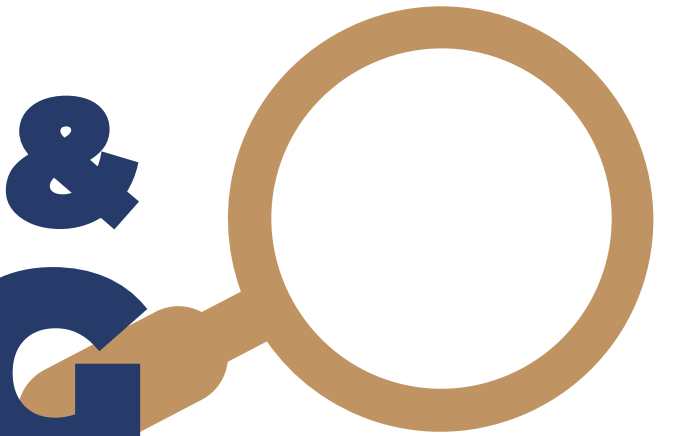


TITLE IX

INVESTIGATING & RESOLVING



SEXUAL HARASSMENT COMPLAINTS

PRESENTED BY

Brandon Carey
OSSBA STAFF ATTORNEY



WHAT IS HARASSMENT?

WHAT IS SEXUAL HARASSMENT?

High Bar Before Title IX Implicated



- Lots of behavior may meet the definitions of harassment/sexual harassment under your student code of conduct, but not be Title IX issues.
- The Title IX investigation process is only invoked when behavior meets the specific definitions of sexual harassment listed in the Title IX regulations.

Enhanced Process



Under the 2020 regulations, districts must respond differently (i.e., in accordance with the grievance procedures listed in the regulations) when:

1. The district has "actual knowledge"
2. Of sexual harassment as defined by the 2020 regulations
3. Within the district's education programs or activities (i.e., very specific definitions)
4. Against a person in the United States

THE BASICS

 What basic elements are required of districts?

What are schools required to do?

**Section
106.8**

Coordinators

**Section
106.8**

Policies

Procedures

Coordinators

Designate at least one employee to coordinate compliance with Title IX.

Section 106.8

Policies

Adopt a policy & disseminate to applicants, students, parents & legal guardians, employees, etc.

Procedures

Adopt a grievance procedure in compliance with regulations.

Posting Requirements



Must post the following information on school district website in a prominent location:

- Contact information for the school's Title IX Coordinator(s) (the name or title of the Title IX Coordinator, an office address, a telephone number, and an email address).
 - **OCR seems to prefer name *and* title**
- Non-discrimination policy
- Training materials used to train the school's Title IX personnel.

Title IX

Team Structure



- Title IX Coordinator
- Investigator (TIX-C can be investigator)
- Informal Resolution Facilitator
- Decision-maker (cannot be TIX-C or investigator)
- Appeal Decision-maker (cannot be any of the above)

Sexual Harassment

Sex-based conduct that meets the following three definitions and criteria.



1. Quid Pro Quo

An employee of the recipient conditioning the provision of an aid, benefit or service of the recipient on an individual's participation in unwelcome sexual conduct.

2. Hostile Environment

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.

BREAKING DOWN “HOSTILE ENVIRONMENT”

Severe ● Pervasive ● Objectively Offensive

SEVERE

Pervasive

Objectively Offensive

SEVERE

Was it particularly egregious or explicit conduct?

Was it conduct accompanied by threats of violence?

Did it continue despite requests to stop?

Pervasive

Objectively Offensive

SEVERE

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Was it conduct accompanied by threats of violence?

Did it continue despite requests to stop?

Pervasive

“Harassment is pervasive when it occurs either in concert or with regularity.”

Pattern or practice

Widespread

Well-known among students and employees
(Source – ATIXA: PreK-12 Title IX Course)

Occurring in public spaces

Objectively Offensive

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Objectively Offensive

To determine whether conduct is objectively offensive, many factors may be considered, including:

Age

Claimant/Respondent Relationship

Number of Persons Involved

Frequency

Severity

Humiliation

Intimidation

Abuse

SEVERE

Pervasive

Objectively Offensive

When breaking down different hostile environments, consider all relevant circumstances:

- Degree to which conduct affected one or more students' education
- Type, frequency and duration of the conduct
- Relationship between alleged harasser and victim(s)
- Number of individuals involved
- Age and sex of the alleged harasser and victim(s)
- Size of the school, location of the incidents, and context in which they occurred
- Other similar incidents not involving the same individuals
- Incidents of gender-based, but nonsexual harassment

Denial of Equal Access



Does not require complete exclusion from an education, but rather denial of “equal access.”

Signs may include:

- Skipping class to avoid a harasser
- A decline in a student’s GPA
- Having difficulty concentrating in class

However, no concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant’s position of the ability to access the recipient’s education program or activity on an equal basis with persons who are not suffering such harassment.

Definition 3:

Sexual Assault



An offense that meets the definition of:

- Rape
- Fondling
- Incest or statutory rape as used in the FBI's Crime Reporting System

Definition 4:

Domestic Violence



A felony or misdemeanor crime of violence committed by:

- Current/former spouse or intimate partner
- A person with whom the victim shares a child.
- A person who is cohabitating with, or has cohabitated with, the victim as a spouse/intimate partner.
- A person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
- Any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

Definition 5:

Dating Violence



Violence committed in a social relationship of a romantic or intimate nature. The existence of such a relationship shall be based upon the reporting party's statement with consideration of the following factors:

- The length of the relationship.
- The type of relationship.
- The frequency of interaction between those involved.
- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

Definition 6:

Stalking



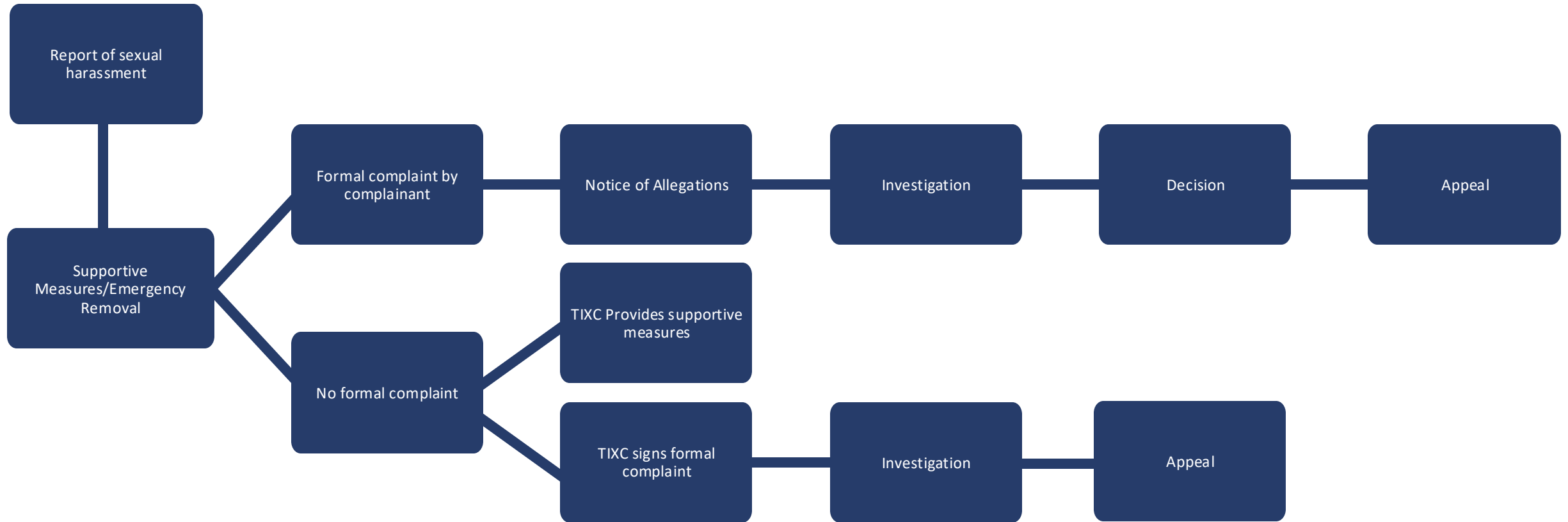
Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for the person's safety or the safety of others.
- Suffer substantial emotional distress.



