

TITLE IX TRAINING

PART I: DEFINITIONS AND OVERVIEW OF PROCESS

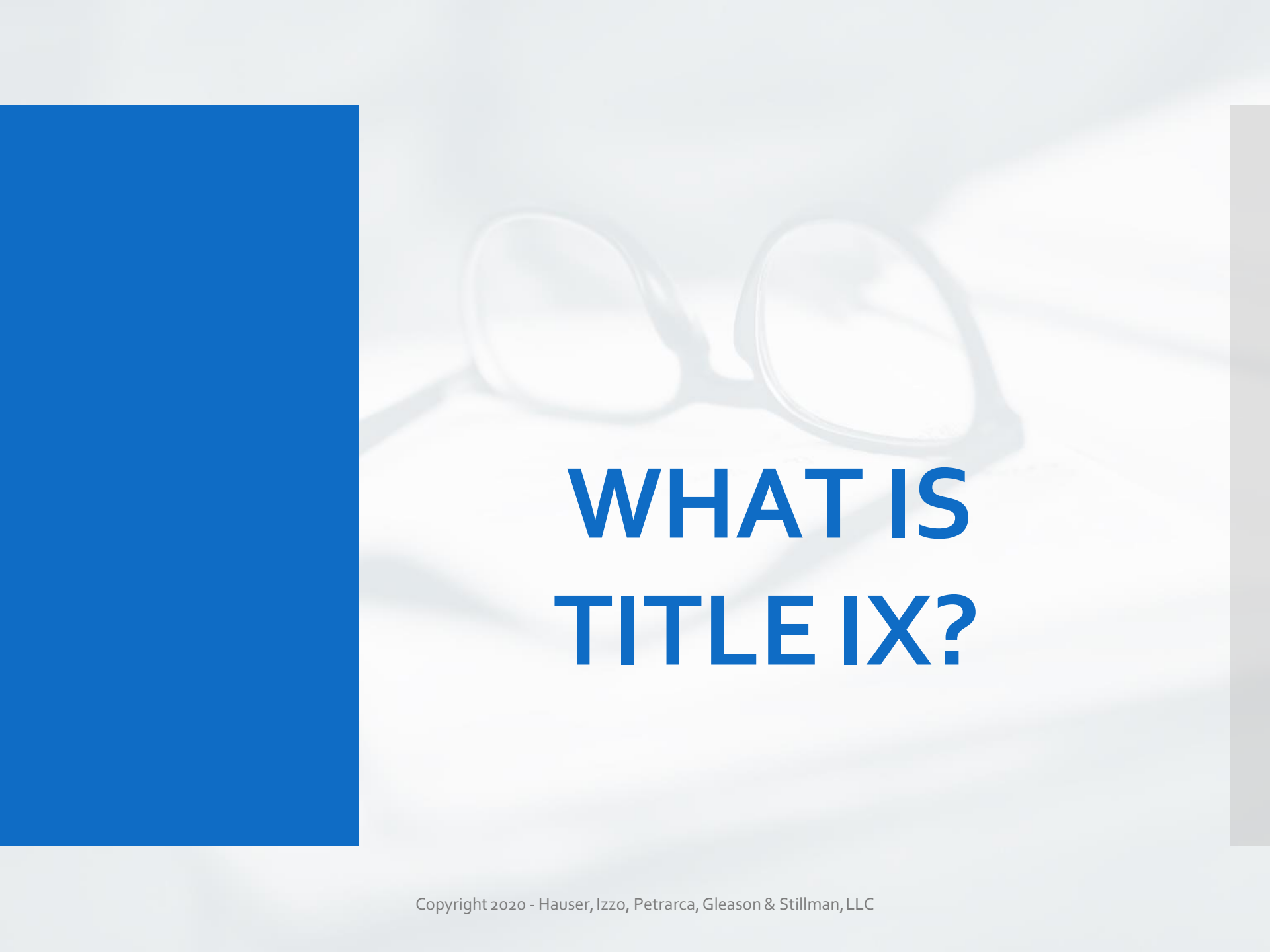
PRESENTED BY:

HAUSER, IZZO, PETRARCA,
GLEASON & STILLMAN, LLC
ATTORNEYS AT LAW

October, 2020

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WHAT IS TITLE IX?



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

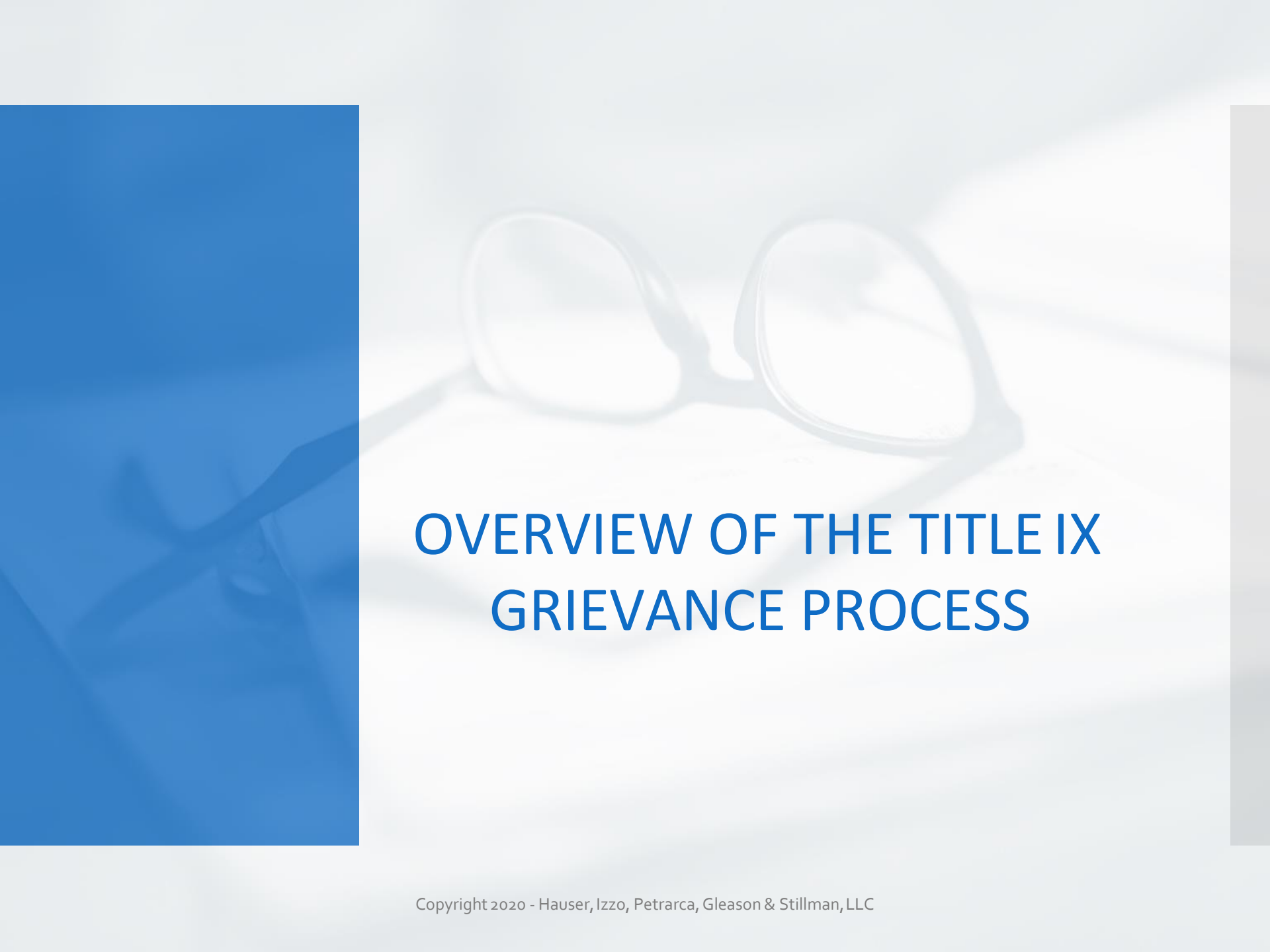
20 USC 1681

ENFORCING TITLE IX

- US DOE Office for Civil Rights- includes voluntary resolution process and determination of equitable relief.
- Courts- Complainant or Respondent may bring lawsuit for monetary damages.

WHAT ARE THE DISTRICT'S RESPONSIBILITIES?

1. Adopt a nondiscrimination policy statement that identifies a Title IX Coordinator.
2. Adopt and implement procedures for receiving and responding to reports and complaints of sexual harassment.
3. Adopt and implement a grievance process to address formal complaints of sexual harassment.
4. Implement various notice, recordkeeping, and training requirements.



