

DOCUMENTING TITLE IX CLAIMS OF SEXUAL HARASSMENT

Under the New Regulations



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TITLE IX GRIEVANCE PROCESS SEXUAL HARASSMENT



- Prevent or stop sexual harassment
- Provide equitable process for handling reports/complaints
- Implement supportive measures to individuals
- Document efforts to ensure compliance, have record for future action, identify patterns
- Avoid finding of deliberate indifference

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TITLE IX GRIEVANCE PROCESS SEXUAL HARASSMENT



- New regulations adopted standards from Supreme Court cases (Davis, Gebser).

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LIABILITY

A private damages action may lie against a school board under Title IX in cases of student-on-student sexual harassment but only where the funding recipient acts with **deliberate indifference** and the harassment is so severe that it effectively bars the victim's access to an educational opportunity or benefit.

Davis v. Monroe County Bd. of Educ.,
526 U.S. 629 (1999).

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TITLE IX GRIEVANCE PROCESS SEXUAL HARASSMENT



- A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the U.S. 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 known circumstances.**

34 CFR 106.44(a).

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LIABILITY

A recipient is liable for its own actions in response to known harassment.

Davis v. Monroe County Bd. of Educ.,
526 U.S. 629 (1999).

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LIABILITY

Liability under Title IX does not extend to school officials, teachers, and other individuals.

Plummer v. Univ. of Houston,
860 F.3d 767 (5th Cir. 2017).

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LIABILITY

Remember that Title IX is not the exclusive mechanism for addressing gender discrimination in schools.

Fitzgerald v. Barnstable Sch. Comm., 555
U.S. 246 (2009).

For example: 14th Amendment – substantive due process
Right to bodily integrity

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RECORD KEEPING



- Initial intake report
- Response to sexual harassment report – supportive measures
- Formal complaint
- Notice to parties
- Emergency removal
- Administrative leave
- Informal resolution
- Notice to parties of interviews
- Evidence submitted to parties
- Investigative report
- Notice of opportunity to submit questions
- Questions and submitted answers
- Determination of responsibility
- Documentation of remedies and sanctions
- Appeal documentation
- Decision of appeal

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Hypothetical:

Lashonda, 5th grade cisgender female

Allegations

- Cisgender male classmate repeatedly groped and touched on Lashonda's breast and in her genital area
- Made vulgar statements: *I want to get in bed with you. I want to feel your boobs.*
- Placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward Lashonda in PE class.
- Rubbed his body against her in the hallway
- On campus and the school bus
- Repeatedly over a 5-month period

- Parent says already reported to campus administration and nothing done.
- Calls Director of Student Services office.

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Record of Reports

STUDENT WELFARE
FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION FFH
(LOCAL)

Employee Report Any District employee who suspects or receives direct or indirect notice that a student or group of students has or may have experienced prohibited conduct shall promptly notify the appropriate District official listed in this policy and take any other steps required by this policy.

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Record of Reports

Definition of District Officials For the purposes of this policy, District officials are the Title IX coordinator, the ADA/Section 504 coordinator, and the Superintendent.

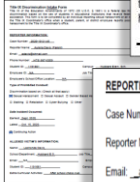
Title IX Coordinator Reports of discrimination based on sex, including sexual harassment, gender-based harassment, or dating violence, may be directed to the designated Title IX coordinator for students. [See FFH(EXHIBIT)]

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Intake

Title IX Discrimination Intake Form
Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681) is a federal law that prohibits discrimination based on the sex of students in educational institutions that receive federal financial assistance. This form is to be completed by an individual reporting sexual harassment or an individual in the Title IX Coordinator's office when a student, parent, or district employee reports possible sexual harassment to the Title IX Coordinator's office.



REPORTER INFORMATION:
Case Number: 2020-10-2145
Reporter Name: Aurelia Davis (Parent)
Email: adavis@gmail.com
Phone Number: (478) 867-5309
Student ID: 1191661 Campus: Hubbard Elem. Sch.



Intake

Type of Prohibited Conduct:
Discrimination based on: (Check all that apply)
 Sexual Harassment Sexual Assault Gender Based Harassment Dating Violence
 Stalking Retaliation Cyber Bullying Other

Date Incident Occurred:
Earliest Sept 2020
Latest Oct 15, 2020
 Continuing Action



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Intake

ALLEGED VICTIM'S INFORMATION:
Name: Lashonda Davis
School/Department: Hubbard E.S. Job Title: NA
Email: NA Employee ID: NA
Student ID: 1191661 Campus: HES
Extra-Curricular Activities: After school chess club



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Intake



- Description of prohibited conduct
- Any witnesses
- Previously discussed with witnesses
- Identify any administrators or district employees reported to
- Signature and date of person taking initial report

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Child Abuse Report?

