

# New Title IX Regulations

Ashley Rohleder-Webb  
KASB Staff Attorney  
July 15, 2020 – Virtual Seminar



“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.”

*Title IX of the Education Amendments Act of 1972*

1

- Summary of Changes
- New Terminology and Definitions
- Overview of Formal Complaint and Investigation Process
- Requirements for Recordkeeping and Prohibition on Retaliation
- Policy and Notice Requirements
- Recommendations for Moving Forward

2

## Summary of Changes

- ▶ No changes to existing regulations related to athletic participation, employment, or single-sex education
- ▶ Defines sexual harassment
- ▶ Provides due process rights to accusers and accused persons in sexual harassment investigation and decision making, as well as outlining the procedure for response:
  - ▶ Requires response when district has "actual knowledge" of sexual harassment
  - ▶ Specific roles of Title IX Coordinator, Investigator, Decision-Maker
  - ▶ Provides terminology and definitions for use in Title IX complaints
  - ▶ Mandates provision of supportive measures during investigation process
  - ▶ Requirements of Determination of Responsibility
  - ▶ Prohibits retaliation

3

## New Title IX Terminology and Roles

4

## Sexual Harassment Definition

- ▶ Sexual harassment shall include conduct on the basis of sex involving one or more of the following:
  - ▶ (1) a district employee conditioning the provision of an aid, benefit, or service of the district on an individual's participation in unwelcomed sexual conduct;
    - ▶ Quid pro Quo
  - ▶ (2) unwelcomed conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district's educational program or activity; or
    - ▶ Hostile Environment
  - ▶ (3) sexual assault, dating violence, domestic violence, or stalking.
    - ▶ VAWA definitions

5

## Quid pro Quo

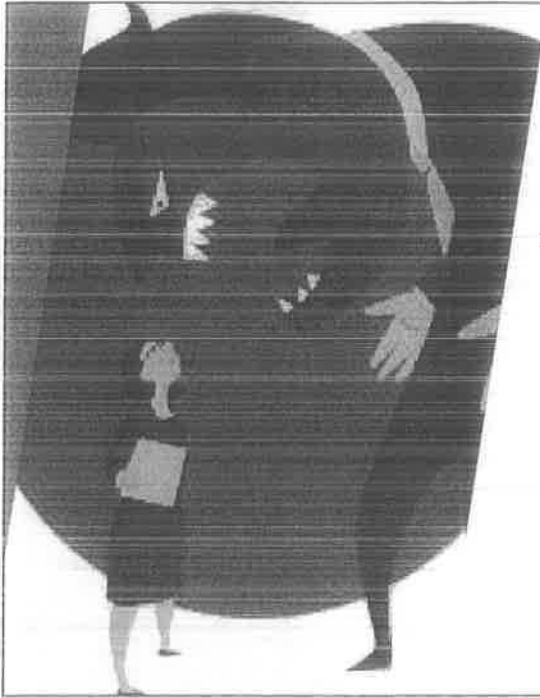


Something for something

The diagram features two large, dark grey arrows pointing in opposite directions. The left arrow points left and contains the text 'Something for something'. The right arrow points right and contains the text 'Only perpetrated by employee'. The arrows are connected at their bases, forming a continuous shape.

Only perpetrated by employee

6



## Hostile Environment

- ▶ Unwelcome conduct that a reasonable person would determine to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to work/education.

7

## VAWA “Big Four”

- Sexual Assault**
  - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- Dating Violence**
  - violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim where the existence of such a relationship shall be determined based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved.
- Domestic Violence**
  - includes crimes of violence committed by a person who is a current or former spouse, partner, person with whom the victim shares a child, or who is or has cohabited with the victim as a spouse or partner, by a person similarly situated to a spouse of the victim under Kansas or applicable federal law, or by any other person against an adult or youth victim having protection from such person's acts by Kansas or applicable federal law.
- Stalking**
  - engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or to suffer substantial emotional distress.