OVERVIEW OF THE TITLE IX GRIEVANCE PROCESS

DEFINITION OF PARTIES:

COMPLAINANT: Person who is the alleged victim of conduct that could constitute sexual harassment.

RESPONDENT: Person who is reported to be the perpetrator of conduct that could constitute sexual harassment.

OVERVIEW OF THE TITLE IX GRIEVANCE PROCESS

- Districts are required to adopt a formal grievance process to investigate and resolve formal complaints of sexual harassment under Title IX.
- A REPORT of sexual harassment requires immediate response from the District, but only a FORMAL COMPLAINT triggers the grievance process.

OVERVIEW OF THE TITLE IX GRIEVANCE PROCESS

The grievance process must treat complainants and respondents equitably by (1) providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent; and (2) by following a grievance process that complies with the regulations before imposing any disciplinary sanctions against a respondent (other than emergency removals and administrative leaves).

Complainants and Respondents have equal opportunity in the investigation and decision-making processes.

OVERVIEW OF THE TITLE IX GRIEVANCE PROCESS

- Process must provide for investigations, determinations of responsibility and appeals that are based on an objective evaluation of relevant evidence by individuals designated by the District who are free from bias, conflict of interest and prejudgment of facts.
- Process must include reasonably prompt time frames for conclusion.

OVERVIEW OF THE TITLE IX GRIEVANCE PROCESS

REPORT of Sexual Harassment Received- meet with complainant- may result in supportive measures OR Formal Complaint.

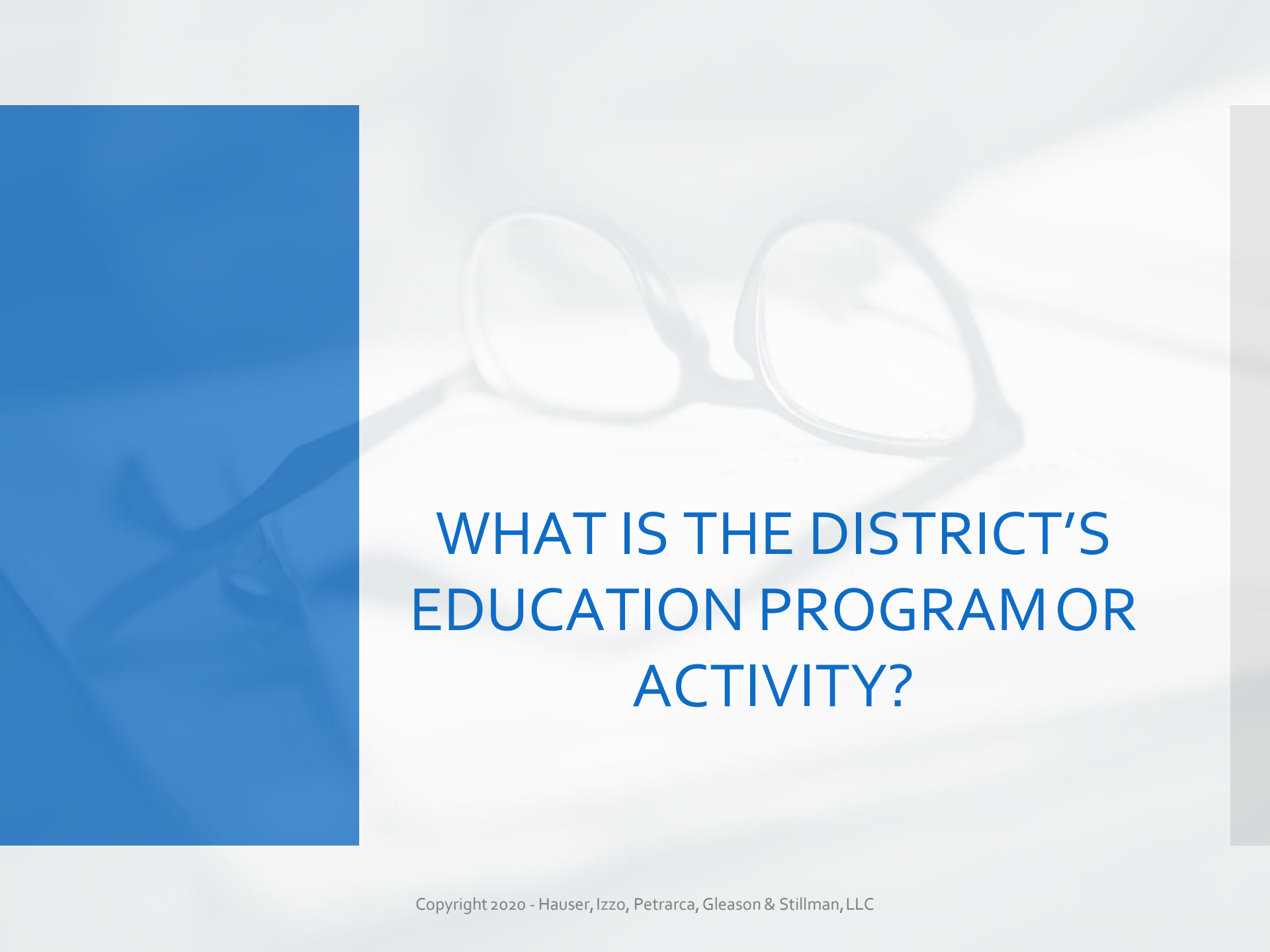
FORMAL COMPLAINT- may result in Informal Resolution or Formal Grievance Process.

FORMAL GRIEVANCE PROCESS- Investigation, Determination of Responsibility, Appeal.

WHEN MUST THE DISTRICT RESPOND TO TITLE IX SEXUAL HARASSMENT?

A District that has **actual knowledge** of Title IX **sexual harassment** against an individual in the United States in an **educational program or activity of the District**, must respond promptly, in a way that is **not deliberately indifferent**.



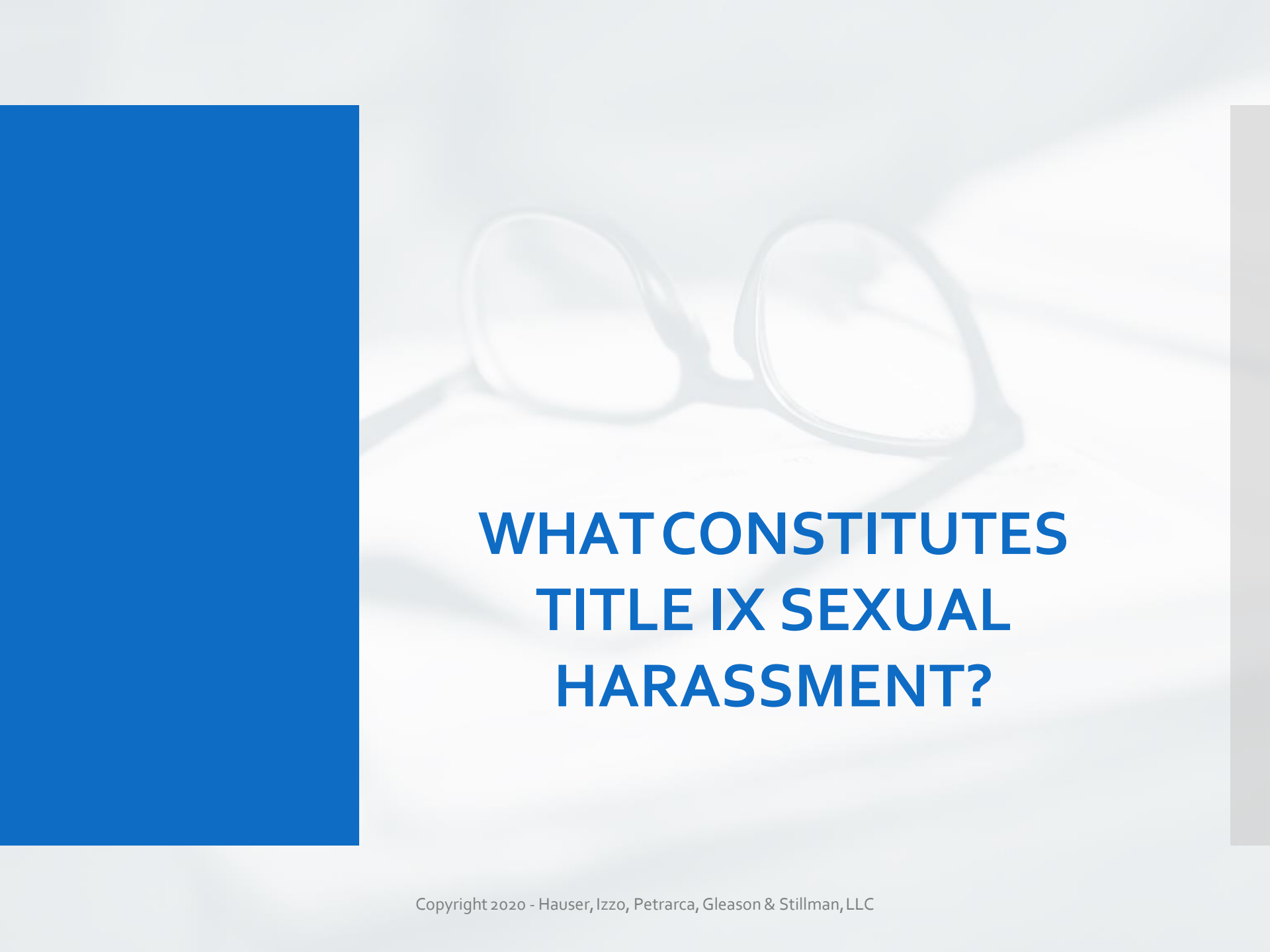


WHAT IS THE DISTRICT'S EDUCATION PROGRAM OR ACTIVITY?

