

TITLE IX TRAINING

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YOUR TRAINING TOOLBOX



- Training materials from this session are available at the following link:

<https://scottscrivenlaw-my.sharepoint.com/:f:/p/julia/ElqcjOUrAnRConMGjKgNEaYB0RZRrPLg7pwFYnyX0yy1JQ?e=br4ied>

- It also contains other useful resources we will reference during the training.

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**“MR. SMITH,
BOBBY IS
HARASSING
ME.”**

Harassment, intimidation, bullying.

Sexual harassment.

Harassment based on race, ethnicity, disability, other protected classes.

Could be just plain annoying/mean/rude/inappropriate behavior.

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**“MR. SMITH,
BOBBY IS
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ME.”**

Bullying and Other Forms of Aggressive Behavior

Harassment, intimidation, or bullying means:

- 1.any intentional written, verbal, electronic, or physical act that a student or group of students or staff member exhibits toward another particular student(s) or staff member(s) more than once and the behavior both causes mental or physical harm to the other student(s) or staff member(s) and is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for the other student(s); or
2. violence within a dating relationship.

See Board Policy 5517.01 and Guideline 5517.01.

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**“MR. SMITH,
BOBBY IS
HARASSING
ME.”**

Sexual harassment

“Sexual Harassment” means conduct on the basis of sex that satisfies one (1) or more of the following:

1. Board employee conditioning the provision of an aid, benefit, or service of the District on an individual's participation in unwelcome sexual conduct (often called “*quid pro quo*” harassment);
2. 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 District's education program or activity; or
3. “sexual assault” as defined in 20 U.S.C. 1092(f)(6)A(v), or “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).

See Board Policy 2266.

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**“MR. SMITH,
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ME.”**

Harassment based on race, ethnicity, other protected classes.

Harassment means any threatening, insulting, or dehumanizing gesture, use of technology, or written, verbal or physical conduct directed against a student or school employee that:

- A. places a student or school employee in reasonable fear of harm to his/her person or damage to his/her property;
- B. has the effect of substantially interfering with a student's educational performance, opportunities, or benefits, or an employee's work performance; or
- C. has the effect of substantially disrupting the orderly operation of a school.

See Board Policy 5517 and Guideline 5517.

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**“MR. SMITH,
BOBBY IS
HARASSING
ME.”**

Annoying/mean/rude/inappropriate behavior.

See Code of Conduct and/or educational intervention.

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**“MR. SMITH,
BOBBY IS
HARASSING
ME.”**

Harassment, intimidation, bullying.
See Board Policy 5517.01 and Guideline 5517.01.

Sexual harassment.
See Board Policy 2266.

Harassment based on race, ethnicity, disability, other protected classes.
See Board Policy 5517 and Guideline 5517.

Could be just plain annoying/mean/rude/inappropriate behavior.
See Code of Conduct.

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TRAINING REQUIREMENTS



- Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an informal resolution process must receive training on:
 - the definition of sexual harassment in the regulations,
 - the scope of the recipient's education program or activity,
 - how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, **as applicable**, and
 - how to serve impartially, including by avoiding prejudice of the facts at issue, conflicts of interest, and bias.

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ROLE-SPECIFIC TRAINING REQUIREMENTS



- Districts must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in the regulations.
- Districts must ensure that decision-makers receive training on any technology to be used at a live hearing and 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, as set forth in the regulations.

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TRAINING REQUIREMENTS



- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution must be made available on the school's website, if it has one.
- Training materials must be kept for 7 years.