What process do districts follow when a violation occurs?

Overview of Allegation & Investigation Process



Report of sexual harassment

Supportive Measures/Emergency Removal

DISTRICT RECEIVES NOTICE

(Actual Notice or Actual Knowledge)

K-12 Schools



Any school district employee having knowledge of the notice.

Postsecondary Schools



Use the Gebser definition.

Critical: A Different Path



When a district has notice of possible sexual harassment, the school must take a different path than any other (i.e., non-sexual harassment) disciplinary incidents.

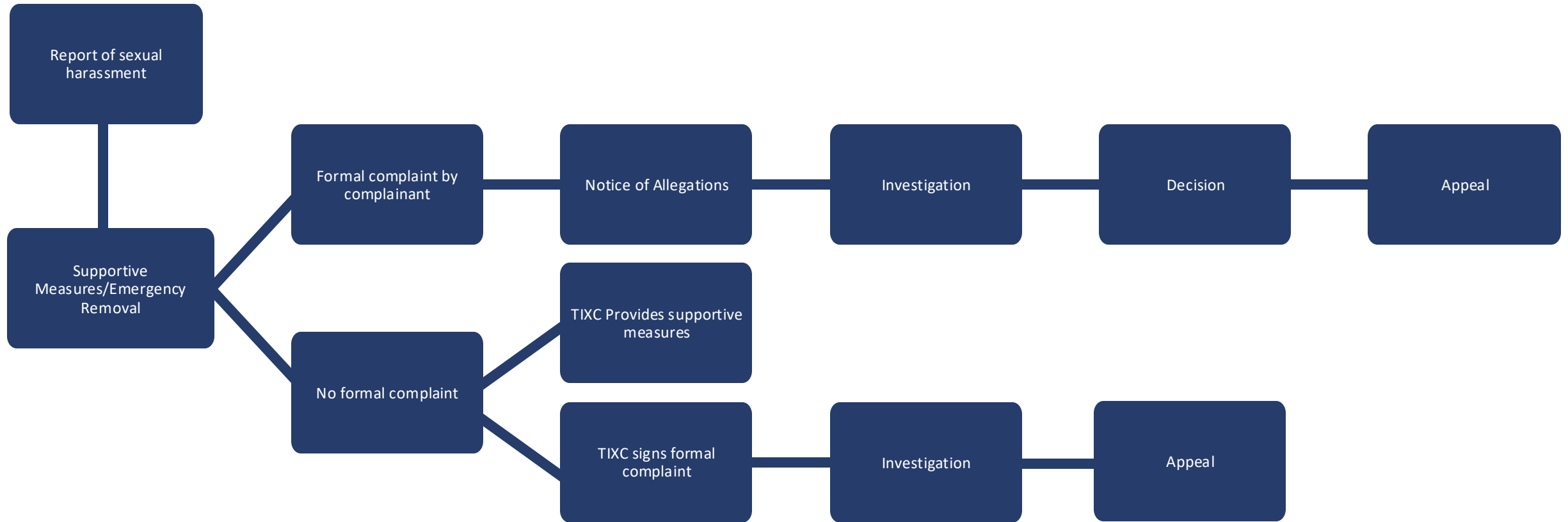
Critical: A Different Path

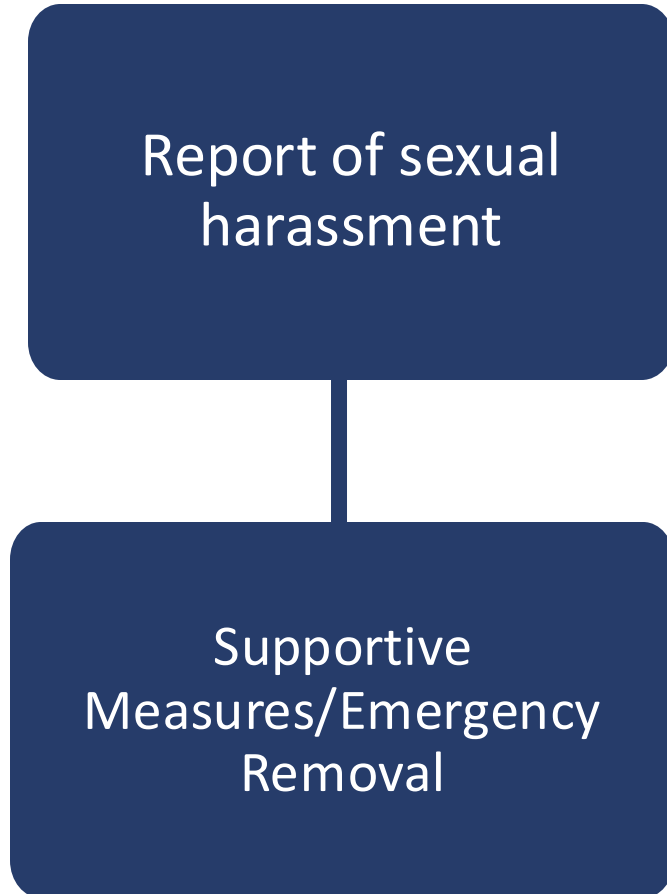


Steps Upon Notice:

- Notify the Title IX Coordinator
- Take non-disciplinary steps to ensure conduct does not continue and both parties are safe. DO NOT discipline yet!
- Facilitate discussion between complainant and Title IX Coordinator as quickly as possible (will determine your next steps).

Overview of Allegation & Investigation Process





1. INITIAL DISCUSSION & SUPPORTIVE MEASURES

Title IX coordinators must contact the alleged victim to:

- Explain how to file a formal Title IX complaint.
- Offer supportive measures, **regardless of whether a complaint is filed.**

Supportive/Interim Measures:

- Must be offered upon actual notice.
- May be offered during or in lieu of a formal complaint.
- To restore or preserve access to program without unreasonably burdening other party.

Report of sexual
harassment

Supportive
Measures/Emergency
Removal

2. CONSIDER EMERGENCY REMOVAL

**Before emergency removal of a
respond, district must:**

- Perform an individualized risk analysis;
- Determine that an immediate physical threat to the health or safety of any student or other individual arising from the allegations justifies the removal; and
- Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.