THE EDUCATION PROGRAM OF THE DISTRICT INCLUDES:

ALL OPERATIONS of the District.

Locations, events, or circumstances over which the District exercised substantial control over both the respondent and the context in which the sexual harassment occurs, including off campus events.

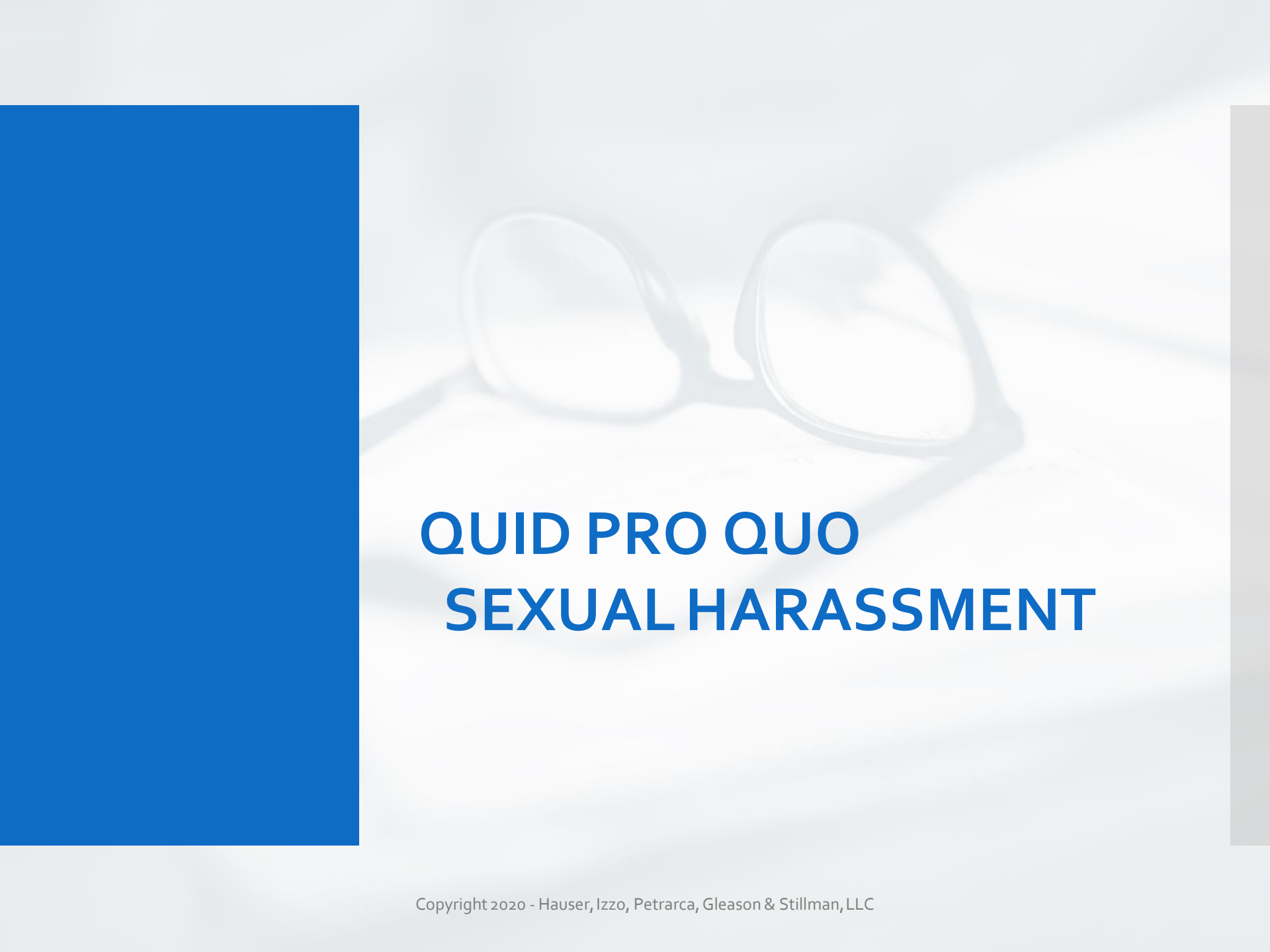


WHAT CONSTITUTES TITLE IX SEXUAL HARASSMENT?

TYPES OF SEXUAL HARASSMENT:

- Quid pro quo harassment.
- Hostile environment.
- Sexual Assault
(Clery Act)
- Dating violence
- Domestic violence
- Stalking





QUID PRO QUO SEXUAL HARASSMENT

TYPES OF SEXUAL HARASSMENT:

QUID PRO QUO SEXUAL HARASSMENT

District employee conditions providing an aid, benefit or service on participation in unwelcome sexual conduct.

(“Something for Something”)

Example:

Teacher requires kiss from student in exchange for a good grade.



QUID PRO QUO SEXUAL HARASSMENT

- School employee to student.
- Interpreted broadly.
 - Can be *implied*
 - Can be a single instance
- No requirement of intent.
- No requirement that severe or pervasive.
- Must be unwelcome.



HOSTILE ENVIRONMENT SEXUAL HARASSMENT

HOSTILE ENVIRONMENT SEXUAL HARASSMENT

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

HOSTILE ENVIRONMENT SEXUAL HARASSMENT (cont.)

- No intent required.
- Look at circumstances, expectations, relationships, location, frequency, gravity of conduct.



REASONABLE PERSON STANDARD FOR “OBJECTIVELY OFFENSIVE”

- This is a reasonable person **standing in the shoes of the complainant.**
- Regulations Commentary indicates that this is fact specific; the specific facts and circumstances of the incident and parties involved may cause different people to reach different conclusions.

SEVERITY STANDARD

- Severity considers the circumstances of the complainant, including age, disability, sex, and other characteristics.
- The Complainant need not prove severity, but only describe what happened. The School must determine if the situation is severe from the perspective of a reasonable person in the Complainant's position.

PERVASIVE STANDARD

Commentary indicates that “pervasive” is more than once. However, the school should investigate a single incident to determine if it is part of a pervasive pattern of harassment.



WHAT IS UNWELCOME?

- Unwelcome is without consent of victim and is subjective; Complainant does not wish to participate.
- Consider age, ability, culture of victim.



HYPOTHETICALS

HYPOTHETICALS

A student spreads rumors of a sexual nature through emails, texts, and social media about a classmate over a number of weeks.



HYPOTHETICALS

A student texts another student an off-color joke with sexual connotations.

HYPOTHETICALS

Throughout the football season, a team member makes sexual advances towards another team member and that player quits the team.

HYPOTHETICALS

A female teacher compliments a male student on his new haircut. The teacher has been the subject of a prior sexual harassment complaint by another student.



HYPOTHETICALS

Male teacher sends female student text messages and buys her gifts that her parents believe are inappropriately expensive.