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TITLE IX COORDINATOR RESPONSIBILITIES RECORD-KEEPING



The district maintains the following records for a period of seven years:

- Documentation of the district's response to a report or formal complaint of sexual harassment. Such documentation must include:
 - Any actions, including supportive measures, taken and designed to restore or preserve equal access to the district's education program or activity.
 - If supportive measures were not provided, documentation of the reasons why such a response was not clearly unreasonable in light of the known circumstances.
 - Documentation for the basis that its conclusion that its response to the report or complaint was not deliberately indifferent.
- Documentation of each sexual harassment investigation, including any determination regarding responsibility, any disciplinary sanctions imposed on the Respondent, and any remedies provided to the Complainant designed to restore or preserve equal access to the district's education program or activity.
- Any appeal and the appeal outcome.
- Any informal resolution and the outcome.
- All materials used to train Title IX Coordinators, investigators, decision makers, and any person who facilitates an informal resolution process.

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NEW TITLE IX REGULATIONS & NEW OBLIGATIONS



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IMPLEMENTATION ADJUSTMENTS



- In many ways, the regulations are about adults on college campuses, not minor children.
- Process is inherently slower than before.
- Districts must follow a compliant grievance process before issuing disciplinary sanctions to staff or students. (Emergency removal of a student permissible in specific circumstances; administrative leave for staff available).
- No gag orders prohibiting complainant or respondent from discussing the allegations or gathering evidence.
- Obligated to share evidence gathered during the process with both parties, which frustrates the desire for confidentiality.

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TITLE IX BACKGROUND



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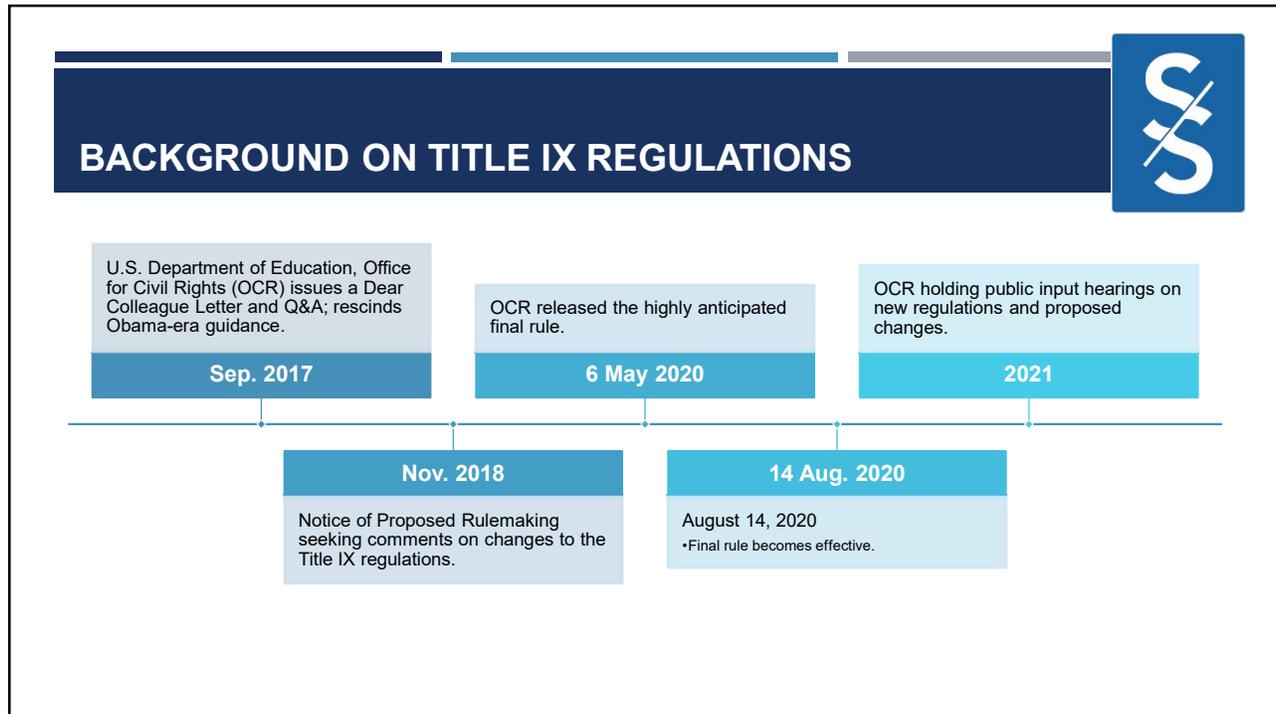
TITLE IX BACKGROUND



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.

