



Fagen Friedman & Fulfroft LLP

# Title IX Regulations – Manager Training

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# Ask Questions



# WHY ARE WE HERE?



# Know the Rules



# Recognize Title IX Sexual Harassment





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





# THIS DOESN'T ADD UP:

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



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



# WHAT IS TITLE IX?







# Title IX

# Title IX Statute

(20 U.S.C. §§ 1681–1688)

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."



# What falls under Title IX?

Recruitment,  
Admissions, and  
Counseling

Financial  
Assistance

Athletics

Sex-Based  
Harassment

Treatment of  
Pregnant &  
Parenting  
Students

Discipline

Single-Sex  
Education

Employment

Retaliation



# Title IX Regulations

(34 C.F.R. Part 106 – Amended as of 8/14/2020)

- Prohibit discrimination on the basis of sex
- Establish procedural requirements
  - Policy + detailed grievance procedure
  - Designation of Title IX coordinator(s)
  - And many more requirements!



# When Must a School Respond to Sexual Harassment?



It Depends  
Who [Well,  
Which Law]  
You Ask

## Employment

- California Fair Employment & Housing Act (FEHA)
- Educ. Code § 200 et al.
- Title VII
- Title IX

## Students

- Educ. Code § 200 et al.
- Title IX





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

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A school with actual knowledge of [Title IX] sexual harassment in an education program or activity against a person in the United States must respond as required under the new Title IX rules....



# Notice

ACTUAL knowledge

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





## **Actual Knowledge**

- 1. Sense**
- 2. Report**



# Official with Authority



- Title IX Coordinator
- Any other officials who have been given authority to institute corrective measures by the school district
- K-12: All employees



# Reporting Sexual Harassment: Who, How and When?

- Any person may report sex discrimination, including sexual harassment, regardless of whether the person is the alleged victim of the reported conduct
- Reports can be made by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator
- Or by any means that results in the Title IX Coordinator receiving the person's report
- Such a report may be made at any time, including during non-business hours, by using the telephone number or electronic mail address, or by mail to the office address listed for the Title IX Coordinator



# Key Word: “Allegation”

**Once a school has notice of an allegation that, if true, would constitute sexual harassment, it must respond**

**“Well, we didn’t believe there was enough evidence it happened” does not get you past your responsibility to use your Title IX procedures**







# Issue Spotting

## **Order of protection:**

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



Does the Principal have actual knowledge/notice of sexual harassment?



# Terminology

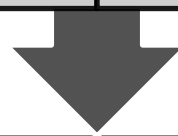
Apply to parties in both *reports* and *Formal Complaints* of sexual harassment



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

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

NOT the Title IX Coordinator, even if the TIXC “signs” a Formal Complaint



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



# What is Sexual Harassment?



It Depends  
Who [Well,  
Which Law]  
You Ask

## Employment

- California Fair Employment & Housing Act (FEHA)
- Educ. Code § 212.5
- Title VII
- Title IX

