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TITLE IX TRAINING
LAKE PARK CHSD 108

August 7, 2023

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Title IX Training
Lake Park CHSD 108

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Presented By:

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August 7, 2023

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Agenda

Background on Title IX Regulations

Overview of Relevant Laws

Key Definitions

Jurisdiction

Board Policy 2:265

Reporting & Response

Avoiding Conflicts of Interest & Bias

Grievance Process for Formal Title IX Sexual Harassment Complaints

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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice.
If you have an individual problem or incident that involves a topic covered in this document, please seek
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Background on Title IX Regulations

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Background on Title IX

- "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 educational program or activity receiving Federal financial assistance…" 20 U.S.C. § 1681(a); 34 C.F.R. § 106.31(a).

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What About Sexual Harassment?

- Although Title IX does not expressly mention sexual harassment, Congress, federal agencies, and courts have interpreted the statute to prohibit sexual harassment in education programs and activities.

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Current Landscape – 2020 Regulations

- Released in May 2020 after formal rulemaking process.
- Went into effect on August 14, 2020.
- Expressly address schools' obligation to address **sexual harassment** in their educational programs and activities.

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Current Landscape – 2020 Regulations

- Major changes from prior guidance interpreting Title IX:
  - Narrower definition of sexual harassment
  - Jurisdictional limitations
  - Single investigator model prohibited
  - Greater due process protections for accused parties

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Changes on the Horizon – 2023 Regulations?

- Department of Education is finalizing review of public comments to proposed amendments to Title IX regulations that were released in Summer 2022.
- Finalized amendments anticipated to be released in October 2023.
- Effective date: TBD (but in 2020, effective date was ~90 days after release).

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Changes on the Horizon – 2023 Regulations?

- Likely changes:
  - Broader definition of "sex-based harassment"
  - Expanded jurisdiction
  - Single investigator model permitted
  - Expanded protections for transgender and nonbinary students and pregnant and parenting students

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So…What Now?

- As long as the Department of Education's review of the current Title IX regulations is ongoing and until any new regulations go into effect, school districts must continue to comply with the existing regulations.

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Overview of Relevant Laws

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Relevant Laws

Title IX of the Education Amendments of 1972 (“Title IX”)
Title VII of the Civil Rights Act of 1964 (“Title VII”)
Illinois Human Rights Act (“IHRA”)
Abused and Neglected Child Reporting Act (“ANCRA”)
Every Student Succeeds Act (“ESSA”)

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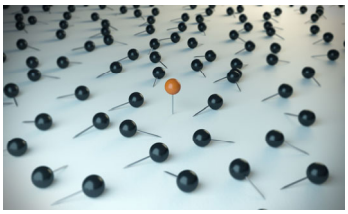
Relevant Laws



- Title VII
  - Prohibits discrimination, including discrimination based on sex, in employment. This includes sex-based harassment.
  - Also prohibits disparate treatment based on sex, which may include treatment based on sex-based stereotypes.
- Illinois Human Rights Act
  - Prohibits discrimination, including in employment.
  - Also prohibits sexual harassment in elementary, secondary and higher education.

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Relevant Laws

- ANCRA
  - Requires immediate reporting when a school employee has reasonable cause to believe that a child known to them in their professional or official capacities may be an abused child or a neglected child.
- ESSA
  - Requires states and districts to have in place policies prohibiting the "aiding and abetting of sexual abuse."

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Key Definitions

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Title IX Sexual Harassment

1. Quid pro quo harassment by a District employee
2. Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access
3. Any instance of sexual assault, dating violence, domestic violence, or stalking

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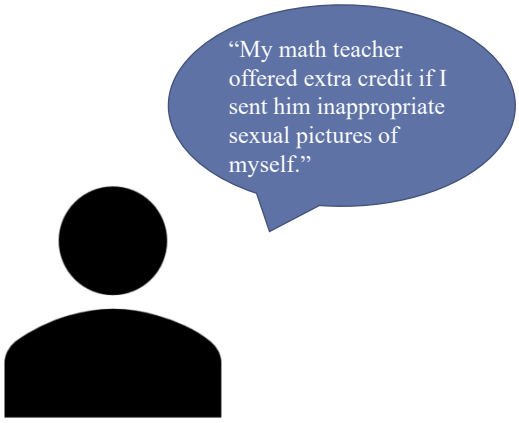
Title IX Sexual Harassment: **Quid Pro Quo**

- When an employee of the District conditions aid, benefits, pay, a position or other opportunities for advancement on an individual's submission to unwelcome sexual conduct.