20 U.S.C. § 1681(a).

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TITLE IX – WHAT IS THE STATUS FOR 2021-2022?

- New sexual harassment regulations announced May of 2020 and effective August 14, 2020.
- The Biden administration has indicated that it is reviewing the 2020 amendments and contemplating revisions. However, until the regulations are formally revised, districts must continue to comply with the current regulations.
- OCR issued a new Q & A in July clarifying its enforcement approach.

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NEW REGULATIONS HIGHLIGHTS



- School districts cannot be deliberately indifferent to known sexual harassment and must promptly respond to reports of sexual harassment. The new regulations defined important terms:
 - Actual knowledge
 - Deliberate indifference
 - Sexual harassment
- Abolished the single investigator/decision-maker model and requires a team approach to addressing Title IX allegations.
- Builds in significant due process for individuals accused of sexual harassment.
- Requires a legalistic, case-management approach to reports, complaints, supportive measures. (Grievance Procedures)

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TITLE IX BACKGROUND



- **Q: Whom does Title IX protect?**
- **A: Any person participating in an educational program in the United States that receives federal financial assistance.**
 - Students.
 - Staff.
 - Applicants for admission.
 - Visitors and community members.

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TITLE IX BACKGROUND



- **Q: What does Title IX protect against?**
- A: Exclusion from participation in, or denial of benefits of, any educational program or activity on the basis of sex.

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EXAMPLES OF SEXUAL DISCRIMINATION IN EDUCATION

- | | |
|--|-------------------------------------|
| ■ Recruitment, Admissions & Counseling | ■ Discipline |
| ■ Financial Assistance | ■ Single-Sex Education |
| ■ Sex-based Harassment | ■ Employment |
| ■ Athletics | ■ Retaliation |
| ■ Pregnant and Parenting Students | ■ Treatment of Transgender Students |

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TITLE IX ENFORCEMENT – REGULATORY



- United States Department of Education’s Office for Civil Rights (“OCR”) oversees Title IX compliance. OCR also enforces other federal civil rights laws that apply to schools.
- OCR issues regulations regarding Title IX. See 34 C.F.R. Part 106.
- OCR has the power to receive complaints alleging violations of Title IX, investigate complaints, issue remedial measures and sanctions, and even take away a school’s federal funding for violations of Title IX.

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TITLE IX ENFORCEMENT - LAWSUITS



- Individuals may file private lawsuits to seek awards of money damages.
- *Franklin v. Gwinnett Public Schools* (1992): Money damages are an available remedy in a private lawsuit alleging a school’s intentional discrimination in violation of Title IX.
- *Gebser v. Lago Vista Independent School District* (1998): A school district is liable for failing to respond to a teacher’s sexual harassment of a student if a school official who had authority to institute corrective measures on the district’s behalf had **actual notice** of, and was **deliberately indifferent** to the teacher’s misconduct.
- *Davis v. Monroe County Board of Education* (1999): A school district is liable for failing to respond to a student’s sexual harassment of another student if the district was **deliberately indifferent** to known acts of harassment in its programs or activities, and the harassment was **so** **severe,** **pervasive,** **and objectively offensive** that it effectively barred the victim’s access to an educational opportunity or benefit.

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TITLE IX COORDINATOR RESPONSIBILITIES



- All districts must designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities under Title IX and notify all students of that employee's contact information.
- Coordinate compliance.
- Have knowledge of the district's policies and procedures on sex discrimination and should be involved in the drafting and revision of such policies and procedures to help ensure that they comply with the requirements of Title IX.
- Coordinate the district's response to all reports and complaints involving possible sex discrimination to monitor outcomes, identify patterns and assess effects on the school climate.
- Provide training and technical assistance on school policies and procedures related to sex discrimination and develop programs to train and educate the school community on their rights and obligations under Title IX.
- New regulations: case management and record-keeping.