## Students

- Educ. Code § 212.5
- Title IX



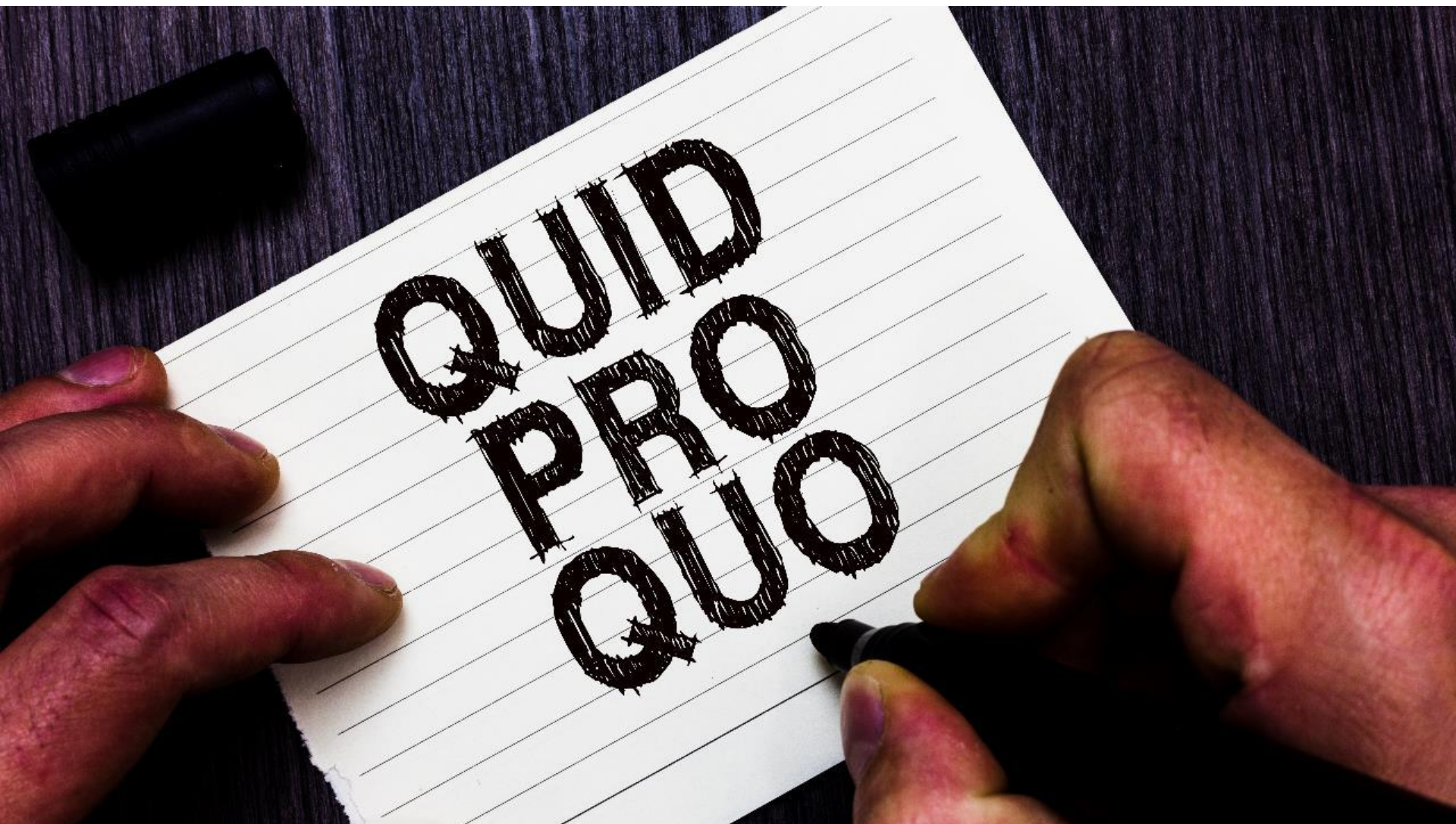


## Title IX Sexual Harassment

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







# Title IX Quid Pro Quo

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

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

**Codified:** Severity and harm presumed



# VAWA “Big Four”

Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Domestic Violence 34 U.S.C. 12291(a)(8)

Dating Violence 34 U.S.C. 12291(a)(10)

Stalking 34 U.S.C. 12291(a)(30)







## Title IX Hostile Environment



# Title IX – What is Sexual Harassment?

## Old Definition

Unwelcome conduct determined by a reasonable person to be **severe, pervasive or persistent as to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities**

## New Definition (8/14)

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





# Unwelcome Conduct

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





# What is severe?



# Severe

- Something more than just juvenile behavior among students
- Something more than behavior that is even antagonistic, non-consensual, and crass
- Simple acts of teasing and name calling are not enough, even when based on sex



# What is pervasive?



# Pervasive

- Systemic, widespread
- Multiple incidents—one incident is likely not enough
- Reconciles the general principle that Title IX prohibits indifference to known harassment with the practical realities of responding to misconduct



# What is objectively offensive?



# Objectively Offensive



Constellation of  
surrounding  
circumstances,  
expectations, and  
relationships



**ACCESS DENIED**





# Access Denied

- Hostile environment - harm is not presumed
  - **Effectively denies a person EQUAL access to the school's education program or activity**
- "So undermines and detracts from the victims' educational experience..."
- Specific manifestation of trauma not required



# Practical Analysis

Is this severe, pervasive, and objectively offensive?



A teacher offers a student  
to trade a back rub for a  
good grade on a test



Students incessantly mock a female student for not wearing makeup, saying she looks “like a boy”



The student shares a  
naked photo of another  
student with 20  
classmates



Teacher makes a sexually inappropriate comment to a student in class



A high school age student reports to her counselor that she was at a local cross country meet over the weekend. She reported that one of the boys at the meet touched her legs above the knee and was hitting on her. She told the boy that it made her feel uncomfortable and she avoided the boy for the rest of the meet. She reported the incident to her coach, but, to the best of her knowledge, the coach has not done anything.