HYPOTHETICALS

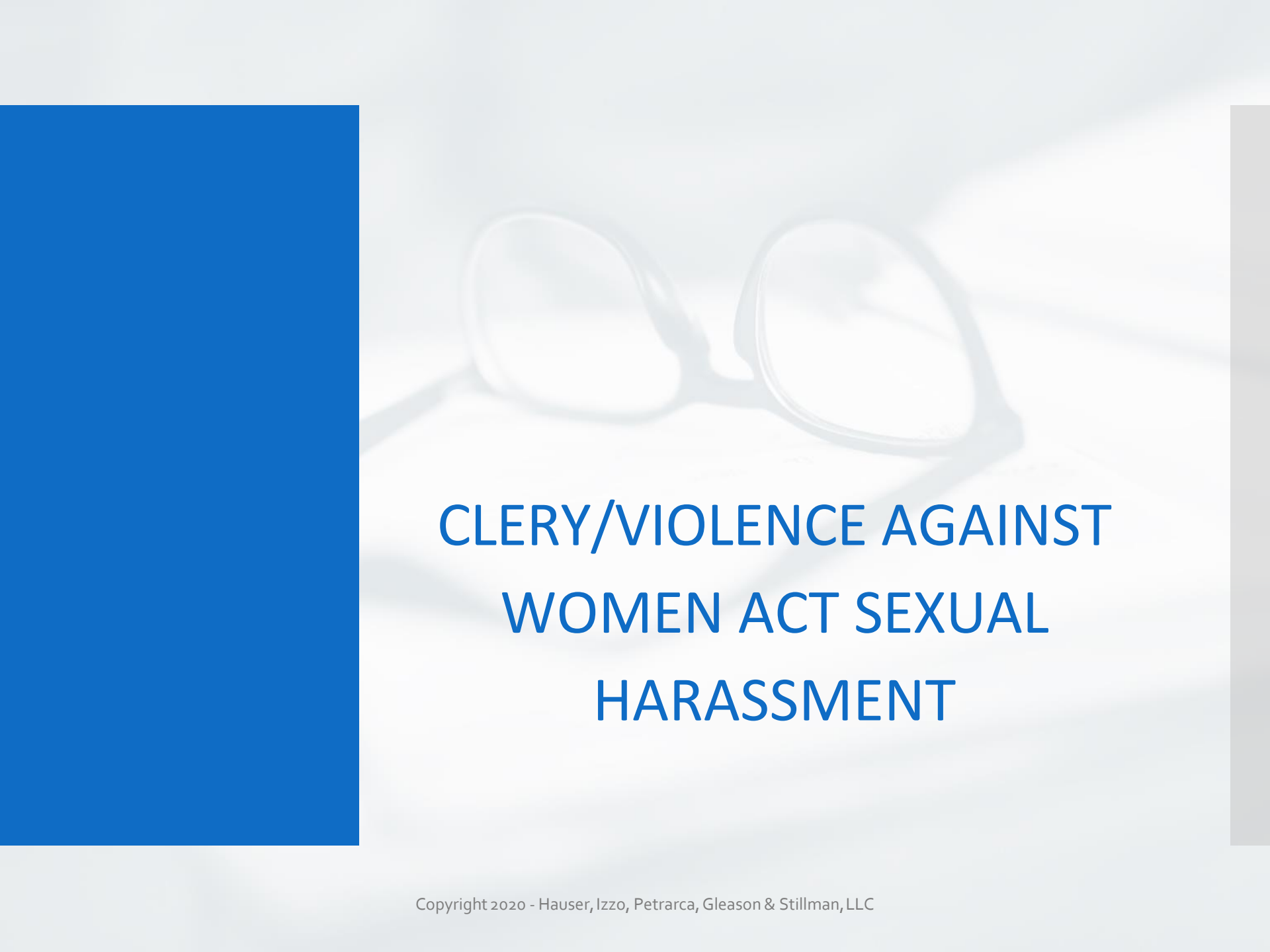
A student emails her boyfriend a picture of herself getting out of the shower.



HYPOTHETICALS

The boyfriend shares the email with other students in the evening from his home computer.





CLERY/VIOLENCE AGAINST WOMEN ACT SEXUAL HARASSMENT

SEXUAL ASSAULT: forcible or nonforcible sex offense as defined by the FBI's uniform crime reporting system:

- Rape
- Sodomy
- Sexual Assault with an object
- Fondling
- Incest
- Statutory Rape



SEXUAL ASSAULT: forcible or nonforcible sex offense as defined by the FBI's uniform crime reporting system:

"Rape" means the carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. Carnal knowledge is defined as the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).

SEXUAL ASSAULT: forcible or nonforcible sex offense as defined by the FBI's uniform crime reporting system:

"Sodomy" means oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

SEXUAL ASSAULT: forcible or nonforcible sex offense as defined by the FBI's uniform crime reporting system:

"Sexual Assault with an Object" means use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. An object or instrument is anything used by the offender other than the offender's genitalia, e.g., a finger, bottle, handgun, stick.

SEXUAL ASSAULT: forcible or nonforcible sex offense as defined by the FBI's uniform crime reporting system:

“Fondling” means the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

SEXUAL ASSAULT: forcible or nonforcible sex offense as defined by the FBI's uniform crime reporting system:

“Incest” means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

SEXUAL ASSAULT: forcible or nonforcible sex offense as defined by the FBI's uniform crime reporting system:

“Statutory Rape” means sexual intercourse with a person who is under the statutory age of consent. (In Illinois, age of consent is 17)

DATING VIOLENCE:

An Act of violence by a person who is or has been in a romantic or intimate relationship with the Complainant. Whether this relationship exists is determined by:

- Length of the relationship.
- Type of relationship.
- Frequency of interaction between the individuals involved.

(does not require pervasiveness)



DOMESTIC VIOLENCE:

Violence committed by a current or former spouse or intimate partner, a person with whom the Complainant shares a child in common, a former or current cohabiter as a spouse or intimate partner, someone similarly situated to a spouse under domestic or family violence laws or a person against whom the Complainant is protected under domestic or family violence laws (e.g. under an order of protection).

STALKING:

Engaging in a course of conduct directed at a specific person that would cause a reasonable person with similar characteristics under similar circumstances to:

- Fear for his or her safety or the safety of others; or
- Suffer substantial emotional distress.

Must be sex-based stalking to qualify as sexual harassment under Title IX.





WHAT IS ACTUAL KNOWLEDGE?

Actual knowledge is notice of sexual harassment or allegations of sexual harassment to:

- The Title IX Coordinator.
- A District official who has the authority to institute corrective measures; or
- ANY EMPLOYEE OF A SCHOOL, K-12.



EXAMPLES OF ACTUAL KNOWLEDGE:

- You personally see or hear something.
- You receive a verbal or written report from a student or from anyone.
- You receive multiple reports that together provide a different perspective of conduct than did a single report.
- A formal complaint is filed pursuant to the District's Title IX Grievance Process.

REPORTS OF SEXUAL HARASSMENT

- **Any person** may report sexual harassment; it need not be the alleged victim.
- Sexual harassment may be reported at **any time**.
- Reports can be made in person, by telephone, by mail or email, using the contact information listed for the Title IX Coordinator.
- Reports can be made by any other means that results in the Title IX Coordinator receiving the verbal or written report.



CONFIDENTIALITY

The District must keep confidential the identity of any individual who makes a report or complaint of sex discrimination, including sexual harassment, any complainant, any respondent, anyone who has been accused of sex discrimination or harassment and any witness, except as required by FERPA or to carry out the purposes of the regulations, including the investigation and grievance process, and unless confidentiality would impair the ability to provide supportive measures.

RETALIATION PROHIBITED

No school district or other person may intimidate, threaten, coerce or discriminate against any person for the purpose of interfering with the person's Title IX rights or because the person made a report or complaint, testified, assisted or participated in the Title IX grievance process.





WHAT IS DELIBERATE INDIFFERENCE?

WHAT IS DELIBERATE INDIFFERENCE?

A District is deliberately indifferent if its response to an allegation of sexual harassment is “clearly unreasonable in light of the known circumstances.”

WHAT IS DELIBERATE INDIFFERENCE? (cont.)

“Clearly unreasonable” is not defined in the regulations, but the regulations require that the District treat complainants and respondents equitably:

- Complainant- supportive measures

- Respondent- disciplined only after responsibility determined in grievance process

Reasonable Response Required by Regulations:

1) Supportive Measures- regardless of whether a formal complaint is filed.

After a formal complaint is filed:

2) Voluntary Informal Resolution.

3) Formal Grievance Process.

FORMAL COMPLAINT

- Document filed by a complainant or signed by the Title IX Coordinator.
- Alleges sexual harassment against a Respondent.
- Requests that the school district investigate the allegation of sexual harassment.



FORMAL COMPLAINT(cont.)

- At the time the Complaint is filed, the Complainant must be participating in, or attempting to participate in an educational program or activity of the District.



