

TITLE IX SEXUAL HARASSMENT REGULATIONS

Grace Pennerat
Poyner Spruill LLP

OVERVIEW

Title IX Purpose & Definitions

School District Obligations Under Title IX

The Players: Title IX Personnel

Title IX Process Initiation

Informal Resolution

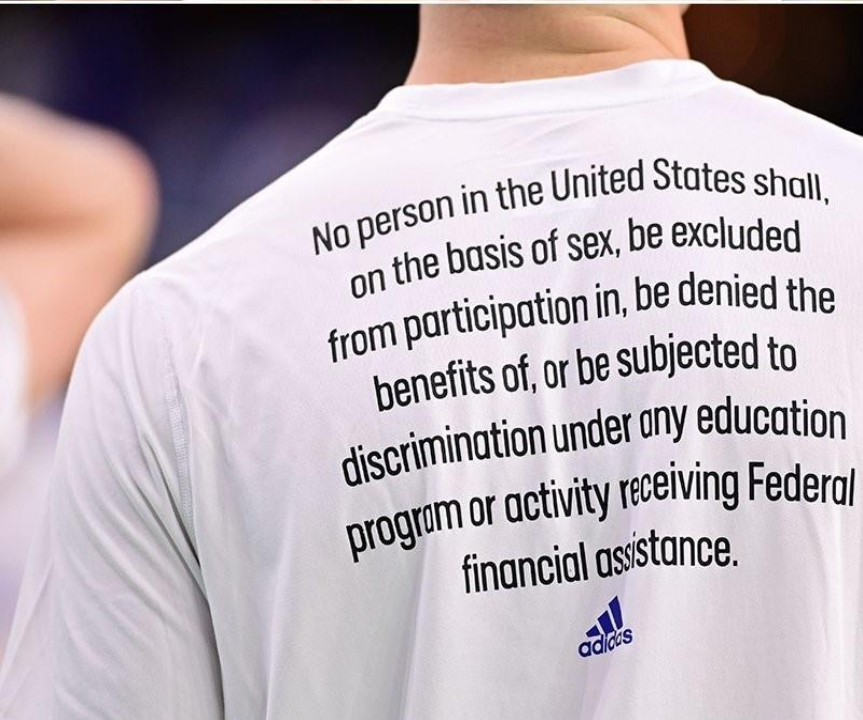
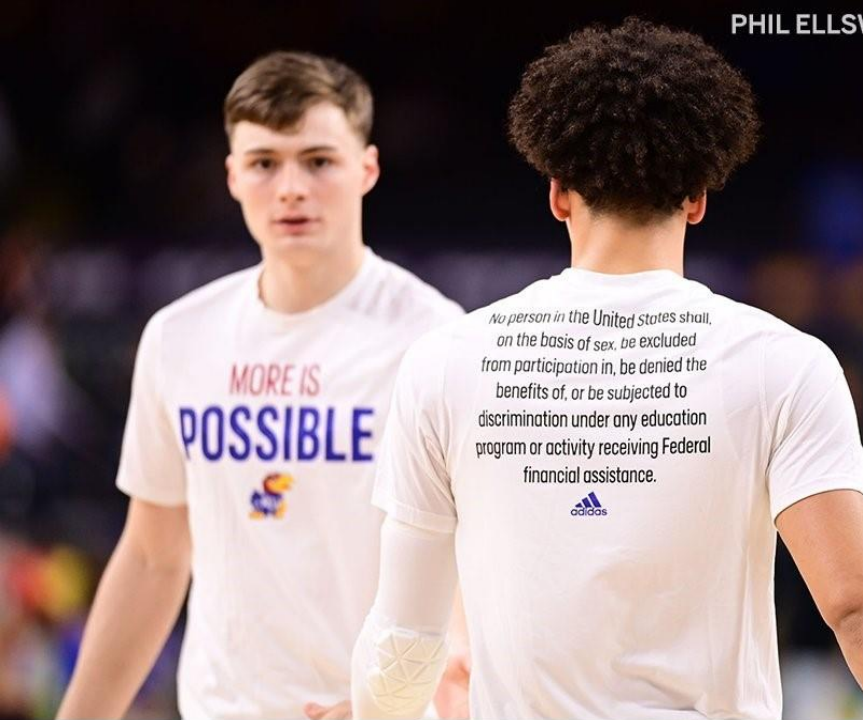
Formal Complaint Process

Appeals Process

The Intersection of Title IX & Special Education

Questions

TITLE IX PURPOSE & DEFINITIONS



WHAT IS TITLE IX?

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...” 20 U.S. Code §1681

ESPN [@espn]. (2022, April 2). *Kansas wore these Title IX shirts before tonight's Final Four game* ↓
[Tweet]. Twitter. <https://twitter.com/espn/status/1510392060142305284>

“ON THE BASIS OF SEX”

Now Includes:

- Sexual orientation
- Gender identity

WHAT'S NEW WITH TITLE IX?

On May 6, 2020, the U.S. Department of Education (DOE) issued final Title IX regulations, which went into effect on August 14, 2020.

1. Made major changes from the Obama-era guidance.
2. Created a new process for handling formal complaints of sexual harassment.
3. Established new notice, training, and record-keeping requirements.
4. Required boards to adopt new policies.
5. Aligned Title IX Regulations with the U.S. Supreme Court Decisions in *Gebser v. Lago Vista Independent School District* (1998) and *Davis v. Monroe County Board of Education* (1999).

SUPREME COURT CASES: WHEN IS A DISTRICT LIABLE FOR SEXUAL HARASSMENT?

Gebser v. Lago Vista Independent School District (1998)

District is liable for harassment when it:

- **Has actual knowledge** of allegations by an “**appropriate person**”; and
- Responds to the allegations so deficiently that it amounts to “**deliberate indifference.**”

Davis v. Monroe County Board of Education (1999)

District is liable for harassment when it:

- Has actual knowledge by an appropriate person;
- Responds with deliberate indifference; **AND**
- The harassing conduct was “**so severe, pervasive, and objectively offensive**” that it **denied the victim equal access to educational opportunities or benefits.**

