



2021 Texas Title IX Administrator Conference

Questions and Answers

If the complainant does not want to file a formal complaint should the Title IX coordinator do it for her/him/they to protect the district?

This question reflects the fact that under the 2020 Title IX sexual harassment regulations, anyone can make a report of sexual harassment but only complainants or the Title IX coordinator can file a formal complaint that triggers the Title IX investigation/grievance process. If the Title IX coordinator thinks the facts justify a formal complaint, it becomes a judgment call whether he/she/they can resolve the matter in an informal manner that protects the unofficial complainant, respondent, and the district. The formal complaint process ensures that a full investigation is conducted and documented. Allegations that are especially egregious may merit the full investigation and grievance process, even when a complainant does not file a formal complaint.

Should we still honor the Complainant's decision?

One of the primary themes of the 2020 regulations is that significant deference should be given to the wishes of the complainant with respect to whether a formal complaint is pursued. Districts cannot force a complainant to file a formal complaint. Nonetheless, districts should document if he/she/they choose not to file a formal complaint and state in the letter that if they change their mind the District will begin an investigation immediately. If there are simple remedies you can provide (e.g., move the child, etc.), you should do those. That is all evidence there was not a deliberate indifference.

Can you provide examples of what, "pervasive" means under the definition of Sexual Harassment?

Pervasive is defined as existing in or spreading through every part of something. <https://www.merriam-webster.com/dictionary/pervasive>. The opposite of pervasive is an

isolated incident. So, in the school environment, pervasiveness would be found where the conduct occurs throughout the relevant interactions (e.g., if every time Student A sees Student B, Student B makes a sexually charged comment, that would be pervasive). Title IX does not quantify the term “pervasive” or set a number of instances, but the term is intended to identify patterns of behavior.

How do we address the female student who sent the pictures to the male student?

That will depend on the facts. If the pictures were unwelcome, then the female student may have engaged in sexual harassment when she sent them to the male student. Assuming the pictures were welcome and the students were in a dating relationship at the time they were sent to the male student and they were not sent during the school day, then Districts should exercise caution in trying to discipline the female student, as the Office for Civil Rights may view the female student as a victim of sexual harassment or cyberbullying. Supportive measures must be provided to a complainant (regardless of whether the complainant ever files a formal complaint).

Can we see a "sample" district website that has the appropriate disclaimers?

[Title IX | McAllen Independent School District \(mcallenisd.org\)](http://mcallenisd.org)

Would this not fall into David’s law?

This question pertains to one of the hypothetical scenarios discussed at the training involving the distribution of nudes of one student by another student. Yes, this might also be an example of cyberbullying prohibited by Texas Education Code 37.0832. Many instances of misconduct fall under David’s law, hazing, Title IX, and other provisions of a district’s student code of conduct. Because Title IX has strict rules for how complaints must be handled and comes with potential civil damages for failure to act (or for a deliberate indifference), make sure to comply with Title IX. David’s law does not include damages as a remedy.

How does Title IX impact instructional settings such as PE (i.e., locker room access, locker room monitoring, etc.)?

First, locker rooms should be adequately monitored to prevent or remedy behavior that could be considered sexual harassment. With regard to students who are transgender, gender nonconforming, non-binary, the present position of the U.S. Department of Education is that Title IX protects such students from discrimination that these students must be allowed to use the restrooms, locker rooms, showers, etc. of the gender with which they identify. See materials from *Transgender* session.

As a supportive measure, when you want to change the student's schedule, who do you change- Complainant or Respondent?

Recall that a schedule change can be implemented as a supportive measure only if it does not unreasonably burden a party (e.g., complainant or respondent). Barring truly unusual circumstances, changing a student's class schedule would not be considered an unreasonable burden, even if somewhat burdensome. Historically, the preference has been to change the schedule of the respondent, rather than the complainant who may view the change as retaliatory for making a complaint.

The form that Holly went over titled, "Title IX Determination of Responsibility", is to be completed by whom?

The Title IX Determination of Responsibility is the written decision crafted by the trained Title IX decision maker after he/she/they review all of the relevant evidence.

Just for clarification, there is another form that Holly went over titled, "Title IX Final Investigation Report. This form is to be completed by the Title IX Investigator?

