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Introduction to the New Regulations & Initial Screening

Agenda

- Dipping our collective toes in the Title IX regulations
- Initial screening to assess jurisdiction
- Initial Title IX process and obligations
- Referring cases outside of Title IX jurisdiction for action under code of conduct
- **Q&A**

Adoption of SCOTUS Standards for Title IX Liability

The New York Times

DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct

Education Secretary Betsy DeVos released final regulations for schools dealing with sexual misconduct, giving them the force of law for the first time and bolstering due-process rights.

The rules preserve Education Secretary Betsy DeVos's broad goals in overhauling Title IX. Anna Moneymaker/The New York Times

"The *Gebser/Davis* framework is the appropriate starting point for ensuring that the Department's Title IX regulations recognize the conditions under which a school's response to sexual harassment violates Title IX. Whether the available remedy is money damages (in private litigation) or termination of Federal financial assistance (in administrative enforcement), the Department's regulations must acknowledge that when a school itself commits sex discrimination, the school has violated Title IX."

"*Gebser/Davis* Framework"

Gebser v. Lago Vista Indep. School District (1998)

"An 'appropriate person' . . . is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination. Consequently, in cases . . . that do not involve official policy of the recipient entity . . . a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond."

Davis v. Monroe County Board of Education (1999)

- "The language of Title IX itself—particularly when viewed in conjunction with the requirement that the recipient have notice of Title IX's prohibitions to be liable for damages—also cabins the range of misconduct that the statute proscribes. **The statute's plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs.** If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it.
- Moreover, because the harassment must occur 'under' 'the operations of' a funding recipient, . . .the harassment must take place in a context subject to the school district's control . . . ."
- "These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises **substantial control** over **both** the **harasser** and the **context** in which the known harassment occurs. Only then can the recipient be said to "expose" its students to harassment or "cause" them to undergo it "under" the recipient's programs."

Alan S. Weiner for The New York Times

"They should have done something right from the start," said Aurelia Davis of the harassment endured by her daughter LaShonda at school six years ago. The two posed yesterday at home in Forsyth, Ga.

THE VICTIM

When a Tormented Child Cried Stop

By DAVID FIRESTONE

ATLANTA, May 24 — LaShonda Davis was 10 when she told her mother it was time to hire a lawyer.

Her mother, Aurelia Davis, was bewildered at first. For months, LaShonda had been harassed by a boy in her fifth-grade class in Forsyth, Ga., about 50 miles southwest of Atlanta. The school, Hubbard Elementary, had not done anything to stop the boy, even though he had grown increasingly provocative, rubbing against LaShonda and asking for sex.

But hiring a lawyer seemed drastic to Ms. Davis. Even today, after the United States Supreme Court handed down a significant ruling supporting the Davis family's contention that schools can be held liable for prolonged harassment, Ms. Davis was still appalled that the matter had required such high-level legal attention, and the support of women's rights groups.

"It should never have had to go all the way to the Supreme Court," said Ms. Davis, a hospital file clerk in Forsyth who had never hired a lawyer before. "They should have done something right from the start. But they didn't have any kind of respect for my child, and they didn't want to admit that they were wrong in what they did."

A Georgia mother and daughter's six-year legal battle.

The harassment, which started in December 1992, went on almost every day for five months, Ms. Davis said. She said she complained to the teacher and the principal, but nothing was done until she called the sheriff and had the boy prosecuted.

He eventually pleaded guilty to sexual battery.

During those five months, Ms. Davis said, LaShonda grew increasingly upset and despondent, talking of suicide and having a difficult time in class. She is now 16 and a junior in high school.

School officials in Monroe County, which includes Hubbard, would not comment today, but the school board's lawyers have argued that Federal law never explicitly held schools responsible for preventing the harassment of one student by another.

That all changed today with the Court's 5-to-4 decision, which applies to any school in the nation that accepts Federal money. The Court's reasoning was based on an interpretation of Title IX, the 1972 law barring sexual discrimination at those schools, and occasioned an impassioned debate among the Justices over the degree to which the Federal Government should be involved in what Justice Anthony M. Kennedy in his dissenting opinion called "the routine problems of adolescence."

All of that is beside the point for Ms. Davis, who said she was also unconcerned about the monetary damages for which she is now eligible to sue. For her, it comes down to a much more basic principle:

"They make you send your kids to school, right? So don't you think they should protect them while they're there?"