If the incident could be child abuse, the employee(s) receiving the report must report to CPS or law enforcement within 48 hours.



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Promptly contact complainant

The Title IX Coordinator must 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, and explain to the complainant the process for filing a formal complaint.

34 CFR §106.44(a).

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If the district does not provide the supportive measures, the Title IX Coordinator must document why not.

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Emergency Removal

Nothing in the Title IX grievance process 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. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

34 CFR 106.44(c).

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Removals requiring analysis:

- OSS
- DAEP
- Expulsion
- Change of class/schedule*
- Change of campus*
- Teams
- Clubs
- Organizations
- Student activities (STUCO)

*Could be a supportive measure if doesn't unreasonably burden the respondent.

See p. 770-777 - Commentary

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Emergency Removal Form

Emergency Removal Form

Name of Respondent Student: Groper Flanders (G.F.)

Title IX Case No. 2020-10-21-45 Current Campus: Hubbard E.S.

**A Respondent may be removed from the district's educational program or activities if the District makes an individualized safety and risk analysis and determines that an immediate threat, arising from the allegations of sexual harassment, to anyone's physical health or safety justifies removal. This analysis may involve the campus/district threat assessment team. A student who is removed on an emergency basis must be provided with notice and an opportunity to challenge the decision. A student with a disability has rights under the Individuals with Disabilities Education Act and/or Section 504 of the Rehabilitation Act and may not be removed without following the procedural safeguards of those laws.*

Emergency Removal Form

Does the student receive special education or Section 504 supports? If so, refer to ARD/504 committee. See Texas Education Code § 37.004.

If the Respondent has already been removed for behaviors other than sexual harassment, list the basis for the removal from the Student Code of Conduct (e.g., bullying, cyberbullying, use of profanity, lewd or vulgar language on campus or school-related activity, violation of technology acceptable use policy, assault, hazing): _____

Examples of removal include OSS, DAEP, expulsion, change of campus, removal from extracurricular activity.

Emergency Removal Form

Removal Determination:

No – Respondent does not pose an immediate threat arising from the allegation of sexual harassment to anyone's physical health or safety.

Yes – Respondent poses an immediate threat arising from the allegation of sexual harassment to the physical health or safety of the self or others.

Basis for Removal: Due to on-going physical nature of alleged conduct, G.F. is being removed from the after school chess program where there is less student supervision than regular classroom instruction pending the results of the Title IX investigation and grievance process. G.F. is also temporarily suspended from the bus.

Emergency Removal Form

Length Removal: Semester Year Indefinite Trial Basis Other: pending grievance process

School employees involved in making Emergency Removal Decision:
Threat Assessment Team: B. Query (Principal/Behavior Coordinator); A. Kennedy (School Counselor);
Rehnquist (LSSP); C. Thomas (Title IX Coordinator); A. Scalia (Exec. Dir. Special Education)

*The district threat assessment and safe and supportive school team should be notified of removal determination.

*Upon removal, Respondent student must be notified of opportunity to challenge emergency removal: Parent
was informed of right to challenge emergency removal under FNG(LOCAL).

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Dismissal of a Formal Complaint

Dismissal Basis: (Check all that apply)

- Does not constitute sexual harassment
- Did not occur in district program or activity
- Did not occur in the U.S.
- Dismissal requested by Complainant
- Respondent no longer enrolled in district
- Circumstances prevent the district from gathering evidence sufficient to reach a determination

Reasoning for Dismissal: Describe the reasoning behind the dismissal of this complaint.

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Written Notice of Interviews

As you are aware, the District has received a Formal Complaint alleging sexual harassment involving your student. I plan to interview your student at [Time] on [Date] regarding this pending complaint. The interview will occur at [Location].

You and/or an advisor for the student may accompany the student to the interview to observe the process. However, the student will be expected to respond to questions directly, as developmentally appropriate. While an advisor may attend the meeting, he/she may not question the student, others, or the investigator.

