



The New Title IX Regulations: What K- 12 Schools Need to Know Now

Lynne C. Adams
Osborn Maledon, P.A.
September 18, 2020

A close-up, slightly blurred photograph of a young child with blonde hair, wearing a pink shirt, sitting at a desk and writing in a notebook with a pencil. The child's face is partially visible in the upper left, looking down at the paper. The background is out of focus, showing a bookshelf with various books.

What is 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 subject to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681, adopted in 1992

The background of the slide is a photograph of a person, likely a woman, with her eyes closed and a pink sleeve visible. A semi-transparent teal box is on the left, and a white text box is on the right.

New Title IX Regulations

Effective on August 14, 2020, although several lawsuits were filed to postpone the effective date.

More comments submitted in response to the proposed rules than any other set of rules *ever*. The discussion of the comments are 2033 pages long.


Replace some previous guidance, including the April 2011 Dear Colleague Letter, the April 2014 Q&A and the May 2016 Dear Colleague Letter, all of which were rescinded in 2017.

Address procedures for responding to *sexual harassment* allegations.



Title IX Prohibits Sex Discrimination

- Sexual harassment is one form of sex discrimination.
- The new regulations now define “sexual harassment”:
 - Employee quid pro quo
 - Hostile environment
 - Violence Against Women Act offenses:
 - Sexual violence
 - Dating violence
 - Domestic violence
 - Stalking



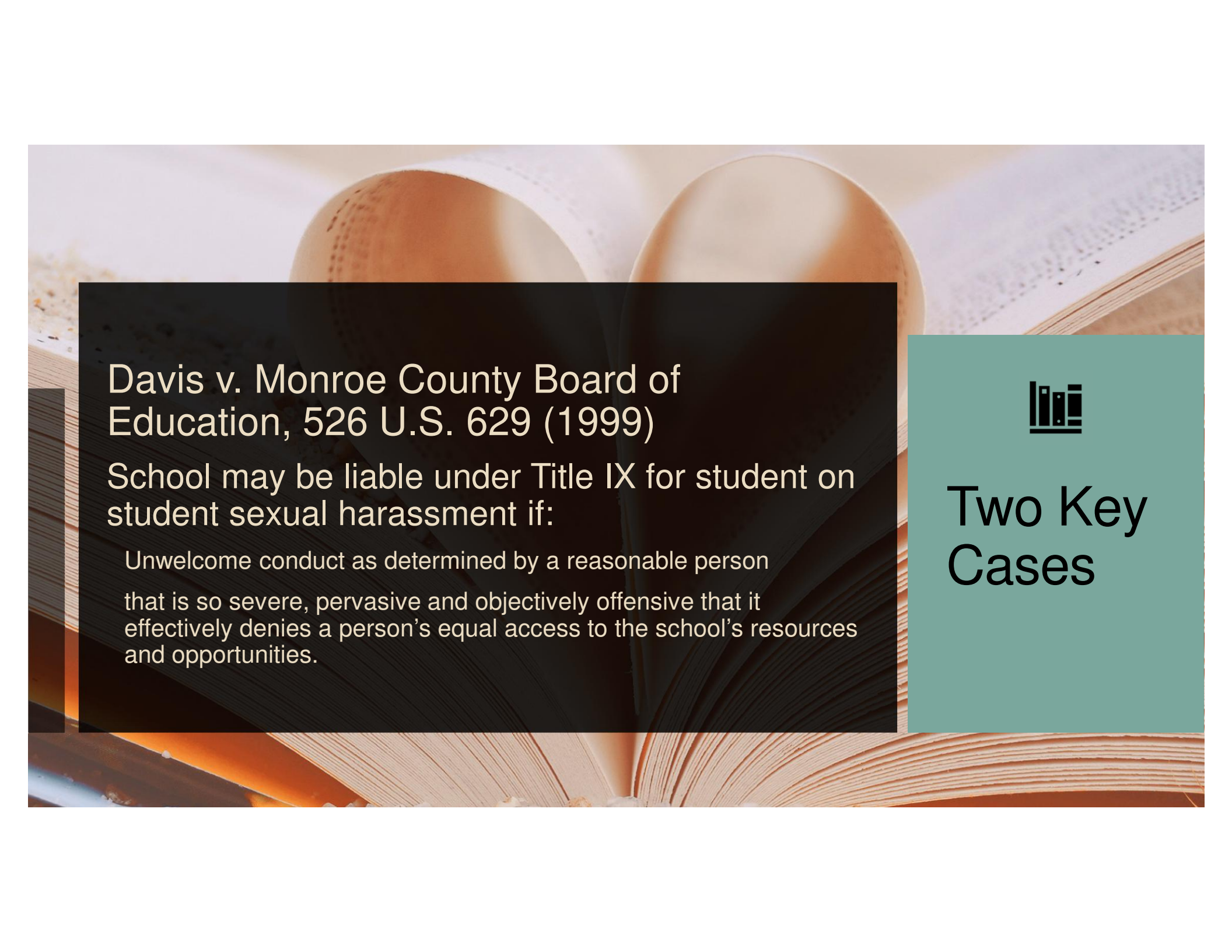
Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998)

School may be liable under Title IX for employee on student sexual harassment if:

- School official with authority to institute corrective measures
- has actual notice of allegations that an employee is engaging in sexual misconduct involving the student
- and the school acts in a deliberately indifferent manner.



Two Key Cases



Davis v. Monroe County Board of Education, 526 U.S. 629 (1999)

School may be liable under Title IX for student on student sexual harassment if:

Unwelcome conduct as determined by a reasonable person that is so severe, pervasive and objectively offensive that it effectively denies a person's equal access to the school's resources and opportunities.



