

Title IX For Career, Technical & Trade Schools

Presented by
Edward Cramp & Jessica High
Higher Education Practice Group

August 24, 2020



Edward M. Cramp

Partner

EMCramp@duanemorris.com

(619) 744 2223



Jessica S. High

Associate

JHigh@duanemorris.com

(619) 744 2214

Today's Presentation

- What's new?
- History of Title IX
- Enforcement
- Definition of Sexual Harassment
- Grievance Procedure Overview



WHAT'S NEW?

What's New

- No more single investigator/decision maker role for Title IX Coordinator
 - Roles split into Coordinator, Investigator, Decision Maker, Appellate Authority
- Emphasis on fairness and equal treatment
 - No more assumptions of guilt
 - Equal access to information and assistance
- Informal resolution

What's New

- Live Hearing process
 - Emphasis on fairness and due process
- School can designate which officials are charged with reporting
- Mandatory and discretionary dismissals
- & more

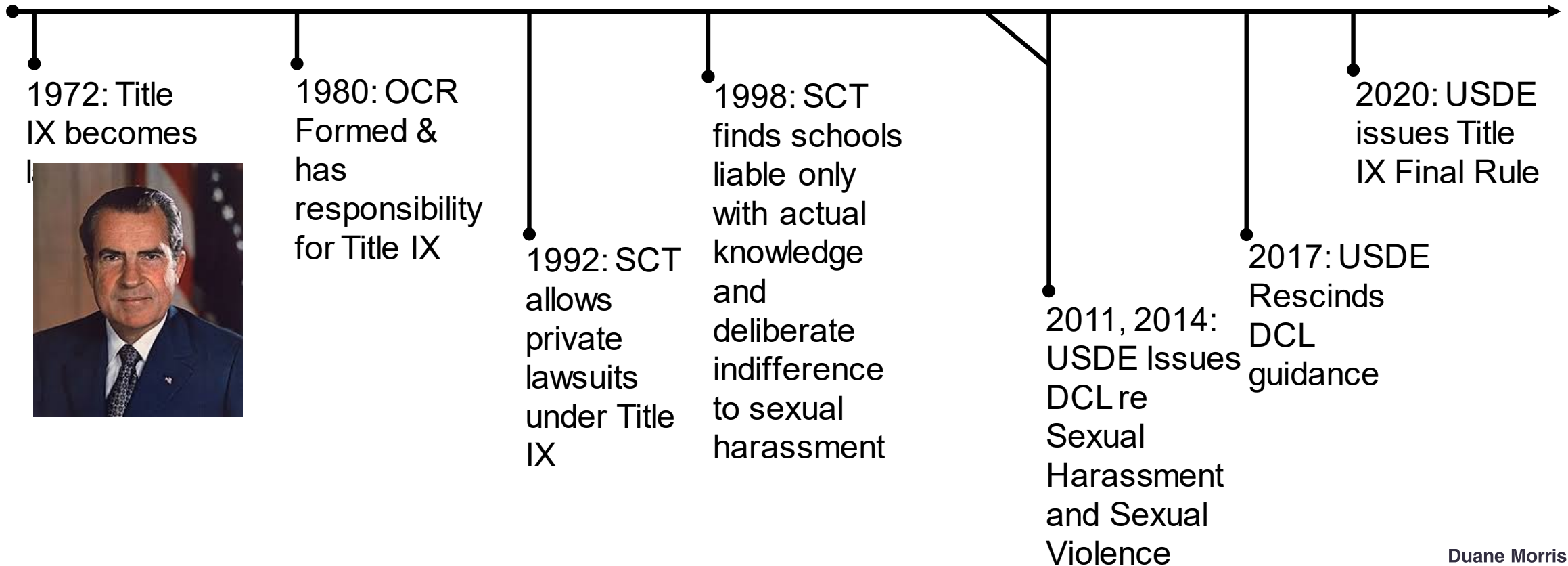


HISTORY OF TITLE IX

Title IX Prohibits Sex Discrimination

No person in the United States shall on the basis of **sex**, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance

Title IX Timeline



2020 Final Rule

- Effective August 14, 2020
- Amends 34 CFR Part 106
- 2011 Q&A and 2001 OCR guidance remain good to the extent consistent with Final Rule