34 CFR §106.45(b)(5).

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Opportunity to Review Evidence

Letter to Parent of Complainant Letter to Parent of Respondent

You have the right to review any evidence obtained as part of the investigation of sexual harassment involving your student. Please contact me at (XXX) XXX-XXXX or [email] by [date] if you would like the opportunity to inspect and review the evidence.

The evidence may be provided in a format that prevents copying or downloading in order to protect the confidentiality of information in education records for the students involved.

You may submit a written response within 10 days of reviewing the evidence. Your written response will be considered before I draft the investigative report.



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Investigative Report



- A report of alleged sexual harassment was received by the campus/Title IX Coordinator's office on [date]
- The alleged victim was contacted by the Title IX Coordinator's office and provided with information about the grievance process and supportive measures
- A Formal Complaint was filed on [date]
- The Title IX Coordinator provided the Complainant and Respondent with written notice of their rights in the grievance process and information about the availability of supportive measures.
- The following supportive measures were implemented: _____
- Campus administration and the Title IX Coordinator made a determination regarding Emergency Removal of the Respondent. [or] The Title IX Coordinator and Human Resources made a determination regarding Administrative Leave for the Respondent.

Procedural Steps



- *The Title IX Coordinator appointed the undersigned to investigate the Formal Complaint. Investigator.*
- *The Investigator reviewed the Formal Complaint and relevant district policy and student code of conduct provisions beginning [date].*
- *The Investigator sent written notice of interviews and right to an advisor on [date].*
- *The Investigator interviewed the Complainant on [date].*
- *The Investigator interviewed witnesses provided by Complainant on [dates].*
- *The Investigator interviewed the Respondent on [date].*
- *The Investigator interviewed witnesses provided by the Respondent on [dates].*
- *The Investigator [add other steps taken during investigation—review of physical evidence, location].*

Procedural Steps



- *The parties were given the opportunity to submit evidence, which was reviewed by the Investigator.*
- *The Investigator completed secondary interviews with Complainants, witnesses, additional witnesses, or Respondent.*
- *The parties were given the opportunity to inspect and review evidence and submit a written response.*
- *The draft investigation report written was sent to all parties with an opportunity to respond within 10 calendar days.*
- *The parties did/did not submit written responses that were considered by the Investigator.*

Procedural Steps



- I. Factual information about the parties*
- II. The allegations in the Formal Complaint*
- III. Timeline/dates*
- IV. Relevant sections of board policy and the student of code of conduct*
- V. Whether a CPS report was necessary*
- VI. Whether there is a related criminal/juvenile investigation*
- VII. Evidence from witnesses*
- VIII. Physical or other evidence*
- IX. Consideration of written responses to draft investigative report.*

Findings of Fact



Investigative Report

The new Title IX grievance process does not prohibit the investigator from making recommendations, but the decision maker must make an independent decision based on an objective review of the evidence.



This is the final investigative report in this matter. The Decision Maker will allow the parties to submit relevant questions for the other party(ies) or witnesses before making a determination of responsibility for sexual harassment.

Title IX Investigator

Date

Opportunity to Submit Questions



Determination of Responsibility

The new Title IX grievance process does not prohibit the investigator from making recommendations, but the decision maker must make an independent decision based on an objective review of the evidence.





Determination of Responsibility

- Nature of allegations
- Procedural steps
- Findings of fact
- Determinations based on preponderance of evidence/beyond reasonable doubt
- Remedies provided
 - Supportive measures to complainant
 - Supportive measures/sanctions to respondent
- Appeal information



SUPREME COURT:

Whether gender-oriented conduct rises to the level of actionable "harassment" under Title IX depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved, and courts must bear in mind that children may regularly interact in a manner that would be unacceptable among adults; damages are not available for simple acts of teasing and name-calling, even where these comments target differences in gender, and the behavior must be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity.

Davis v. Monroe County Bd. of Educ.,
526 U.S. 629, 651 (1999).

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APPEAL FORMS

- Appeal form
- Letter – Notice to Other Party
- Decision on Appeal



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OFFICE FOR CIVIL RIGHTS

Thirty-two (32) times in the commentary to the new Title IX regulations, OCR promises to not second guess the substantive decisions of recipients, so long as procedures are followed.

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FFH (REGULATION)

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- Remember the purposes for documenting.
- Consider the ultimate audience.
- As educational experts, an administrator must ensure that errors in writing do not undermine his/her credibility.
- Date and sign final reports.
- Make sure Title IX Coordinator gets a copy of all related documents and evidence.

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