TITLE IX SEXUAL HARASSMENT DEFINED

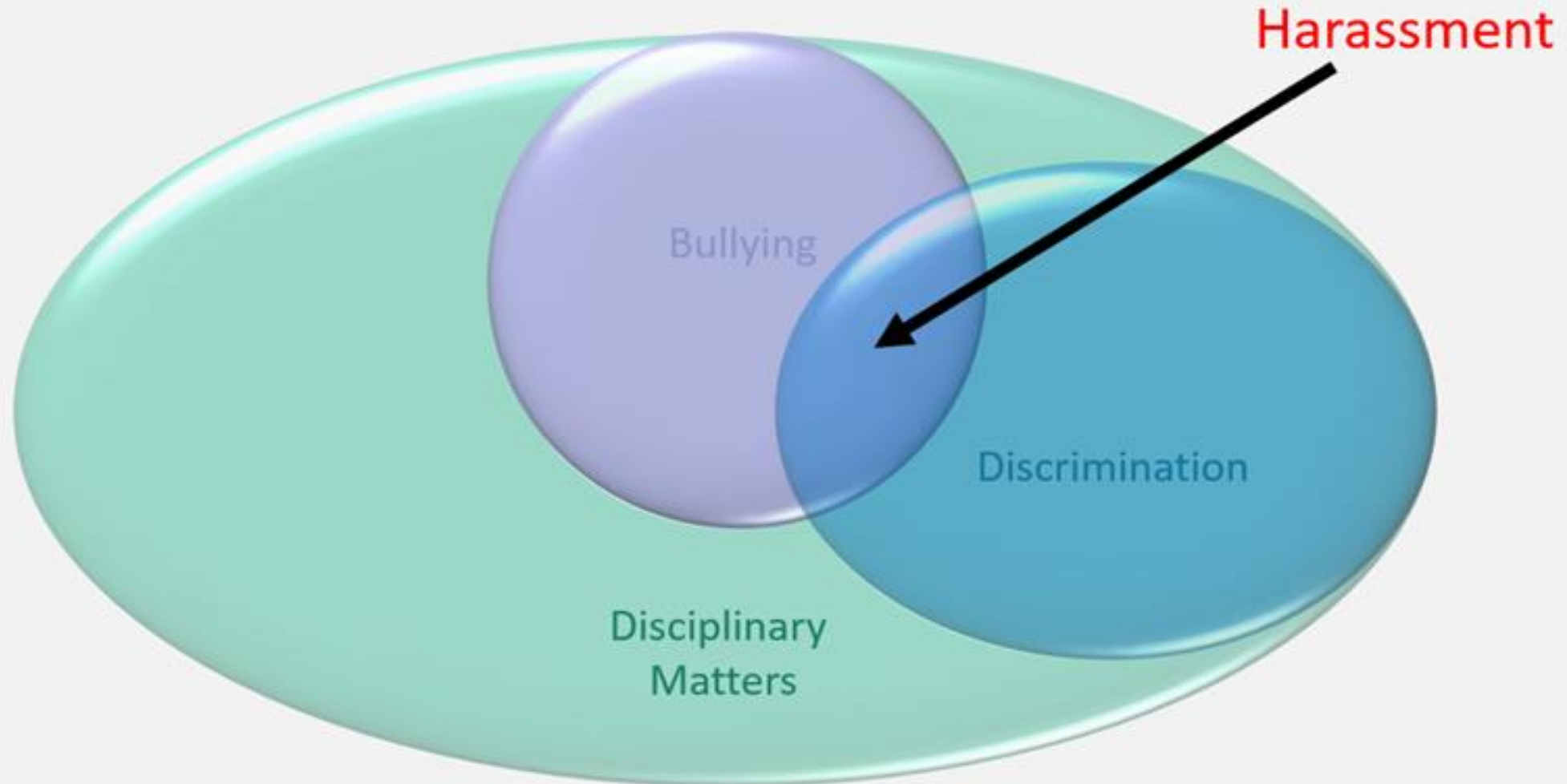
3 types of prohibited sex-based conduct:

1. Quid Pro Quo

2. Unwelcome Conduct

3. Clery Act and the Violence Against Women Act
("VAWA") Components

Harassment v. Discrimination v. Bullying v. Discipline



QUID PRO QUO

Occurs when:

1. a school employee
2. conditions access to educational benefits
3. on unwelcome sexual conduct

Note: This provision only applies to employee conduct

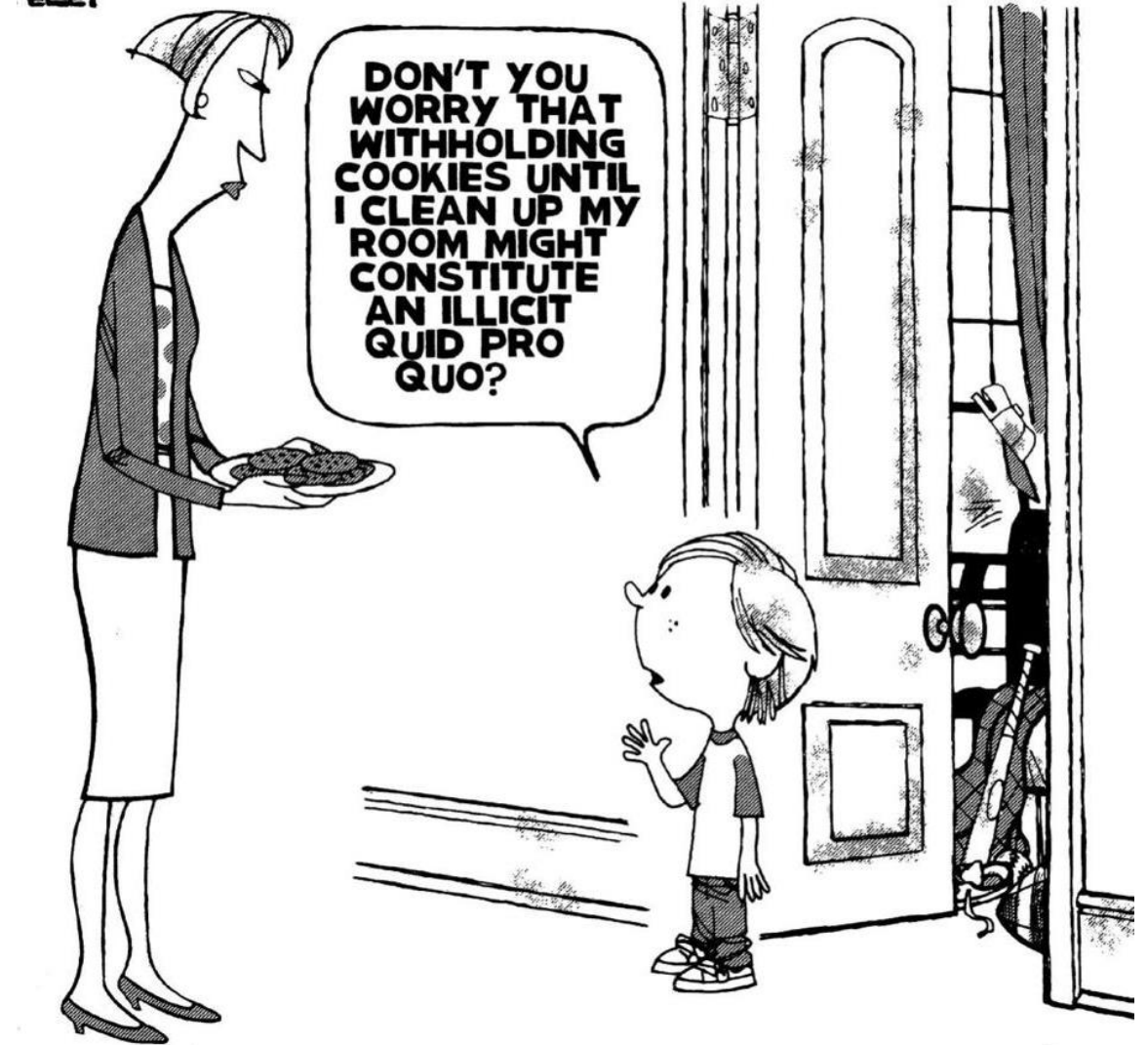
QUID PRO QUO

A teacher tells a student that the student will get an A on the final exam if the student sends the teacher nude photos

A teacher, who is also the coach of the varsity soccer team, names a student captain of the team with the expectation that the student will provide sexual favors to the coach.