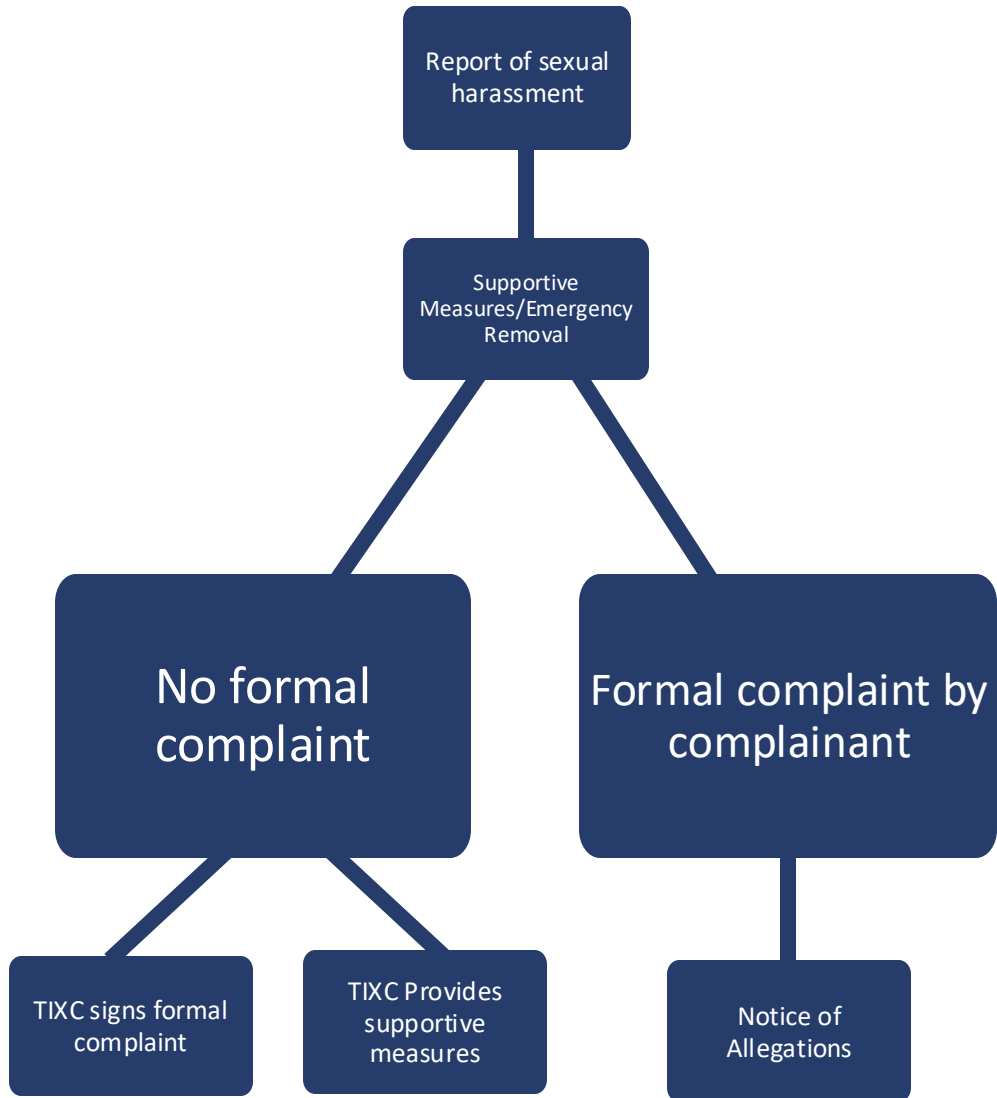
Report of sexual harassment

Supportive Measures/Emergency Removal

3. LAW ENFORCEMENT & DHS REFERRAL



If the allegations could constitute a crime or child abuse, immediately contact law enforcement and/or DHS.



4. FORMAL COMPLAINTS

(Only responsible for investigating a formal complaint)

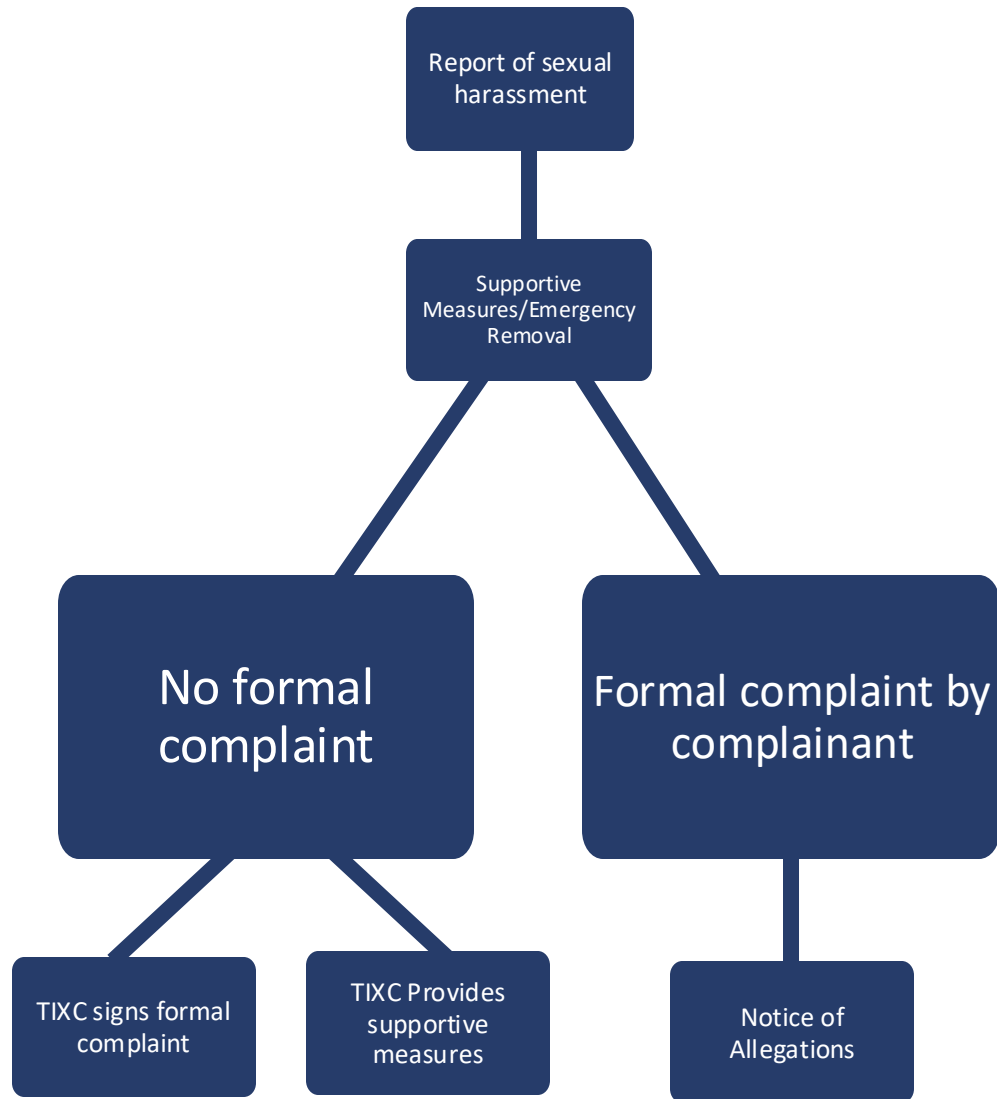
Formal Complaint – Written Document:

- Signed by either the complainant (definition limited to the alleged victim), the complainant's parents or the Title IX coordinator.
- Alleges sexual harassment against a respondent.
- Requesting an investigation.

A formal complaint may be filed:

- In person
- By mail
- Email
- Any additional method designated by the recipient

NO FORMAL COMPLAINTS



1. Provide supportive measures if alleged conduct covered under Title IX.
2. Title IX Coordinator initiates Title IX complaint.
3. If alleged conduct would not be covered under Title IX, address under student code of conduct.



This is a dangerous phase of the process.

If you believe the alleged conduct would be a Title IX violation, and a complaint is not filed, **you may need to file on behalf of the alleged victim.**