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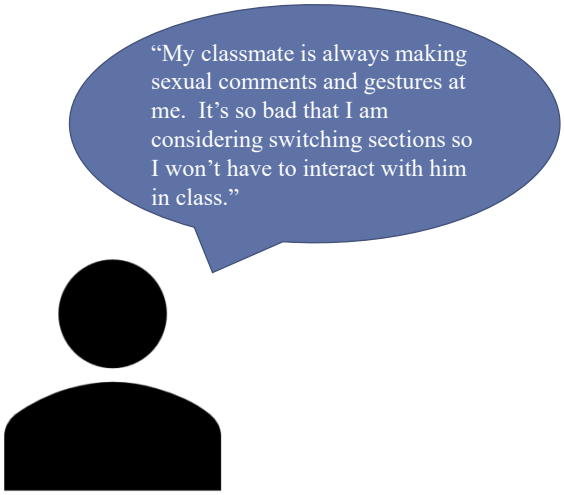
Title IX Sexual Harassment: **"Hostile Environment"**



- Unwelcome
- Severe <u>and</u> pervasive <u>and</u> objectively offensive
- Denial of equal educational access

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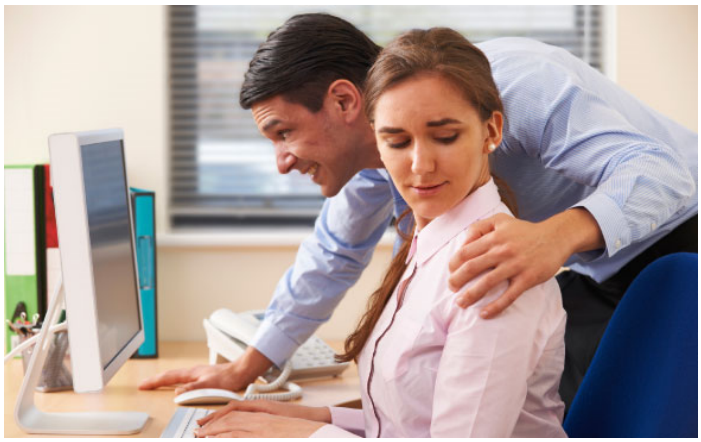
Title IX Sexual Harassment Hostile Environment

Compare with Title VII definition for workplace hostile environment claims:

- Unwelcome sexual advances and other conduct of a sexual nature having the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.



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Title IX Sexual Harassment

Hostile Environment

Compare with IHRA definition:

- Any conduct of a sexual nature exhibited by an education representative toward a student, when such conduct has the purpose of substantially interfering with the student's educational performance or creating an intimidating, hostile or offensive educational environment.

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Title IX Sexual Harassment: **Specific Acts**

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

**As defined under the Clery Act/VAWA*

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Title IX Sexual Harassment: **Specific Acts**

Sexual Assault

- An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting program.

Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress.

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Title IX Sexual Harassment: **Specific Acts**

Domestic Violence

1) Felony or misdemeanor crimes committed by a current or former spouse or intimate partner under the laws of the jurisdiction and, in the case of victim services, includes the use or attempted use of physical abuse or sexual abuse.

2) A pattern of any other coercive behavior (not necessarily criminal) committed, enabled, or solicited to gain or maintain power and control over a victim, by a person who:

   - is a current or former spouse or intimate partner, or person similarly situated to a spouse of the victim;
   - is cohabitating or has cohabitated with the victim as a spouse or intimate partner;
   - shares a child in common with the victim; or
   - commits acts against an adult or youth victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

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Key Definitions: Hypothetical

- You receive a report of a student being punched repeatedly by her ex-boyfriend, another student, while on an overnight school-sponsored field trip.
  - Which kind(s) of sexual harassment might this be?

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Key Definitions: **Hypothetical**

- A student member of the Debate Club reports that they were sexually harassed by the Club advisor.
- What types of evidence/information would be relevant to determining whether the alleged harassment was severe, pervasive, and objectively offensive?

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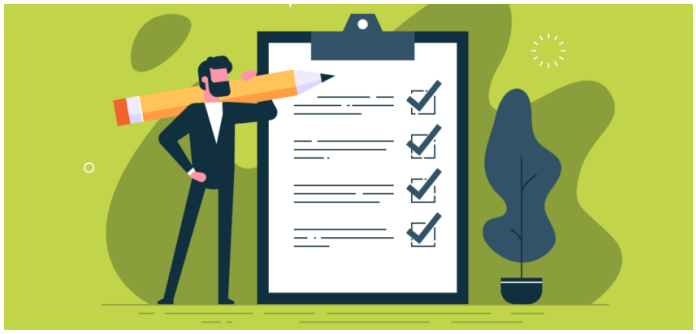
Jurisdiction



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Jurisdiction Under Title IX

- The Title IX regulations apply only to alleged sexual harassment that occurs "in the District's education program or activity, against a person in the United States."

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Title IX Jurisdiction

Scope of District's Education Program or Activity

Includes locations, events, or circumstances over which the District exercised substantial control over both the respondent and the context in which the sexual harassment occurred.

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Title IX Jurisdiction

Scope of District's Education Program or Activity

Examples for discussion:

- On the school bus?
- Local business where students are participating in school fundraising activities?
- Teacher's home?
- Social media?

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Jurisdiction: "… in the United States"

To fall under Title IX, the alleged misconduct must have occurred in the United States.

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Title IX Jurisdiction

Other Relevant Policies

If the alleged misconduct was outside the U.S. or not in the District's education program or activity, look to other applicable District policies, such as:

- 2:260, *Uniform Grievance Procedure*
- 5:20, *Workplace Harassment Prohibited*
- 5:90, *Abused and Neglected Child Reporting*
- 5:120, *Employee Ethics; Conduct; and Conflict of Interest*
- 7:20, *Harassment of Students Prohibited*
- 7:180, *Prevention of and Response to Bullying, Intimidation and Harassment*
- 7:185, *Teen Dating Violence Prohibited*
- 7:190, *Student Behavior*

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Jurisdiction: Hypothetical

- Compare:
  - A student athlete allegedly fondles another student athlete while off-campus at a sporting event with their team and coach
  - A student athlete allegedly fondles another student athlete while at a friend's home
- Which type of alleged misconduct falls under Title IX?
- What are the District's response obligations with regard to each type of alleged misconduct?