An assistant principal says that he/she will only provide a letter in support of a student's nomination for a scholarship to college if the student participates in sexual conduct with the assistant principal.

©2019 PITTSBURGH POST-GAZETTE
CREATORS SYNDICATE



UNWELCOME CONDUCT

- 1) Unwelcome conduct
- 2) Determined by a reasonable person
- 3) To be so severe and pervasive and objectively offensive
- 4) That it effectively denies a person equal access to an education program or activity.

Note: Severe conduct that constitutes sexual assault, dating violence, domestic violence, or stalking is covered by the third prong (Clery Act & VAWA Conduct) of the definition of sexual harassment.

EFFECTIVE DENIAL OF EQUAL ACCESS TO EDUCATION

A school must evaluate whether a reasonable person in the complainant's position would be effectively denied equal access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.

Does not require "that a person's total or entire educational access has been denied."

Examples:

- Skipping class to avoid a harasser, a decline in a student's grade point average, or having difficulty concentrating in class;
- A third grader who starts bed-wetting or crying at night due to sexual harassment; or
- A high school wrestler who quits the team but carries on with other school activities following sexual harassment.

CLERY ACT & VAWA COMPONENTS

The Clery Act – Federal law requiring colleges and universities to disclose information about crime on and around campuses. Enforced by U.S. DOE. Does not apply to K-12.

Violence Against Women Act (VAWA). Federal law, enacted in 1994, administered by U.S. DOJ.

The following offenses, as defined in Clery and VAWA, are now specifically included as forms of sexual harassment:

1. Sexual Assault - 20 U.S.C. 1092(f)(6)(A)(v)
2. Dating Violence - 34 U.S.C. 12291(a)(10)
3. Domestic Violence - 34 U.S.C. 12291(a)(8)
4. Stalking - 34 U.S.C. 12291(a)(30)

SEXUAL ASSAULT

- Conduct on the basis of sex
- Qualifies as one of the following:

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

Either:

1. Without Consent **OR**
2. Victim was incapable of giving consent because of age or temporary/permanent mental or physical incapacity.

DATING VIOLENCE



- Conduct on the basis of sex
- Violence committed by a person who has been in a relationship of romantic/intimate nature with the victim

DOMESTIC VIOLENCE

- Conduct on the basis of sex
- Misdemeanor or felony crime of violence committed by:
 - Current/former spouse/intimate partner (or someone similarly situated to a spouse)
 - A person with whom the victim shares a child in common
 - A person who is cohabitating with or who has cohabitated with the victim as a spouse or intimate partner
 - By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws



STALKING

Conduct on the basis of sex

Course of conduct

Directed at a specific person

Would cause a reasonable person to either:

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

RESPONDING TO SEXUAL MISCONDUCT THAT IS NOT TITLE IX SEXUAL HARASSMENT

A school has discretion to respond appropriately to reports of sexual misconduct that do not fit within the scope of conduct covered by the Title IX grievance process.

Title IX does not replace a school's more expansive code of conduct and does not prohibit a school from enforcing that code to address misconduct that is not Title IX Sexual Harassment



SCHOOL DISTRICT OBLIGATIONS UNDER TITLE IX

WHEN MUST SCHOOLS RESPOND TO SEXUAL HARASSMENT ALLEGATIONS?

School must respond when it has actual knowledge of sexual harassment that occurred/is occurring in the school's education program or activity.

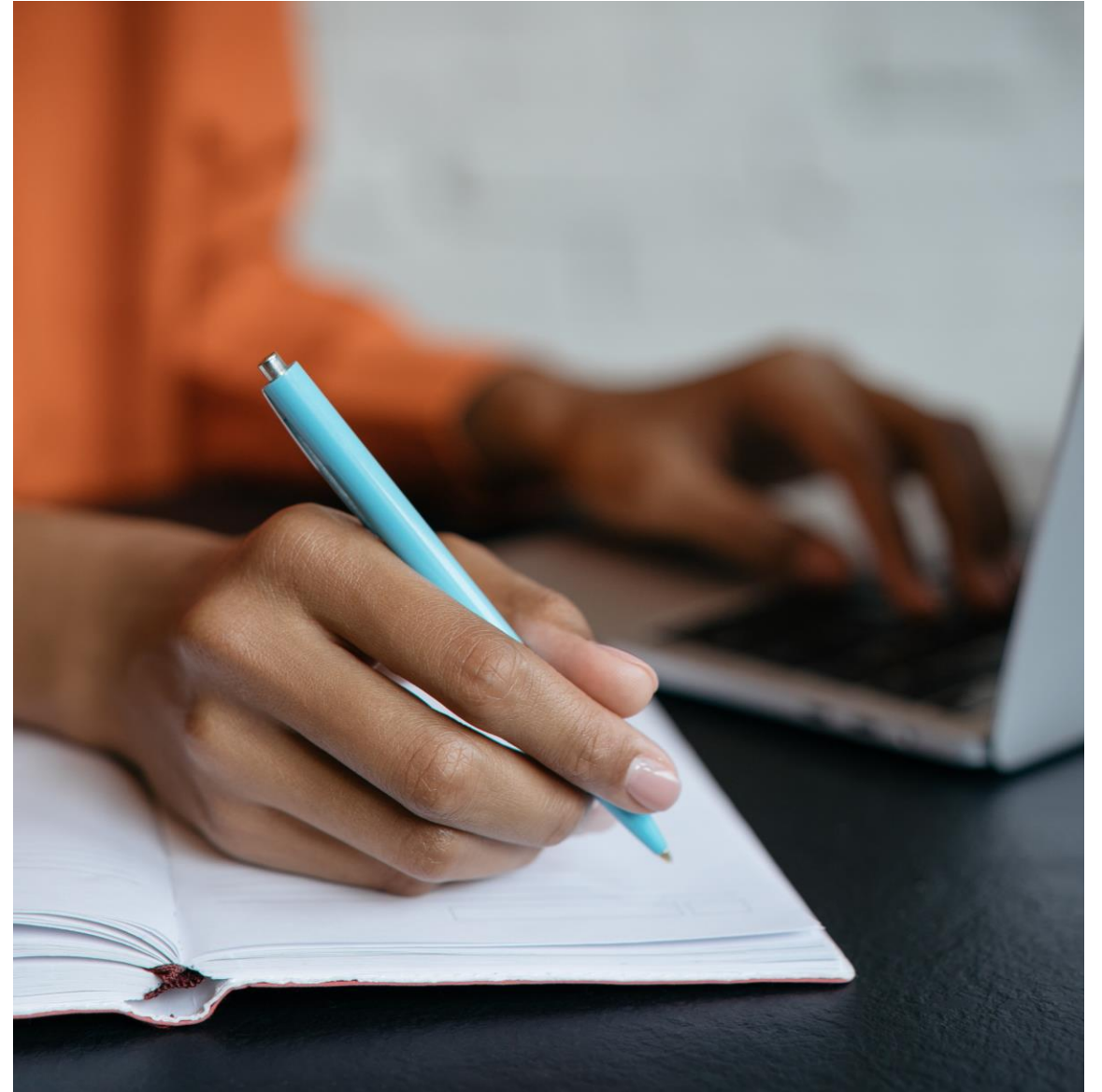
- Actual knowledge means a mandated reporter has notice of “sexual harassment or allegations of sexual harassment.”
- Education program or activity includes “locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.”
- Schools are only responsible for responding to allegations of discrimination/harassment that occur in the United States.