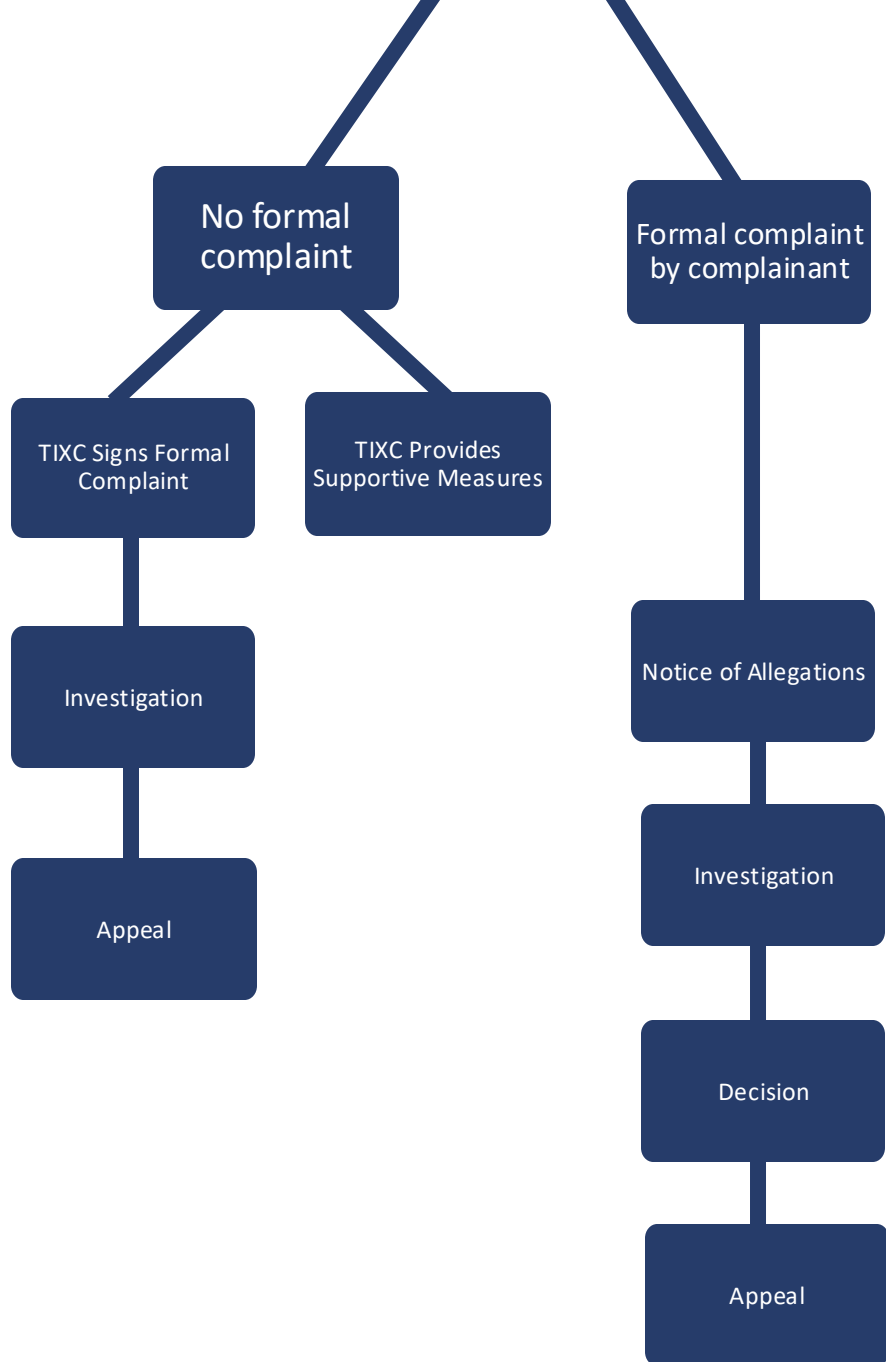
FORMAL COMPLAINTS

— Coordinator Initiated —

Title IX coordinators may file a formal complaint when they determine that “a non-deliberately indifferent response to the allegations requires an investigation...” (Final Rule, pg. 386).

If a grievance process is initiated against the wishes of the complainant, that decision should be reached thoughtfully and intentionally by the Title IX Coordinator, **“not as an automatic result that occurs any time a recipient has notice that a complainant was allegedly victimized by sexual harassment...”** (Final Rule, pg. 387).





5. JURISDICTIONAL DETERMINATION

(Must have jurisdiction to investigate under Title IX)

Respond when having actual knowledge of sexual harassment in:

1. An education program or activity of the recipient
2. Against a person in the U.S.

What is an education program or activity?

Subject Matter

- Do the alleged facts violate any definitions under sexual harassment (106.30(a))?

People

- Claimant/Respondent

Place, Event or Activity

- Does the school have **substantial control** over the context of where the harassment occurred?
- For example: on campus, off-campus locations owned by the district, school-sponsored activities, etc.



- Must be participating, or attempting to participate, in the district's programs or activities.
- Could be a student, faculty or staff, or at least attempting to be (may also need to investigate if complainant is a volunteer or contractor working on school grounds).
- If no, no jurisdiction.



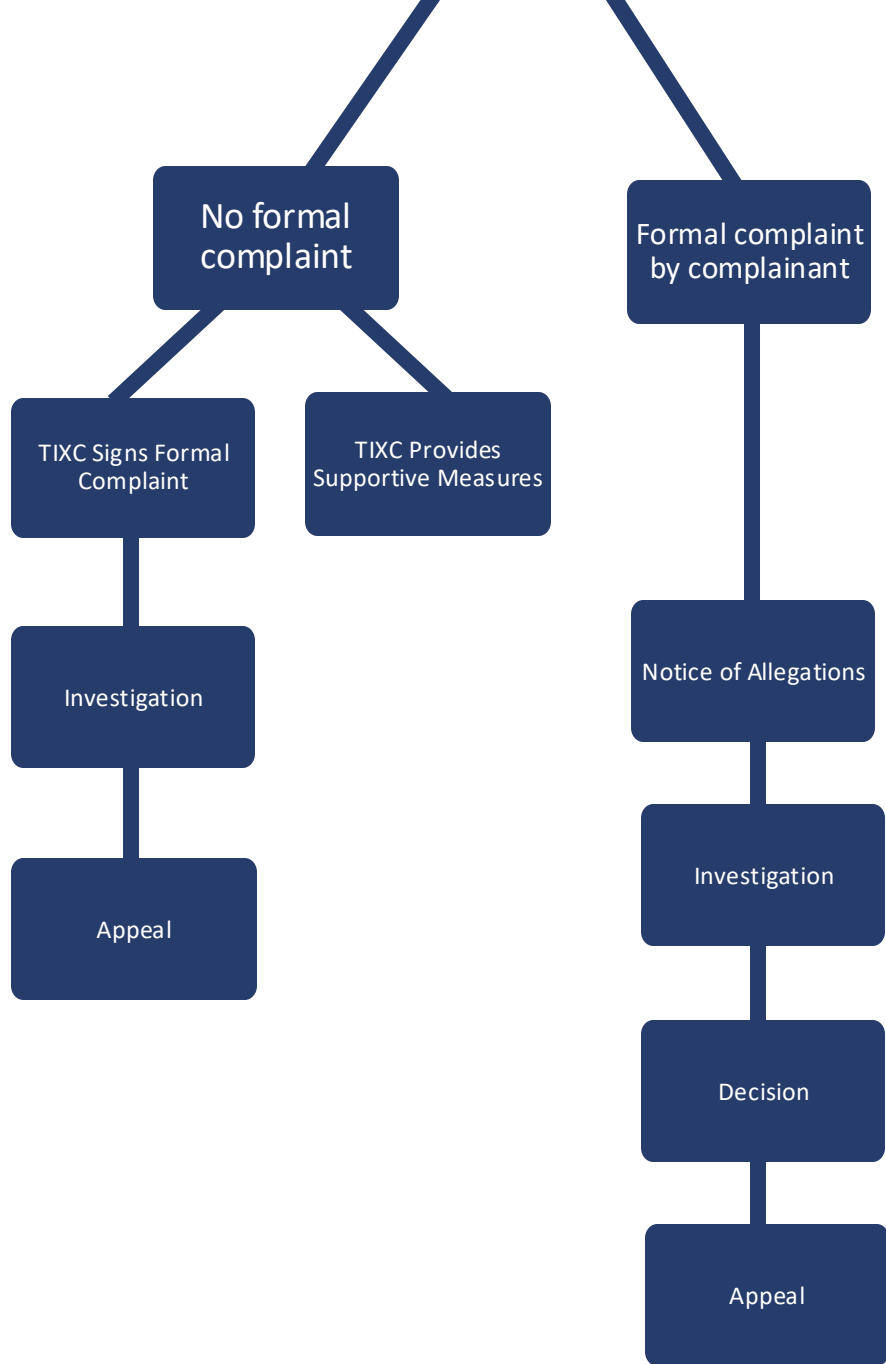
- Does the district have substantial control over the respondent?
 - Student
 - Employee,
 - Volunteer on Campus
 - Contractor Working on Campus
 - Etc.
- If no, no jurisdiction (although may need to provide supportive measures).