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Board Policy 2:265 – Title IX Sexual Harassment Grievance Procedure

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Policy 2:265

Prohibitions

- Prohibits sexual harassment, as defined under Title IX.
- Prohibits retaliation against anyone who, in good faith, has made a report or complaint, assisted, or participated or refused to participate in any manner in a proceeding under the policy.

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Policy 2:265
Applicability

- The District complies with Title IX and its implementing regulations concerning everyone in the District's education programs and activities, including:
  - Applicants for employment
  - Students
  - Parents/guardians
  - Employees
  - Third parties

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Policy 2:265
Enforcement

District employees found to have engaged in Title IX sexual harassment will be subject to disciplinary action, up to and including discharge

Students found to have engaged in Title IX sexual harassment will be subject to disciplinary action, up to and including suspension and expulsion

Title IX sexual harassment by third parties (e.g., vendors, parents, visitors) will be addressed in accordance with the authority of the Board, in the context of the relationship with the third-party

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Policy 2:265

Key Definitions

Complainant:

- Individual who is alleged to be the victim of conduct that could constitute sexual harassment

Respondent:

- Individual who has been reported to be the perpetrator of the conduct that could constitute sexual harassment

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Policy 2:265

Key Definitions

Formal Title IX Sexual Harassment Complaint:

- Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment in violation of Title IX and requesting that the District investigate the allegation.
  - Note: Parent/guardian may file a formal complaint on behalf of their child. In such a case, the student is still the "complainant" for purposes of Title IX.

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Policy 2:265 Key Definitions

Supportive Measures:

- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available, and without fee or charge
- Offered to the complainant or the respondent before or after a formal Title IX sexual harassment complaint is filed or where no formal Title IX sexual harassment complaint has been filed

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Policy 2:265

Other Elements

- Requires the Superintendent and/or designee to ensure that the District prevents and responds to allegations of Title IX Sexual Harassment
  - Curriculum components
  - Education and training for school staff
  - Notice of policy and contact information of Title IX Coordinator
- Reporting and confidentiality of reports
- Initial processing of reports

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Policy 2:265

Key Principles for Procedures

- Treat complainant and respondent equitably
- Objective evaluation of relevant evidence
- Presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility
- Compliance with grievance process before any disciplinary actions against a respondent.
- Include reasonably prompt timeframes for conclusion of the grievance process
- Base all decisions upon the preponderance of evidence standard

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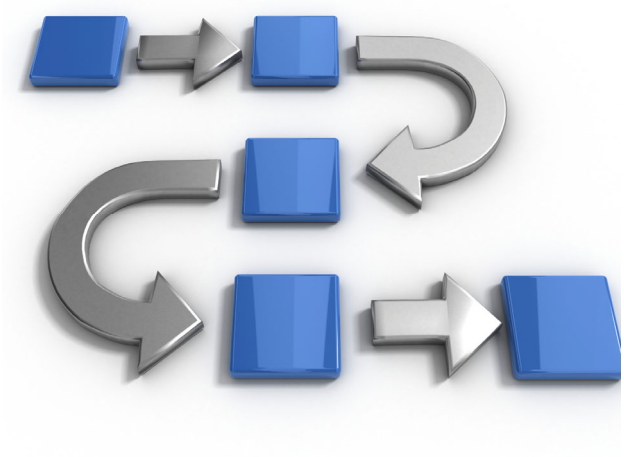
Administrative Procedures for Board Policy 2:265



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Purpose of Procedures

- Implement Board Policy 2:265
- Establish the District's required response to reports of sexual harassment that may violate Title IX (2:265-AP1)
- Establish the District's investigation and response process in response to a formal Title IX sexual harassment complaint (2:265-AP2)

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Role of Title IX Coordinator

- Upon receiving knowledge of a sexual harassment allegation, promptly contacts complainant to discuss supportive measures and explain the process of filing a formal complaint.
- Analyzes reports under other relevant Board polices to determine appropriate method for processing and reviewing reports.
- Maintains the confidentiality of the sexual harassment allegation, to the greatest extent practicable.
- May sign a formal Title IX sexual harassment complaint.

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Role of Title IX Coordinator

- When a Formal Complaint is filed, follows the Formal Title IX Sexual Harassment Grievance Process (2:265-AP2).
- Ensures a determination is made about whether an emergency removal or administrative leave is necessary, pending the investigation outcome.
- Creates and maintains, for at least seven years, records of any actions and supportive measures taken and provided in response to the report of sexual harassment.

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Role of All District Employees

Immediately report any suspicion of child abuse or neglect.

Promptly forward all reports of sexual harassment (including anonymous reports) to the Title IX Coordinator.

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Reporting Alleged Sexual Harassment

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Reporting

The Who and to Whom

Who can report?

- Anyone – including students, employees and third parties
- Need not be the person who is alleged to be the victim of the misconduct

To whom should reports be made?