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

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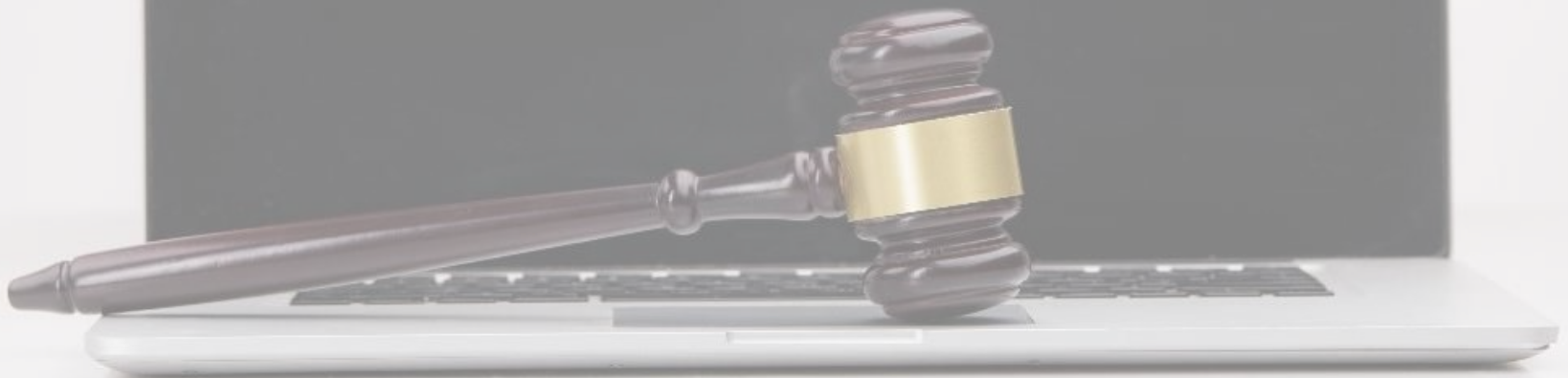


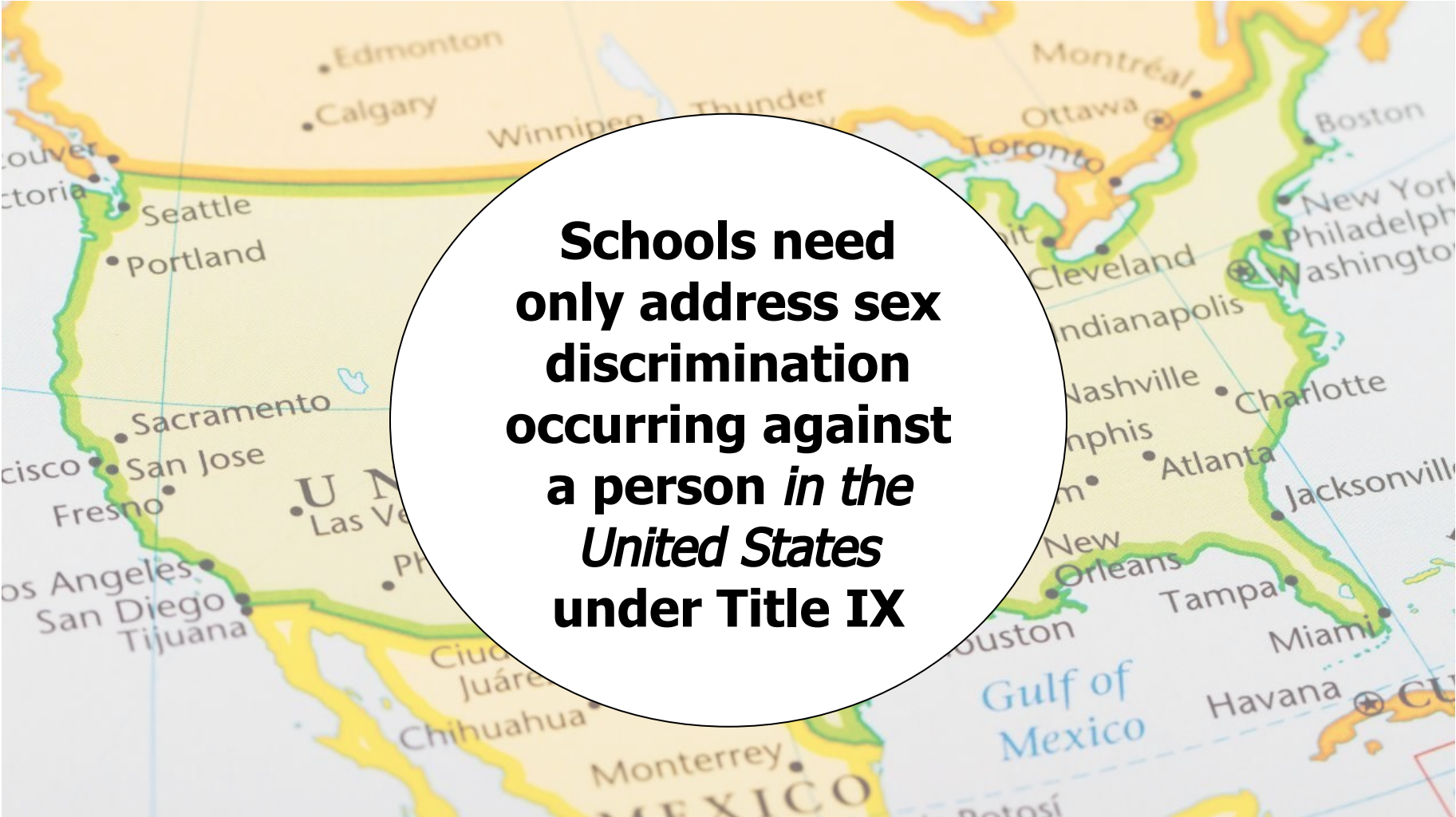
**Program or Activity:** Any location, event, or circumstance over which the school exhibits substantial control over both the alleged harasser and the “context” in which the harassment occurred