Downstream Effects



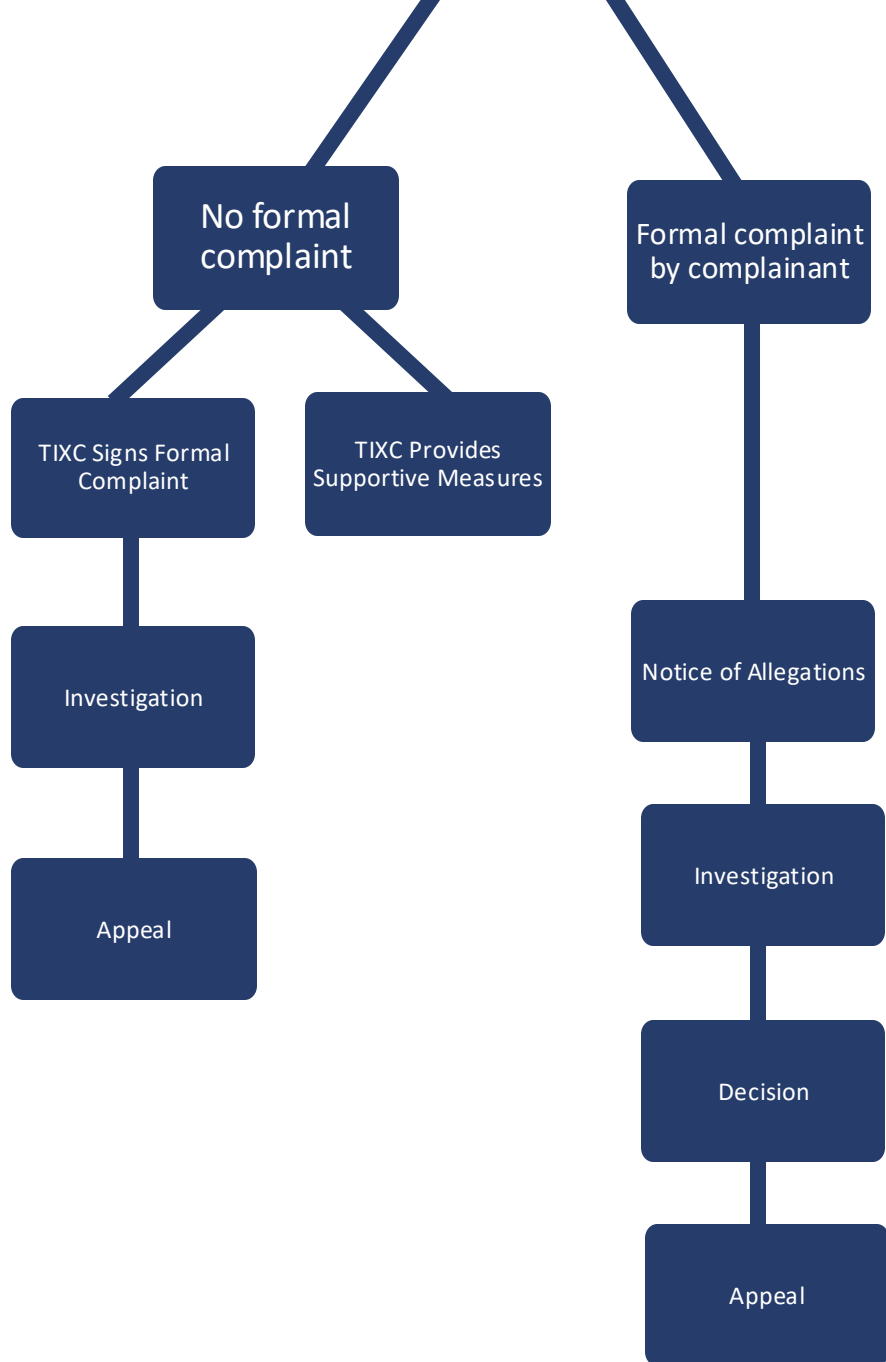
What about the “downstream effects” of harassment that occurred off-campus?

Although districts cannot address behavior over which they do not have substantial control (e.g., at someone’s home on a weekend), they may be responsible for addressing any carryover of the behavior that occurs in areas in which it does have jurisdiction.



6. DISMISSAL

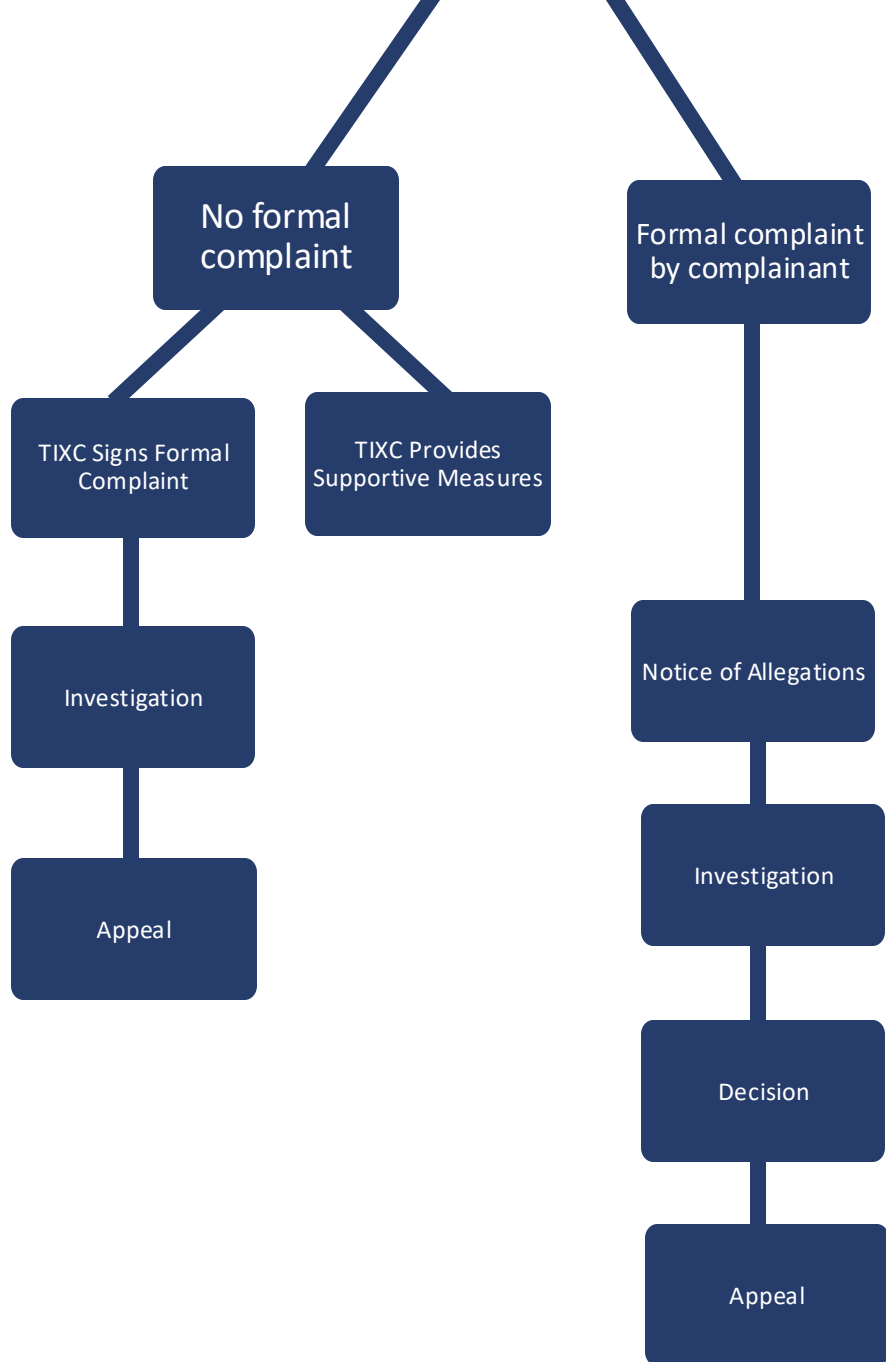
The district must dismiss the complaint if any of the jurisdictional requirements in the previous slide are not met.