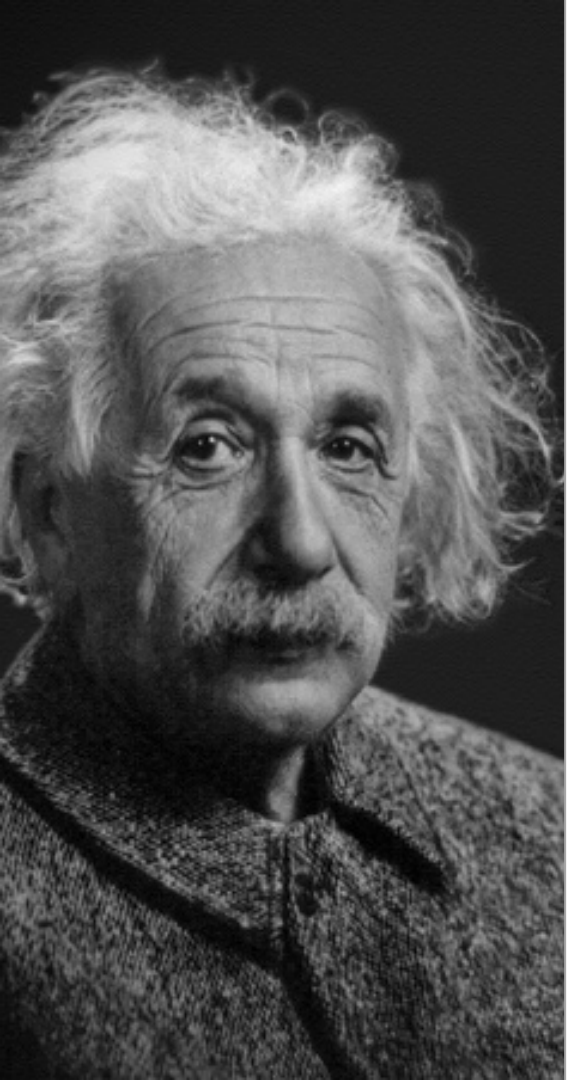
(b) *Response to a formal complaint.* (1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).

What Does 106.44(a) Say?

"A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances."

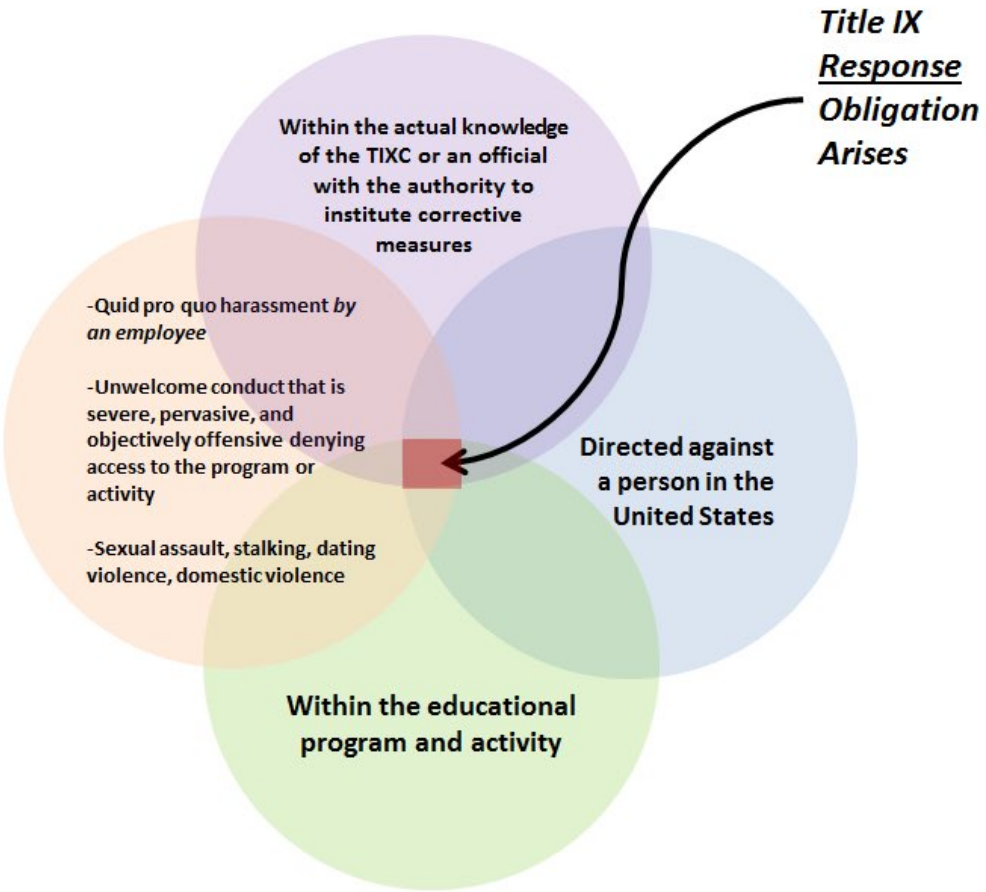
"For the purposes of this section, §§ 106.30, and 106.45, 'education program or activity' includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