# Online & Off Campus

Substantial control over the context?



A map of the United States is shown in the background, with various cities labeled. Overlaid on the map is a large white circle containing the text. The text is in a bold, black, sans-serif font. The words "United States" are italicized.

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



# HOW MUST YOU RESPOND?



# Board Policies on Harassment

Option 1: **AR 4119.12/4219.12/4319.12 (Personnel) & AR 5145.71 (Students) Title IX Sexual Harassment Complaint Procedures** (for TIX Sexual Harassment *only*)

Option 2: **AR 4119.11/4219.11/4319.11 (Personnel) & AR 5145.7 Sexual Harassment** (for any other violation of law, including other types of “sexual harassment”)

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





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

NEW Title IX  
Sexual  
Harassment AR

Proceed under  
another policy

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

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



# Adequate Response

1. Initial Response  
/ Supportive  
Measures

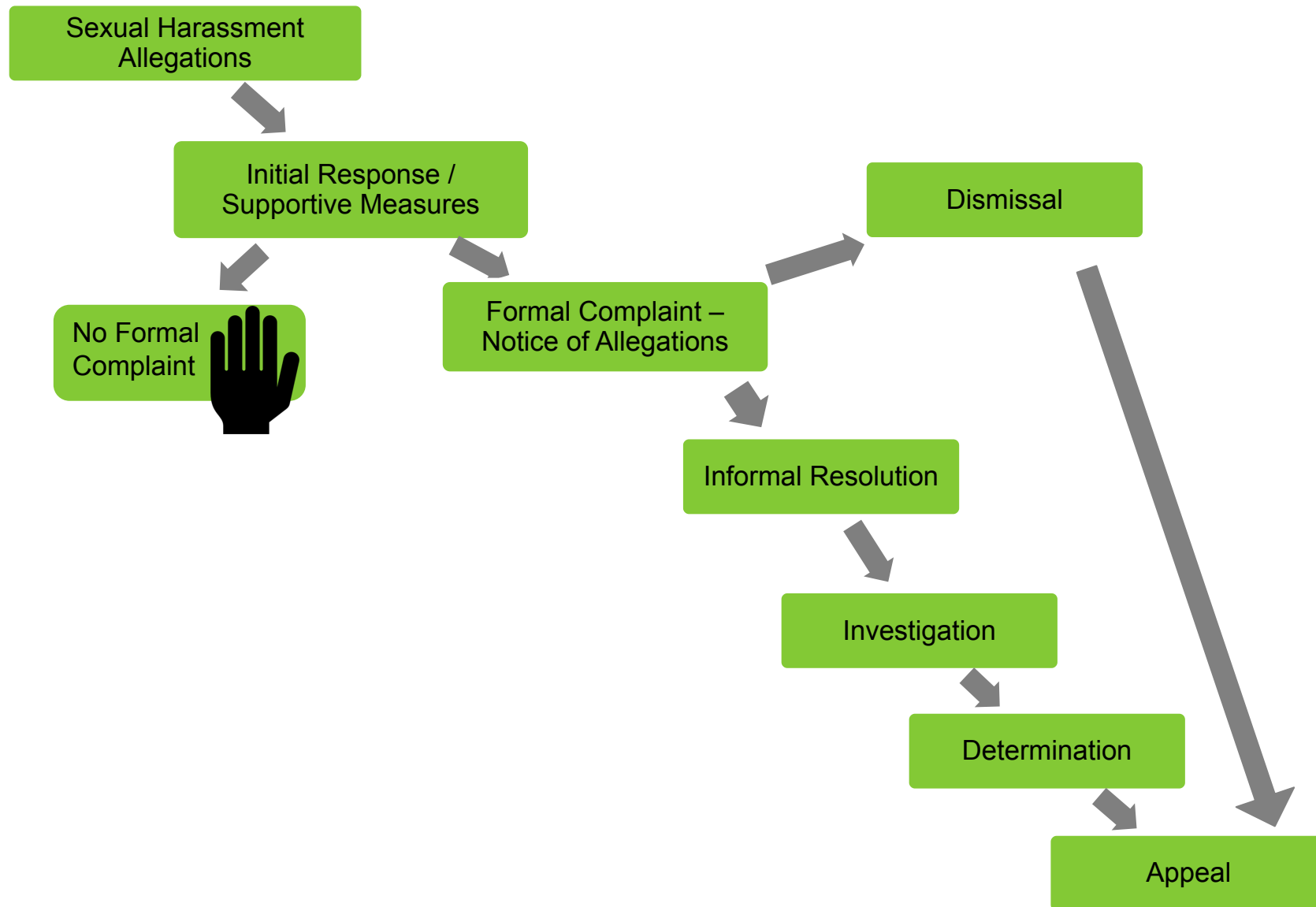
2. Informal  
Resolution  
(Voluntary)

3. Investigation

4. Decision

5. Appeal





# 1

## Initial Response/Supportive Measures



Title IX Coordinator or designee must promptly, **even if no Formal Complaint is filed:**

- Contact the Title IX Complainant to discuss the availability of “supportive measures”
- Consider the Title IX Complainant’s wishes with respect to supportive measures
- Inform the Title IX Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a Formal Complaint

***New:***  
**Initial**  
**Response**





## **Formal Complaint**

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



# Confidentiality

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





# Supportive Measures

## What Changed?

### OLD TERM (OCR Guidance)

- Used terms such as “interim measures” or “interim steps” to describe measures to help a complainant maintain equal educational access
- Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents

### NEW TERM (Final Rule)

- **Non-punitive**, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed (34. C.F.R.106.30(a)).
- **Should be designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party**





## Examples of Supportive Measures

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

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



# Emergency Removals / Admin Leave

## Immediate emergency removal

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