6. DISMISSAL

The district may dismiss the complaint if, at any time during the investigation or hearing:

- The complainant notifies the Title IX coordinator in writing that they would like to withdraw the complaint or any allegation;
- The respondent is no longer enrolled or employed by the district; or
- Specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

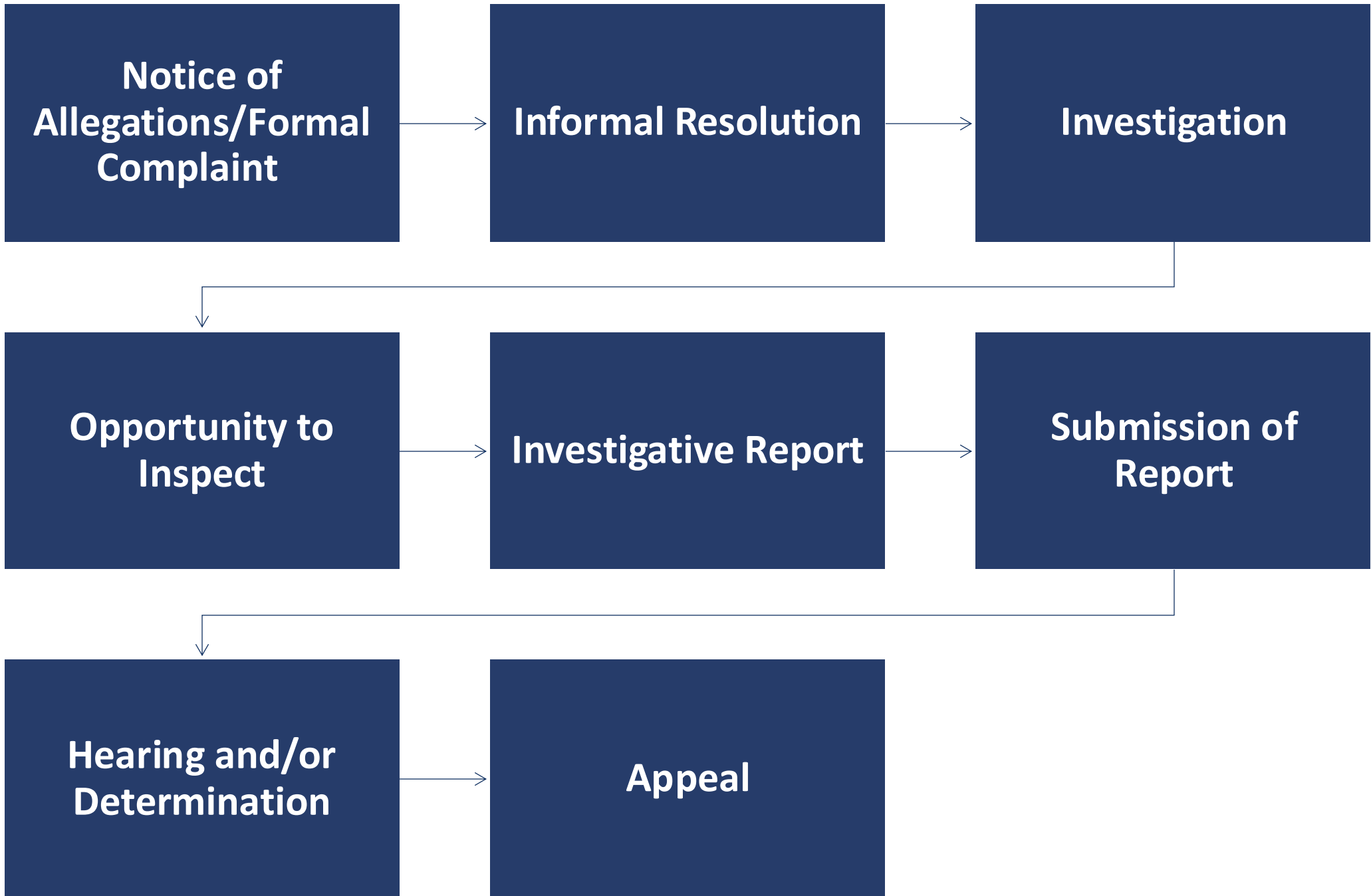


6. DISMISSAL

Upon dismissal either required or allowed in the slides above, the district must send written notice of the dismissal and reasons for the dismissal.

YOU'RE NOW IN A NEW ZONE

The Investigation ● *Grievance Procedures*



Title IX

Grievance Procedures



- If the district answers the jurisdictional questions in the affirmative, the complaint must be investigated in accordance with the grievance process outlined in 34 U.S.C 106.45.
- If the institution follows OCR's procedures, then it will not be found "deliberately indifferent."

The Basics of Grievance Procedures



- Treat complainant and respondent equitably, including providing supportive measures to both parties, if necessary.
- Objective evaluation of all evidence, “both inculpatory and exculpatory evidence,” prior to making a determination.
- The Title IX Coordinator, investigator or person making the decision must be free of bias against the complainant/respondent, and appropriately trained on the definition of sexual harassment and how to conduct an investigation.
- Have “reasonably prompt timeframes” for the completion of the investigation (106.45(b)(1)(ii)).

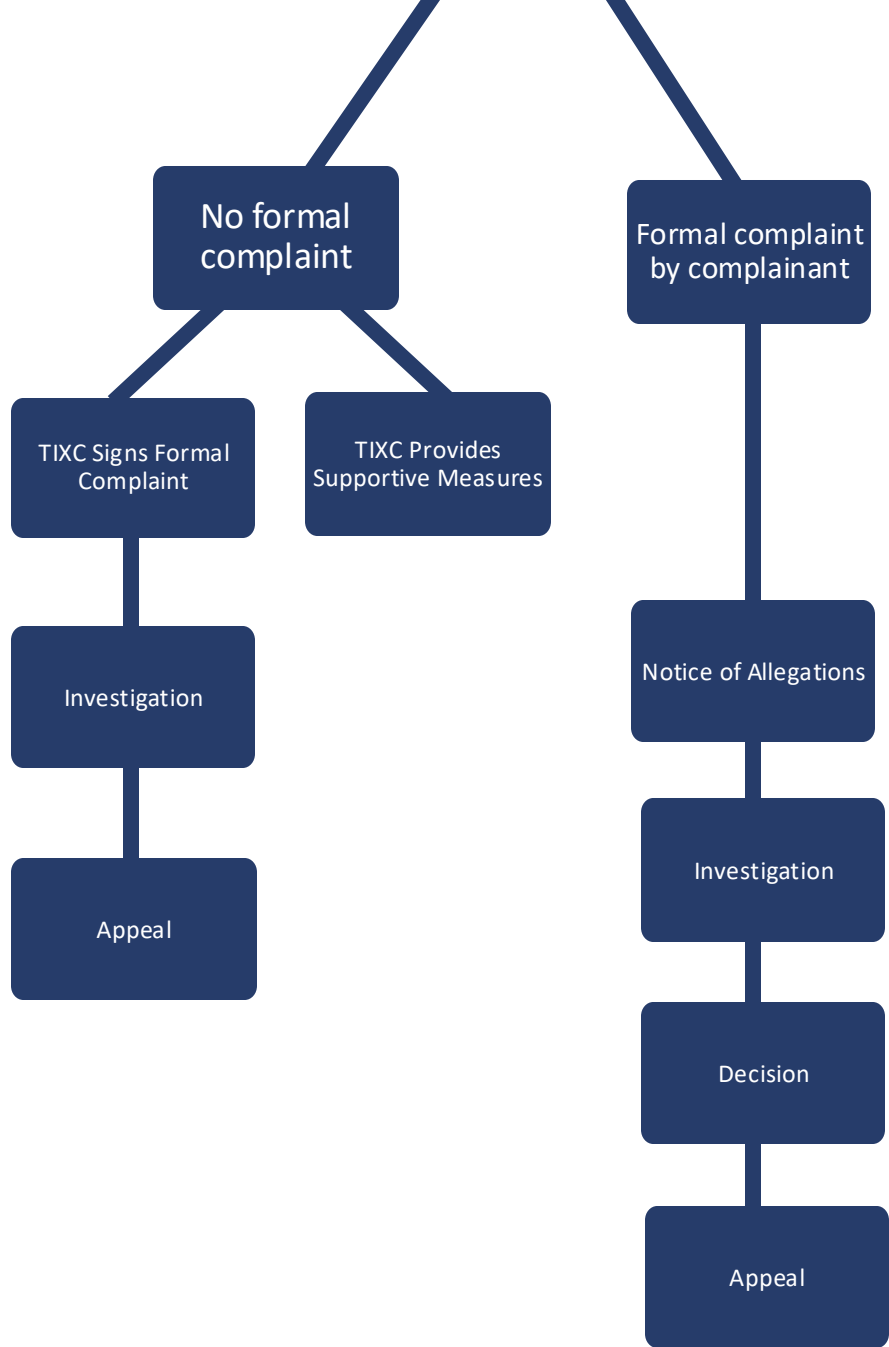
Standard of Proof



Can only use preponderance of the evidence if that standard is used for other violations in the code of conduct with the same maximum penalty.