2020 Final Rule

- Over time courts have interpreted Title IX to include sexual harassment as a form of sex discrimination, but regulations have never explicitly addressed the issue until now
- Title IX final rule is a “floor, not ceiling”
- Schools have the flexibility to offer increased or other procedures so long as mandated Title IX legal requirements are met

School could have stricter laws

Recent Title IX Litigation

- James Haidak v. University of Massachusetts at Amherst
 - Expelled after ex-girlfriend accused him of physical assault while studying abroad
- John Doe v. Boston College
 - Attending an event on a cruise ship for college newspaper and accused of sexual assault
- John Doe v. Rhodes College
 - Fraternity member and football player expelled for raping another student

Enforcement

- Office of Civil Rights (OCR) investigates and resolves complaints
- Based on an investigation, OCR enters into resolution agreements with schools that require the school to make changes to certain policies and procedures and to take other actions to improve the campus climate
- Title IX contains a private right of action authorizing individuals who have been harmed by a school's failure to provide Title IX protections to file a Title IX lawsuit for damages in federal court against the school

OCR Resources

- Webinar: Title IX Regulations Addressing Sexual Harassment
- OCR Blog
- Email OCR OPEN Center with questions (T9questions@ed.gov)

Participate in events, read blog, and email if needed.

WHAT IS SEXUAL HARASSMENT?

Sexual Harassment

- Conduct on the basis of sex that falls into one or more of the following 3 categories:

1. Quid Pro Quo

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

If you go on a date with me I'll get you a better grade, etc..."

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; or

Hostile environment can be 1 time (rape, etc.), or less drastic on a more regular basis.
Ultimately the behavior has to deny equal access of the program or activity

3. Sexual Violence

- “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v),
“dating violence” as defined in 34 U.S.C. 12291(a)(10),
“domestic violence” as defined in 34 U.S.C. 12291(a)(8), or
“stalking” as defined in 34 U.S.C. 12291(a)(30)

Sexual Violence

- **Sexual Assault:** As defined in 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- **Dating Violence:** As defined in 34 U.S.C. 12291(a)(10), means violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship; the type of relationship; and, the frequency of interaction between the persons involved in the relationship.

Sexual Violence

- **Domestic Violence:** As defined in 34 U.S.C. 12291(a)(8), includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or 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 of the jurisdiction.
- **Stalking:** As defined in 34 U.S.C. 12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to: (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.

Sexual Violence and Clery/VAWA

- Violence Against Women Reauthorization Act of 2013 (“VAWA”) requires inclusion of state definitions for Sexual Assault, Dating Violence, Domestic Violence, Stalking and Consent are contained in the Annual Safety and Security Report (“ASR”)
- Clery (Jeanne Clery Disclosure of Campus Security Policy and Crime Statistics Act) Crime Statistics are reported based on federal definitions

OTHER KEY DEFINITIONS

Complainant

- **Must be alleged victim unless parent or legal guardian has a legal right to act on behalf** have to be complainant to go through the steps.
- Note that any person may report sex discrimination, including sexual harassment to the Title IX Coordinator person who makes the report doesn't have to be complainant.
- Person reporting does not have to be the victim of conduct that could constitute sex discrimination or sexual harassment (other grievance procedures)
- Only a complainant may file a formal complaint that initiates a Title IX grievance procedure

Respondent

- Individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Formal Complaint

- Signed by a Complainant or Title IX Coordinator alleging sexual harassment against a Respondent, requesting an investigation
- Complainant must be a current or prospective student or employee
- Defer to Complainant's wishes as to whether to pursue an investigation Can still open if egregious enough (weapon, etc.)
- Title IX Coordinator can sign a complaint to initiate an investigation if they determine that not pursuing would be deliberately indifferent or that not pursuing a claim would be harmful to the campus community