Yes, the Investigative Report is to be completed by a trained Title IX investigator.

Are statements provided by the witnesses considered evidence that must be provided to the Complainant and Respondent? Plus, do we need to redact the name of the witness on their statement before we provide it to the Complainant and Respondent as part of the evidence?

Yes, witness statements are evidence. An electronic copy of all evidence must be provided simultaneously to both parties before the investigative report is finalized. No, the statements should not be redacted. The Department of Education believes that complainants and respondents are entitled to know who is being interviewed and should receive the same information about the allegations.

Are witness statements considered evidence? Are those witness statements provided to both parties?

See above.

If a student/student issue is reported what would be the advantage to the complainant to file a formal complaint given traditional school discipline can address it more rapidly and anonymously?

The advantage for a complainant to file a formal complaint would be to ensure that a thorough investigation, including the collection of evidence, occurs, that district officials

are made aware of the matter, and that there will be record of the matter preserved by the district for at least seven years.

What if a complainant chooses not to file a formal complaint and allow for traditional discipline but afterwards isn't satisfied with discipline; can they turn around and choose to file? Does the respondent receive a second set of consequences after the investigation concludes?

A complainant can later change his/her/their mind about filing a formal complaint. If the Respondent has not finished her/his/their disciplinary sanction (e.g., DAEP placement), the district might be required to return the student to her/his/their regular campus, reinstate them to any extracurricular team, or remove any other on-going sanction, pending the outcome of the investigation. If the disciplinary sanction has already concluded, the district would complete the investigation and make a determination of responsibility. It would be up to the decision maker whether or not to impose a second set of sanctions. The concept of “double jeopardy” is typically reserved for criminal law and does not apply to student discipline matters.

For the written documentation provided to the complainant, is this a requirement of a formal Title IX complaint or both informal and formal Title IX complaints?

The Title IX regulations do not refer to “informal complaints,” only “formal complaints.” Districts should have a process (e.g., email, or on-line submission process) for any person to make a report of sexual harassment. There is no mandated form for this process. Because “formal complaints” must be in writing and signed by the complainant or Title IX coordinator, districts should have a form for formal complaints.

How do we explain to a parent the difference between handling a complaint as a Report vs a Formal Complaint?

Provide the parent with a copy of the district’s FFH policy and regulations/Title IX procedures. Explain that supportive measures are available, regardless of whether a formal complaint is filed. Review the process for conducting investigations, including the timelines. Explain that the formal complaint process is exactly that—formal—and provides for significant due process protections for Respondents. After the evidence is collected, including interviews of all relevant witnesses, a copy of all evidence is sent to both parties and they are given 10 calendar days to submit a written response that the investigator must consider before finalize the investigative report. Once the investigative report is finalized, it is sent to both parties and the decision maker. Another 10 calendar days will elapse before the decision maker is allowed to issue a final determination. Thus,

this process will take a minimum of 20 calendar days and could take even longer. A report of sexual harassment by contrast can be dealt with on a much shorter timeline.

If the student is 18 and reports sexual assault from another student and then says, “I don't want my parents to know” or “I don't want this to go any further,” what do we do?

If the sexual assault occurred on school property, obviously, that must be reported to law enforcement, campus administration, and the district’s Title IX Coordinator. If it occurred off campus and not at a school related event, then, by definition, it is not sexual harassment under the 2020 Title IX regulations, which exclude events that occurred off campus. You can, but are not required, to report off campus crimes to law enforcement. If the victim is an adult with a significant disability (e.g., cognitive impairment), you should report the matter to Adult Protective Services. If you think that the student or others are at risk of additional harm, you should report the matter. Likewise, if the sexual assault has resulted in sexual harassment on campus or at a school related activity, then the Title IX Coordinator should be made aware and supportive measures offered. Otherwise, you can honor the student’s request that the matter remain confidential.

Is it possible for you to share the link to the two resources Holly mentioned - 20 new tasks for Title IX coordinators and the infographic?

The two resources (*Twenty New Tasks for Title IX Coordinators* and *Title IX Grievance Process* info-graphic) can be found on pages 43-50 of the materials tab for the session titled *Understanding Your Role as a Title IX Administrator and How to Handle Common Campus Scenarios*.