AND

Must use same standard for employees and students.



7. NOTICE TO PARTIES & ASSIGN INVESTIGATOR

(Written notice provided before discussions/interviews)

Written notice must include:

- Citations to relevant grievance procedures.
- Allegations with sufficient details.
- A statement indicating the responding party is “presumed not responsible” until a determination is made.
- The right to an advisor of their choice who may be an attorney.
- That parties may request to inspect and review relevant evidence.
- Reminder of the institution’s policy not to make false statements or intentionally submit false information.

Notice must also be provided for:

- Reasonable delays for “good cause”
- Additional allegations to be investigated that weren’t in the original complaint



An investigation is now opened
– **what happens next?**



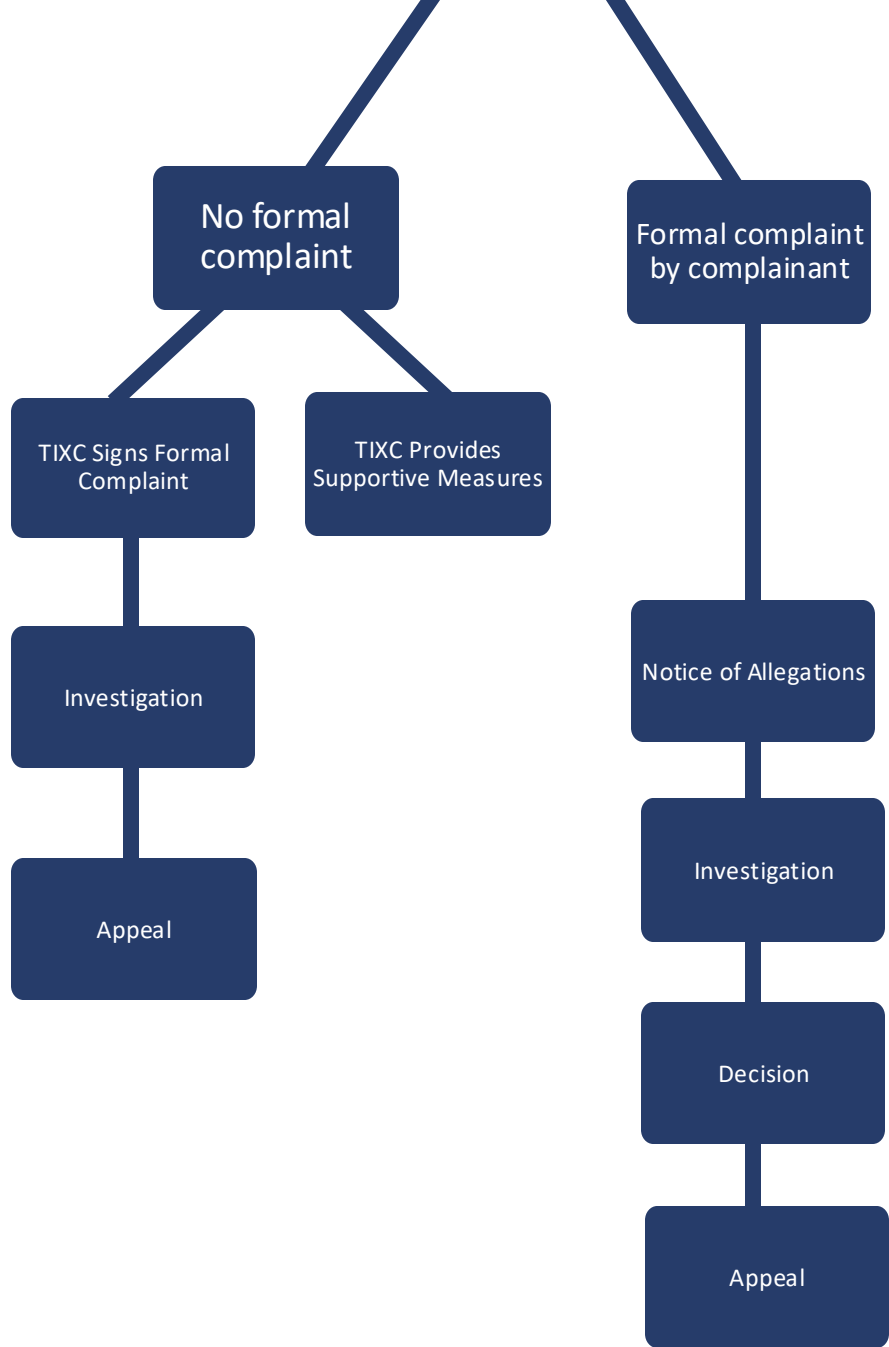
The district has completed steps 1-7 of the process – what happens next?

8. Supportive Measures

Now that you have more information, determine whether initial measures were adequate.

9. Informal Resolution

- School and parties will determine if appropriate
- Allowed at any time prior to a final determination
- Must obtain voluntary, written consent
- Cannot be used if allegation of an employee harassing a student
- Must provide detailed notice to parties of – allegations, requirements of the process, circumstances which would preclude formal resolution & consequences of participation.



10. THE INVESTIGATION

(Written notice provided before discussions/interviews)

In general:

- The burden of gathering evidence is on the institution
- Equal opportunity to present witnesses and evidence
- No restrictions on discussing allegations or gathering and presenting evidence
- Equal opportunities to have others present during the grievance process

Advisors:

- Cannot restrict either party's ability to have an advisor present at all proceedings.
- The advisor can be anyone chosen by the party.

Delays or Extensions



- Temporary delays in the investigation will only be allowed for “good cause”
- Provide notice to parties explaining reasons for action.

Law Enforcement Investigation



Must be

- Reasonably short – preferably no longer than two weeks.
- Only for the time it takes law enforcement to quickly complete necessary interviewing and evidence gathering.



Also, when such a delay occurs, the institution must provide written notice to the parties of the delay and the reasons for it.

THE INVESTIGATION – GATHERING EVIDENCE

INTERVIEWS

EVIDENCE

SEARCHES

THE INVESTIGATION – GATHERING EVIDENCE

INTERVIEWS

Written notice must be provided far enough in advance to give the parties sufficient time to prepare to participate.

Notice of:

Date

Time

Location

Participants

Purpose of all hearings, investigative interviews or other meetings.

Attach as an exhibit – take notes, record or both to create a usable transcript.

EVIDENCE

SEARCHES

THE INVESTIGATION – GATHERING EVIDENCE

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EVIDENCE

When gathering any possible evidence be deliberate to help in making a determination.

SEARCHES

THE INVESTIGATION – GATHERING EVIDENCE

INTERVIEWS

Written notice must be provided far enough in advance to give the parties sufficient time to prepare to participate.

Notice of:

Date

Time

Location

Participants

Purpose of all hearings, investigative interviews or other meetings.

Attach as an exhibit – take notes, record or both to create a usable transcript.

EVIDENCE

When gathering any possible evidence be deliberate to help in making a determination.

SEARCHES

Searching personal electronics devices or other belongings:

- Only after establishing and documenting reasonable suspicion for the search.
- Should comply with any state law or local policy limitations on such searches.