- Title IX Coordinator
- District administrator (Principal, AP, Dean of Students)
- Any employee with whom the person is comfortable speaking

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Reporting
Employee Obligations

- Under Policy 2:265:
  - All District employees must report allegations of sexual harassment, including anonymous reports.
  - School employees must respond to incidents of sexual harassment by promptly making or forwarding a report to the Title IX Coordinator.
  - An employee who fails to promptly make or forward a report may be disciplined, up to and including discharge.

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Reporting: Confidentiality of Reports

Do not promise confidentiality.

Under Policy 2:265, reports of alleged sexual harassment will be confidential to the greatest extent practicable, subject to the District's duty to investigate and maintain an educational program or activity that is productive, respectful, and free of sexual harassment.

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Initial Response to Reports Alleging Sexual Harassment

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"Actual Knowledge" under Title IX

Notice of sexual harassment or allegations of sexual harassment to <u>any</u> District employee or to the District's Title IX Coordinator

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"Deliberate Indifference" under Title IX

Once the District has actual knowledge of alleged sexual harassment, the District must respond to the allegations:

- Promptly
- In a manner that is not "clearly unreasonable in light of the known circumstances"

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Overview of Initial Response Process

- Analyze report to determine the appropriate method for processing/reviewing it.
- For any report alleging Title IX sexual harassment, promptly contact the complainant to:
  - discuss and offer supportive measures,
  - consider the complainant's wishes with respect to supportive measures,
  - explain that supportive measures are available with or without filing a formal complaint, and
  - explain the process for filing a formal complaint.

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Initial Response Process Analyze Report

The Title IX Coordinator will analyze the report to determine whether there is another or an additional appropriate method(s) for processing and reviewing it.

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Initial Response Process

Analyze Report

Step 1: Analyze the Report

- Does Title IX apply?
- Does another District policy apply?

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Title IX Jurisdiction Analysis

Allegations received

1. Did alleged misconduct occur **in District's program or activity?**

2. Was the alleged misconduct against someone **in the United States?**

3. If true, do the allegations meet at least one of the **definitions of sexual harassment?**

If YES to All:

Promptly contact the complainant to discuss supportive measures and options for filing a formal complaint

If NO to Any:

Title IX does not apply. Check other District policies.

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Initial Response Process

Contact Complainant

<u>Step 2: Contact the Complainant</u>

- Reminder: Complainant is the individual who is alleged to be the victim of alleged sex-based misconduct

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Initial Response Process

Contact Complainant

When meeting with the complainant, the Title IX Coordinator should:

- discuss and offer supportive measures;
- consider the complainant's wishes with respect to supportive measures;
- explain that supportive measures are available with or without filing a formal complaint; and
- explain the process for filing a formal complaint.

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Supportive Measures

- Examples of supportive measures:
  - Schedule changes
  - Counseling services

  - Extensions or other academic accommodations
  - Mutual no-contact directives

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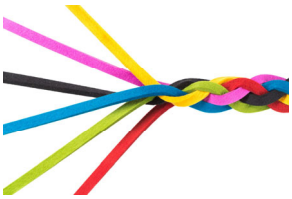
Supportive Measures

- The Title IX Coordinator is responsible for coordinating appropriate supportive measures.
  - Such coordination may require consultation with other District personnel.



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Supportive Measures: Hypothetical

- You are a high school statistics teacher. One of your students, Alex, contacts you to report that another student, Sam, has been making inappropriate comments and gestures toward Alex during class. Alex says she asked Sam to stop, but his behavior has only gotten worse. Alex says she is having trouble concentrating during class and asks if you can move Sam to a different class section.
  - How should you respond to Alex?
  - Should you move Sam into a different class section? Why or why not?

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Reporting & Response: Hypothetical #1

- You overhear the Varsity girls' basketball coach telling one his players that she reminds him of his favorite professional athlete. You ask the student about it, and she says that the coach has told her this several times. She also tells you that the coach refers to her by the athlete's name and calls her "Babe" when she plays well in a game. The student says she likes the special attention from her coach, but she has noticed the other players seem uncomfortable with how the coach treats her and have stopped inviting her to team get-togethers.
  - Assuming the allegations are true, could the coach's conduct meet the definition of sexual harassment?
  - How would you respond in this situation?

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Reporting & Response: Hypothetical #2

- You are an Assistant Principal. One of the teachers at your school contacts you to report that her 10th grade students are referring to her as their "girlfriend" during class. In addition, she notes that several students have jokingly asked to take her on a date after class in front of the other students. The teacher reports that she typically responds to the comments and jokes by laughing or saying, "I'm married," but that the comments and jokes are making her feel increasingly uncomfortable.
  - Could the students' alleged conduct constitute sexual harassment?
  - Should you report the teacher's allegations?

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Questions?