TITLE IX TRAINING

PART II: SUPPORTIVE MEASURES

**PRESENTED BY:
HAUSER, IZZO, PETRARCA,
GLEASON & STILLMAN, LLC**

OCTOBER, 2020

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SUPPORTIVE MEASURES:

- **Non-disciplinary, non-punitive individualized services** offered as appropriate, as reasonably available and without fee or charge to the complainant or respondent **before or after the filing of a formal complaint or where no formal complaint has been filed.**
- Designed to restore or preserve equal access to the education program or activity **without unreasonably burdening the other party**, including measures designed to protect the safety of all parties or the school environment, or to deter sexual harassment.

SUPPORTIVE MEASURES: (CONT.)

- Supportive measures **must** be offered to the complainant; they **may** be provided to the respondent.
- Supportive measures provided to the complainant or respondent must be kept confidential to the extent that confidentiality does not impair the ability to provide the measures.

SUPPORTIVE MEASURES: (CONT.)

- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- Identifying, offering, and monitoring supportive measures should be ongoing and continuous until the situation is resolved.
- If the District determines that allegations would not constitute Title IX sexual harassment, it still may provide supportive measures in non-Title IX situations, such as in response to allegations of bullying or other harassment.

WHAT IS AN “UNREASONABLY BURDENSOME” SUPPORTIVE MEASURE?

- No specific definition in the regulations.
- The Preamble indicates that the purpose of this condition is to protect complainants and respondents from the other party's request for a supportive measure that would unreasonably interfere with either party's educational pursuits.
- The Comments suggest that the District's grievance process should be conducted timely to avoid supportive measures being unreasonably burdensome.

EXAMPLES OF SUPPORTIVE MEASURES:



- Counseling
- Extension of deadlines or other course-related adjustments.
- Modification of work or class schedules or student seating.
- Escort services.
- Mutual restrictions on contact between the parties.
- Leaves of Absence for employee.
- Increased security and monitoring.
- Other similar measures.

EXAMPLES OF SUPPORTIVE MEASURES IN PREAMBLE:

The list in the Regulations Preamble is meant to be non-exhaustive and schools have flexibility in designing these measures:

- Supportive measures should be ageappropriate.
- Use common sense and good judgment.
- Consider the needs of the parties and the circumstances of the situation.

THESE ARE NOT SUPPORTIVE MEASURES :

- Expulsion
- Termination of Employment

before the grievance process has been completed because these measures are disciplinary, punitive, and/or unreasonably burdensome to the Respondent.



EMERGENCY REMOVAL OF STUDENT AS A SUPPORTIVE MEASURE:

The regulations provide for emergency removal of a student in response to an allegation of Title IX sexual harassment:

- The District must perform an individualized safety and risk analysis and determine that there is an immediate threat to the physical health or safety of any student or other individual arising from the sexual harassment allegation that justifies removal.
- The student removed must have notice and an opportunity to challenge the decision immediately after removal.
- This does not modify student rights under IDEA, Section 504, the ADA, or Senate Bill 100.

ADMINISTRATIVE LEAVE OF EMPLOYEE AS A SUPPORTIVE MEASURE:

The regulations also permit a District to place a non-student employee on administrative leave during the pendency of the grievance process in response to a formal complaint.

- The Preamble states that the leave is paid so it is not unreasonably burdensome.
- The employee's rights under ADA are not affected by the regulations.
- Also consider Illinois law, board policy and collective bargaining agreement.



TITLE IX TRAINING

PART III: INFORMAL RESOLUTION

OCTOBER, 2020



**PRESENTED BY:
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INFORMAL RESOLUTION

After a Formal Complaint of Title IX sexual harassment has been filed, the District **may** offer the parties an informal process, such as mediation, to resolve the Complaint. Otherwise, the “default” under the regulations is investigation and adjudication of the Complaint under the grievance process.



INFORMAL RESOLUTION (cont.)

- Informal Resolution may be offered only when a Formal Complaint is filed.
- The District cannot require the parties to participate in lieu of the formal grievance process.
- Informal Resolution may occur at any time prior to the District reaching a Determination on the Formal Complaint.

INFORMAL RESOLUTION (cont.)

- Informal Resolution must be completed in a reasonably prompt time frame.
- The District must obtain the voluntary, written consent of each party to participate in the Informal Resolution.
- Any party has the right to withdraw from Informal Resolution at any time prior to finalizing the process.
- If Informal Resolution is attempted and not successful, the District must complete a full investigation and adjudication of the Formal Complaint using the grievance process.

NOTICE REGARDING INFORMAL RESOLUTION

The written notice of Formal Complaint allegations must include:

- notice of the availability of Informal Resolution;
- the circumstances in which Informal Resolution precludes resuming the Formal Complaint process arising from the same allegations;
- the right to withdraw from the process at any time; and
- any consequences resulting from the Informal Resolution process, including records that will be maintained or could be shared.



WHO CAN FACILITATE AN INFORMAL RESOLUTION?

- The person facilitating the Informal Resolution must not have a conflict of interest, or a bias for or against complainants or respondents in general, or against the participating complainant or respondent.
- The person facilitating the Informal Resolution must receive training in the definitions of Title IX sexual harassment, the scope of the District's education program or activity, how to conduct an investigation and grievance process, the informal resolution process and how to serve impartially, including avoiding prejudgment, conflict of interest and bias.

WHO CAN FACILITATE AN INFORMAL RESOLUTION? (cont.)

The person facilitating the Informal Resolution may not be the same person who will act as the investigator, decision maker or appeal decision maker in the grievance process.



INFORMAL RESOLUTION

Informal Resolution MAY NOT be used to resolve allegations that an employee sexually harassed a student.





TITLE IX TRAINING

PART IV: COORDINATORS

**PRESENTED BY:
HAUSER, IZZO, PETRARCA,
GLEASON & STILLMAN, LLC**

OCTOBER, 2020

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DISTRICT IDENTIFICATION OF TITLE IX COORDINATOR

- The District must expressly designate at least one employee as the “Title IX Coordinator.”

(This is a significant role, so the District may want to designate more than one individual or designate deputy Coordinators to whom the Title IX Coordinator may delegate specific tasks.)

REQUIRED NOTIFICATIONS

The District must notify students, parents, employees, unions, applicants for employment of:

- The Title IX Coordinator's (1) name or title; (2) address; (3) email address and (4) telephone number.
- The name and contact information for the Title IX Coordinator must be prominently displayed on the District's website and in each handbook made available to students, parents, employees, unions, and applicants for employment.



REQUIREMENTS FOR THE TITLE IX COORDINATOR

- The individual must not have a conflict of interest, bias against complainants or respondents in general, or against a specific complainant or respondent.
- The person must have adequate time to devote to Coordinator responsibilities.
- The person must have required training in definitions of Title IX sexual harassment, the scope of the District's education program or activity, how to conduct a grievance process, how to serve impartially, including avoiding prejudgment of facts, bias, and conflict of interest.

OVERVIEW OF COORDINATOR ROLES AND RESPONSIBILITIES

- Coordinate District efforts to comply with Title IX regulations – notices, staff training and record keeping.
- Receive reports and Formal Complaints of sexual harassment from any person.
- Respond to reports and complaints of sexual harassment.
- Identify and oversee implementation of supportive measures.



OVERVIEW OF COORDINATOR ROLES AND RESPONSIBILITIES (CONT.)

- Has discretion to file formal complaint.
- Oversee grievance process and serve as resource.
- Dismiss formal complaint as appropriate.
- Ensure effective implementation of any remedies determined by the decision maker.
- Cannot perform any decision-making role in formal complaints.



RESPONDING TO REPORTS OF SEXUAL HARASSMENT

REPORTS OF SEXUAL HARASSMENT

- **Any person** may report sexual harassment; it need not be the alleged victim.
- Sexual harassment may be reported at **any time**.
- Reports can be made in person, by telephone, by mail or email, using the contact information listed for the Title IX Coordinator.
- Reports can be made by any other means that results in the Title IX Coordinator receiving the verbal or written report.



REPORTS OF SEXUAL HARASSMENT

Reminder: A report of sexual harassment is not the same as a formal complaint. Only a formal complaint begins the grievance process. However, the District must respond to both.

GENERAL RESPONSE TO A REPORT OF SEXUAL HARASSMENT

Upon receipt of a report of sexual harassment, the Coordinator must:

- Promptly contact the Complainant to discuss the availability of supportive measures.
- Consider the Complainant's wishes regarding supportive measures.
- Inform Complainant that supportive measures are available, whether or not a formal complaint is filed.
- Explain process for filing a formal complaint.



MEETING WITH COMPLAINANT

- Be sensitive and supportive; Do not make comments or use body language that suggest disbelief or that the reported behavior is the Complainant's fault; Do not discourage the Complainant from participating in the grievance process.
- Document your conversation.
- Remind complainant that retaliation is prohibited.