REPORTING SEXUAL HARASSMENT: WHO, HOW, AND WHEN?

May be made by anyone, not just the alleged victim or a mandated reporter

Can be made by phone, mail, email, letter, or by any means that result in the Title IX Coordinator receiving the report

Made at any time, including non-business hours

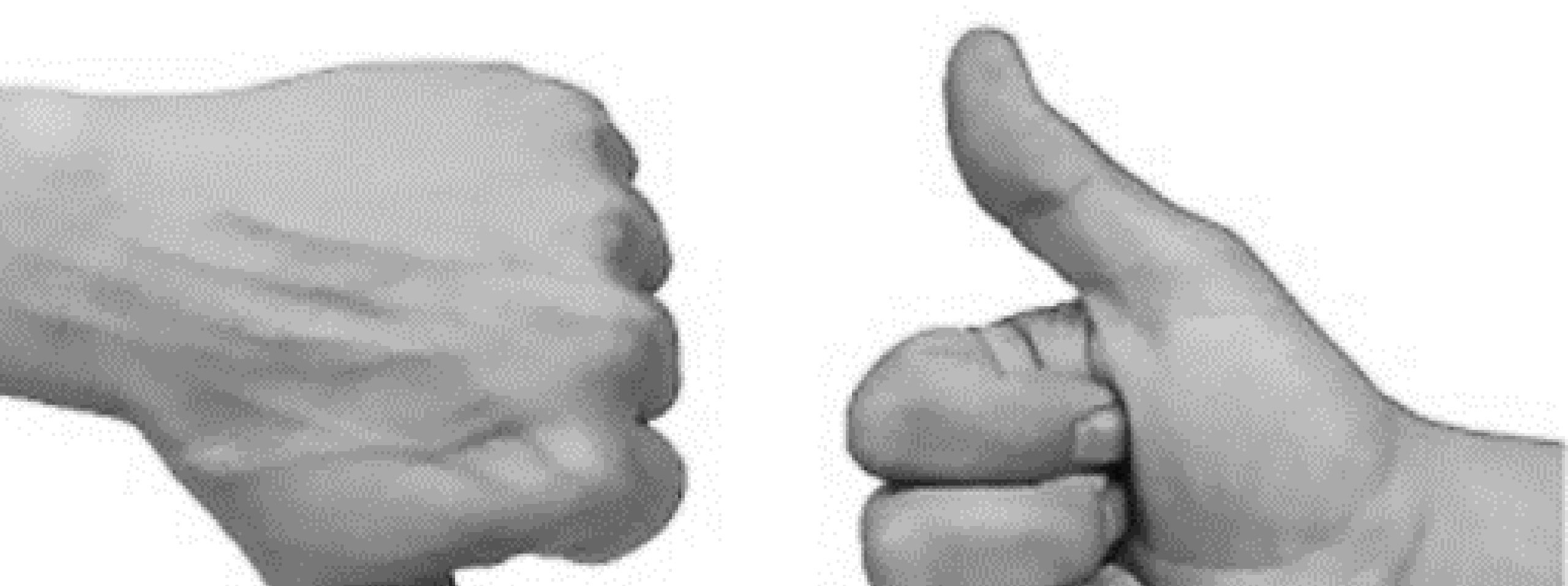


“DELIBERATE INDIFFERENCE”

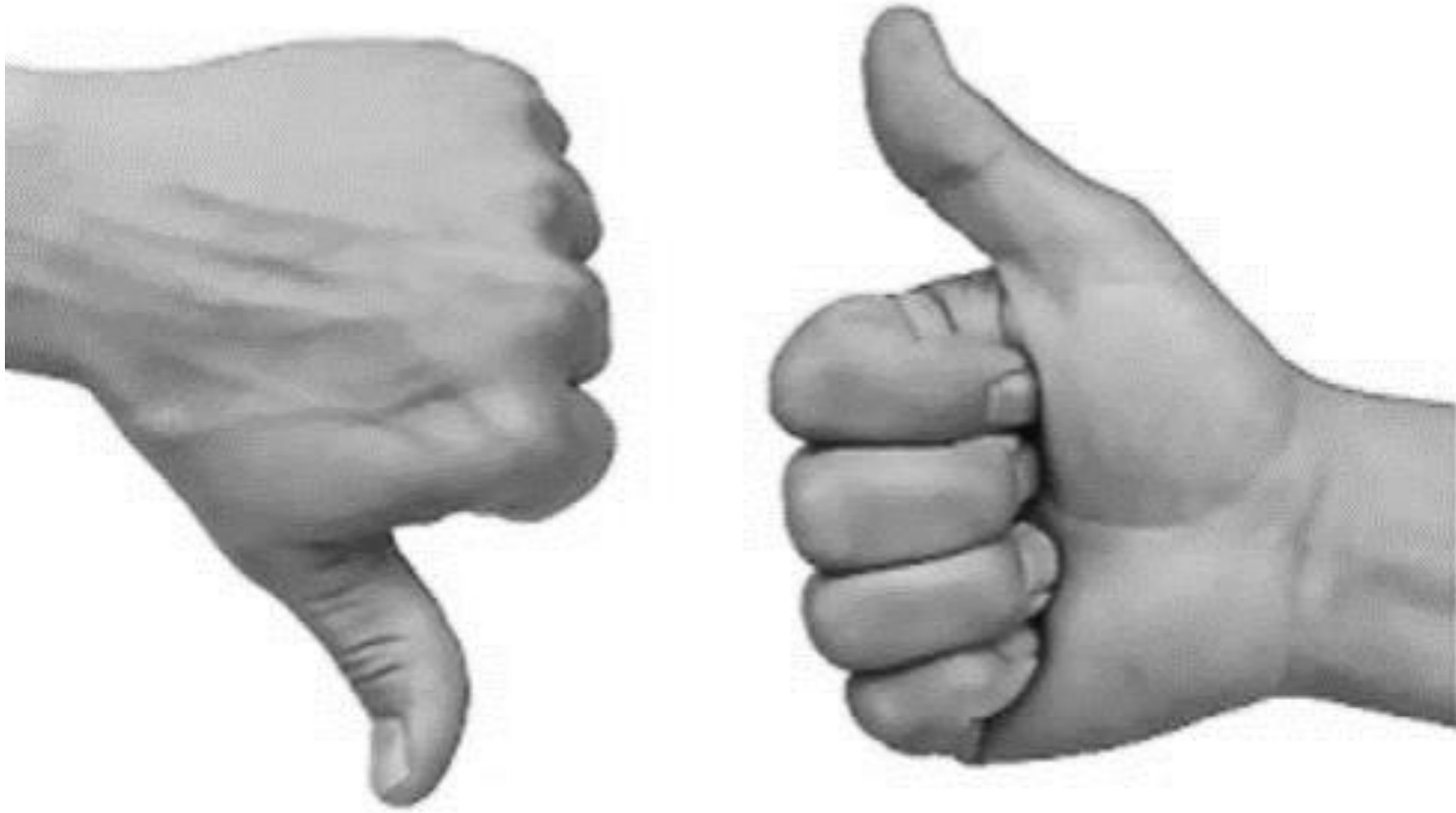
An institution acts with deliberate indifference only if its response to sexual harassment is clearly unreasonable in light of the known circumstances