"A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent."



Theory of Applicability

- AK + SH + EP + US = IX
- If any of these elements do not exist, there is no obligation under IX regulations


Title IX
Response
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Arises
Within the actual knowledge of the TIXC or an official with the authority to institute corrective measures
-Quid pro quo harassment *by an employee*
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Directed against a person in the United States
Within the educational program and activity

“Actual Knowledge”

Regulations

- “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a **recipient’s Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient** . . . .”
- In the postsecondary context, notice to the Title IX Coordinator always constitutes actual knowledge. The determination of whether another employee is an “official with authority to institute corrective measures” depends upon the institution’s operational structure and the employee’s specific roles and duties.

Practical Points

1. Assess who these officials are
2. Clarify in policy documents about who these employees are
3. Ensure website materials, student/employee/faculty handbooks, etc. are updated with accurate contact information

Intersection with SB 212

How are mandatory reporting obligations affected?

When is the institution's Title IX obligation triggered?

- To provide support and resources?
- To investigate?

Tex. Edu. Code § 51.252(a) [SB 212]	**34 CFR § 106.44** (a) A recipient with **actual knowledge** of sexual harassment in an education program or activity of the recipient against a person in the United States, **must respond promptly in a manner that is not deliberately indifferent**. **34 CFR § 106.30(a)** **Actual knowledge** means notice of sexual harassment or allegations of sexual harassment to a recipient's **Title IX Coordinator or any official of the recipient who has authority to institute corrective measures** on behalf of the recipient . . . . **The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. . . .** **Formal complaint means a document filed by a complainant** or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.
"An employee of a postsecondary educational institution who, **in the course and scope of employment**, witnesses or receives information regarding the occurrence of an incident that the employee **reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking** and is alleged to have been **committed by or against a person who was a student enrolled at or an employee of the institution** at the time of the incident **shall promptly report the incident to the institution's Title IX coordinator** or deputy Title IX coordinator."	

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“Sexual Harassment”

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- An employee conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or
- “Sexual assault” as defined in Clery Act, “dating violence” “domestic violence” or “stalking” as defined in VAWA.

What’s not included?

“Educational Program or Activity”

- Locations, events, or circumstances over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.
- “Substantial control” → while factors “such as whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred . . . may be helpful or useful for recipients to consider . . . to determine the scope of a recipient’s program or activity, no single factor is determinative.”
- “a recipient’s Title IX obligations extend to incidents of sexual harassment that occur **off campus** if any of three conditions are met:
  - the off-campus incident occurs as part of the recipient’s ‘operations’ pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
  - the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
  - the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to § 106.44(a).”

Practical: Theory of Applicability

- AK + SH + EP + US = IX
- If any of these elements do not exist, there is no institutional obligation **under IX regulations**
- Just because it's not IX does not mean we don't deal with it

Hypothetical

Student A reports that Student B sexually assaulted Student A three weeks ago, off-campus in a private apartment complex in an adjacent town. No university student-organizations or employees are involved. There is no claim of any additional misconduct occurring on campus or in university programs or activities.

Hypothetical

Title IX Coordinator receives a complaint from Alumnus A who graduated in 2019. Alumnus A reports that Student B, who is currently a junior, groped Alumnus A's genitals without consent at a party hosted at a fraternity house in the fall of 2018. The fraternity is recognized by the university. Alumnus A is in a graduate program at a different university located several states away.

Application to Employees

The regulation's mandatory requirements for investigation and grievance procedures apply to cases involving students and employees

- Regulation does not distinguish between at-will employees or those under an employment contract
- Regulation does not distinguish between classes of faculty
- Regulation does not supplant other institutional obligations under Title VII or other employment laws

Practical Considerations:

- Will you have a unitary Title IX policy and eliminate all employee-specific policies?
- How will you coordinate Title VII and Title IX obligations?