MEETING WITH COMPLAINANT (CONT.)

Offer Supportive Measures:

- Document supportive measures offered and accepted.
- Document supportive measures offered and rejected and the Complainant's reason for rejecting the supportive measure.
- Document any supportive measures requested by the Complainant that will not be provided and the reason the District will not provide the requested supportive measure.

MEETING WITH COMPLAINANT (CONT.)

- Explain how to file a formal complaint.
- Explain informal resolution process if offered by District.
- Explain grievance process- investigation and determination of responsibility, appeal process.

IMPLEMENTATION OF SUPPORTIVE MEASURES

- Coordinate supportive measures with school employees on a need to know basis.
- Monitor provision and effectiveness of supportive measures.

FORMAL COMPLAINT

- Document filed by complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the District investigate the allegation of sexual harassment.

Remember that a formal complaint begins the grievance process but notice of conduct that could constitute Title IX sexual harassment triggers the District's obligation to respond to the situation.

FORMAL COMPLAINT (CONT.)

- Complainant may file a formal complaint with the Title IX Coordinator in person, by mail, by email or electronically through a portal provided by the District, or by any other method designated by the District, using the contact information the District is required to provide for the Title IX Coordinator.
- Complaint must include the Complainant's physical or digital signature or otherwise indicate that the Complainant is the person filing the formal complaint.



**SHOULD THE FORMAL COMPLAINT
BE DISMISSED?**

MANDATORY DISMISSAL OF COMPLAINT

The Coordinator **must** dismiss the Formal Complaint if:

- The conduct alleged does not constitute sexual harassment.
- The conduct did not occur in the District's education program or activity.
- The conduct did not occur in the United States.

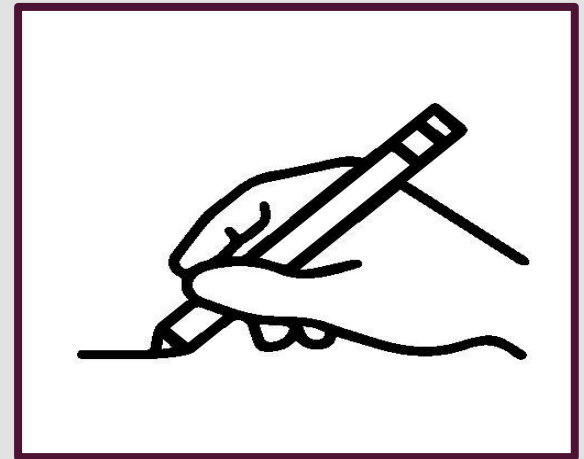
PERMISSIVE DISMISSAL OF THE COMPLAINT

The Coordinator **may** dismiss the formal complaint if:

- Complainant provides the Coordinator written notification that he or she wishes to withdraw the formal complaint or any allegations in the complaint.
- The Respondent is no longer enrolled in or employed by the District.
- Specific circumstances prevent the District from gathering evidence sufficient to reach a determination regarding the formal complaint or its allegations.

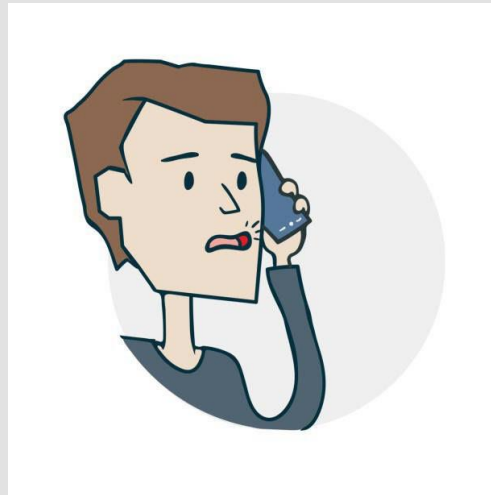
The Coordinator must promptly send notice of the dismissal to the Complainant and Respondent simultaneously and the reasons for dismissal.

Either party may appeal the Dismissal.



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- Dismissal means dismissal from the Title IX process. However, the District should still enforce its Code of Conduct and policies and may offer supportive measures.
- Follow the uniform grievance procedure?
 - Determine consequences under the District's bullying policy?





**A FORMAL COMPLAINT MAY ALSO BE FILED BY
THE TITLE IX COORDINATOR**

WHEN IS A FORMAL COMPLAINT FILED BY THE TITLE IX COORDINATOR?

- The Complainant declines to file a formal complaint, but the Title IX Coordinator determines that the District's interest in the situation is sufficiently substantial that the matter should be investigated and resolved through the grievance process.
- **Only** the Title IX Coordinator may file a complaint, but he or she may obtain input from other District officials or legal counsel to determine whether to file the complaint.

The Preamble to the regulations indicates that whether the Coordinator should file a formal complaint when the Complainant does not want an investigation or to participate should be made thoughtfully and intentionally and the Coordinator should evaluate whether filing is necessary as part of a response that is not deliberately indifferent or clearly unreasonable in light of the known circumstances.



The Preamble indicates that Coordinators have discretion, but are not required to file a formal complaint after receiving multiple reports of potential sexual harassment about the same respondent.

-
- If the Coordinator **DOES** sign a formal complaint, the Coordinator is not the Complainant in the grievance process and must remain free from conflict of interest and bias.
 - The Complainant is not obligated to participate in the grievance process.

CONSOLIDATION OF FORMAL COMPLAINTS

The District may consolidate formal complaints against more than one Respondent, or by more than one Complainant against one or more Respondents, or by one party against the other where the sexual harassment allegations arise out of the same facts and circumstances.

**COORDINATOR MUST ENSURE NOTICE TO PARTIES IF
THE FORMAL COMPLAINT IS NOT DISMISSED**



WRITTEN NOTICE OF ALLEGATIONS TO ALL PARTIES

The notice of allegations potentially constituting sexual harassment must include sufficient details known at the time:

- Identities of the parties.
- Conduct allegedly constituting sexual harassment.
- Date and location of alleged incident.

The notice must be supplemented if new allegations are made after issuance.

WRITTEN NOTICE OF ALLEGATIONS TO ALL PARTIES (CONT.)

- Must be provided in sufficient time for the parties to prepare a response before any initial interview in the investigation process.
- Must include a statement that Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.

WRITTEN NOTICE OF ALLEGATIONS TO ALL PARTIES (CONT.)

- Must include information about any informal resolution process the District has made available.
- Notice, that if informal resolution is available, either party has the right to withdraw from informal resolution and resume the grievance process at any time before agreeing to a resolution.
- Notice of any consequences resulting from the informal resolution process, including records that will be maintained or could be shared.

WRITTEN NOTICE OF ALLEGATIONS TO ALL PARTIES (CONT.)

- Must inform the parties that that they may have an advisor of their choice, who may be an attorney, inspect and review evidence during the grievance process.
- Must inform parties of any provision in the District's policy that prohibits knowingly making false statements or submitting false information during the grievance process.

TITLE IX COORDINATOR SHOULD CONSIDER EMERGENCY REMOVAL OF STUDENT OR ADMINISTRATIVE LEAVE OF EMPLOYEE



EMERGENCY REMOVAL OF STUDENT AS A SUPPORTIVE MEASURE

The regulations provide for emergency removal of a student in response to an allegation of Title IX sexual harassment:

- The District must perform an individualized safety and risk analysis and determine that there is an immediate threat to the physical health or safety of any student or other individual arising from the sexual harassment allegation that justifies removal.
- The student removed must have notice and an opportunity to challenge the decision immediately after removal.
- This does not modify student rights under IDEA, Section 504, the ADA, or Senate Bill 100.

ADMINISTRATIVE LEAVE OF EMPLOYEE AS A SUPPORTIVE MEASURE

The regulations also permit a district to place a non-student employee on administrative leave during the pendency of the grievance process in response to a formal complaint.

- The preamble states that the leave is paid so that it is not unreasonably burdensome.
- The employee's rights under ADA are not affected by the regulations.
- Also consider Illinois law, board policy and collective bargaining agreement.

COORDINATOR ROLE IN INSPECTION/REVIEW OF EVIDENCE

The Coordinator may also be the investigator (but not a decision maker).

The Coordinator (or the separate investigator) may facilitate the parties' opportunity to inspect and review any evidence obtained as part of the investigation.

COORDINATOR ROLE IN INVESTIGATION

- After completion of the investigation, the Coordinator (or investigator) **MAY** be responsible for providing the parties with a copy of the written investigative report (must be sent at least 10 days before determination of responsibility is reached).
- May coordinate review process and exchange of written questions.