SETTINGS WHERE TITLE IX MAY APPLY

1. Buildings or other locations that are part of the school's operations, including remote learning platforms;
2. Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred (e.g., a school field trip to a museum)
3. Computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the school
4. Student's personal electronic devices if used to perpetrate online sexual harassment during class time may constitute a circumstance over which the school exercises substantial control



**DOES THE SCHOOL HAVE ACTUAL
KNOWLEDGE?**

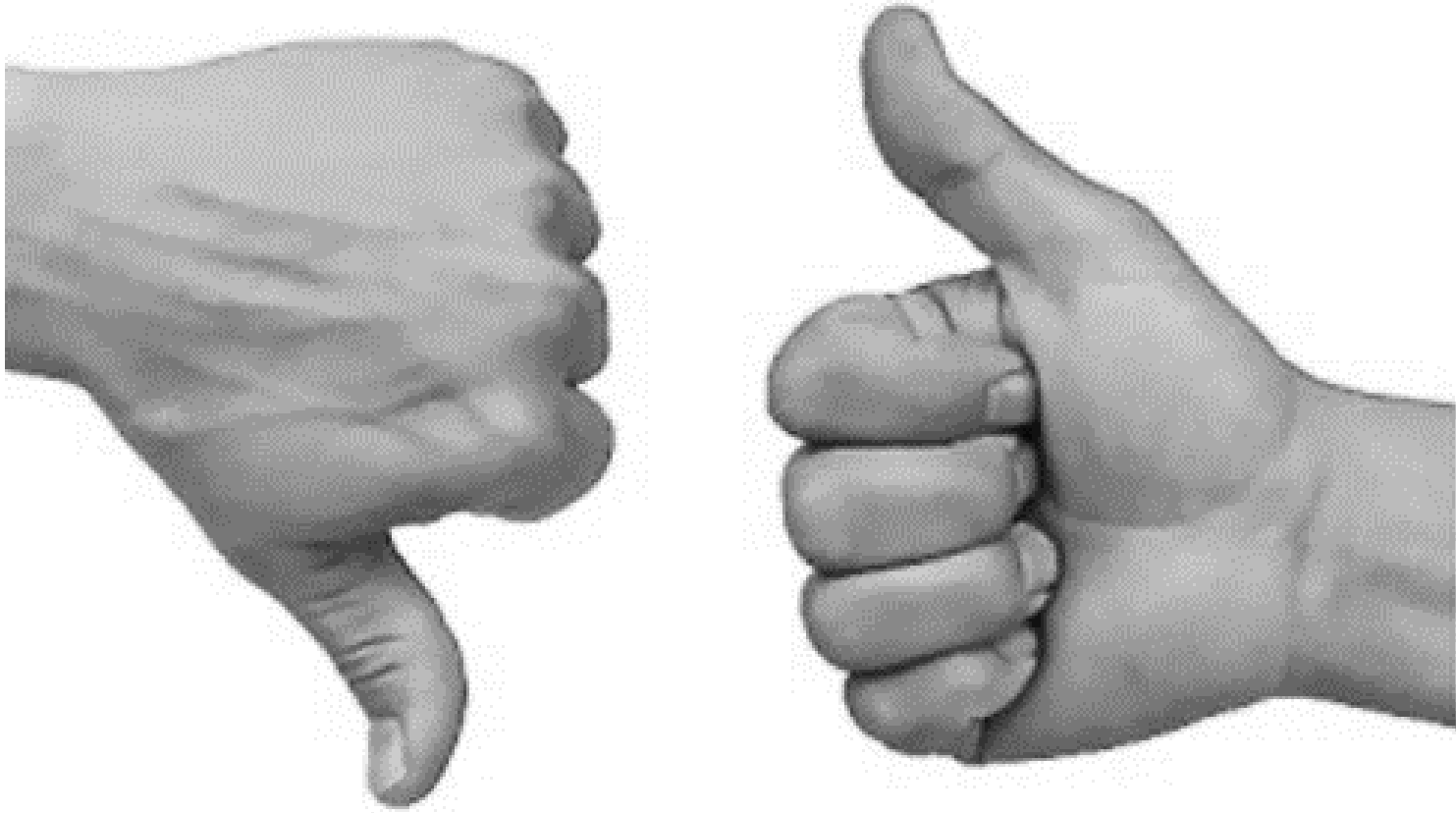


**DOES THE SCHOOL HAVE ACTUAL
KNOWLEDGE?**

A teacher overhears two students talking in the hallway. One student says that while she was walking to her locker after soccer practice yesterday, another student pushed her against a locker and tried to kiss her against her will.

On June 23, 1972, Richard Nixon signed the
Education Amendments of 1972
(Title IX) into law.