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat** to **physical health or safety**
- **Notice, opportunity to challenge** provided “immediately” provided the removal
- Consider other laws, e.g., “change in placement” under IDEA

## Employee administrative leave

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

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



## Application – Emergency Removal

A middle school student reports to his teacher that a group of boys in the class have been bullying him at recess for an extended period of time. This complainant alleges that the group of boys would try to slap his buttocks area and even tried to pull down his pants on several occasions. The complainant goes on to say that this group of boys also does this to several other students, but that they are too scared to come forward.

Does this conduct fall under Title IX?

- What action should the teacher take immediately?
- What action should the Title IX Coordinator take?



# Dismissals



## **Mandatory if conduct alleged:**

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

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

## **Permissive if:**

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

## **2 Informal Resolution (Voluntary)**



# Informal Resolution

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

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

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

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





# **3 Investigation**



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# Formal Complaint Response

34 C.F.R. 106.45(b)

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



- Written notice to known parties  
“upon receipt of written complaint”
- In sufficient time to allow respondent to prepare a response before any **initial** interview
- Must include:
  - Notice of grievance process, including any informal resolution process
  - Notice of allegations, in sufficient detail to allow respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known)

## More Steps: Written Notice



- Must include:
  - Statement that respondent presumed not responsible and that responsibility determined at conclusion of grievance process
  - Notice of parties' rights to have an attorney or non-attorney advisor and to inspect and review evidence
  - Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false evidence during the grievance process
- Must be supplemented if new allegations opened for investigation