Two Key Cases



Avoiding Liability

A school that has *actual knowledge* of possible *sexual harassment* in a school *program or activity* must respond *promptly* and in a manner that is not *deliberately indifferent*.



What Definitions Have Changed? “Quid Pro Quo”

OLD DEFINITION (OCR)

- An INDIVIDUAL – EMPLOYEE, SCHOOL VOLUNTEER OR STUDENT –
- conditions an aid, service or benefit of the school
- on an individual’s participation in unwelcome sexual conduct.

NEW DEFINITION (RULES)

- A SCHOOL EMPLOYEE
- Conditions an aid, service or benefit of the school
- on an individual’s participation in unwelcome sexual conduct.

Severity and harm are presumed with quid pro quo sexual harassment. By its very nature, it will result in a denial of access to the education program.



What Definitions Have Changed? “Hostile Environment”

OLD DEFINITION (OCR)

- Unwelcome conduct
- Determined by a reasonable person
- That is severe, pervasive OR persistent and that INTERFERES WITH OR LIMITS a student's ability to participate in or benefit from school services, activities or opportunities.

NEW DEFINITION (RULES)

- Unwelcome conduct
- Determined by a reasonable person
- That is so severe, pervasive AND objectively offensive that it EFFECTIVELY DENIES a student equal access to a school program or activity.

The return of the Davis standard!



What Definitions Have Changed? “Actual Knowledge”

OLD DEFINITION (OCR)

- A school has a responsibility to respond promptly and effectively if a school **KNOWS OR SHOULD HAVE KNOWN** about sexual harassment.

NEW DEFINITION (RULES)

- A school with **ACTUAL KNOWLEDGE** of sexual harassment in a program or activities must respond promptly and in a manner that is not deliberately indifferent.



What Definitions Have Changed? “Actual Knowledge”

Actual knowledge is notice of possible sexual harassment that has been provided to:

- A school's Title IX Coordinator; or
- *Any employee* of the school.

All of your employees should be trained to immediately report any conduct that might be sexual harassment to the Title IX Coordinator.



What Definitions Have Changed? “Deliberate Indifference”

OLD DEFINITION (OCR)

- A school must take immediate action to eliminate the sexual harassment, prevent its recurrence and address its effects.

NEW DEFINITION (RULES)

- The school fails to respond reasonably in light of known circumstances.



What Definitions Have Changed? “Deliberate Indifference”

A return to the Gebser standard:
“The response must amount to deliberate indifference to discrimination. . . . The premise, in other words, is an official decision by [the school] not to remedy the violation.”

Some form of investigation and remediation is typically sufficient, if it is reasonable in scope. A school’s investigation and response need not be perfect. But the school needs to take some reasonable action.



New Grievance Process Requirements for Responses to Sexual Harassment Allegations