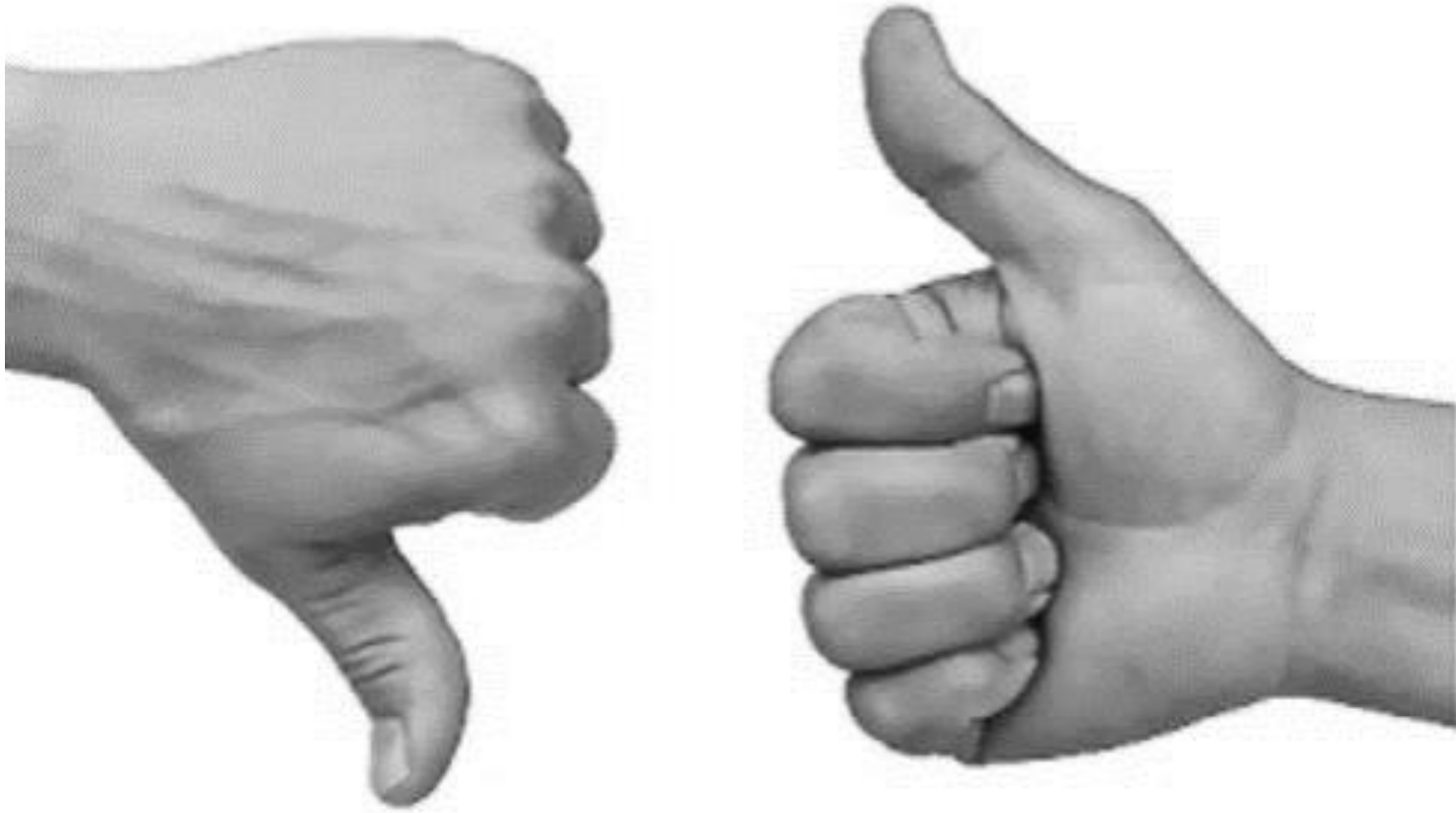




**DOES THE SCHOOL HAVE ACTUAL
KNOWLEDGE?**

The school receives a Gaggle notification of an email between two students. Student 1 said she was sexually assaulted at a party last weekend.

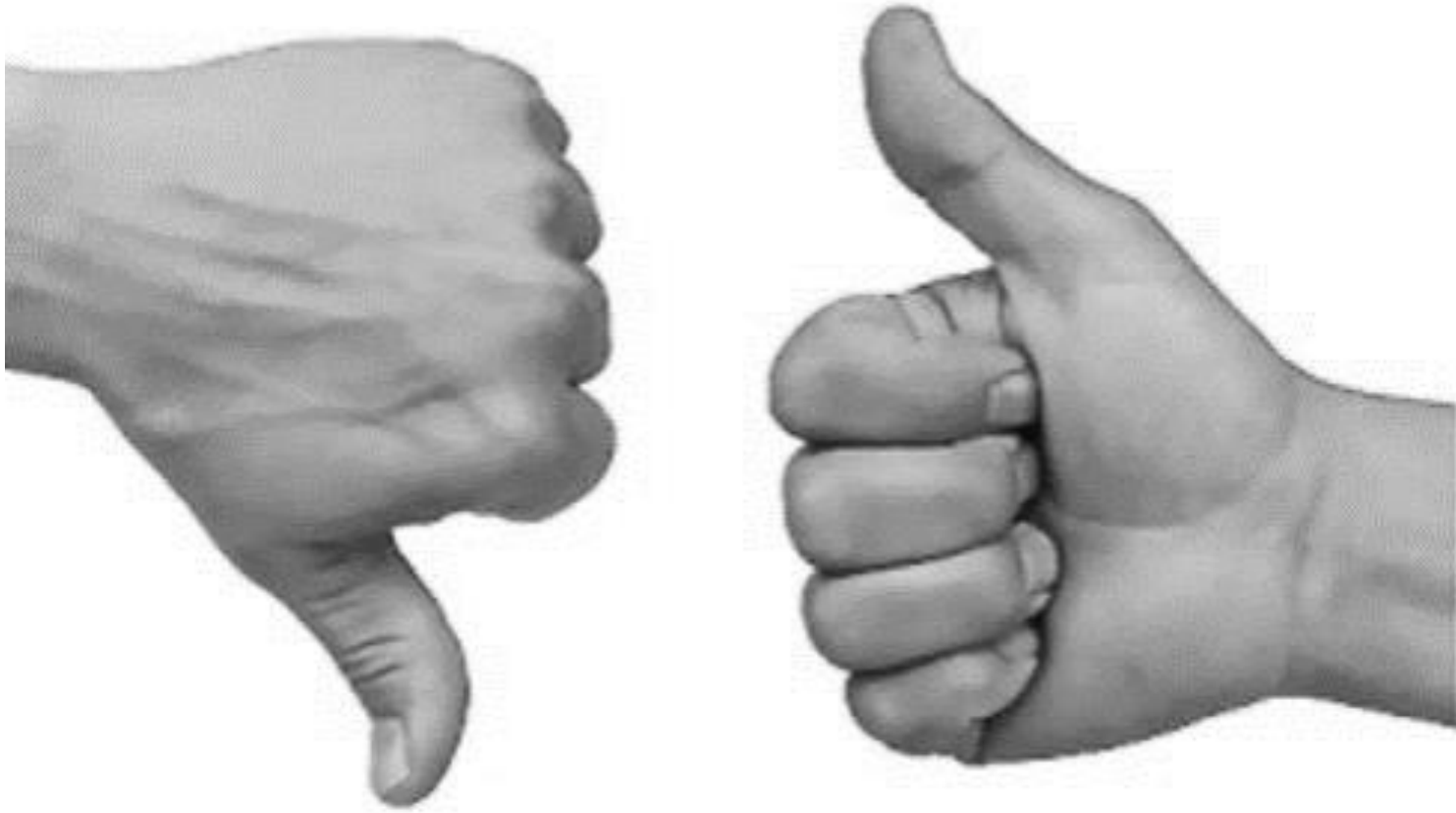




Joe and Sam are dating. You hear Sam tell his friends that he and Joe have a secret “kissing spot” that they frequent after school.