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Break

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Grievance Process for Formal Title IX Sexual Harassment Complaints

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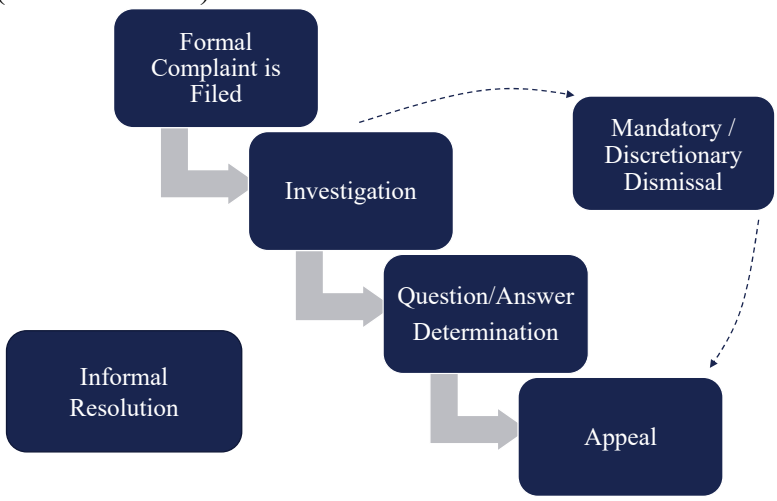
Grievance Process

Overview (See 2:265-AP2)



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Grievance Process for Formal Complaints

Formal complaint:

- Document filed by a complainant or signed by Title IX Coordinator alleging sexual harassment in violation of Title IX and requesting that the District investigate the allegation.
- At the time the complainant files a formal complaint, the complainant must be participating in or attempting to participate in the District's education programs or activities.

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Formal Complaint Hypothetical

A student graduates from high school in June. In September, the former student contacts the Title IX Coordinator to report that she was sexually harassed by another student (who is now a current senior) the previous February. The former student indicates that she would like to file a formal complaint.

Can the former student file a formal complaint?
If no, what options does the former student have?

Same scenario as above, but the former student was just hired by the District to serve as a tutor for 9th grade students. Now can the former student file a formal complaint?

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Grievance Process

Notice of Allegations

- Must be sent simultaneously to both parties (or the parties' parent(s)/guardian(s)) after Title IX Coordinator's receipt of formal complaint.
- Informs the parties of:
  - The grievance process, including informal resolution
    - Notice Letter Regarding Informal Resolution should be enclosed
  - The allegations
  - The presumption of non-responsibility on the part of the respondent
  - The parties' right to an advisor
  - The parties' right to inspect and review evidence
  - The District policies prohibits knowingly making false statements or submitting false information during the grievance process.

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Grievance Process

Emergency Removals and Administrative Leave

- The District may remove a respondent from its education program or activity on an emergency basis before completing the grievance process <u>if</u>:
  - Based on an individualized safety and risk analysis, an immediate threat to the physical health or safety of an individual arising from the allegations of sexual harassment justifies removal.
- Respondent must receive notice and an opportunity to challenge the decision immediately following the removal.
  - For students: Be mindful of SB 100 requirements.
  - For employees: Be mindful of any CBA requirements, but Title IX allows placing a respondent on administrative leave.

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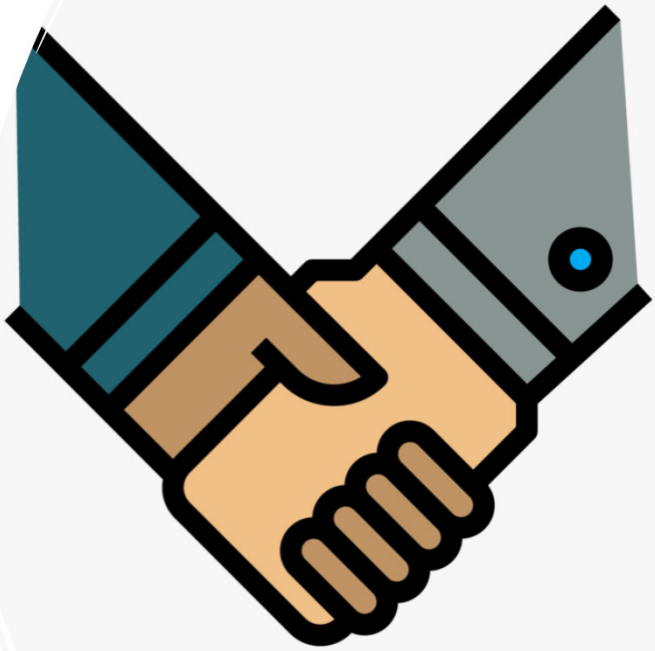
Informal Resolution

- Requires both parties' **voluntary**, **written consent.**
- May occur at any time after the parties receive the initial notice of allegations and prior to a determination regarding responsibility being reached.
- Party may withdraw at any time prior to reaching a resolution.
- Not permitted in allegations of employee sexual misconduct toward a student.



Consolidation of Formal Complaints

- Title IX Coordinator may consolidate formal complaints where the allegations of sex-based misconduct arise out of the same facts or circumstances.

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Dismissal of Formal Complaints

Mandatory Dismissal

- The District must dismiss a formal Title IX sexual harassment complaint where the Title IX Coordinator or designated investigator determines that the conduct alleged in the formal complaint:
  - (a) Does not meet Title IX's definition of sexual harassment; and/or
  - (b) Does not satisfy Title IX's jurisdictional requirements.
- *Note: Dismissal does not preclude action altogether – just for purposes of Title IX.*

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Dismissal of Formal Complaints

Discretionary Dismissal

- The District may, but is not required to dismiss a formal complaint where:
  - The complainant gives written notification of their desire to withdraw the formal complaint or certain allegations;
  - The respondent is no longer enrolled in or employed by the District; or
  - Specific circumstances prevent the District from gathering evidence sufficient to reach a determination.