Formal Complaint or Actual Knowledge



Initial Response by Title IX Coordinator



If Formal Complaint, then Investigation



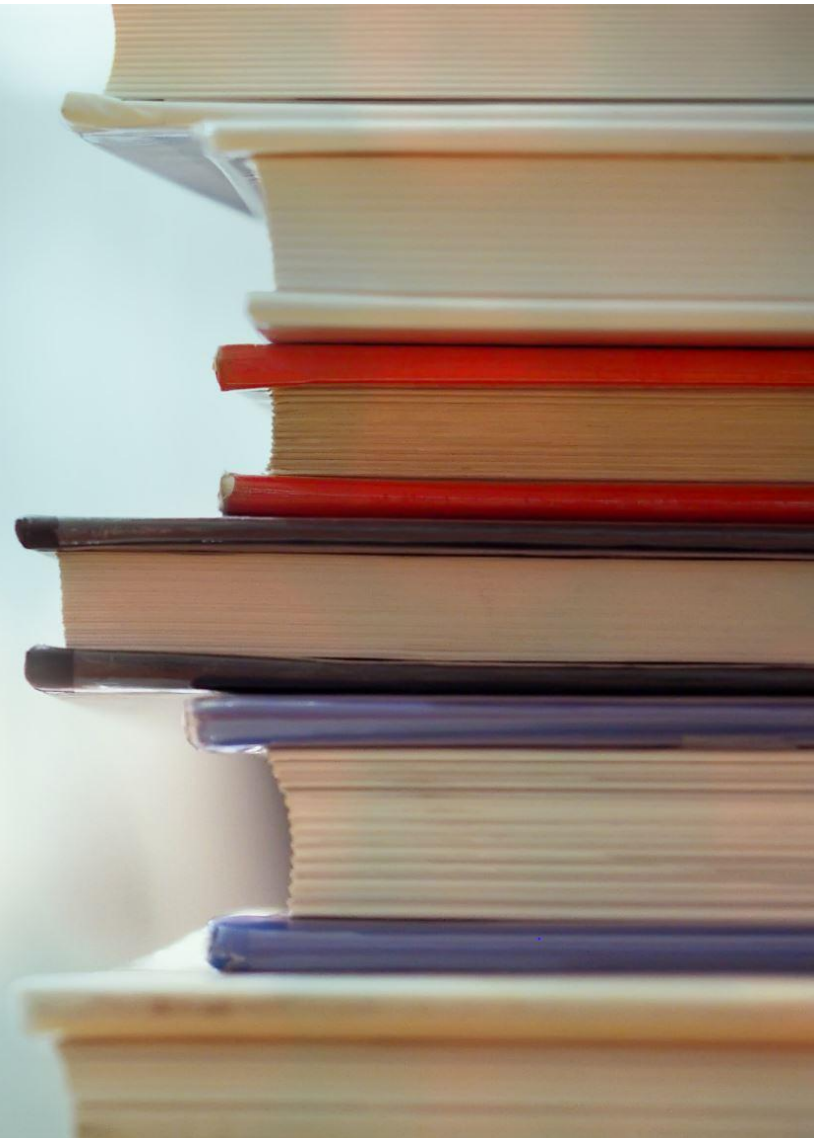
Decision Maker Makes “Final” Decision



Potential Appeal



Initial Responses to Allegations



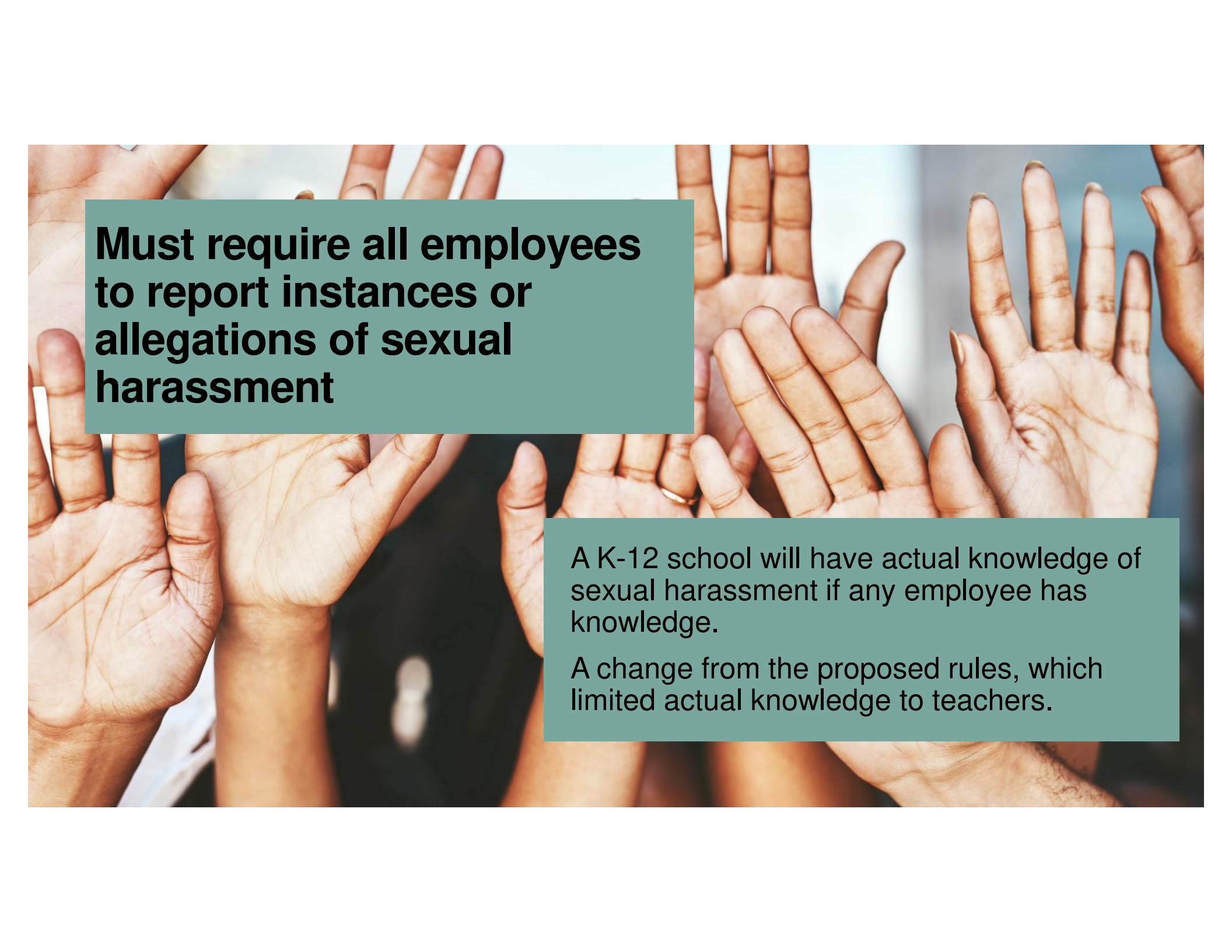


Must appoint a Title IX Coordinator

Must be called the Title IX Coordinator

Must be designated and “authorized” to coordinate your school’s Title IX compliance efforts.