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NEW TITLE IX TERMS AND DEFINITIONS



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NEW TITLE IX LINGO (TERMS)



Recipients: School districts are now referred to as “recipients.”

Complainant: A person alleged to be the victim of conduct that could constitute sexual harassment.

Respondent: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Supportive Measures: These are your “interim measures.”

Determination of Responsibility. Finding whether a person is responsible for sexual harassment.

Advisors: Parties may have an advisor, who may be an attorney, participate in the process.

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NEW TITLE IX LINGO (DEFINITIONS)



Sexual Harassment: Conduct on the basis of sex that satisfies one or more of the following:

- 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 (i.e., *quid pro quo* sexual harassment);
- 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," "dating violence," "domestic violence," or "stalking," as defined by the Clery Act.
 - Sexual assault: Any sexual act, including rape, sodomy, sexual assault with an object, or fondling “directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.”

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EXAMPLES OF EFFECTIVE DENIAL OF EQUAL ACCESS



- Schools must evaluate whether a reasonable person in the complainant's position would be effectively denied equal access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.
- Skipping class to avoid a harasser, decline in a student's grade point average, or having difficulty concentrating in class.
- A third grader who starts bed-wetting or crying at night due to sexual harassment.
- A high school wrestler who quits the team but carries on with other school activities following sexual harassment.
- A student need not have already suffered loss of education before being able to report sexual harassment.
- Effective denial of equal access to education does not require that a person's total or entire educational access has been denied.
- Complainants do not need to have dropped out of school, failed a class, had a panic attack, or otherwise reached a "breaking point" or exhibited specific trauma symptoms to be effectively denied equal access.

(From OCR's July 2021 Q&A)

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IS IT SPOO? (SEVERE, PERVASIVE AND OBJECTIVELY OFFENSIVE)



- Harrison, a 7 year old, exposes his penis to another student on the bus on the way home from school.
- Katherine, the English Department Head, tells a student teacher in the faculty lounge that he is sexy and jokes that he should join her for a night at the Belamere Suites.
- Joseph quits the soccer team because his coach keeps touching his arms, shoulders and back and it makes him feel uncomfortable to be around her.
- Michelle recently broke up with her boyfriend. He is spreading rumors about her and telling everyone about the physical aspects of their relationship. She is humiliated.

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NEW TITLE IX LINGO (DEFINITIONS)



Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment **to any employee.**

Obligation to Respond

- A school with **actual knowledge** of sexual harassment in a program or activity against a person in the U.S. must respond promptly and in a manner that is **not deliberately indifferent.**

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NEW TITLE IX LINGO (DEFINITIONS)



Deliberate Indifference

- Failure to respond reasonably in light of known circumstances.
- (Old rule: The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.)

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NEW REQUIREMENTS



- Prescriptive grievance procedures.
- Reasonably prompt timeframes.
- Must select evidentiary standard.
- Abandonment of single investigator/decision-maker model.
- Jurisdictional decisions and dismissal of formal complaints.
- Lots of due process.

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TITLE IX TEAM MEMBERS



Title IX Coordinator

Initially contacts and offers supportive measures. Assesses and sometimes files complaints. Documents and manages the process.



Investigator

Person designated to investigate, gather evidence and compile an investigation report.

(May be Title IX Coordinator).



Decisionmaker

Person who issues a written determination regarding responsibility.

Cannot be the same person as the Title IX Coordinator or the Investigator.



Appeals Designee

Must offer both respondent and complainant an opportunity to appeal.

Cannot be the same person as the Title IX Coordinator, Investigator, or the Decisionmaker.

