Complainant

The final decision must state *whether* remedies will be provided to the Complainant but not what remedies will be provided. Thus, the decision may note in the written determination only that a Complainant will receive remedies but should not note in the written determination that the district, for example, will change the Complainant’s housing arrangements as part of a remedy. A Respondent should know whether the district will provide remedies to the Complainant, because the Respondent should be aware that the Respondent’s actions denied the Complainant equal access to the district’s education program or activity. Similarly, the parties should both know the rationale for the result as to each allegation, including a determination regarding responsibility, because due process principles require the district to provide a basis for its determination.

# Possible Remedies

- Remedies are required after a Respondent has been determined responsible under the grievance process
- No list of appropriate remedies in regulations
- Left to discretion of educators
- Designed to restore or preserve the right to equal access to education
- Remedies need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent

§ 106.45(b)(1)(i)

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# Possible Remedies

- Remedies may include the same individualized services described as “supportive measures”
- **Supportive measures:** counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus and other similar measures
- **Other possibilities:** tutoring for student, removal of student from class/team/campus, policy/procedure changes, staff or student training

§ 106.45(b)(1)(i)

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## Appeals

- May offer for other reasons equally to both
- Must have a different Decision Maker, but still cannot be Investigator or Title IX Coordinator
- Must give other party reasonable, equal opportunity to submit written statement
- Must issue decision in writing and provide simultaneously to both parties

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## Appeals

The District should establish a deadline for filing an appeal and may require appeals be filed on a form provided by the District.

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# OCR REVIEWS

The Department assures schools that when enforcing these new regulations it will refrain from second guessing a school district's determination regarding responsibility based solely on whether the Department would have weighed the evidence differently.

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## RECORD KEEPING

34 C.F.R. 106.45(b)(10)

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**At least 7 years. Check your FB(LOCAL).**

Records related to alleged sexual harassment must be maintained for a minimum of 7 years

- Investigation records
- Disciplinary sanctions
- Remedies
- Appeals
- Records of any actions taken, including supportive measures

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**At least 7 years.**

Must document for every instance:

- Why response was not deliberately indifferent
- That measures were taken to restore or preserve equal access to the educational program or activity
- If no supportive measures provided, why that was not deliberately indifferent

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**Title IX Boot Camp (half day)**

Tuesday, October 20, 2020

1:00 pm – 5:00 pm

**Title IX Administrator Conference**

Wednesday, October 21, 2020

9:00 am – 4:00 pm

**A Title IX Conference specifically designed for K-12 administrators!**

Visit [www.edlaw.com](http://www.edlaw.com) for more information and to register online.

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# QUESTIONS?

CONTACT US



**EICHELBAUM WARDELL**

[www.edlaw.com](http://www.edlaw.com)

(800) 488-9045

[information@edlaw.com](mailto:information@edlaw.com)

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