8

## Other Definitions

- ▶ **Complainant:** An individual alleged to be the victim of sexual harassment
  - ▶ Not necessarily the individual who reports or who files formal complaint
- ▶ **Respondent:** An individual alleged to be the perpetrator of sexual harassment
- ▶ **Formal Complaint:** A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the school investigate the allegation of sexual harassment
- ▶ **Supportive Measures:** Individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome, to the other party while designed to ensure equal educational access, protect safety or deter sexual harassment.

9

## 3 Roles in Formal Complaint Investigation Process



### Title IX Coordinator

Employee designated to coordinate its efforts to comply with Title IX.

Appointed by board and always serves as Title IX Coordinator, cannot be Investigator or Decision-Maker in any case.



### Investigator

carries out the investigation after the formal complaint is filed and conducts interviews of the witnesses, collects and documents evidence, and drafts an investigative report.



### Decision-Maker

reviews all the evidence and prepares an impartial written responsibility determination as to whether the alleged conduct occurred and provides an opportunity for the parties and their representatives to prepare written questions to be answered by the other party.

10

## Title IX Coordinator, Investigator, Decision- Maker, or Facilitator of an Informal Resolution Process



Shall not have a conflict of interest or bias for or against the complainant or respondent (personally or generally).

Will exercise objective evaluation of all available evidence, both inculpatory and exculpatory, and prohibit credibility determinations based on a party's status as complainant, respondent, or witness.



Will receive training to perform their roles

11

## Training:

- ▶ the definition of sexual harassment;
- ▶ the scope of the education program and activities;
- ▶ how to conduct an investigation, including appeals and informal resolution processes;
- ▶ and how to serve impartially, including
  - ▶ by avoiding prejudice of the facts,
  - ▶ conflicts of interest, and
  - ▶ bias.
- ▶ Decision-makers shall receive training on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.
- ▶ Investigators shall receive training on issues of relevance of questions and evidence in order for them to create investigative reports that fairly summarize relevant evidence, and how to prepare an investigation report.

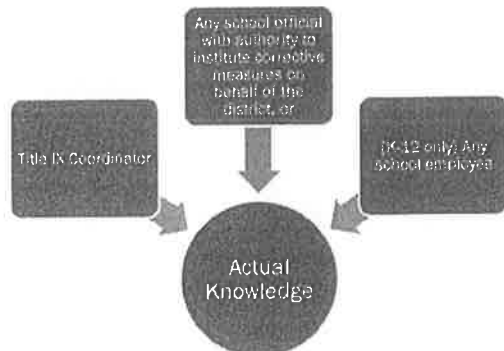
12

# Formal Complaint Investigation Process



13

## Report of Sexual Harassment



- ▶ District must respond when it has “actual knowledge” of sexual harassment.
- ▶ Actual knowledge:
  - ▶ Notice of sexual harassment, including claims of sexual harassment
  - ▶ Other school employees report claims to Title IX Coordinator.

14

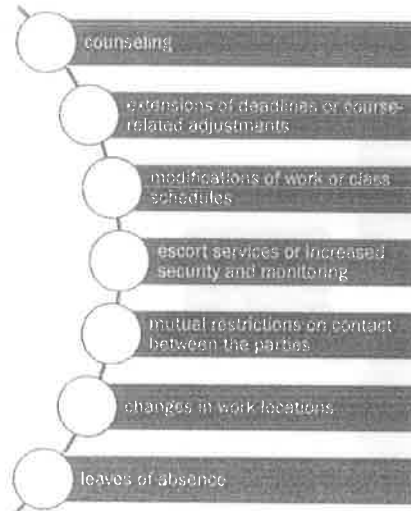
## Title IX Coordinator Contacts Complainant

- ▶ Response must not be “deliberately indifferent”
  - ▶ Clearly unreasonable in light of known circumstances
- ▶ Promptly contact complainant, and meet confidentially:
  1. To discuss availability of supportive measures.
  2. Consider the complainant’s wishes with respect to supportive measures.
  3. Inform the complainant of the availability of supportive measures with or without a formal complaint, and
  4. Explain the process for filing a formal complaint.
- ▶ KASB Policy Recommendation: 10 days, unless good cause for delay.
- ▶ Should respect complainant’s wishes regarding whether or not a school investigates, unless the Title IX Coordinator determines that signing a formal complaint over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.