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OVERVIEW OF GRIEVANCE PROCEDURES

- Report
- Formal complaint
- Supportive measures
- Initial assessment
 - Jurisdiction/dismissals
 - Other policies/duty to report/law enforcement
- Informal resolution
- Formal investigation
 - Interviews
 - Sharing evidence
 - Preparation of investigation report
- Written questions/answers
- Determination of Responsibility/Sanctions
- Appeals

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REPORT OF ALLEGED HARASSMENT



- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.
- School employees are mandatory reporters of alleged sex harassment.
- Districts must promptly respond to reports of sex harassment in a manner that is not deliberately indifferent.

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FORMAL COMPLAINT OF ALLEGED HARASSMENT



- Document filed or signed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that district investigate the allegation of sexual harassment.
- 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.
- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator, and by any additional method designated by the recipient.
- As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
- Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under the regulations.

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Report



Respond

Formal
Complaint



Investigate

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When the Title IX Coordinator receives a report of sex harassment, they must contact the Complainant and provide specific information:

- **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 the process for filing a formal complaint.**

Contact Complainant Upon Receipt of a Report or Complaint

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SUPPORTIVE MEASURES



- *Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.
- Supportive measures may include 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, and other similar measures.
- Must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

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TITLE IX COORDINATOR'S INITIAL ASSESSMENT



- Consider involvement/coordination with law enforcement.
- Consider other applicable policies, codes of conduct involved.
- Consider jurisdiction and mandatory/permissive dismissal.
- Consider Complainant's wishes regarding a formal complaint.
- Consider Complainant's request for confidentiality or no action.
- Consider whether to initiate a formal complaint and investigation.
- Consider district safety and the obligation to promptly respond in a manner that is not deliberately indifferent.
- Consider whether informal resolution could be appropriate, if a formal complaint is filed.
- Consider emergency removal/administrative leave.
- Consider consolidation of complaints.

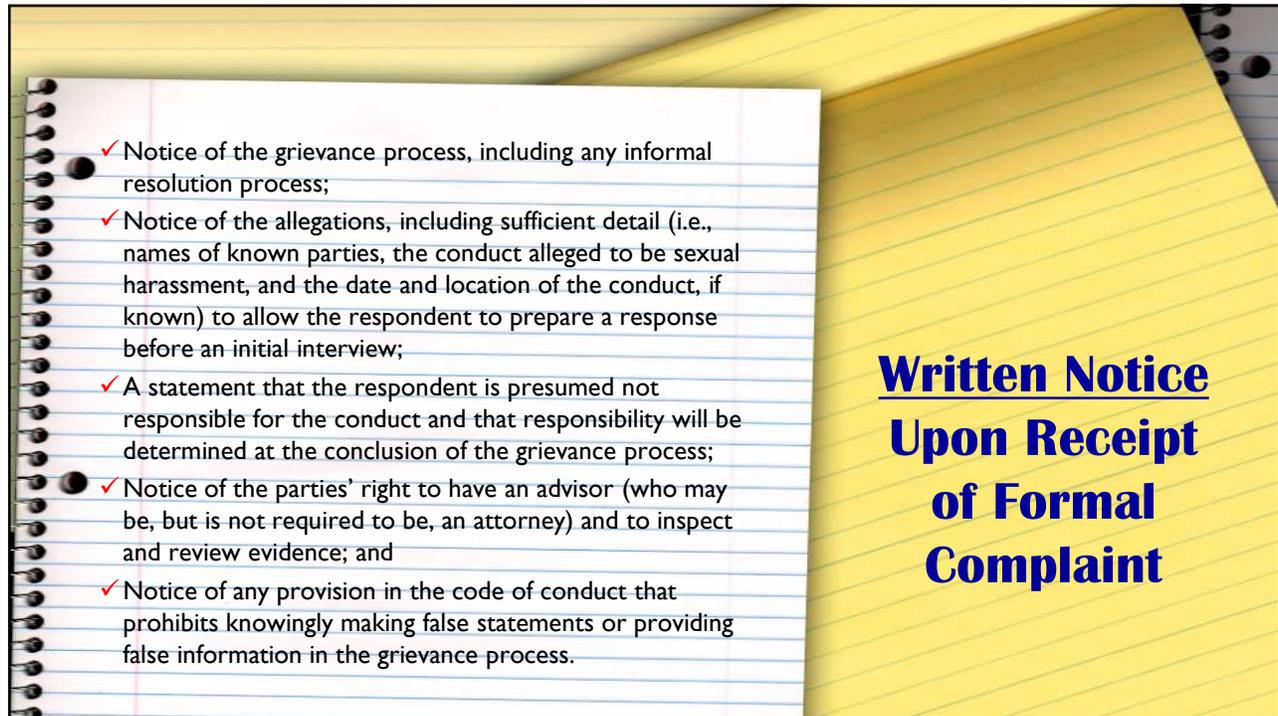
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TITLE IX COORDINATOR-INITIATED COMPLAINT/INVESTIGATION