Example

At-will custodial worker is accused of sexually harassing a female student in the hallway. The custodial worker was placed on an improvement plan a month ago for being late to work. He has complied with the improvement plan. But for the accusation of sexual harassment, the institution would have continued to employ the custodial worker. Now it is considering terminating his employment.

Title IX Coordinator Responsibilities When AK + SH + EP + US

"promptly contact the complainant to discuss the availability of supportive measures"

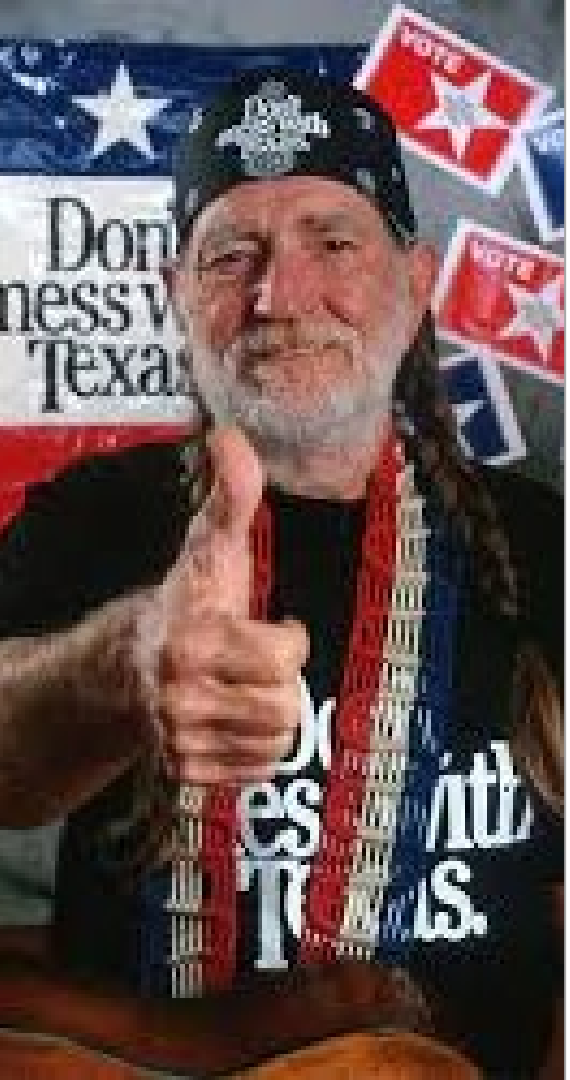
"consider the complainant's wishes with respect to supportive measures"

"inform the complainant of the availability of supportive measures with or without the filing of a formal complaint"

"explain to the complainant the process for filing a formal complaint"

"Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party"

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- "Other similar measures"



Required Texas Supportive Measures

(1) to the greatest extent practicable **based on the number of counselors employed by the institution, ensure that each alleged victim or alleged perpetrator** of an incident of sexual harassment, sexual assault, dating violence, or stalking and any other person who reports such an incident **are offered counseling provided by a counselor** who does not provide counseling to any other person involved in the incident; and

(2) notwithstanding any other law, **allow an alleged victim or alleged perpetrator** of an incident of sexual harassment, sexual assault, dating violence, or stalking **to drop a course in which both parties are enrolled without any academic penalty**.

Interim Removal

- "Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal."
- "Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45."

Example

Student A files formal complaint against Student B accusing Student B of sexual assault (incapacitation). Student A communicates that seeing Student B on campus causes extreme emotional distress which affects Student A's ability to concentrate on classes. Student A requests that Student B be removed from campus pending an investigation.

“Explain to the Complainant the Process for Filing a Formal Complaint”

- “Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent **and** requesting that the recipient investigate the allegation of sexual harassment.”
- Practical Q: when will Coordinator intervene & what happens next?
- “At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.”

What Happens When It's IX + FC?