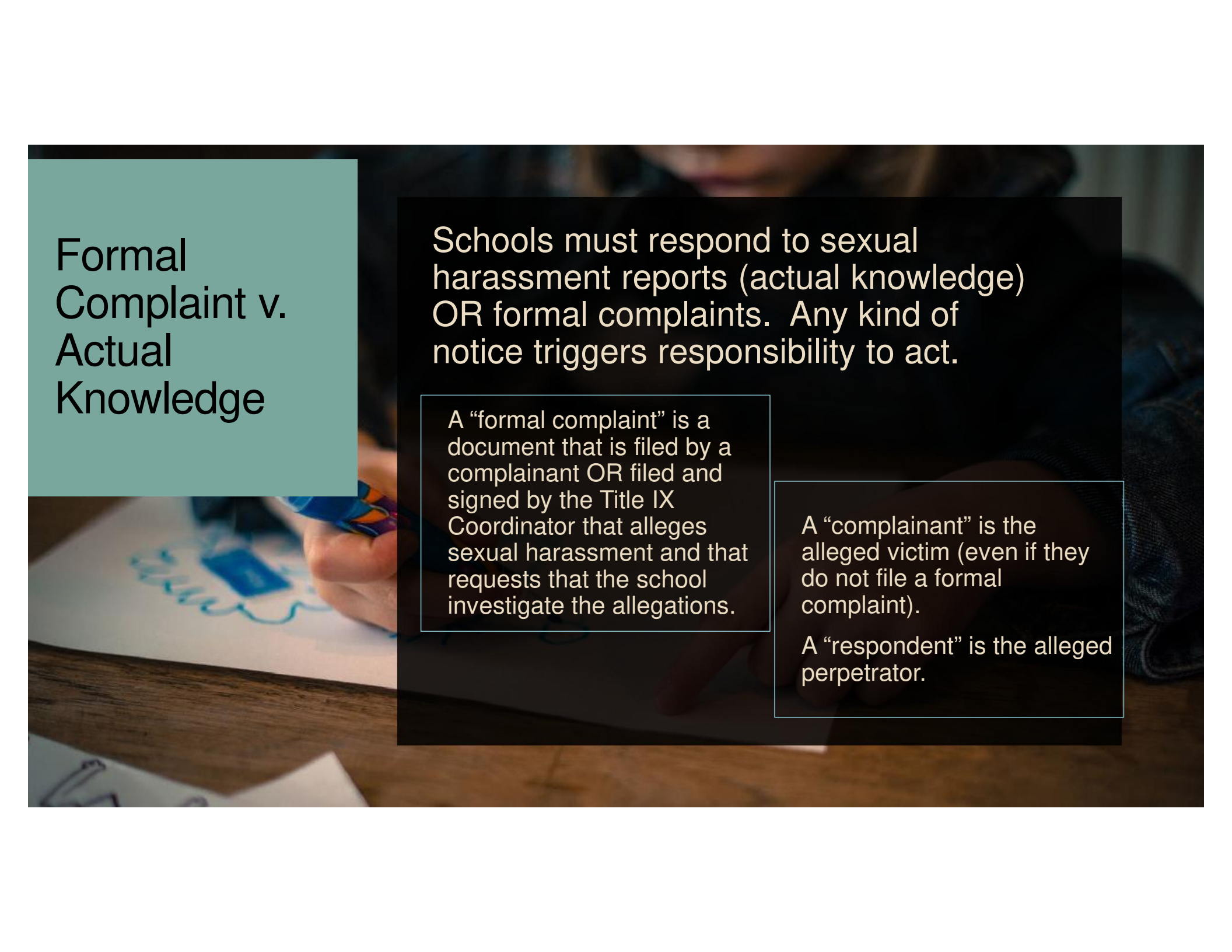
Must post Title IX Coordinator’s contact information on your website, including office address, email address and phone number.



**Must require all employees
to report instances or
allegations of sexual
harassment**

A K-12 school will have actual knowledge of sexual harassment if any employee has knowledge.

A change from the proposed rules, which limited actual knowledge to teachers.



Formal Complaint v. Actual Knowledge

Schools must respond to sexual harassment reports (actual knowledge) OR formal complaints. Any kind of notice triggers responsibility to act.

A “formal complaint” is a document that is filed by a complainant OR filed and signed by the Title IX Coordinator that alleges sexual harassment and that requests that the school investigate the allegations.

A “complainant” is the alleged victim (even if they do not file a formal complaint).

A “respondent” is the alleged perpetrator.

Initial Responses to Notice

Schools must:

Treat complainants and respondents equitably, including offering supportive measures to both complainants and respondents.

Follow a grievance process before disciplining or sanctioning a respondent.

Initial Responses to Notice

Even if no formal complaint is filed, the Title IX Coordinator must:

- contact the complainant to discuss the availability of “supportive measures;”
- consider the complainant’s wishes with respect to supportive measures;
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; and
- explain the process for filing a formal complaint.



What Definitions Have Changed? “Supportive Measures”

OLD DEFINITION (OCR)

- Used terms like “interim measures” to describe steps schools were required to take to support a complainant.
- Did not mandate offering them.
- Did not indicate whether they must be available to complainants *and* respondents.
- Was not clear whether they could be punitive.

NEW DEFINITION (RULES)

- **Non-punitive, individualized services offered as appropriate and without charge to a complainant OR a respondent before or after filing a formal complaint or if no formal complaint is filed.**
- **Must be designed to restore or preserve educational access without “unreasonably” burdening the other party.**



What Definitions Have Changed? “Supportive Measures”

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 and thus improper.

Unless. . .



Emergency Removal

A student may be removed on an emergency basis when necessary to protect the student or another individual from *immediate threat* to *physical health or safety*.

- The decision must be based on an individualized safety and risk analysis.
- May not be solely for emotional or mental health reasons.
- After the removal, the school must give student notice and an opportunity to challenge the removal.
- Consider the interplay of other laws related to removal, including IDEA (a change in placement?) and Section 504.