- When required by policy (i.e., where student alleges sexual harassment by an employee).
- Where the conduct is an alleged crime.
- Where disciplinary action against the employee or student would result if the allegations are true.
- Where district safety or the obligation to promptly respond in a manner that is not deliberately indifferent are implicated by failure to pursue a formal complaint/investigation.

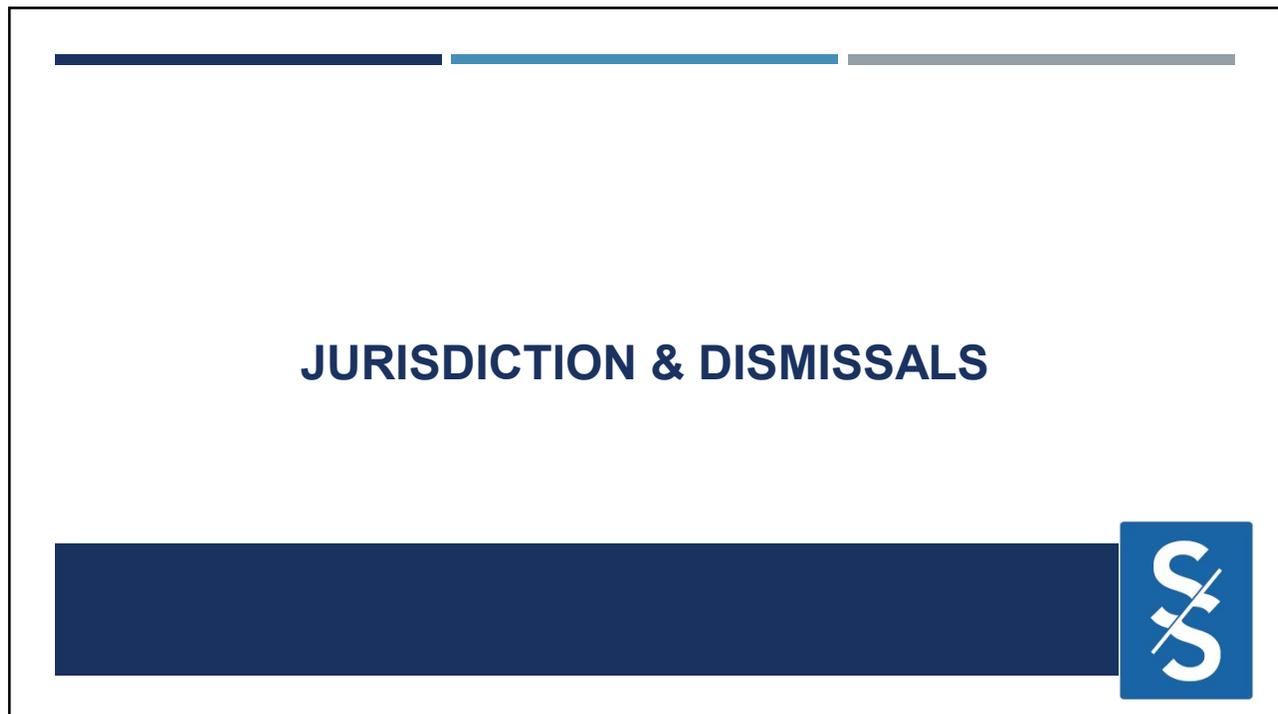
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- ✓ Notice of the grievance process, including any informal resolution process;
- ✓ Notice of the allegations, including sufficient detail (i.e., names of known parties, the conduct alleged to be sexual harassment, and the date and location of the conduct, if known) to allow the respondent to prepare a response before an initial interview;
- ✓ A statement that the respondent is presumed not responsible for the conduct and that responsibility will be determined at the conclusion of the grievance process;
- ✓ Notice of the parties' right to have an advisor (who may be, but is not required to be, an attorney) and to inspect and review evidence; and
- ✓ Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process.