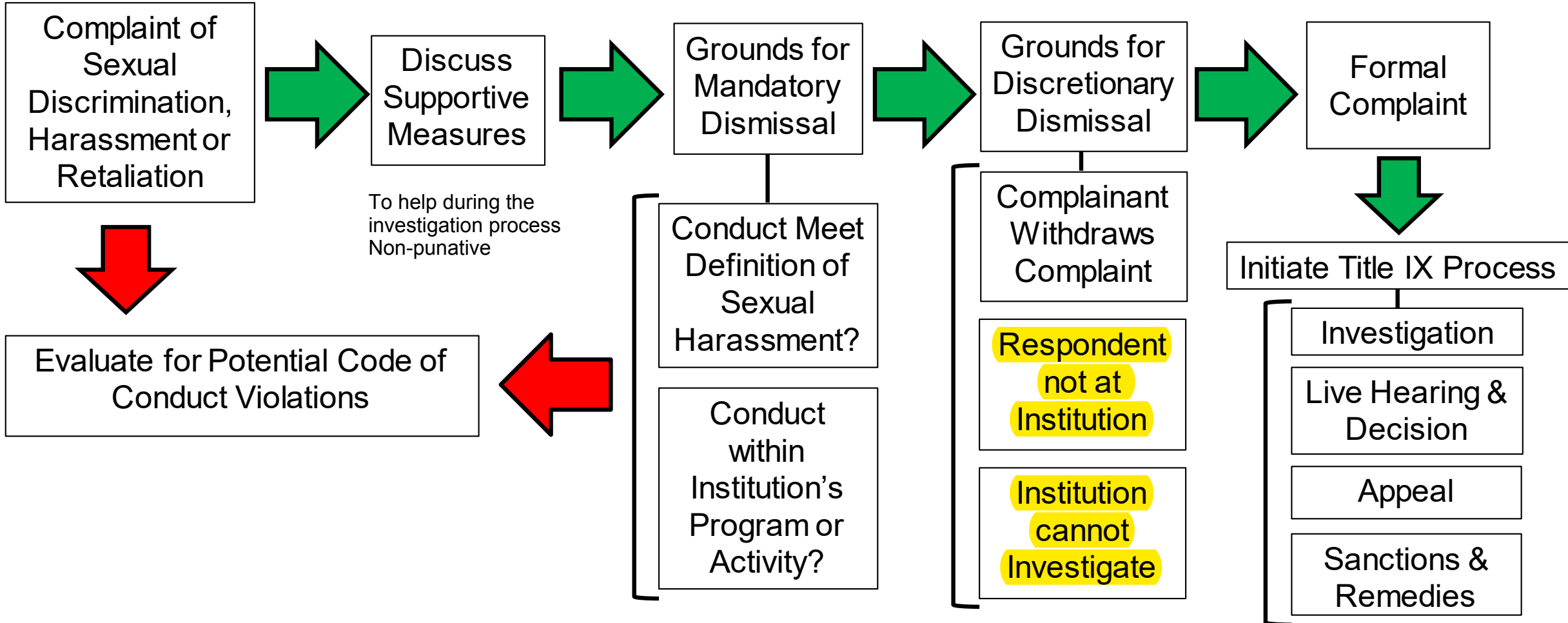


GRIEVANCE PROCESS OVERVIEW

Title IX Complaint Process Overview

- Formal Complaint Received by Title IX Coordinator
- Optional Informal Resolution Process
- Investigation
- Live Hearing
- Decision and Remedial Measures
- Appeals

Grievance Process Flow Chart



Publication and Dissemination

- Title IX Coordinator information and nondiscrimination policy must be posted on website and in each handbook or catalog provided to prospective/current students and employees Information needs to be pervasive
- Copy of grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school will respond, must be distributed to all prospective/current students and employees
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be posted to the website Can post on website

Title IX Coordinator Visibility

- Name or title, office address, email address, and telephone number
- Prospective/Current students and employees are notified of Title IX Coordinator contact information
- Anyone can report sex discrimination (including sexual harassment) even if they are not the victim by mail, telephone email or in person

Response

- School responds when:
 - 1. Actual knowledge of Sexual Harassment
 - 2. That occurred within the school's education program or activity
 - 3. Against a person in the United States
- School violates Title IX when its response to sexual harassment is clearly unreasonable in light of the known circumstances (deliberate indifference)

not always about the "right

1. Actual Knowledge

- A school's Title IX response obligation is based on "actual knowledge" of sexual harassment
 - Notice of sexual harassment or allegations of same to the Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the school ("designated official")
 - Constructive notice "should have known" standard eliminated

Reporters

- Identify which employees must, may or must only with Complainant's consent report to the Title IX Coordinator
- Triggers notice

everyone is no longer a "responsible employee"

Now, able to designate who must, may, or must only with Complainant's consent report.
Other than designated, can be discretionary reporters.

Make sure we have the correct people designated and that is public.

2. Education Program or Activity

- Includes locations, events, or circumstances over which the school exercises **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 the school
- Clery Geography map

Good visual to provide.