Informal Resolutions

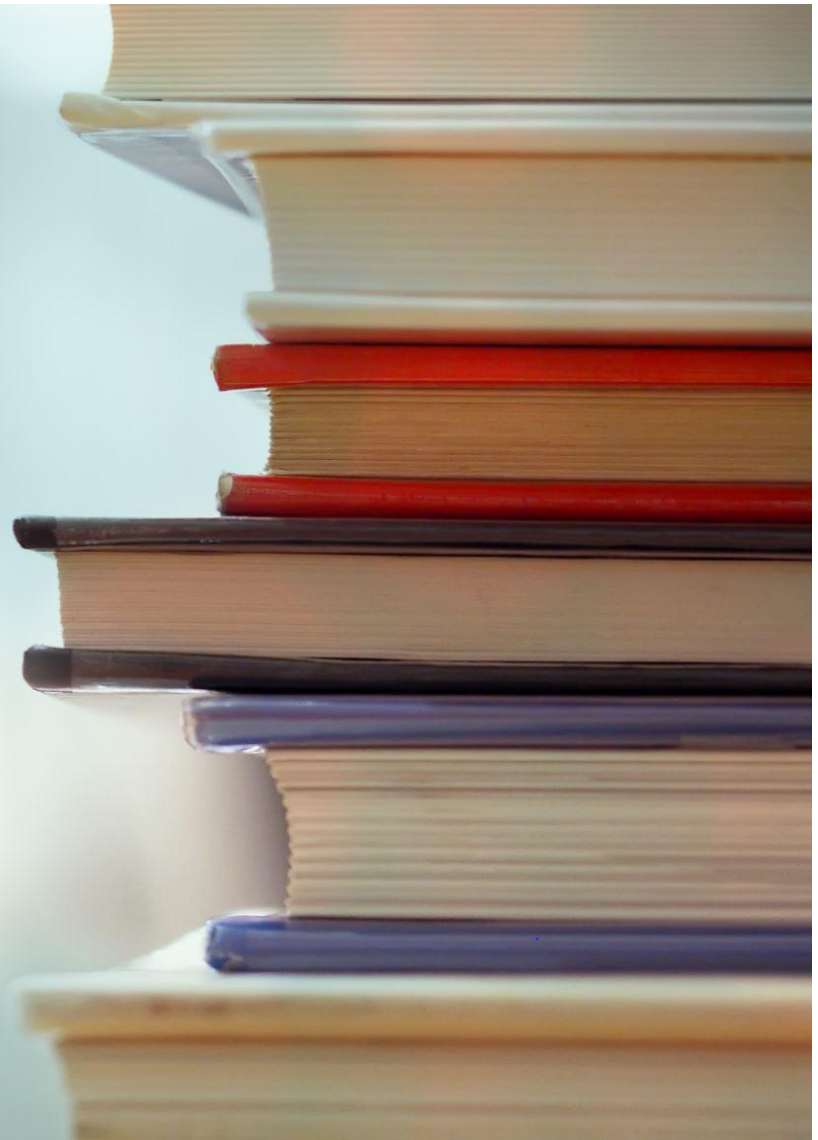
Informal resolutions are prohibited unless a formal complaint has been filed.

Informal resolutions are prohibited when the complainant is a student and the respondent is an employee.

Informal resolutions are allowed if:

- both parties are provided written notice of their rights; and
- both parties have provided voluntary, written consent to participate in the informal resolution.

Investigating Formal Complaints





Formal Complaint Process

New requirements for investigating, dismissing and determining responsibility related to formal complaints.

Must treat parties equitably.

Must evaluate all evidence objectively.

Must presume that the respondent is not responsible.

Must provide reasonably prompt time frames for completion.

Must describe the possible outcomes.

Must state whether using the preponderance of the evidence or clear and convincing standard of evidence to determine responsibility.

Must ensure no conflict of interests by involved parties.

Must describe the appeal process.

Must describe the supportive measures that are available.

Must not require, allow or use evidence that is privileged.



Written Notice

Schools must provide written notice to the parties in sufficient time to allow the respondent to prepare a response before any initial interview.

The written notice must include:

- notice of the grievance process, including any informal resolution process;
- notice of the allegations, in sufficient detail to allow the respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known);
- a statement that the respondent is presumed to be not responsible for the conduct alleged;
- a statement that responsibility will be determined at the conclusion of the grievance process;
- notice of the parties' rights to have an attorney or non-attorney advisor and to inspect and review evidence; and
- notice of any provision in the code of conduct or school policies that prohibits knowingly making false statements or providing false evidence during the grievance process.



Who Investigates?

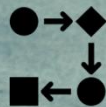


Your Title IX Coordinator can investigate OR you can use someone else to investigate.

You *must* use a different person to investigate if the Title IX Coordinator has a conflict.

- They signed the formal complaint.

- They have a bias against one or both of the parties.



Investigation

When you investigate a formal complaint, you must:

- Ensure that the burden of proof is on the school, including for gathering any evidence.
- Provide an equal opportunity for the parties to present witnesses and evidence.
- Not restrict either party's ability to discuss the allegations or gather and present evidence.
- Provide the parties with the same opportunities for attorney/non-attorney advisors to be present during interviews or proceedings.
- Provide written notice of the date, time, participants, purpose and location of each interview or other meeting to allow the party to prepare or participate.



Dismissal

Formal Complaints *must* be dismissed if:

- The complaint does not state an allegation of sexual harassment, even if all facts are found to be true;
- The sexual harassment, even if it did occur, did not occur in a school program or activity; or
- The sexual harassment did not occur in the United States.

Formal Complaints *may* be dismissed if:

- If the complainant notifies the Title IX Coordinator that s/he wants to withdraw the Complaint;
- If the respondent's employment or enrollment with the school ends; or
- If circumstances prevents the gathering of evidence sufficient to render a determination (passage of time since conduct, complainant refuses to cooperate, etc.).



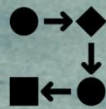
Investigation

Timing:

You need to act promptly, but there is no set deadline in the regulations.

Make certain that you comply with the timeline in your school's Title IX Policy.

You can delay for “good cause” (law enforcement, witness unavailability, etc.), but let both parties know in writing.