15

## Supportive Measures

- ▶ The district will treat the complainant and respondent equitably by offering supportive measures.
- ▶ These non-disciplinary and non-punitive measures will be offered as appropriate, as reasonably available, and without cost to the complainant or the respondent.
- ▶ Supportive measures are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party.
- ▶ “Supportive Measures” shall include, but not be limited to, measures designed to protect the safety of all parties, to protect the district’s educational environment, or to deter sexual harassment.
- ▶ The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.



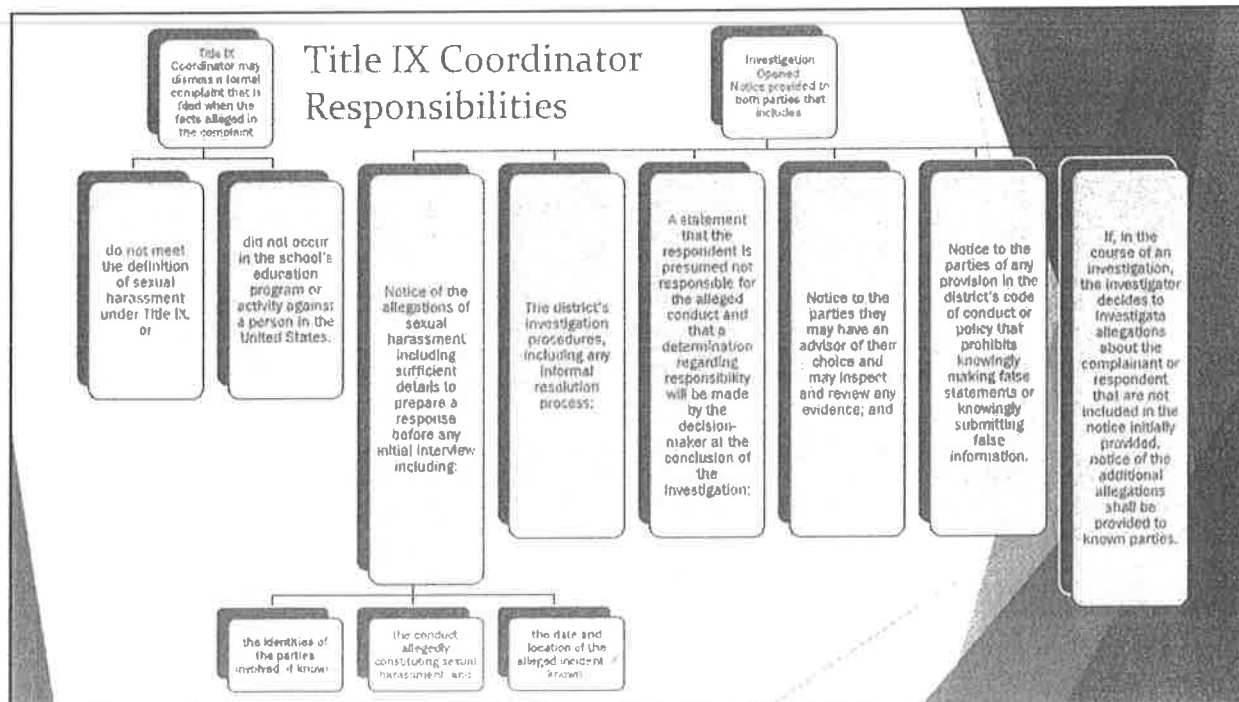
16



## Formal Complaint

- ▶ 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 District where the formal complaint is filed.
- ▶ A formal complaint may be filed with the Title IX Coordinator in person, by mail, by email, or by any other means that results in the Title IX Coordinator receiving the report.
- ▶ A formal complaint contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint (unless signed by the Title IX Coordinator).