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Dismissal of Formal Complaints

- A party may appeal a decision to dismiss a formal complaint or allegations therein.

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Quiz Time

- In each of the following scenarios, is dismissal <u>mandatory</u> or <u>discretionary</u>?
  1. The respondent resigns from employment at the District.
  2. The respondent gets arrested and is being held without bond pending their criminal trial.
  3. After initiating the investigation, the investigator determines that all of the conduct alleged by the complainant occurred while the parties were on a school-sponsored trip to Spain.

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Avoiding Conflicts of Interest & Bias

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Conflicts of Interest & Bias

- Title IX Regulations provide that any individual designated to serve as the Title IX Coordinator, investigator, decision-maker, or appellate decision-maker must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- Can be a basis for appeal if the conflict of interest or bias affects the outcome.

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Conflicts of Interest

- Key question:
  - Does the Title IX team member's prior or existing relationship with or knowledge of a party prevent the team member from serving impartially?

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Conflicts of Interest

- Where a Title IX team member self-identifies a conflict of interest, they should notify the Title IX Coordinator that they will need to recuse themselves.
- Where a party believes that a team member has a prohibited conflict of interest, the party must contact the Title IX Coordinator to request a substitution.
  - The Title IX Coordinator may request information from the team member to help them evaluate the claim.

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Bias

- Title IX Regulations prohibit bias <u>for or against</u>:
  - Complainants or respondents generally; and/or
  - An individual complainant or respondent.

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Bias

- **<u>How</u>** might bias be exhibited in the context of Title IX proceedings?
  - Making decisions based upon stereotypes, personal opinions, or something other than the facts/evidence.
  - Treating the complainant and respondent differently based upon their sex or other protected characteristic.

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Bias

- **When** might bias be exhibited in the context of Title IX proceedings?
  - Deciding whether to sign a formal complaint against a respondent?
  - Considering what supportive measures are appropriate?
  - Conducting investigatory interviews?
  - Providing the parties with access to evidence?
  - Assessing the parties' credibility?

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Tips for Promoting Objectivity/Impartiality

- Avoid pre-judging the facts.
  - Wait until all evidence is presented to determine whether policy violation occurred.
- Create and follow checklists.
  - Procedural requirements
  - Allegations to be proven/disproven
- Document treatment of both parties.
  - Opportunities to provide evidence
  - Details of the parties' interviews (time to prepare, breaks, advisors' roles, etc.)
  - Access to relevant evidence
  - Offering flexibility or granting requests for accommodations
- Document rationale for credibility determinations.

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Conflicts of Interest & Bias: Hypothetical

- You serve on the District's threat assessment team. At a threat assessment team meeting several months ago, you took part in a decision to remove a respondent from the District's educational program on an emergency basis. The District subsequently conducted a Title IX investigation with respect to that respondent, and you have just been appointed to serve as the decision-maker for the case.
  - Do you have a prohibited conflict of interest?

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Investigation of Formal Complaints

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Investigations: Written Notice

Required written notices

- Notice of allegations (upon receipt of a formal complaint)
- Notice of investigative interview, meeting, or hearing
- Notice of (mandatory or discretionary) dismissal

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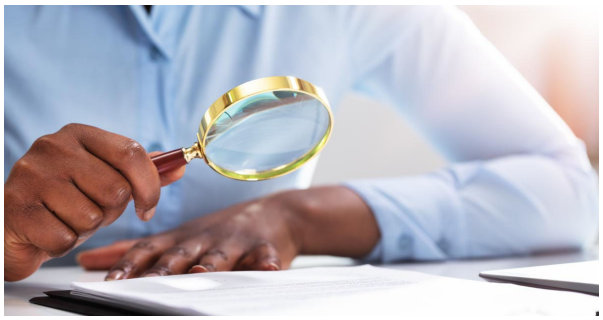
Investigations: Evidence

- Equal opportunity for parties to provide:
  - Fact and expert witnesses
  - Inculpatory and exculpatory evidence
- No gag orders



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Investigations: Advisors

- Both parties may select an advisor of their choosing
  - May, but need not be, an attorney
- Advisor's role is to provide support, guidance, advice
- May not speak on behalf of the party

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Investigation: Access to Evidence

- Both parties must have equal access to inspect and review all evidence that is directly related to the complaint allegations.
- At the conclusion of the investigation and prior to the completion of the investigator's report, the investigator must send both parties a copy of all relevant evidence.
  - Be mindful of FERPA/ISSRA and student privacy considerations.
  - Notify parties of parameters/limitations on re-disclosure of records and evidence.

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Investigation: Access to Evidence

- The parties will have 10 school business days to submit a written response to the evidence, which the investigator must consider prior to completion of his/her investigative report.
  - Investigator must also send a copy of each party's written response to the other party.

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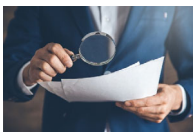
Investigation: Preparation of Investigation Report

- After receiving/reviewing the parties' written responses, the investigator must create an investigative report that fairly summarizes the relevant evidence, which will be forwarded to the decision-maker.
- The investigator must also send to each party (and their advisors) the investigative report and allow the parties 10 school business days to submit a written response to the report.