Investigative Report Process

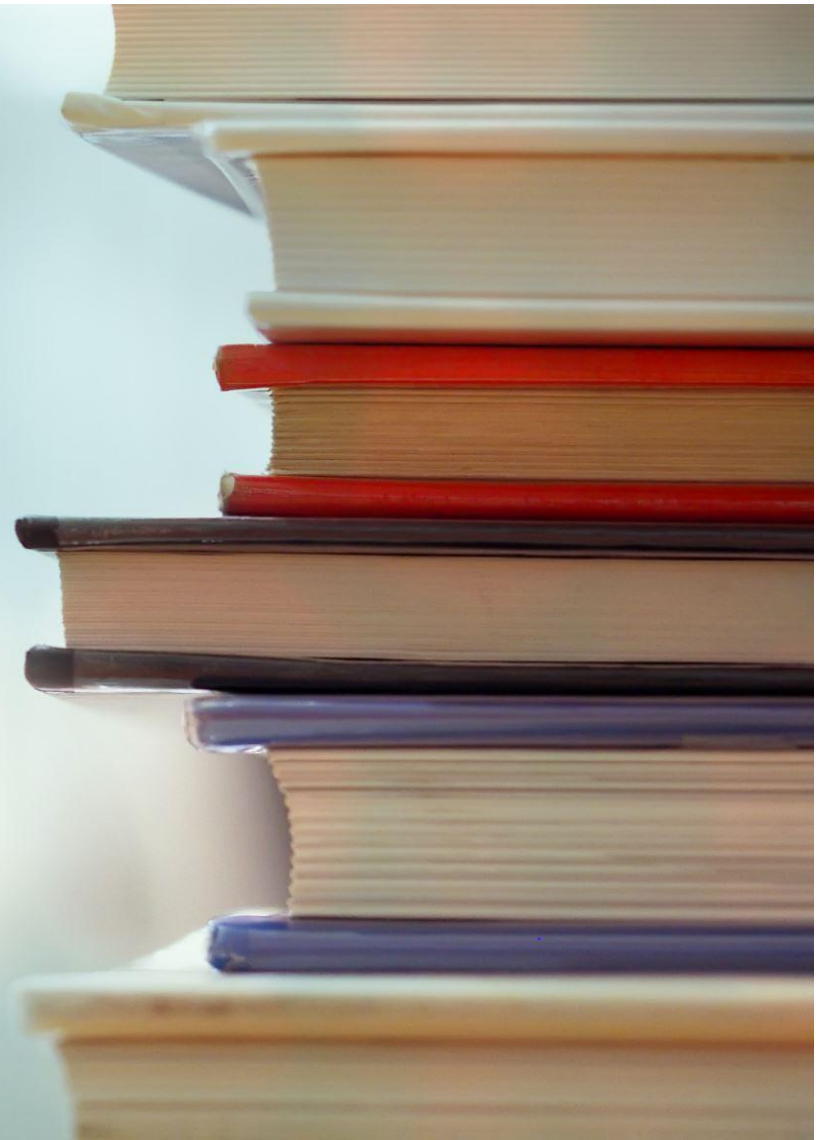
The investigator must provide the parties and their advisors with an equal opportunity to review all evidence – including evidence that is not going to be included in the report – at least 10 days before the report is finalized.

The parties may prepare written responses to the evidence, and the investigator must consider the responses before finalizing the report.

Then, the investigator must finalize a written report that fairly summarizes the relevant evidence.

The investigator must provide the final report to the parties at least 10 days before a determination of responsibility.

Making Decisions About Formal Complaints



Who Decides?