- ▶ A complaint should be filed as soon as possible after the conduct occurs, but not later than 180 calendar days after the complainant becomes aware of the alleged violation, unless the conduct forming the basis for the complaint is ongoing.

17



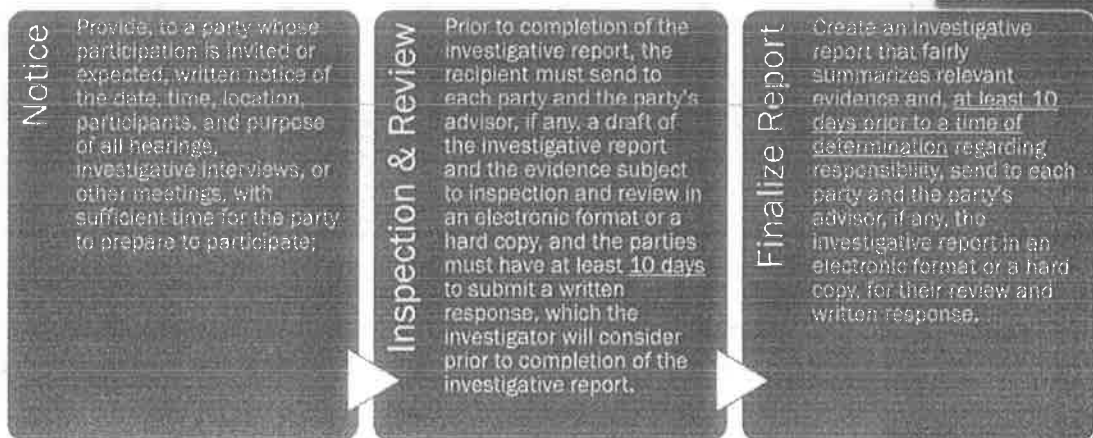
18

## Investigator's Responsibilities



19

## Investigation Process



20

## Investigative Report

- ▶ The investigator shall prepare an investigative report that fairly summarizes relevant evidence and share the report with the parties and their advisors for review and response.
- ▶ The investigator's written report shall include an objective evaluation of all relevant evidence using a preponderance of the evidence standard to determine responsibility.

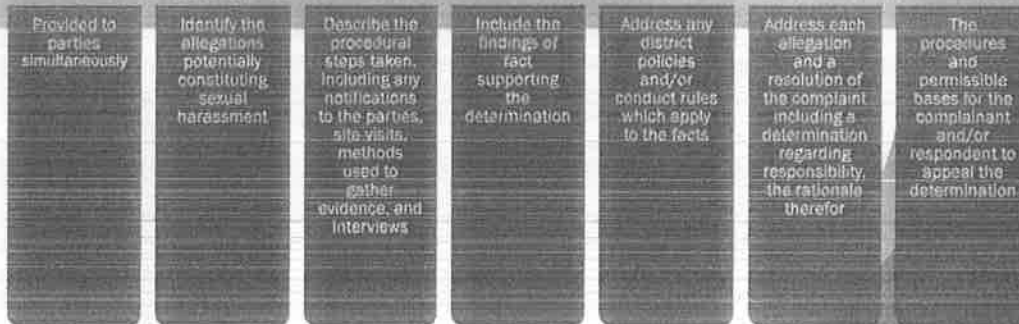
21

## Decision-Maker Responsibilities

- ▶ Upon receiving the investigator's report, the decision-maker must make a determination regarding responsibility and afford each party the opportunity to submit written, relevant questions that the parties want asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions.
- ▶ If determined that harassment occurred, disciplinary procedures are triggered.
- ▶ The decision becomes final on the date the parties receive the results of an appeal, if any appeal is filed, or on the date the opportunity for an appeal expires.