More  
Steps:  
Written  
Notice





## Written Notice: Required

- Informal resolution notice
- Notice at start of investigation
- Dismissal notice
- Interview notices
- Report
- Notice which proposed questions not asked on cross and why
- Written determination and notice of appeal rights

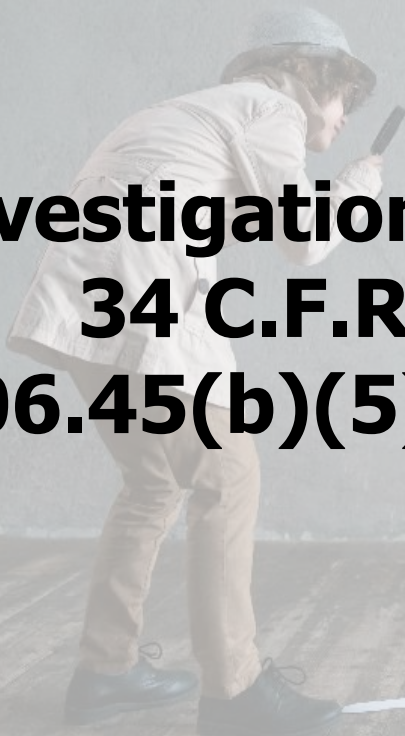




## Written Notice: Recommended

- Document information to complainant at initial meeting, including supportive measures requested/provided
- Document that review of evidence provided to both parties
- Document opportunity to ask questions, answers, follow-up questions, etc.





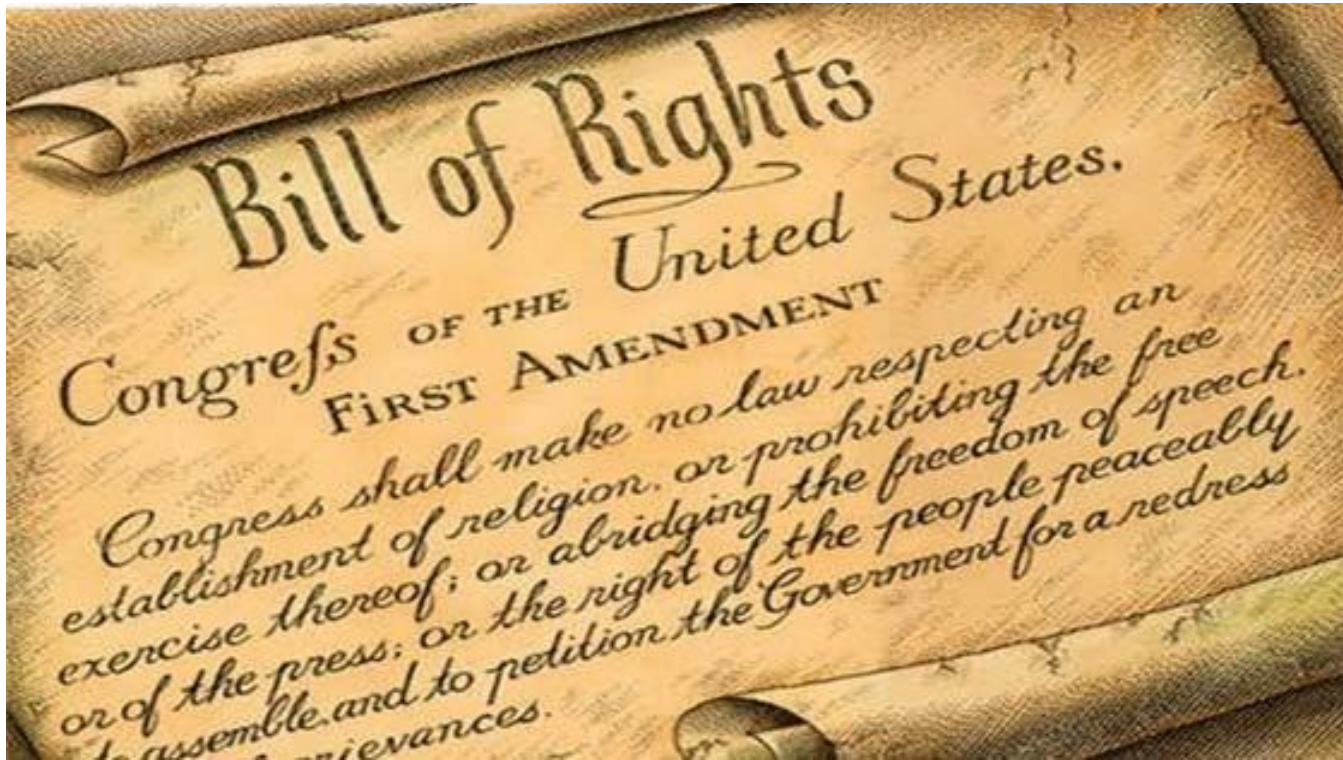
# **Investigation 34 C.F.R. 106.45(b)(5)**