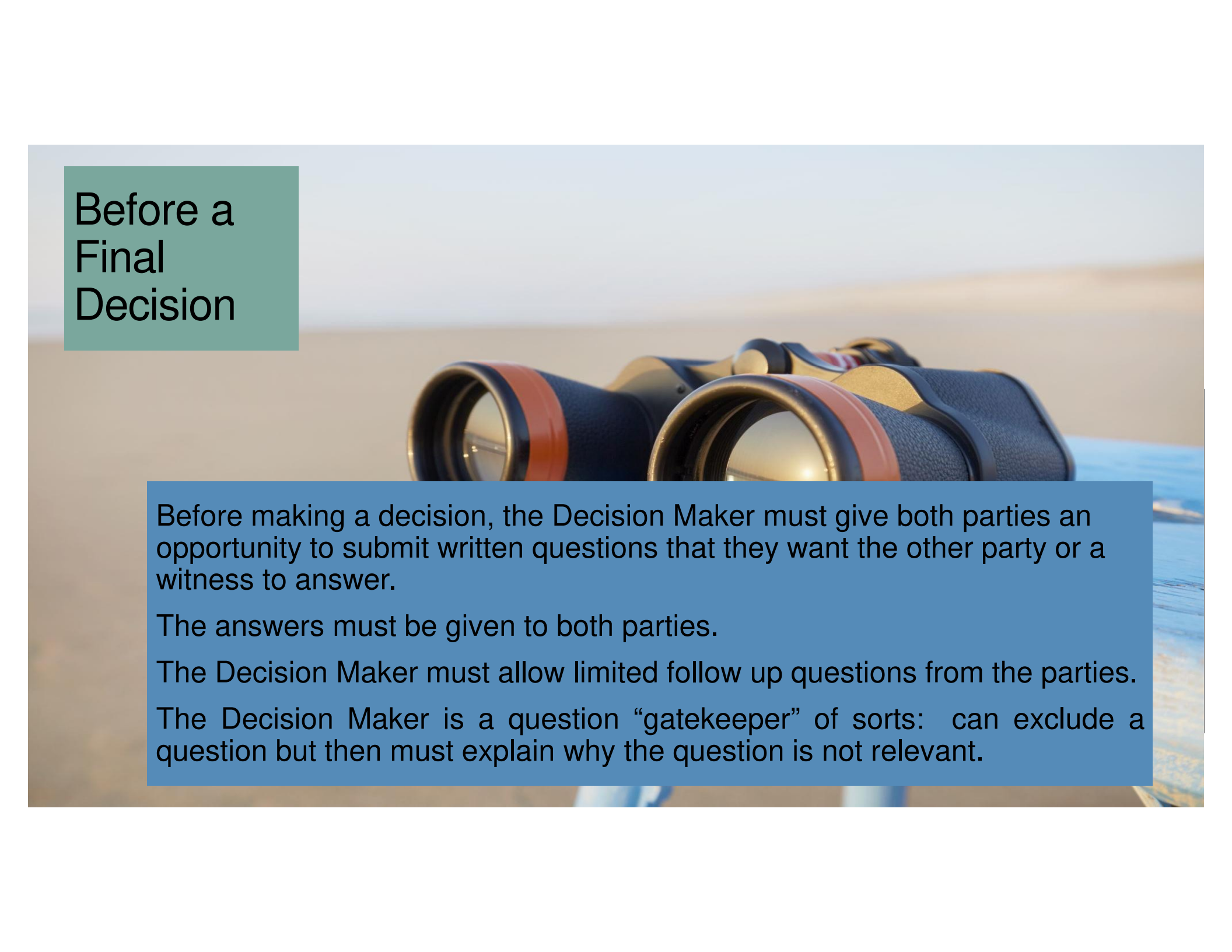


The final report now goes to the Decision Maker. The Decision Maker cannot be the same person as the Title IX Coordinator or investigator.

This means, you need at least three different people to handle sexual harassment complaints:

1. 1. The Title IX Coordinator
2. 2. The Decision Maker
3. 3. Someone to decide any appeals

[And maybe 4. An investigator (or two) if the Title IX Coordinator has a conflict.]



Before a Final Decision

Before making a decision, the Decision Maker must give both parties an opportunity to submit written questions that they want the other party or a witness to answer.

The answers must be given to both parties.

The Decision Maker must allow limited follow up questions from the parties.

The Decision Maker is a question “gatekeeper” of sorts: can exclude a question but then must explain why the question is not relevant.

“Final” Decision

The Decision Maker must review the investigative report and the answers to any written questions and then issue a written decision.

The written decision must include:

- The allegations;


- The procedural steps taken;

- The Decision Maker’s findings of fact;

- The application of the code of conduct to the facts;

- A statement of and the rationale for the result of *each* allegation, including determination of responsibility, any disciplinary sanctions imposed and whether remedies to restore or preserve equal access to the educational program will be provided; and

- A description of appeal rights.

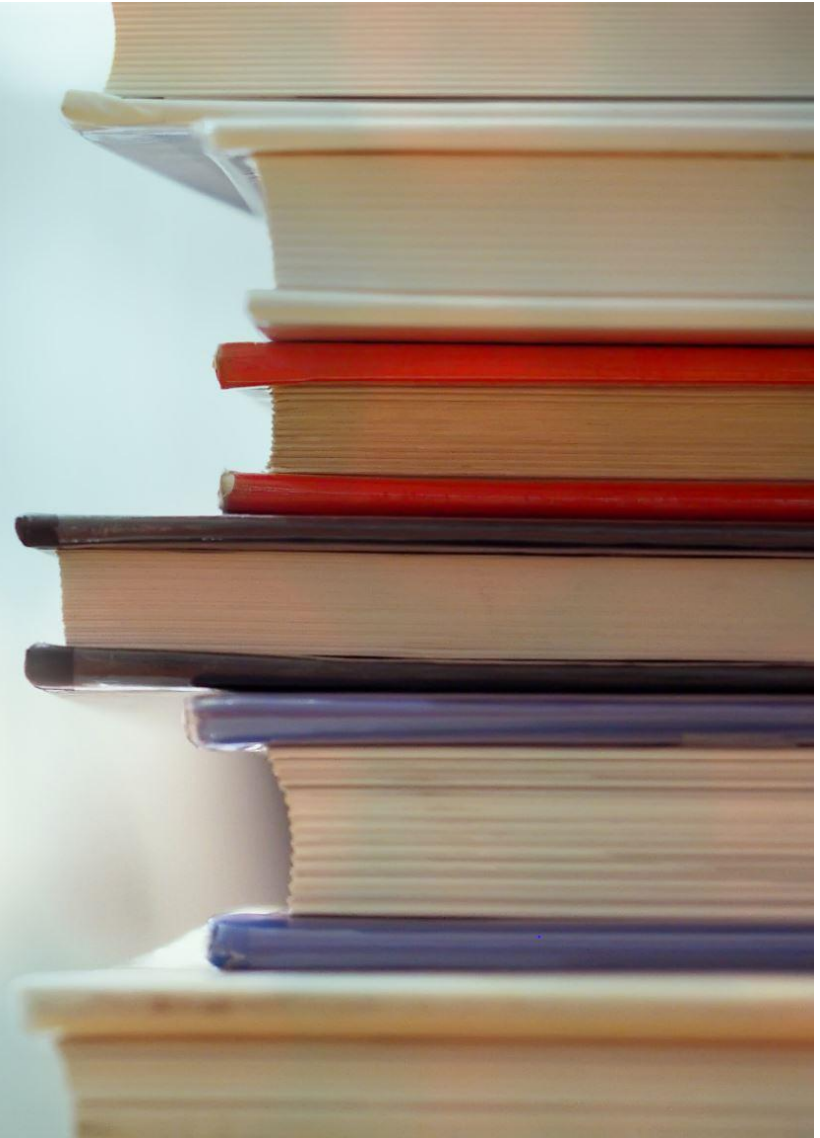
The background of the slide is a photograph of a desert landscape under a clear sky. In the foreground, a pair of blue and red binoculars is resting on a blue, textured surface, possibly a railing or part of a structure. The desert floor is sandy and extends to the horizon.

“Final” Decision

If the Decision Maker decides that the respondent engaged in sexual harassment, they must consider not only proper discipline, but appropriate measures for the complainant.