22

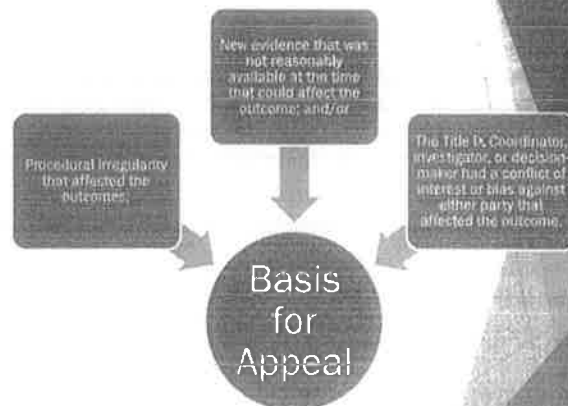
## Written Determination of Responsibility



23

## Appeals

- ▶ The complainant or respondent may appeal the decision-maker's determination regarding responsibility or a dismissal of a formal complaint.
- ▶ Request for appeal shall be made in writing within 20 days after the date of the written determination regarding responsibility.
- ▶ Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- ▶ Provide the written decision simultaneously to both parties



24

## Appeal Decision-Maker Responsibilities



Review the evidence gathered by the investigator, the investigator's report, and the original decision-maker's determination;



Notify both parties in writing of the filing of an appeal and give them 10 days after the appeal is filed to submit further evidence in writing;



Not have a conflict of interest or bias for or against complainant or respondent and receive the required training;



Issue a written decision and the rationale for the decision within 30 days after the appeal is filed;



Describe the result of the appeal and the rationale for the result in the decision; and



Provide the written decision simultaneously to both parties and to the Title IX Coordinator.