- Notice to the respondent "upon receipt of a formal complaint"
- Sufficient details known at the time and with sufficient time to prepare a response before any initial interview → identities of the parties involved, the conduct allegedly constituting sexual harassment, & the date and location of the alleged incident.
- The written notice must:
  - include a statement that the respondent is presumed not responsible
  - inform the parties that they may have an advisor of their choice and may inspect and review evidence
  - inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

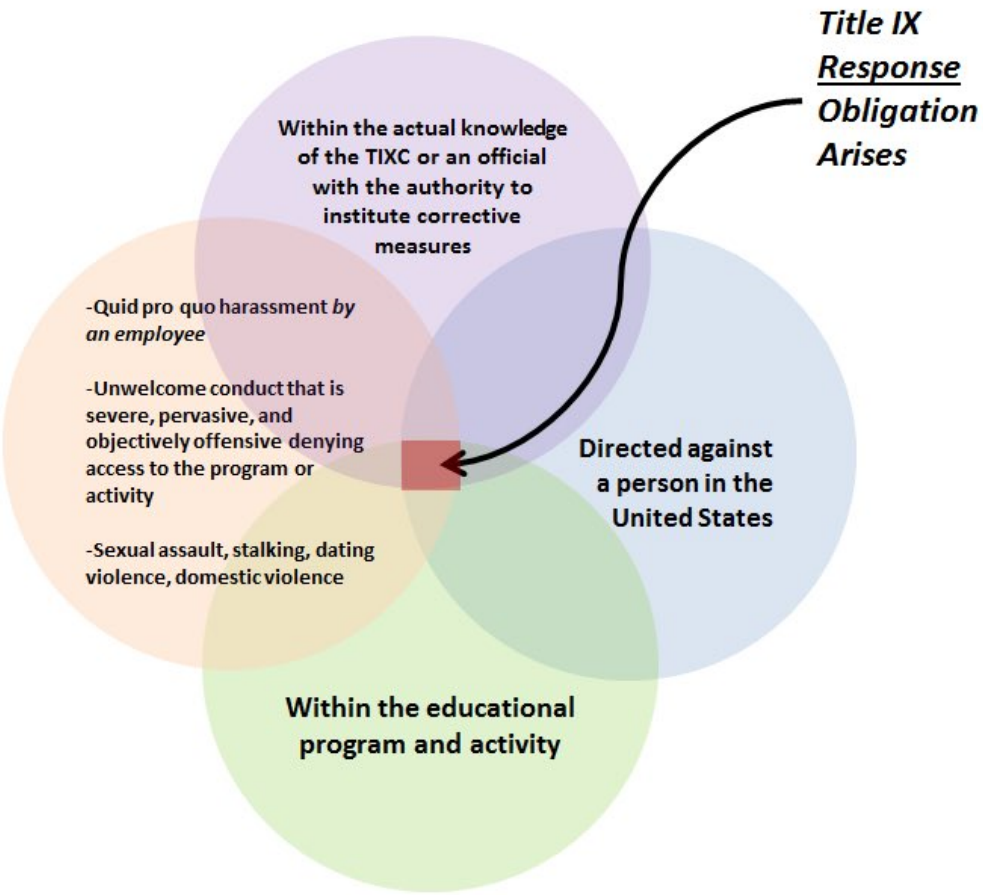
What happens if we start investigating other stuff?

- "The recipient must investigate the allegations in a formal complaint."
- If no SH + EP + US then "**must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct."
- "The recipient **may** dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein."
- Upon a dismissal "the recipient **must** promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties."

If the formal complaint is not dismissed . . .

- "The recipient must investigate the allegations in a formal complaint."
- "For postsecondary institutions, the recipient's grievance process must provide for a live hearing."

To be continued . . . .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Operationalizing the Regs

Assume we receive a report . . .

Step 1: Outreach to alleged victim to discuss resources and options – document and implement

Step 1 and ½: Consider interim removal & **ensure other relevant stakeholders are notified**

Step 2: If we have a FC (or determine a FC should be made), notify respondent

Step 2 and ½: Assess whether SH + EP + US exists

- If yes, investigate. If no, dismiss & written notice.

Reminder: Just because it's not IX does not mean we don't deal with it -- **ensure other relevant stakeholders are notified**

Documentation & Recordkeeping

A recipient must maintain for a period of **seven years** records of –

A. **Each sexual harassment investigation** including any determination regarding responsibility and any audio or audiovisual recording or transcript . . . , any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant . . . ;

B. **Any appeal** and the result therefrom;

C. **Any informal resolution** and the result therefrom; and

D. **All materials used to train** Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials **publicly available** on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

Additionally, "For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, **including any supportive measures**, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. **If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable** in light of the known circumstances."

QUESTIONS?