These can be similar to supportive measures, but now they can be punitive toward the respondent.

Appeals of “Final” Decisions





Appeals

Appeal rights must be offered to both the complainant and respondent for dismissals and final determinations.

The bases for an appeal are the following:

- procedural irregularity;

- new evidence that was not reasonably available earlier;

- conflict of interest on the part of the Title IX Coordinator, the investigator, or the Decision Maker.

The school can offer other bases for appeal to the complainant and respondent on equal terms.

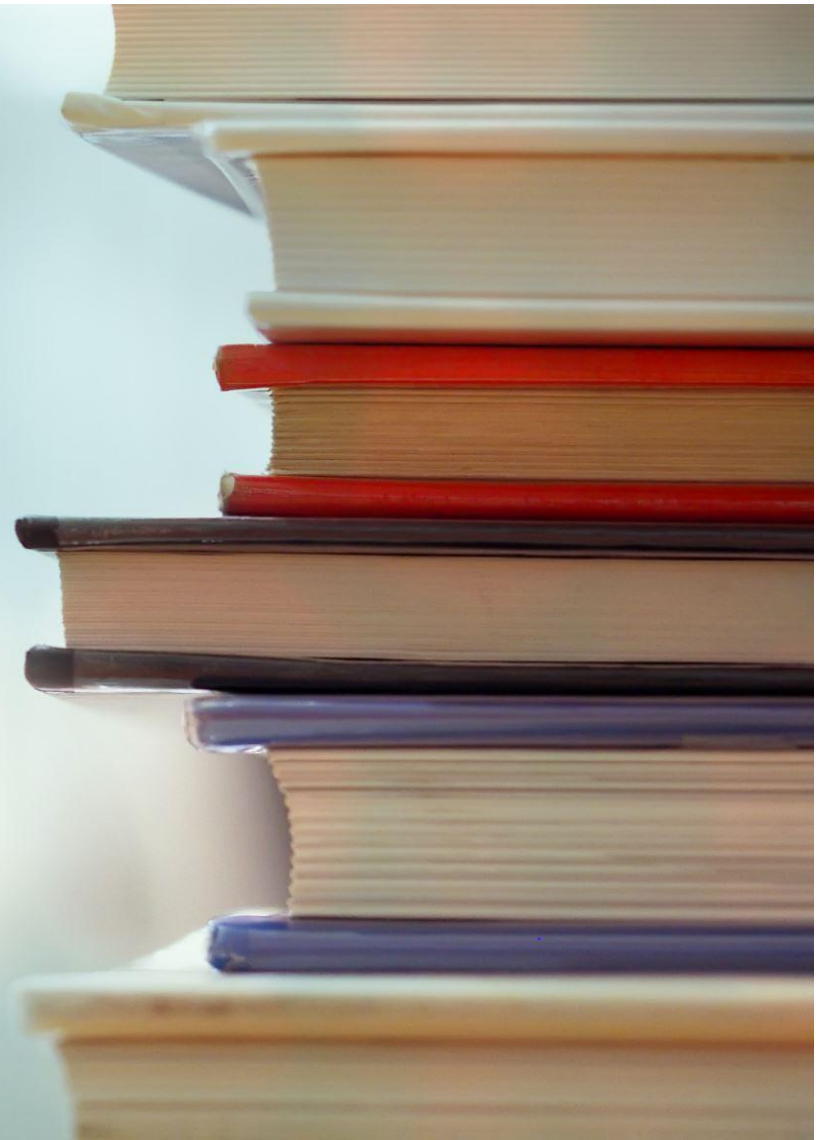


Appeals

Must give written notice that an appeal has been filed to both parties.
Both parties have an equal opportunity to submit a written statement in support of or challenging the Decision Maker's decision.

Remember: The person who hears the appeal cannot be the same person as the Decision Maker.

More Things You Have to Do





Training and Recordkeeping

Training:

All staff must be trained on how to identify and report sexual harassment.

All Title IX coordinators, investigators, Decision Makers, and persons that may facilitate an informal resolution must receive training on:

- the definition of sexual harassment;
- the scope of the recipient's education program or activity;
- how to conduct an investigation and grievance process; and
- how to serve impartially.

Investigators must also receive training on how to prepare an investigative report.

Recordkeeping:

Records related to an allegation of sexual harassment must be kept for a minimum of 7 years.

Records required to be created and maintained include:

- training materials;
- investigation records;
- disciplinary sanctions;
- supportive measure or other actions;
- remedies;
- appeals.

Records must also explain why the school's response was not deliberately indifferent.



Website Posting

You must post three things on your school's website:

1. The name of your Title IX Coordinator and the Coordinator's contact information (including email address). This information must be "prominently displayed."
2. Your school's non-discrimination policy.
3. Any training materials used to train the individuals who will be involved in your Title IX processes.



Six-ish Things You Need to Do NOW

1. Appoint a Title IX Coordinator and post the Coordinator's contact information on your website.

2. Adopt a Title IX Policy that includes all of the required procedures.



Six-ish Things You Need to Do NOW

3a. Determine who your Decision Maker will be.

3b. Determine who will hear any appeals.

4. Provide notice of your Policy and procedures and the Title IX Coordinator's contact information to applicants for employment, students, and parents – include it in handbooks.



Six-ish Things You Need to Do NOW

5. Post your notice of nondiscrimination on your website.

6a. Provide training to all individuals who will be involved in Title IX issues and post the training materials on your website.

6b. Make certain that all of your employees understand that they are obligated to report sexual harassment to your Title IX Coordinator.



Questions?

Lynne C. Adams
ladams@omlaw.com
602-640-9348