25

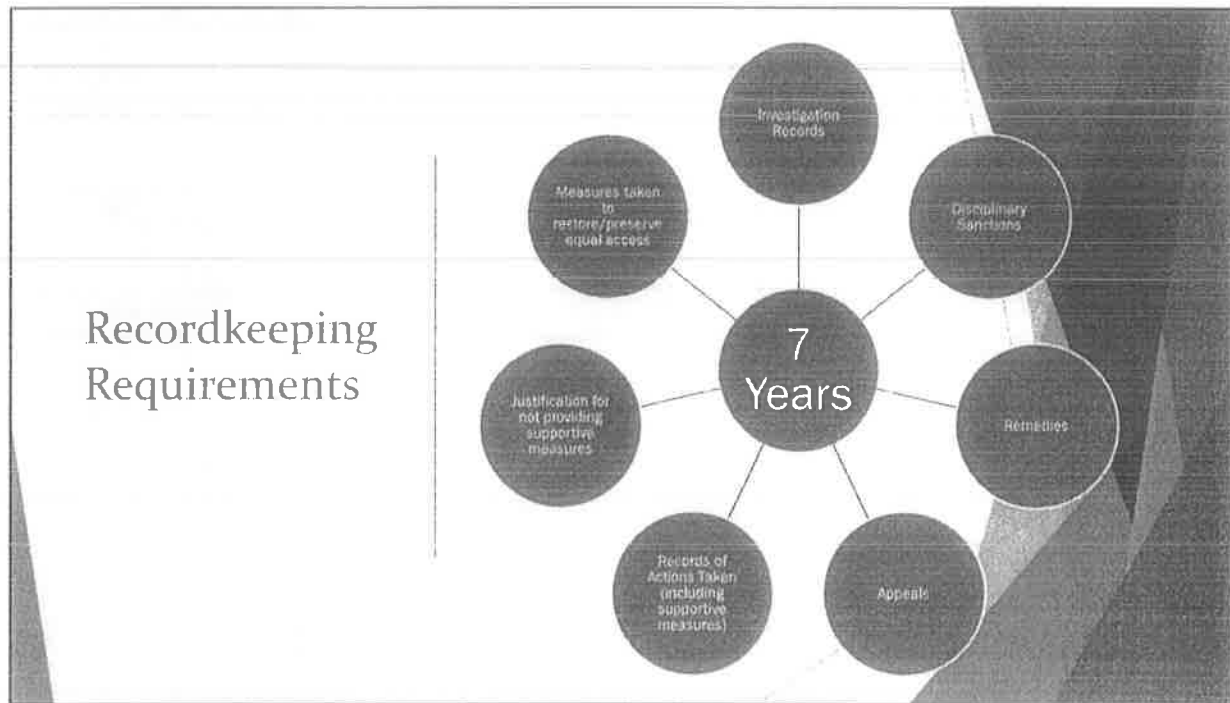
## Informal Resolution Process

- ▶ At any time during the formal complaint process and prior to reaching a determination regarding responsibility, the district may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and determination of responsibility.
- ▶ The informal resolution process may be facilitated by a trained educational professional, consultant, or other individual selected by the Title IX Coordinator under the following conditions:
  - ▶ The parties are provided a written notice disclosing the allegations, the requirements of the informal resolution process, information on when it may preclude the parties from resuming a formal complaint arising from the same allegations;
  - ▶ At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the investigation of the formal complaint and be informed of any consequences resulting from participating in the informal resolution process;
  - ▶ The parties voluntarily and in writing consent to the informal resolution process; and
  - ▶ The informal resolution process cannot be used to resolve allegations that an employee sexually harassed a student.
- ▶ If the matter is resolved to the satisfaction of the parties, the facilitator shall document the nature of the complaint and the proposed resolution, have both parties sign the documentation and receive a copy, and forward it to the
- ▶ Title IX Coordinator. Within 20 days after the complaint is resolved in this manner, the Title IX Coordinator shall contact the complainant to determine if the resolution of the matter remains acceptable. If the matter is not resolved, or if the individual does not believe the resolution remains acceptable within 20 days after the informal resolution document is executed, the individual or the Title IX Coordinator may proceed with the formal complaint process.

26

# Requirements for Recordkeeping and Prohibition on Retaliation

27



28

## Retaliation Prohibited

Complaints alleging retaliation may be filed according to the formal complaint investigation procedures for sex discrimination.

- ▶ No district or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or 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 under this part.
- ▶ Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.
- ▶ The district must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA, as required by law, or to conduct any investigation, hearing, or judicial proceeding arising thereunder.

29

## Retaliation Prohibited

- ▶ The exercise of rights protected under the First Amendment does not constitute retaliation prohibited by Title IX.
- ▶ Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a formal complaint investigation proceeding does not constitute retaliation, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.



30

# Policy and Notice Requirements

31

## Notification

- ▶ Districts must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the district, of the name or title, office address, electronic mail address, and telephone number of the Title IX Coordinator.
- ▶ Each district must notify persons entitled to a notification that the district does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX not to discriminate in such a manner.
- ▶ Such notification must state that the requirement not to discriminate in the education program or activity extends to admission and employment, and that inquiries about the application of Title IX and this part to such district may be referred to the district's Title IX Coordinator, to the Assistant Secretary, or both.

32



## Publication

- ▶ Districts must prominently display the contact information required to be listed for the Title IX Coordinator on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification.
- ▶ Districts must not use or distribute a publication stating that the district treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX.
- ▶ Districts must adopt and publish formal complaint investigation procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by Title IX and a process that complies with the regulations.
- ▶ Districts must provide persons entitled to a notification notice of the district's formal complaint investigation procedures, 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 district will respond.