We only offer supportive measures to the respondent when there's a formal complaint, right?

While nothing in the 2020 Title IX regulations prohibits a district from offering supportive measures to a respondent outside the formal complaint process, the only time districts are required to do so is when a formal complaint has been filed.

Can employee (e.g., a nurse) give his/her/their attorney a student’s document if that employee is involved in a grievance with the district without parents’ consent?

If this question is asking whether a nurse who has hired private counsel may provide her counsel with school documents, the answer is no. The nurse would be breaching confidentiality, as well as FERPA and potentially HIPAA, to take school documents for her personal use. Depending on the circumstances, she might be able to reference the information during the grievance, but the records themselves would have to be received through a legal means (i.e., parent permission or subpoena).

To verify, an investigator must obtain consent to record when interviewing a witness, respondent, or complainant?

In Texas, a school employee, by law, must receive consent to audio or video record a student. Tex. Educ. Code 26.009 (exceptions include for safety purposes, purposes related to regular classroom instruction, extracurricular activities, and cameras in special education settings). An investigator should tell an adult that he/she/they are being recorded; it is a professional courtesy, not the law.

So, if there is an outside person doing the investigation, they need consent first to review discipline records etc. is this a violation of FERPA?

The outside person hired to investigate should have some type of contract or written agreement that either makes them an authorized individual for purposes of FERPA or outlines the confidentiality requirements and the person signs off on that document. Outside contracted individuals can be an exception to FERPA. See your district's FL(LOCAL) policy.

I have been trained to still conduct the school investigation at the same time the police is. Is that not a smart thing to do?

The answer to this question is dependent on the circumstances and the police. Some law enforcement officials are more collaborative than others. Some are more "protective of their turf." Work with law enforcement officials, so you can both do your job. That is a give-and-take to permit you both to timely perform your duties.

Are we talking about only athletics, or is this all UIL events (Band, choir, etc...).

The Equitable Participation in Athletics presentation was only about athletics, because OCR has designated the tests and program components discussed only with regards to athletics. However, Title IX also applies to participation in other extracurricular activities. So, a student could claim he/she/they were denied equal access or equal treatment in one of those activities based on sex in violation of Title IX. But it will be harder to show that, given that for the most part those activities are co-ed.

Does this apply to facilities also? For example, we are improving baseball fields, with plans right after that to improve softball fields. Are we required to update both at the same time, or can we do one, then the other?

Assuming that the new baseball field results in facilities that provide greater benefits to the boys' program than the girls' program that are not offset by another program component, the district will be out of compliance while it waits for the softball facilities to

be upgraded. So, no you are not covered from liability. However, from a practical perspective, you should be okay because the likely remedy will be to upgrade the softball facilities and since you are already doing that, OCR or a court will likely recognize your efforts. The danger is that if the new baseball field causes someone to complain and OCR comes poking around, they could find you out of compliance in other areas, which would not be good. To avoid any issues, the district should have started with the softball fields first and then done baseball.

Can we discuss again that Title IX must review booster club funds, etc.?

Yes, Title IX covers booster club funds, donations, and fundraisers. If such funds cause a disparity between the programs, the district must ensure that the disparity is eliminated, which may involve reallocating district funds that would have been spent on the boys to the girls.

How do you handle Title IX investigations with special education students when both the perpetrator and victim are none verbal?

For nonverbal students, interview them and have them convey their information to you in whatever modality they typically use for class (PECs, ASL, etc.). If the incident is not reported by nonverbal students, but came to your attention after being witnessed by a staff member or other person, then that witness may be your best source of information. If the outcry is made through a parent of a nonverbal student, you would still attempt an interview with the child, but recognize that just like with a tight-lipped witness, you are limited in what conclusions you can draw when the information available is sparse.

For students in Pre-K through 3rd, is it best to the staff member to transcribe what the students state?

Yes, it is better than relying on the student to put his or her words in writing at that age. Please be sure to plainly note if you are transcribing the child's statement and why—i.e., young age—so there is no confusion later about how the statement was created. Depending on the circumstances, a forensic interview by specially trained interviewers through your local child advocacy center may be needed.