- Burden of proof on school
- Certain treatment records cannot be obtained without voluntary, written consent
- No restriction of rights of parties to discuss allegations or gather or present evidence
- Same opportunities for others present during interviews or related proceedings (e.g., attorney or non-attorney advisor)
- Written notice to parties of date, time, participants, purpose, and location of each investigative interview with sufficient time to prepare
- All evidence provided to parties and their advisors with 10 days to respond before report
- Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility





# First Amendment Rights



# Gathering Other Evidence



# Opportunity to Review Evidence

- Before the investigatory report is completed, evidence relating to the allegations must be sent to each party and advisor and should include all evidence (including that which the school does not intend to rely upon and exculpatory and inculpatory evidence)
- Parties have 10 days to provide a written response



# Investigation Report

- Fairly summarizes the relevant evidence
- Provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or determination of responsibility



# **4 Decision**



Determinations  
of Responsibility  
34 C.F.R.  
106.45(b)(6)

- Written cross-examination of parties and witnesses by the parties for **K-12**
- Each party allowed to submit written, relevant questions to be asked of another party or witness to the decisionmaker, who will provide each party with the answers and the opportunity for follow-up questions





# The Decision



# Standard of Proof: Preponderance of the Evidence



# Remedies & Sanctions

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



# **5 Appeal**



# Appeal Process

- Available to both parties
- Appeal of dismissal or written determination
- Three bases for appeal
  - Procedural issue
  - New Evidence
  - Bias or Conflict of Interest
- Must affect the outcome