33

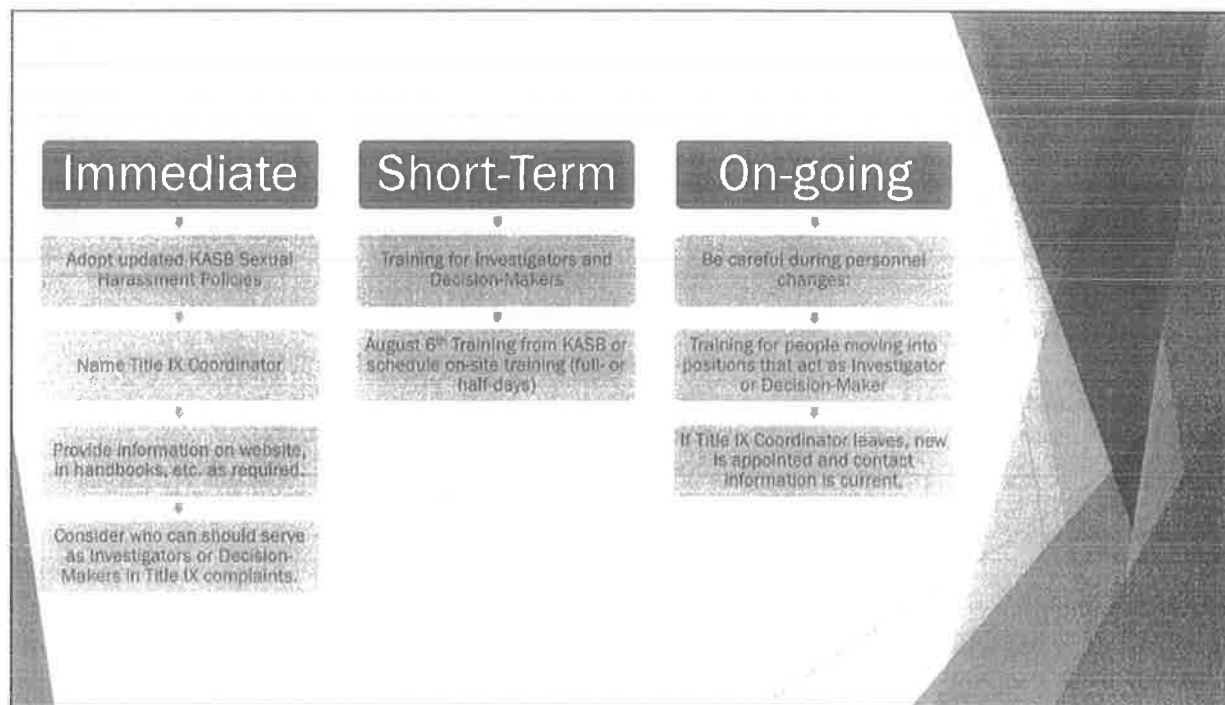
## Notification & Publication

- ▶ Provide notice of
  - ▶ Nondiscrimination Policy,
  - ▶ Formal Complaint Investigation Process,
  - ▶ Title IX Coordinator's Contact Information, and
    - ▶ Name/Title, Office Address, Phone Number, Email
  - ▶ that inquiries about the application of Title IX may be referred to the Title IX Coordinator, to the Assistant Secretary, or both.
- ▶ On website, in handbooks or other materials available to:
  - ▶ applicants for admission and employment,
  - ▶ students,
  - ▶ parents or legal guardians of elementary and secondary school students,
  - ▶ employees,
  - ▶ and all unions or professional organizations holding collective bargaining or professional agreements with the district

34

# Recommendations for Moving Forward

35



36

# Questions?



To provide feedback about today's training, please complete the evaluation. There is also a place for specific questions regarding Title IX:

<https://kasb.org/title-ix-20200715>

If you have additional questions, please sent to:

Legal@kasb.org

1-800-432-2471

With your questions, we will be building a FAQ to share