COORDINATOR ROLE AFTER INFORMAL RESOLUTION OR THE GRIEVANCE PROCESS

The Coordinator must oversee implementation of supportive measures and remedies, as applicable.

ROLE OF COORDINATOR TO DEVELOP RECORD KEEPING PROTOCOLS

The Title IX regulations require that certain records be maintained for SEVEN years from the date the proceedings conclude and any sanctions or remedies are implemented.

It is recommended that records be maintained for longer than seven years if the complainant or respondent is a minor, through the relevant statute of limitations for the minor filing a civil suit regarding the allegations.



RECORDS TO BE MAINTAINED

- Records of any actions the District takes, including supportive measures, in response to a report **OR** formal complaint of sexual harassment.
- Document basis for conclusion that District response is not deliberately indifferent and measures have been taken to restore or preserve equal access to the school's education program or activity.
- If the District does not provide complainant with supportive measures, it must document why not providing the supportive measure(s) was not clearly unreasonable in light of known circumstances.

RECORDS TO BE MAINTAINED

- All materials used to train Coordinators, investigators, decision-makers and any person facilitating an informal resolution process.
- These materials must also be made available on the District's website.

RECORDS TO BE MAINTAINED WITH REGARD TO FORMAL COMPLAINT

- Records of each sexual harassment investigation, including determination of responsibility, any disciplinary sanctions against Respondent, any remedies provided to Complainant to restore or preserve equal access to the school's education program or activity.
- Transcript from any hearing.
- Documents from any appeal and the result of the appeal.
- Documentation of any informal resolution and the result therefrom.

COORDINATOR ROLE TO ENSURE MANDATORY TRAINING

Persons designated by the District as Title IX Coordinators, investigators, decision makers or facilitators of informal resolution must receive training on:

- Definition of sexual harassment.
- Scope of the District's education program or activity.
- How to conduct an investigation and grievance process, including appeals and informal resolution.
- How to serve impartially, including avoiding prejudgment of facts, conflicts of interest and bias.

COORDINATOR ROLE TO ENSURE MANDATORY TRAINING (CONT.)

- Investigators must receive training on relevance and how to create an investigative report that fairly summarizes relevant information.
- Decision makers must receive training on relevance of questions and evidence, including when evidence of a complainant's sexual predisposition or prior sexual behavior are not relevant.



TITLE IX TRAINING PART V: INVESTIGATION

OCTOBER, 2020

PRESENTED BY:
HAUSER, IZZO, PETRARCA,
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GRIEVANCE PROCESS OVERVIEW

Grievance Process Timeline

The formal grievance process begins after a complainant files a formal complaint.

Steps in the process:

- Notice to the parties
- Investigation
- Determination
- Appeal

NOTICE

Notice Requirements

The school must provide the parties with written notice containing the following information:

- The school's grievance process, including any informal resolution process.
- The allegations of sexual harassment, including details about:
 - Identities of the parties.
 - The conduct allegedly constituting sexual harassment.
 - Date and location of the alleged incident(s).
- The parties may have an advisor of their choice.
 - The advisor can, but is not required to, be an attorney.
- The parties have the right to inspect and review the evidence gathered during the investigation.
- The parties must receive notice with sufficient time to prepare a response before any initial interview.



MODIFYING INVESTIGATIONS

Modifying Investigations

Can a school investigate allegations that are not in the notice provided to the parties at the beginning of the grievance process?

- Yes, but only if it provides notice of the additional allegations to the parties.



DISMISSING AND CONSOLIDATING COMPLAINTS

Dismissing a Formal Complaint

Complaint must be dismissed if:

- The allegations do not constitute sexual harassment (even if proved).
- The conduct did not occur in the District's education program or activity; OR
- The conduct did not occur against a person in the United States.



Dismissing a Formal Complaint (Cont.)

The school may dismiss a complaint if:

- A complainant notifies the Title IX Coordinator in writing that he or she wants to withdraw the formal complaint or any allegations.
- The respondent is no longer enrolled or employed by the school.
- Circumstances prevent the school from gathering sufficient evidence to reach a determination.

Dismissing a Formal Complaint (Cont.)

When a complaint is dismissed, the school must send the parties notice of the dismissal promptly and simultaneously.

Dismissal from Title IX grievance process does not preclude action under a different school policy or code of conduct.

Consolidating a Formal Complaint

The school may consolidate formal complaints when the allegations of sexual harassment arise out of the same facts or circumstances.

INVESTIGATION BASICS

When does an investigation occur?

A school is required to investigate sexual harassment allegations that are made in a formal complaint.

What happens in an investigation?

During an investigation, the school gathers evidence and proof related to the sexual harassment complaint.

Specific steps will vary depending on the specific case.

- Nature of the allegations.
- Age of the parties (e.g., student or employee).
- Number of people involved or with knowledge.

THE INVESTIGATOR

Investigator Requirements

The investigator cannot also be the decision-maker or the appeal decision-maker

Impartial and unbiased

- In general AND in the specific case.

Cannot have a conflict of interest

- If the investigator has a conflict of interest, he or she must be recused from the case.



IMPARTIALITY

Impartiality Basics

Being impartial means avoiding:

- Prejudgment of the facts at issue.
- Conflicts of interest.
- Bias
 - For or against complainant or respondents generally.
 - For or against the parties in a specific case.

Who has to be impartial?

- All participants from the school.
 - Title IX Coordinators, Investigators, Decision-Makers, and any person who facilitates an informal resolution process.

IMPARTIALITY

Prejudgment of Facts at Issue

What does prejudgment mean?

- Passing judgment prematurely or without sufficient analysis or investigation.
- *e.g.*, assuming something happened based on your own preconceived beliefs.

Prejudgment Examples

Sex stereotyping.

Assuming a party does not recall events because they were consuming alcohol at the time.

Assuming most harassment claims are baseless.

Avoiding Prejudgment

Keep an open mind.

Wait to hear all the facts.

Seek out more information.

- Do not stop investigating because the facts you currently have match what you think happened.

Prejudgment Hypothetical

An investigator has previously made comments about how female students often dress inappropriately and “ask for” attention from male students and staff. The female student alleging sexual harassment was wearing a short skirt during the incident at issue.

Does this investigator seem impartial?

Conflicts of Interest

A person cannot administer the Title IX process if he or she has a conflict of interest that prevents him or her from acting impartially.

What is a conflict of interest?

- A conflict of interest occurs when a person's private interests might affect or compromise his or her actions, decisions, judgments, etc.

Types of Conflicts of Interest

Actual Conflict

- A personal interest actually interferes with a participant (e.g. investigator's) ability to act impartially.
- Direct conflict between interest and duties.



Potential Conflict

- A personal interest could interfere with a participant's ability to act impartially.

Perceived Conflict

- The complainant, respondent, or other third parties could reasonably believe that a participant cannot act impartially based on the participant's personal interests.

Conflicts of Interest Examples

The investigator is related to a complainant.

The decision-maker has an outside business relationship with a respondent.

The Title IX Coordinator has been close family friends with the respondent since they were children.

Recusal Based on a Conflict of Interest

Objective test

- Would a reasonable person believe, based on the facts at issue and the participant's personal interests, that the participant in the Title IX process can act impartially?

Bias

What is bias?

- Favorable or unfavorable inclination or preconceived opinion.

Bias can be general or specific.

- General bias
 - Bias in favor or against complainants or respondents generally.
- Specific bias
 - Bias in favor or against the complainant or respondent in a specific case.

Checking Against Bias

Bias can be implicit.

- All participants in the Title IX process need to be cognizant of what they are thinking/feeling, and why they think/feel that way.
- Listen to the opinions of others.
 - If another participant views certain evidence differently, ask yourself why?

The outcome should be based on the facts of the case.

- Not the preconceived beliefs of an investigator, decision-maker, etc.



Bias Examples

General Bias

- An investigator's sibling was previously falsely accused of sexual harassment. The investigator thinks that most complainants are making things up.
- Racial bias

Specific Bias

- A decision-maker previously received a bad evaluation by a superior who is now the respondent in a Title IX matter. The decision-maker does not like the respondent because of the bad review and is “out to get him.”

INVESTIGATION REQUIREMENTS

Burden of Gathering Evidence

The burden to gather evidence is placed on the school investigating the sexual harassment complaint.

- The burden is not on the complainant.
- The burden is not on the respondent.



The Parties' Role in the Investigation

Although it is the school's burden to gather evidence, schools may not restrict the abilities of the parties to discuss allegations or to gather and present evidence.

The parties must have an equal opportunity to present witnesses and evidence.