**DOES THE SCHOOL HAVE ACTUAL
KNOWLEDGE?**





2 first grade student, John and Mary, are best friends. John tells you that Mary touched his rear end when they were on the playground.

**DOES THE SCHOOL HAVE ACTUAL
KNOWLEDGE?**



THE PLAYERS

Title IX Personnel

Title	Responsibilities	Who?
Complainant	<p>A person who is alleged to be the victim of conduct that could constitute sexual harassment</p> <ul style="list-style-type: none"> • <u>NOT</u> a third party who reports alleged sexual harassment perpetrated against someone else • <u>NOT</u> the Title IX Coordinator, even if the TIXC “signs” a formal complaint 	<ul style="list-style-type: none"> • Student, Staff, Third Party
Respondent	<p>A person who has been reported to be a perpetrator of conduct that could constitute sexual harassment</p>	<ul style="list-style-type: none"> • Student, Staff, Third Party
Title IX Coordinator	<ul style="list-style-type: none"> • Oversees and coordinates <u>all</u> Title IX responsibilities for district • Oversees district’s response to Title IX reports and complaints • Implements supportive measures and remedies • Identifies and addresses any pattern or systemic problem revealed by reports and complaints • Evaluates an alleged victim’s confidentiality request, if one is made • Files a formal complaint on behalf of a student/employee, if necessary 	<ul style="list-style-type: none"> • Must be employee; • May not serve as decision-maker

Title	Responsibilities	Who?
Investigator	<ul style="list-style-type: none"> • Conducts a fair, objective, & impartial investigation • Differentiates b/w related & relevant evidence & privilege 	<ul style="list-style-type: none"> • Staff or External Person • May not serve as decision-maker
Decision-Makers	<ul style="list-style-type: none"> • Evaluates evidence, makes, and writes decision • “Rules” on relevancy during cross examination 	<ul style="list-style-type: none"> • Staff or External Person • Cannot serve in any other capacity
Advisor(s)	<ul style="list-style-type: none"> • Advises party they represent (not required) 	<ul style="list-style-type: none"> • Staff or External Person
Informal Resolution Facilitator	<ul style="list-style-type: none"> • Conducts informal resolution process 	<ul style="list-style-type: none"> • Staff or External Person

INITIATING THE PROCESS

ACS POLICY

1726/4036/7237

Title IX Sexual Harassment Grievance Process

Policy Code: **1726/4036/7237**

The process provided in this policy is designed for those who believe that they have been sexually harassed in violation of policy 1725/4035/7236, Title IX Sexual Harassment – Prohibited Conduct and Reporting Process, and wish to file a formal complaint. School officials shall follow the grievance process established in this policy when responding to all formal complaints of sexual harassment.

The superintendent is responsible for notifying students and their parents or legal guardians, employees, and applicants for employment of this policy and ensuring that each principal or site supervisor provides a copy of this policy to these persons.

A. DEFINITIONS

All definitions in policy 1725/4035/7236, Title IX Sexual Harassment – Prohibited Conduct and Reporting Process, are incorporated by reference and have the same meaning when used in this policy, including all references to “sexual harassment” in this policy.

REPORT OF SEXUAL HARASSMENT

- **Report** is an allegation of sex discrimination (including sexual harassment) made by any person, at any time, and by any means that results in the Title IX Coordinator receiving the person's verbal or written report.
- Not limited to a school's campus community and may come from others, such as on-campus visitors.
- School employees **shall immediately** notify the school's Title IX Coordinator of any report of sex discrimination.
- **Note:** This applies to any and all school employees.

UPON RECEIPT OF A REPORT OF SEXUAL HARASSMENT

The Title IX Coordinator must:

1. Contact the alleged victim (i.e., Complainant) if that person can be identified;
2. Offer the Complainant supportive measures
3. Explain the process of filing a formal complaint;
4. Explain the supportive measures can be available with or without a formal complaint;
5. Consider the Complainant's wishes regarding supportive measures;
6. Contact the Respondent (i.e., alleged perpetrator), who must also be offered supportive measures;
7. Document whether supportive measures were provided, including why and why not and if not, how the District is not deliberately indifferent

FORMAL COMPLAINT OF SEXUAL HARASSMENT

- 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
- Only individuals participating in or attempting to participate in the education program or activity of the school may file a “Formal Complaint”
- May be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator and by any additional method designated by the school
- Must contain the complainant’s physical or digital signature, or otherwise indicate that the complainant is the person filing the formal complaint
- Triggers the school’s duty to initiate the grievance process

SUPPORTIVE MEASURES

Offered to both alleged victim and alleged perpetrator

Individualized services

Reasonably available

Nonpunitive, non-disciplinary, and not unreasonably burdensome to the other party

Designed to ensure equal educational access, protect safety, or deter sexual harassment

Supportive measures must be offered regardless of whether the district is informed via a “Formal Complaint” or a “Report”

EXAMPLES OF SUPPORTIVE MEASURES



- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Security and monitoring of certain areas of campus
- Other similar measures

Note: A supportive measure that completely removes a Respondent from an activity (except for “emergency removals” for students and “administrative leave” for employees) would likely be considered punitive.

EMERGENCY REMOVAL

Students

- An accused student can be removed from the education program or activity on an **emergency basis**.
- School must conduct an individualized safety and risk assessment and determine that there is:
 - 1) An **immediate threat** to the **physical health or safety** of any student or other individual arising from the allegations of sexual harassment; and
 - 2) This immediate threat justifies removal from the education program/activity.
- The accused student must be provided with **notice** and an **opportunity to challenge** the decision “immediately” following the removal.

Employees

- The final regulations do not limit an institution’s ability to place an employee on administrative leave during the pendency of a complaint.
- Whether such leave is paid or unpaid is at the institution’s discretion.

Note: Title IX does not modify rights under IDEA (e.g., “change in placement”), §504, or the Americans with Disabilities Act.

INFORMAL RESOLUTION

1. If a formal complaint has been filed, an informal resolution process (e.g., mediation) may be used, but only if all parties agree to participate in an informal resolution process that does not involve a full investigation and adjudication.
2. The Title IX Coordinator will appoint a facilitator who is free from conflicts of interest or bias and who has received special training for the role.
3. Any party may decline or terminate an informal resolution process at any time prior to agreeing to a resolution, without penalty.