11. Opportunity to Inspect



Prior to the completion of the report, must provide both parties:

- An equal opportunity to inspect all evidence directly related to the allegations, even if the institution does not intend to rely on the evidence; and
- An opportunity to “meaningfully respond” to the evidence after inspection.

Parties must have at least 10 days to submit written responses to the evidence, which must be considered prior to completion of the final report

12. Investigative Report



The regulations also require the creation of a written investigatory report that “fairly summarizes relevant evidence.”

12. Investigative Report



- Party Information
- Jurisdiction
- Allegations
- A description of the procedural steps taken from the receipt of the formal complaint through the determination (notices, interviews, methods of evidence gathering, hearings, etc.);
- Analysis of allegations
- Attach exhibits

13. Submit Investigative Report to Parties & Decision-Makers



- The report must be submitted to the parties and their advisors at least 10 days prior to a hearing or determination.
- The parties may provide responses to the report, and the decision-maker should consider the responses prior to making a decision.

14. Live Hearings & Follow Up Questions



K-12 Schools

*Live hearings
are **optional.***

**Postsecondary
Schools**

*Live hearings
and follow up
questions are
mandatory.*

14. Live Hearings & Follow Up Questions



The decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

34 C.F.R. 106.45(b)(6)(i).

14. Live Hearings & Follow Up Questions



- At either party's request, parties can be in separate rooms with technology that has audio and visual feeds.
- At institution's discretion, any or all parties or witnesses may appear virtually.
- Must create an audio or audiovisual recording, or transcript, of hearing and make available to parties.

14. Live Hearings & Follow Up Questions



With or without a live hearing, the decision-maker must ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses.

Inappropriate Follow Up Questions



With or without a hearing, all questioning must exclude evidence of the complainant's sexual behavior or predisposition, except in limited circumstances:

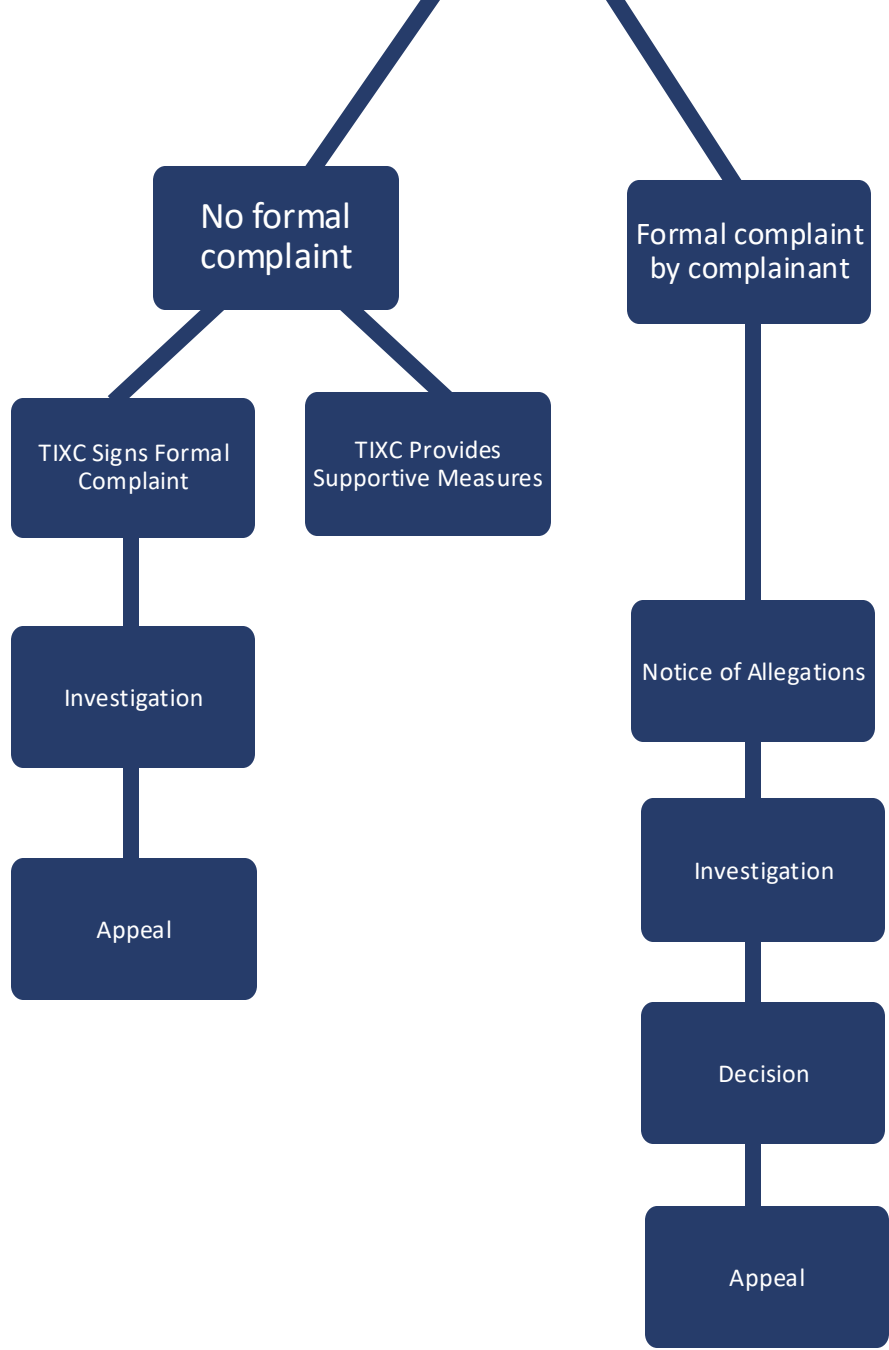
- To prove that someone other than the respondent committed the alleged conduct.
- When specific incidents of reporting party's sexual behavior with responding party are offered to prove consent.

15. Written Determinations



School must issue written determination that includes the following:

- A list of the allegations
- A description of the procedural steps taken from the receipt of the formal complaint through the determination (notices, interviews, methods of evidence gathering, hearings, etc.)
- Findings of fact supporting the determination
- Conclusions
- The rationale for the determination regarding each allegation, which should include the disciplinary sanctions imposed and remedies to be provided, if any
- Rights of Appeal.



16. THE APPEAL

Opportunity for appeal must be offered to either party on, at the least, the following bases:

- A procedural irregularity.
- New evidence that was not reasonably available at the time the determination was made and that could affect the outcome.
- The Title IX Coordinator, investigator or decision-maker had a conflict of interest or bias against one of the parties that affected the outcome



A SCHOOL DISTRICT'S OBLIGATIONS

**TITLE IX
EDUCATION**

Title IX Training



Specifically, Title IX Coordinators, investigators and decision-makers, and any individual that facilitates an informal resolution process, must receive training on the following:

- The definition of sexual harassment;
- All activities included in the institution's programs or activities;
- How to properly conduct an investigation pursuant to the grievance process listed in the regulation, including appeals and informal resolution processes;
- Investigating allegations impartially, conflicts of interest, etc.;

Title IX Training



- Technology that may be used to conduct a live hearing (in the institution conducts live hearings).
- Issues of relevance with regard to questions, including being able to determine when questions about the reporting parties' sexual predisposition or prior sexual behavior are irrelevant.
- How to create a report that “fairly summarizes the relevant evidence”

Title IX

Public Resources



The regulation also requires that all materials used to implement the trainings above must be made available on the institution's website or, if the institution does not maintain a website, upon request "for inspection by members of the public."

Retaliation



The new regulation prohibits retaliation for filing complaints or otherwise participating, or refusing to participate, in the investigation of an allegation of sexual harassment

It also indicates that it is not considered retaliation for an institution to provide disciplinary consequences when an individual makes “a materially false statement in bad faith in the course of a grievance proceeding.” Must have evidence that it is false and made in bad faith (in other words, knew it was false).

Record Keeping



The following must be created and maintained for seven years:

- Investigation documents including written finding, disciplinary sanctions and remedies implemented.
- Appeal and related results.
- Informal resolution/s implemented.
- Supportive measures implemented.

**THANK YOU FOR ATTENDING
TODAY'S WORKSHOP!**



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