- Parties can present both fact and expert witnesses.
- Other inculpatory and exculpatory evidence.
 - Inculpatory = evidence indicating guilty/responsibility.
 - Exculpatory = evidence indicating innocence/lack of responsibility.

The school cannot restrict the parties' ability to discuss the allegations.

The Parties' Role in the Investigation (Cont.)

The parties must have the same opportunities to have other people present during any grievance proceeding.

- *e.g.*, to be accompanied at an investigation meeting by an advisor.
- The school can establish restrictions regarding how much the advisor can participate, but the restrictions must apply equally to the parties.

Requiring an Individual's Participation

The school must provide written notice to a party whose participation is invited or expected with information about:

- Date
- Time
- Location
- Participants
- Purpose of hearings, interviews, or other meetings.



Notice must be provided with sufficient time for a party to prepare to participate.

Parties' Review of Evidence

The school must provide the parties with equal opportunity to inspect and review evidence directly related to the allegations of the formal complaint.

- Including evidence the school does not intend to rely upon.
- Including all inculpatory or exculpatory evidence.
 - Whether obtained from a party or a different source.
- Parties must have at least 10 days to submit a written response before the investigative report is completed.

EVIDENTIARY ISSUES DURING AN INVESTIGATION

What is “Relevant” Evidence

Evidence is relevant if:

- It has any tendency to make any fact more or less probable than it would be without the evidence, AND
- The fact is of consequence in determining the action.

What is not relevant?

- Privileged information (e.g. attorney-client privilege).
- A party’s medical records (unless the party provides voluntary written consent).
- The complainant’s sexual predisposition, unless:
 - It is offered to prove that someone other than respondent is responsible,
OR
 - It relates to complainant’s prior sexual behavior with the respondent and is offered to show consent.

TIPS FOR CONDUCTING AN INVESTIGATION

Types of Evidence – Examples

Documents, including electronic records.

Emails and other written communications.

Photos/videos

Schedules

Seating Arrangements

Personnel/ Student Records

Social Media Posts

Interviews



Planning an Investigation

Identify sources of evidence (interviews, documents, emails, student/personnel records, etc.).

Identify potential witnesses.

- Complainant
- Respondent
- Other witnesses

Create a timeline.

- In what order do you want to interview witnesses?
- Timelines for completing different portions of the investigation.

Preparing and Conducting Interviews— Helpful Tips

Choose order of interviews.

Prepare an outline of questions.

Conduct interviews separately.

Record the interview or take good notes.

Let parties and witnesses know that retaliation is prohibited.

Ask open-ended questions – the goal is to gather information; not to confirm certain beliefs.

Listen closely – ask follow-up questions.

Clarify any confusion. Make sure you understand what a witness is saying.

THE INVESTIGATIVE REPORT

Creating an Investigative Report

Required part of the investigation.

The Report must fairly summarize relevant evidence.

The report must be sent to both parties (and their advisors) at least 10 days before a hearing (if a hearing is provided) or the determination of responsibility.



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TITLE IX TRAINING

PART VI: DECISION-MAKING

OCTOBER, 2020

THE DECISION-MAKER

The Decision-Maker

Cannot be the same person(s) as the Title IX Coordinator or the investigator(s).

Impartial and unbiased

- In general AND in the specific case.

Cannot have a conflict of interest.

- If the decision-maker has a conflict of interest, he or she must be recused from the case.



EVIDENTIARY ISSUES DURING THE DECISION-MAKING PROCESS

What is “Relevant” Evidence

Evidence is relevant if:

- It has any tendency to make any fact more or less probable than it would be without the evidence, AND
- The fact is of consequence in determining the action.

Evidence of Sexual Predisposition

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.

- Exception: if offered to prove that someone other than the respondent committed the alleged conduct.
- Exception: questions/evidence that concern specific incidents of the complainant's sexual behavior with respect to the respondent and are offered to prove consent.

BURDEN OF PROOF

Burden of Proof

School can choose whether to require allegations be proved by “**preponderance of the evidence**” or a “**clear and convincing evidence**” standard.

The school must use the same standard in all cases and whether the Respondent is an employee or a student.

Burden of Proof – Preponderance of the Evidence Standard

Is it more likely than not that the respondent committed the conduct?

- *i.e.*, is it > 50%



Burden of Proof – Clear and Convincing Evidence Standard

Highly and substantially more likely than not that the respondent committed the alleged conduct.

- This is a higher burden than “preponderance of the evidence.”
- This is lower than the “beyond a reasonable doubt” standard used in criminal cases.

DECISION-MAKING PROCESS

General Decision-Making Process

Parties submit questions.

Hearing?

- Optional for elementary and secondary schools.

Written determination regarding responsibility.

Appeal



PARTY-SUBMITTED QUESTIONS

Party-Submitted Questions

After receiving the investigative report, the parties must be allowed to submit written, relevant questions that a party wants asked of any party or witness.

- The school must provide the parties with the answers.
- The school must allow additional, limited follow-up questions from each party.

THE HEARING

The Hearing

Elementary and Secondary schools are not required to hold a hearing as part of their Title IX Grievance Procedure.

If a school's grievance process includes a hearing, certain requirements must be met.



Hearing Procedures

Each party's ***advisor*** is allowed to ask the other party and any witnesses all relevant questions and follow-up questions.

- Including questions challenging credibility.

Hearing Procedures (Cont.)

At the request of either party, the school must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party/witness answering questions.

Hearing Procedures (Cont.)

Cross-examination

- Asking questions of an adverse witness.

Cross-examination requirements.

- Must be conducted by the party's advisor.
- Directly, orally, and in real time.
- Never by the party personally.
- Questions must be relevant.
 - Questions about a complainant's sexual predisposition are not relevant unless they meet one of the exceptions.

Hearing Procedures (Cont.)

Decision-Maker's role at the hearing.

- Before a party or witness answers a question, the decision-maker must determine whether the question is relevant.

Excluding Questions

- The decision-maker must explain any decision to exclude a question as not relevant.

Hearing Procedures (Cont.)

Party Advisors

- If a party does not have an advisor at the live hearing, the school must provide the party with an advisor of his/her choice to conduct cross-examination
 - Can be an attorney
 - No fee or charge to the party

Hearing Procedures (Cont.)

If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that person in reaching a determination regarding responsibility.

- Note: decision-maker cannot draw an inference about the determination regarding responsibility based solely on an individual's absence or refusal to answer cross-examination.

Hearing Procedures (Cont.)

Location and presence of parties/witnesses

- Can have everything at the same location, OR
- Can allow all participants to appear virtually, with technology allowing everyone to see and hear each other simultaneously.

Recording

- Schools must create an audio or audiovisual recording, or transcript, of any hearing and make it available to the parties for inspection/review.

WRITTEN DETERMINATION OF RESPONSIBILITY

Written Determination of Responsibility

The written determination must:

- Identify the allegations.
- Describe the procedure taken from the receipt of the formal complaint through determination, including:
 - Notification to the parties.
 - Interviews
 - Site visits
 - Methods used to gather evidence, and
 - Hearings held, if any.



Written Determination of Responsibility (Cont.)

The written determination must also include:

- Findings of fact supporting the determination.
- Conclusions regarding the application of the school's code of conduct to the facts.
- A statement of, and rationale for, the result as to each allegation.
 - Determination regarding responsibility.
 - Any disciplinary sanctions imposed on the respondent.
 - Whether remedies designed to restore or preserve equal access to the education program or activity will be provided to the complainant.
 - Procedures and permissible bases for the parties to appeal.

Written Determination of Responsibility (Cont.)

The school must provide the parties with the written determination simultaneously.

REMEDIES

Remedies

Remedies are measures provided to a complainant when there has been a determination of responsibility against the respondent

Remedies must be designed to restore or preserve equal access to the school's education program or activity

The Title IX coordinator is responsible for providing remedies.

THE APPEAL

Bases for Appeal

The school must offer both parties an appeal from a determination regarding responsibility, and from any school's dismissal of a formal complaint or any allegations on the following bases:

- Procedural irregularity that affected the outcome.
- New evidence that was not reasonably available at the time of the determination/dismissal, that could affect the outcome.
- Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome.
 - Generally for/against complainants or respondents.
 - For/against the individual complainant or respondent.

The school may equally permit the parties to appeal on additional bases.

The Appeal Decision-Maker

Must be different person than:

- The decision-maker who made the initial determination of responsibility.
- The investigator
- The Title IX Coordinator

Must be unbiased, and cannot have conflicts of interest.

Appeal Procedure

School must notify the other party in writing when an appeal is filed.

Must give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.

Issue a written decision.

- Must describe the result and rationale



Provide the written decision simultaneously to the parties and their advisors.