3. Within the United States

- A school's response obligations, including Title IX grievance process requirements, only "apply only to sex discrimination occurring against a person in the United States"

Complaint Dismissal

- School *must* dismiss a Formal Complaint if:
 - Allegations do not meet the definition of sexual harassment
 - Did not occur in the education program or activity against a person in the United States
- The institution *may* dismiss a Formal Complaint if:
 - Complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein
 - Respondent is no longer enrolled or employed by the institution
 - If specific circumstances prevent the institution from gathering sufficient evidence to reach a determination.

Complaint Dismissal

- If a complaint is dismissed, school give the parties written notice of a dismissal (mandatory or discretionary) and include the reason for dismissal.
- School may still address the allegations under another policy
 - Code of Conduct?

Informal Resolution

- Discretionary—can be used so long as both parties give voluntary, informed, written consent to attempt informal resolution
- Any person who facilitates an informal resolution must be trained
- An institution may not require IR as a condition of enrollment, employment, or enjoyment of any other right
- Must have a Formal Complaint
- Parties can withdraw
- Cannot be used with allegations that an employee sexually harassed a student

Investigations

- Impartial, fair and objective
- Burden on the school
- No gag-orders
- Right to an advisor
- Written notice with sufficient time to prepare
- Opportunity to inspect and respond to evidence
- Investigative report

Advisors

- Parties have the right to select an advisor during an investigation and hearing
- Can be an attorney, but does not have to be
- If the Complaint goes to a live hearing, the parties must have an advisor
- If the party does not have an advisor, school must provide one
- Only advisors may conduct cross-examination of witnesses

Live Hearings

- Must provide a live hearing
- Requirements for a live hearing include:
 - Opportunity for parties' advisors to examine and cross-examine witnesses, including challenging the credibility of witnesses
 - Examinations must be direct, oral, and in real time
 - Parties may be required to stay in separate rooms with a live video+audio connection
 - Only relevant questions may be asked; prior sexual conduct is not relevant

Appeals

- Policy must provide for appeals for both parties
- The bases for an appeal must include:
 - procedural irregularity affected the outcome of the matter
 - newly discovered evidence that could affect the outcome of the matter
 - Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter

Record Keeping

- Seven years
- Records of any actions, including any supportive measures, taken in response to a report or Formal Complaint of sexual harassment
- Includes basis for conclusion, response was not deliberately indifferent, and measures taken to restore or preserve equal access to the education program or activity
- If supportive measures are not provided, documentation of the reasons why a response was not clearly unreasonable in light of the known circumstances

Retaliation

- Policy must effectively prohibits retaliation
 - Including intimidation, threats, coercion, or discrimination for making a complaint or participating in process
- Retaliation does not have to be on the basis of sex or involve sexual harassment

Roles

Title	Responsibilities	Training	Status
Title IX Coordinator	Intake reports and Formal Complaints, provide supportive measures	Sexual harassment definition, scope of education program, how to conduct an investigation, grievance procedure (hearing, appeals, informal resolution), impartiality	Must be school employee Cannot serve as decision-maker
Investigator	Conduct a fair, objective and impartial investigation	Impartiality, how to conduct an investigation, issues of relevance, rape shield, report writing	Employee or 3 rd party Cannot serve as decision-maker
Decision-Maker	Evaluate evidence, determine relevancy during hearing, make and issue determination	Sexual harassment definition, hearing process, technology to be used in hearing, issues of relevance, evidence, rape shield	Employee or 3 rd party Cannot serve in any other capacity
Advisor(s)	Question opposing party and witnesses during hearing	None required	Party provided Employee or 3 rd party
Informal Resolution Facilitator	Conduct informal resolution process	Informal resolution process	Employee or 3 rd party



Thank You!

©2020 Duane Morris LLP. All Rights Reserved. Duane Morris is a registered service mark of Duane Morris LLP.
Duane Morris – Firm Offices | New York | London | Singapore | Philadelphia | Chicago | Washington, D.C. | San Francisco | Silicon Valley | San Diego | Los Angeles | Taiwan | Boston | Houston | Austin | Hanoi |
Ho Chi Minh City | Shanghai | Atlanta | Baltimore | Wilmington | Miami | Boca Raton | Pittsburgh | Newark | Las Vegas | Cherry Hill | Lake Tahoe | Myanmar | Oman | Duane Morris – Affiliate Offices | Mexico City | Sri Lanka |
Duane Morris LLP – A Delaware limited liability partnership