Note: The informal resolution process may not be used to resolve allegations that an employee sexually harassed a student.

FORMAL COMPLAINT PROCESS

GRIEVANCE PROCESS

The district must ensure its grievance process is consistent, transparent and:

1. Treats complainants and respondents equitably;
2. Does not make credibility determinations based on/because of a person's status as a respondent or complainant;
3. Requires objective evaluation of all relevant evidence, both inculpatory and exculpatory;
4. Requires Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators to be free from conflicts of interest and bias and trained to serve impartially;
5. Presumes the non-responsibility of respondents until conclusion of the process;
6. Includes reasonably prompt time frames for the grievance process;
7. Informs all parties of critical information about the district's procedures including the range of remedies and disciplinary sanctions a district may impose, the standard of evidence applied, the district's appeal procedures; and
8. Protects any legally recognized privilege from being pierced during a grievance process.

DISMISSAL OF FORMAL COMPLAINTS

An institution **must** dismiss a complaint if the conduct alleged:

1. Would not constitute sexual harassment even if proven;
2. Did not occur in the institution's education program or activity; or
3. Did not occur against a person in the United States.

Additionally, an institution **may** dismiss a complaint where:

1. The complainant notifies the Title IX Coordinator in writing that they wish to withdraw the complaint or allegations;
2. The respondent is no longer enrolled/employed by the institution; or
3. Specific circumstances prevent an institution from gathering evidence sufficient to reach a responsibility determination.

Institutions **must** provide the parties with written notice of a dismissal **and** the reasons for the dismissal.

Note: Dismissal of the formal complaint under Title IX does not preclude action under another policy or code of conduct. Dismissals may be appealed.

RESPONDING TO FORMAL COMPLAINTS

Upon receipt of a Title IX Formal Complaint, the Title IX Coordinator must:

1. Provide written notice of the allegations to the known parties
2. Investigate and adjudicate the complaint using a grievance process that complies with the final regulations

AN INSTITUTION MAY NOT IMPOSE DISCIPLINE ON A RESPONDENT WITHOUT GOING THROUGH ITS GRIEVANCE PROCESS.

DO WE STILL HAVE TO FOLLOW THE GRIEVANCE PROCESS IF.....

We have it on video?

YES

We questioned the accused student/teacher and he/she admitted to it?

YES

The potential complainant does not wish to file a formal complaint?

MAYBE

INVESTIGATING FORMAL COMPLAINTS

When investigating a formal complaint and throughout the grievance process, the district must:

1. Ensure that the burden of proof and gathering evidence is on the district;
2. Provide an equal opportunity for the parties to present witnesses and other evidence;
3. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
4. Provide the parties with the same opportunities to have others present during any grievance proceeding;
5. Provide the parties with written notice of the date, time, location, participants, and purpose of all hearings, interviews, or other meetings with sufficient time for the party to prepare;
6. Provide both parties an equal opportunity to inspect and review any evidence obtained;
7. Prior to completion of the investigative report, provide each party and the party's advisor, an opportunity to inspect and review the evidence and at least 10 days to submit a written response, which will be considered by the investigator prior to completion of the investigative report; and
8. Create an investigative report that fairly summarizes relevant evidence and provide a copy to each party at least 10 days prior to the hearing for their written response.

DETERMINING RESPONSIBILITY

The decision maker, before reaching a determination regarding responsibility, must:

- 1) Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness;
- 2) Provide each party with the answers; and
- 3) Allow for additional, limited follow-up questions from each party.
- 4) Allow questions about a complainant's prior sexual behavior or sexual predispositions only to establish that another person committed the alleged conduct, or if they concern specific incidents of complainant's prior sexual behavior with respondent and are offered to prove consent.

DETERMINING RESPONSIBILITY

The decision maker will then issue a written determination regarding responsibility, which must also be provided to both parties simultaneously.

The decision-maker(s) **cannot** be the same person(s) as the Title IX Coordinator or the investigator(s).

Note: The burden of proof is on the school.

APPEALS PROCESS

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

1. procedural irregularity that affected the outcome of the matter;
2. newly discovered evidence that could affect the outcome of the matter; and/or
3. Title IX personnel (i.e., Title IX Coordinator, investigator or decision-maker) had a conflict of interest or bias, that affected the outcome of the matter.

Note: A school may add additional bases for appeals, offered equally to both parties.

OTHER REQUIREMENTS

RETALIATION

No district or other person may intimidate, threaten, coerce, or discriminate against any person because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.

NOTICE REQUIREMENTS

Each district must designate at least one employee to coordinate its efforts to comply with Title IX, and that employee must be referred to as the **Title IX Coordinator.**

The district must notify all applicants for admission and employment; students, parents or legal guardians of elementary and secondary school students; and employees of the “name or title, office address, electronic mail address, and telephone number of the employee or employees” designated as the Title IX Coordinator.

The district also must provide notice that the district does not discriminate on the basis of sex in education programs or activities that it operates, including admission or employment, and that inquiries may be referred to the Title IX Coordinator or the U.S. DOE’s Assistant Secretary for Civil Rights, or both. This non-discrimination statement and the contact information for the Title IX Coordinator must be prominently displayed on the district’s website and in each handbook and catalog.

TRAINING

Training required for all staff on how to identify and report sexual harassment

Training required for all Title IX investigators, decision-makers, coordinators, and facilitators of an informal resolution to instruct on how to be:

- 1) impartial and unbiased;
- 2) objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence



RECORD KEEPING

Maintain for seven years every report and formal complaint of sexual harassment. Records to be maintained include:

- Investigative records;
- Disciplinary sanctions;
- Remedies;
- Appeals;
- Actions taken; and
- Supportive measures.

If complainant is not provided supportive measures, then the reasons why must be documented.

Document the basis for the school system's conclusion that its response was not deliberately indifferent.

Document that it has taken measures designed to restore or preserve equal access to the education program or activity.

A record of all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must also be maintained and published on the website.

THE INTERSECTION OF TITLE IX & SPECIAL EDUCATION

IDEA, 504, & TITLE IX

The Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 and Title IX are all *federal law*.

Importantly, the IDEA and 504 both afford students with disabilities with protections before they can be removed from school for disciplinary reasons.

Those involved in the investigation process should not be analyzing which law takes precedence, but rather should be reading these laws together.

INVOLVING THE IEP/504 TEAM IN THE TITLE IX PROCESS

- If a Complainant or Respondent is a student with a disability, Title IX personnel should consult with the student's IEP or 504 team to discuss what supports might be appropriate based on the student's needs in the context of the Title IX process as there may be IDEA/504 implications
- 2 examples of supportive measures set forth in 34 CFR § 106.30 include "changes in work or housing locations [and] leaves of absence," which may be considered a change in the student's placement and should be discussed with the student's IEP or 504 team

QUESTIONS?