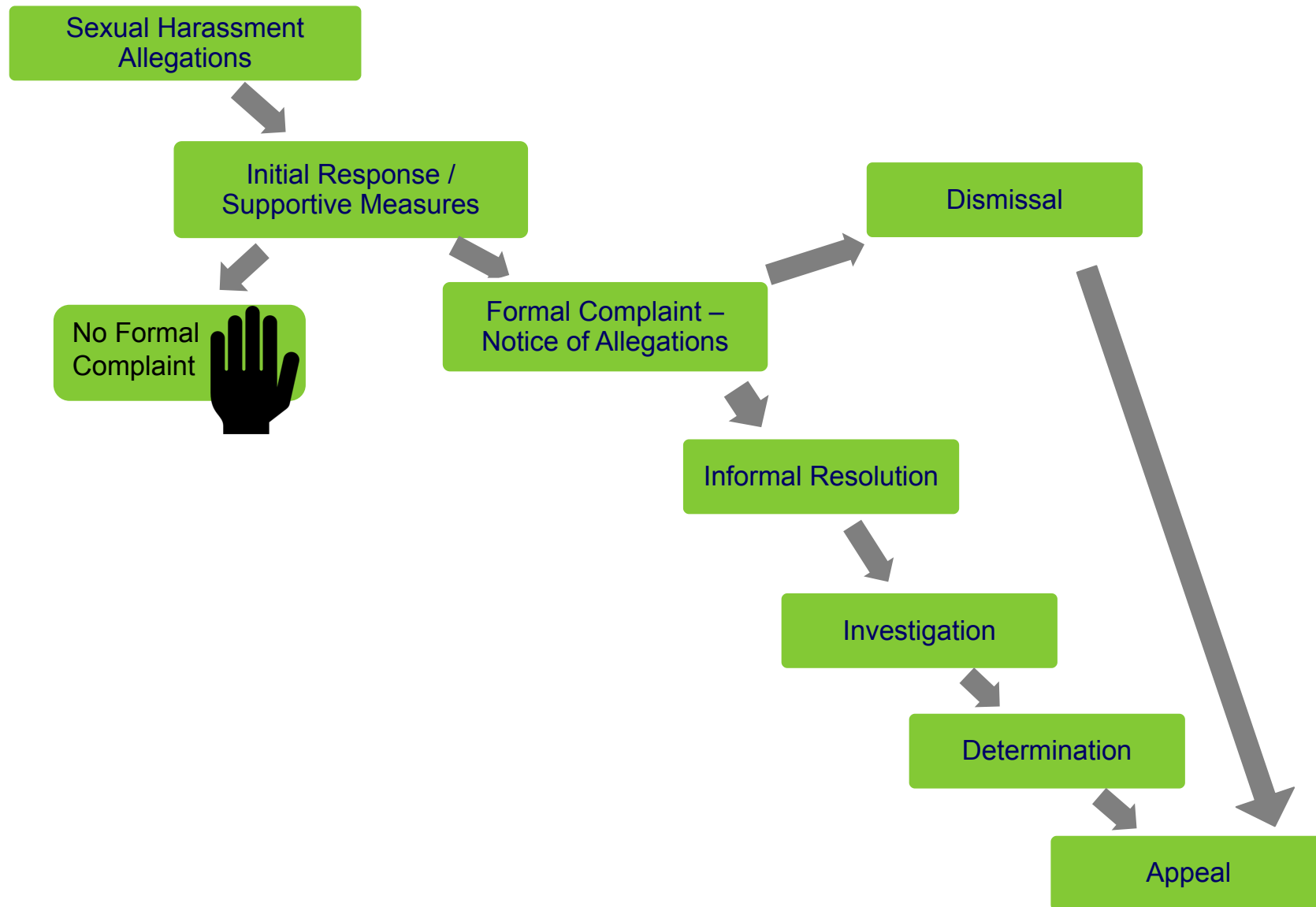


# Appeal Process

- Notify parties of appeal in writing
- Apply procedures equally for both parties
- Provide equal opportunity to submit written statement
- Issue written decision to both parties







# Recordkeeping

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# Recordkeeping

Must maintain the following for 7 years:

- Sexual harassment investigation documents, including:
  - Determination regarding responsibility
  - Recordings or transcripts of live hearing
  - Disciplinary sanctions imposed on Respondent
  - Remedies provided to Complainant
- Appeal and result
- Informal resolution and result
- Actions taken in response to a report of sexual harassment
- Actions taken in response to a formal complaint of sexual harassment



# Recordkeeping

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

- The basis for the school's conclusion that its response was not deliberately indifferent
- Documentation that it has taken measures designed to restore or preserve equal access to the school's education program or activity
- Supportive measures or if no supportive measures are provided, document the reasons why such a response was not clearly unreasonable in light of the known circumstances



# Hypotheticals

- **Chelsea purposefully touches Amy's crotch area during class on one occasion.**
- **ASK:**
  - Is this based on sex?
  - Is it quid pro quo? Hostile environment? A clery crime such as sexual assault, dating violence, domestic violence, or stalking?
  - Is it occurring in the education program or activity and in the U.S.?



# Hypotheticals

- **Emily, the Associated Student Body President, tells Kevin during an ASB meeting at school that she will make him the Vice President of the ASB if he goes out on a date with her.**
- **ASK:**
  - Is this based on sex?
  - Is it quid pro quo? Hostile environment? A clery crime such as sexual assault, dating violence, domestic violence, or stalking?
  - Is it occurring in the education program or activity and in the U.S.?





# Hypotheticals

**John and Mary are classmates. They see each other in the hallway almost every day at school. For months, John would walk up to Mary anytime he saw her and would brush her hair aside and whisper in her ear about sexual acts he wanted to perform on her. He would also make sexually explicit gestures toward her when they sat near each other during class. Mary did not say anything to John about what he did because she was afraid to say anything, but she would turn her head or walk in the other direction every time she saw him.**

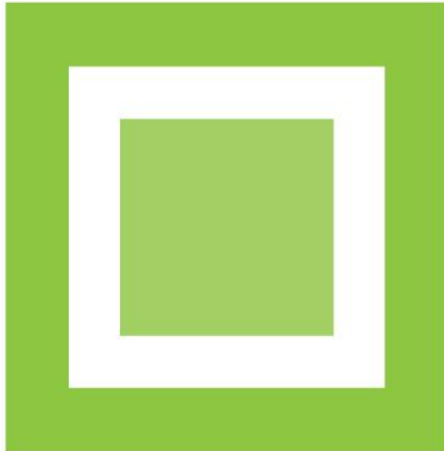
■ **ASK:**

- Is it quid pro quo? Hostile environment? A clery crime such as sexual assault, dating violence, domestic violence, or stalking?
- If hostile environment – is it unwelcome conduct? Is it severe, pervasive, and objectively offensive such that it denies Mary equal access to the education program?



# QUESTIONS?





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