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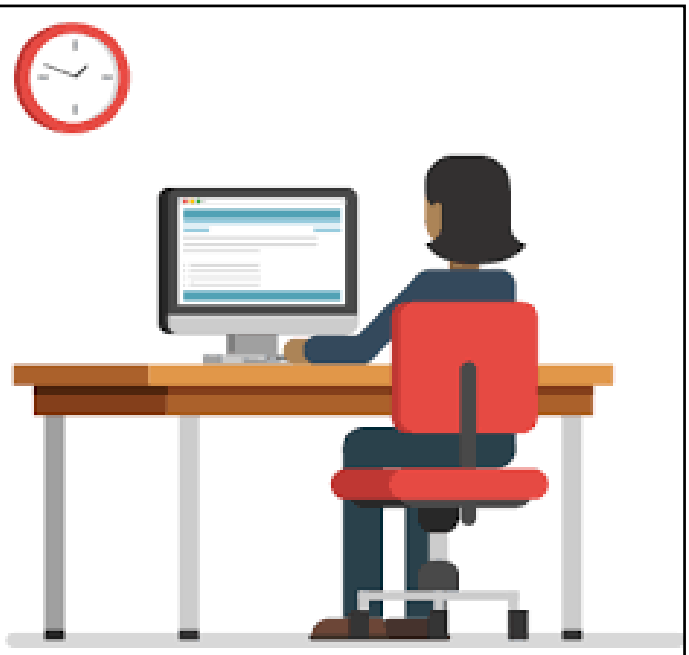
Exchange of Written Questions and Answers



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Written Questions

Process

- Alternative to live hearing.
- Opportunity given to both parties by the decision-maker after investigator sends investigative report.
- Parties may only submit written, relevant questions they want the initial decision-maker to ask of any party or witness.
- Parties must submit questions within five (5) school business days after they receive notice of the opportunity to submit written questions.

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Written Questions

Process

- The initial decision-maker must:
  - Exclude any irrelevant questions
  - Forward relevant questions to the appropriate party or witness
  - Give party or witness five (5) school business days to respond
  - Provide asking party with answers and explain any decision to exclude questions
  - Allow both parties limited follow-up questions

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Written Questions

Rape Shield Protections

- Questions about the complainant's sexual pre-disposition or prior sexual behavior are not permitted unless:
  - Offered to prove that someone other than the respondent committed the alleged conduct; or
  - Questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

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Determination Regarding Responsibility

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Issues for Decision

- Initial decision-maker's role is to determine:
  - Whether facts presented establish that the alleged conduct occurred;
  - Whether that conduct constitutes Title IX sexual harassment; and
  - If the answers to the above are "yes," which sanctions (if any) and remedies are appropriate.

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Considering Evidence

- Relevant documents may include, but are not limited to:
  - The formal complaint
  - The initial written notice of the allegations
  - Written statement(s) and responses by the parties and/or witnesses
  - The investigation report
  - The parties' written questions and answers
  - Police reports, photographs and/or video footage (if any)
  - Prior discipline records
    - Only relevant to issue of appropriate sanction

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Preponderance of the Evidence Standard

- "More likely than not"
- Whether the facts supporting the allegations have greater weight/strength than the facts presented in denial of the allegations
- If 50/50, no violation.

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Written Determination

- Determination of Responsibility Letter must include:
  - Identification of allegations potentially constituting Title IX sexual harassment
  - Description of procedural steps taken
  - Findings of fact supporting determination
  - Conclusions regarding application of conduct standards
  - Statement & rationale for result of each allegation, including:
    - Determination of responsibility
    - Disciplinary sanctions being recommended
    - Whether any remedies will be provided to the complainant
  - Procedures and permissible bases for complainant and respondent to appeal

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Remedies

- The Title IX Coordinator is responsible for implementing any remedies for the complainant, as ordered by the decision-maker.

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Appeals

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Appeals

Both parties have right to appeal any:

- Determination regarding responsibility
- Dismissal of any formal complaint or allegations therein

Party must submit written appeal request to Title IX Coordinator

- Within 10 school business days of receipt of written determination or dismissal

Title IX Coordinator must forward request to appellate decision-maker

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Appeals

Grounds to Appeal

- Procedural irregularity that affected the outcome
- New evidence or information exists that could affect the outcome but that was not reasonably available at the time the determination was made
- Conflict of interest or bias on the part of the Title IX Coordinator, investigator, or decision-maker that affected the outcome

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Title IX Coordinator

- Notifies the other party in writing that an appeal has been filed.
- Provides both parties five (5) school business days to submit a written statement in support of, or challenging, the outcome.
- Promptly forwards all materials relative to the appeal to the appellate decision-maker.

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Appellate Decision-Maker

- Affirms, reverses, or amends the written determination regarding responsibility or the notice of dismissal.
  - 2:265-AP2 requires this to occur within 30 school business days of the appeal.
- Written decision issued to both parties simultaneously within 5 school business days after conclusion of the review.

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Record-Keeping

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Record-Keeping

- For at least seven (7) years, create and maintain records of:
  - The sexual harassment investigation, including any determination regarding responsibility, any sanctions imposed on the respondent and any remedies provided to the complainant;
  - Any appeal and its result; and
  - Any informal resolution and its result.
- Compare with ISSRA requirement for maintenance of temporary school student records.

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Putting It All Together

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Hypothetical

- Alex, a student, reports to her homeroom teacher that a classmate, Aaron, has been making inappropriate sexual jokes and innuendos.
  - Alex and Aaron met when they both attended the same summer school course.
  - They were assigned to work on a project together, much of which was to be done on their own time, off school grounds, and required the exchange of personal contact information.
  - After the project was complete, Aaron allegedly called Alex and asked her out. Alex said yes.
  - Alex states that they went on a few dates, but Alex decided not to pursue the relationship any further.

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Hypothetical

- Alex alleges that after the summer school course ended, Aaron began telling all of the other students in the class that Alex "sleeps around," and he allegedly began making false statements that she sent him sexually explicit photos.
- Alex and Aaron both signed up for the swim team this fall. Last weekend, they attended a team orientation dinner at the coach's house. At the party, Aaron was secretly drinking alcohol. He tried to pressure Alex into drinking as well. Alex reports that Aaron stated, "Rumor has it, you're more fun when you're drunk."
- Alex reports that she told Aaron he was not funny, and to leave her alone.

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Hypothetical

- After Aaron finished the flask of vodka he brought to the party, one of Alex's friends witnessed Aaron showing other members of the swim team a sexually explicit photo of a female and telling them it was Alex.
  - The photo did not show a face, so others at the party did not know if the photo was of Alex or not. Some male team members seemed to believe Aaron.
- Alex is distraught. She is considering quitting the swim team so she will not have to interact with Aaron this fall.
- The homeroom teacher documents her discussion with Alex. What should the teacher do with these allegations? Discuss.

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Hypothetical

- Based on these facts, analyze the jurisdiction under Title IX.
  - Did Aaron's conduct occur in the District's education program or activity?
- Could Aaron's actions constitute Title IX sexual harassment?
- Reminder: Three types of sexual harassment:
  - Quid pro quo harassment by a District employee
  - Unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access
  - Any instance of sexual assault, dating violence, domestic violence or stalking

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Hypothetical

- Alex files a formal complaint. The parties proceed to the written question-and-answer phase of the grievance process.
  - Can Aaron ask Alex if she has ever had a sexual relationship with Aaron?
- After a full grievance process, the decision-maker (who is close friends with the homeroom teacher to whom Alex made her initial report) finds that Aaron is responsible for engaging in Title IX sexual harassment.
  - After receiving the determination, Aaron feels that the decision-maker had a conflict of interest that affected the outcome of the grievance process. He submits an appeal request to the Title IX Coordinator.
- What steps does the Title IX Coordinator need to take with respect to the appeal?

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Emily Bothfeld counsels higher education institutions and K-12 school districts on various issues, including student discipline, Title IX, free speech and expression, student disability rights, board governance, and policy development. In her role leading the firm's Title IX practice, Emily performs extensive work with educational institutions to ensure compliance with Title IX and related laws in all aspects of employment and education, including recruitment, admissions, academic programs, counseling, financial assistance, athletics and extracurricular activities, and facilities access. Emily was instrumental in Robbins Schwartz's development of policies, procedures, and training materials for school districts and higher education institutions in response to the United States Department of Education's 2020 amendments to the Title IX regulations, and Emily has significant experience working closely with Title IX Coordinators and administrators tasked with investigating and adjudicating sexual harassment reports and complaints.

Emily also represents both educational institutions and private companies in matters related to student privacy. She regularly advises school districts regarding privacy considerations and compliance requirements associated with the use of educational technology platforms. She has significant experience negotiating data privacy agreements and education-related service agreements on behalf of schools and organizations. In 2020, Emily co-drafted the Illinois addendum to the National Data Privacy Agreement ("NDPA"), a standardized agreement used by school districts and educational technology vendors throughout the United States to streamline the contracting process and establish a consistent framework for protecting and managing student data. The NDPA is currently being utilized by approximately 750 school districts in Illinois and over 11,000 nationally to facilitate compliance with state and federal student privacy and security laws.

Emily has extensive experience representing educational institutions in responding to complaints filed with the U.S. Department of Education's Office for Civil Rights, Illinois State Board of Education, Office of the Illinois Attorney General, and Illinois Department of Human Rights. Emily regularly defends educational entities in state and federal court in defending against constitutional, civil rights, and breach of contract claims.

Before joining Robbins Schwartz, Emily represented students with disabilities in special education matters. Emily attended the George Washington University Law School, where she was a member of the George Washington International Law Review and the GW Law Moot Court Board. Prior to attending law school, Emily taught high school mathematics and science in Hangzhou, China.

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Illinois Council of School Attorneys

National Council of School Attorneys

RECENT PUBLICATIONS

"College Admissions Under Fire as Top Court Takes Affirmative Action Case," *Chicago Daily Law Bulletin* (2022)

"Disabled Athlete Can't Support ADA Claims," *Chicago Daily Law Bulletin* (2018)

RECENT PRESENTATIONS

Best Practices for Safeguarding Data in an Increasingly Digital World, SecurED Schools: K-12 Data Privacy and Cybersecurity Conference (January 2023*)*

Legal Gymnastics in the Age of COVID and Other Challenges, Illinois Council of Community College Presidents Retreat (January 2022)

Making Sense of the Alphabet Soup: FERPA, COPPA, SOPPA, ISSRA, MHDDCA, and PIPA and Strategies for Compliance, Secured Schools K-12 Data Privacy and Cybersecurity Conference (January 2022)