**Written Notice
Upon Receipt
of Formal
Complaint**

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JURISDICTION & DISMISSALS



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JURISDICTION



- To file a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient.
- “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.

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JURISDICTION



- What about off campus conduct?
 - Jurisdiction may still lie if there is control over the Respondent and the context, even if it occurs off campus.
- For off-campus misconduct outside the jurisdiction of the district, there may be in-program effects.
- Even if no jurisdiction under Title IX, a non-disciplinary remedial response would be best practice.
- May also want to look to other policies and code of conduct.

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MANDATORY DISMISSAL OF FORMAL COMPLAINT



- Must dismiss a formal complaint if:
 - The conduct alleged in the formal complaint would not constitute sexual harassment as defined in the law/policy, even if proved;
 - If the conduct alleged did not occur in the recipient's education program or activity;
 - If the conduct alleged did not occur against a person in the United States.
- Such dismissal does not preclude other action under the District's code of conduct or other policies.

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DISCRETIONARY DISMISSAL OF FORMAL COMPLAINT



- The District may dismiss a formal complaint or any allegations in the complaint if:
 - Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations;
 - The Respondent is no longer enrolled or employed by the District;
 - Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint or allegations.
- Upon dismissal, must promptly send written notice of the dismissal and the reasons to the parties.
- Dismissal may be appealed to the appeals decision-maker.

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EMERGENCY REMOVALS



- A school can remove a student from the school's education program or activities on an emergency basis if the Respondent poses an immediate threat to anyone's physical health or safety.
- The district must undertake an individualized safety and risk analysis, determine 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.
- A school may place an employee on administrative leave during an investigation.

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INFORMAL RESOLUTION



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INFORMAL RESOLUTION CONDITIONS



- Districts may not offer an informal resolution process unless a formal complaint is filed.
- Districts may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment.
- Districts may not require the parties to participate in an informal resolution process.
- However, at any time 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 adjudication, provided that the recipient provides written notice disclosing certain items (next slide).
- Prior to informal resolution, the district must obtain the parties' voluntary, written consent to the informal resolution process.
- Districts cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

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● Notice to the parties must include:

- ✓ the allegations,
- ✓ the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and
- ✓ any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

Written Notice
Prior to
Informal
Resolution

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INVESTIGATIONS



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FIVE SIGNIFICANT CHANGES TO INVESTIGATIONS



- Mandatory separation between the investigation function and decision-making.
- Respondent is not just “innocent until proven guilty,” but must be presumed not responsible for the conduct throughout the entire investigation process.
- Parties are entitled to view all of the evidence in the case, even if it is not relevant.
- Confidentiality of party and witness names is over.

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DUTY TO AVOID BIAS AND CONFLICTS OF INTEREST



- Focus is the integrity of the process. Never an outcome.
- Recognize and understand what your biases are so that you can put them aside.
- Cultural competency – understand your microaggressions or unconscious biases.
- Check ego at the door.

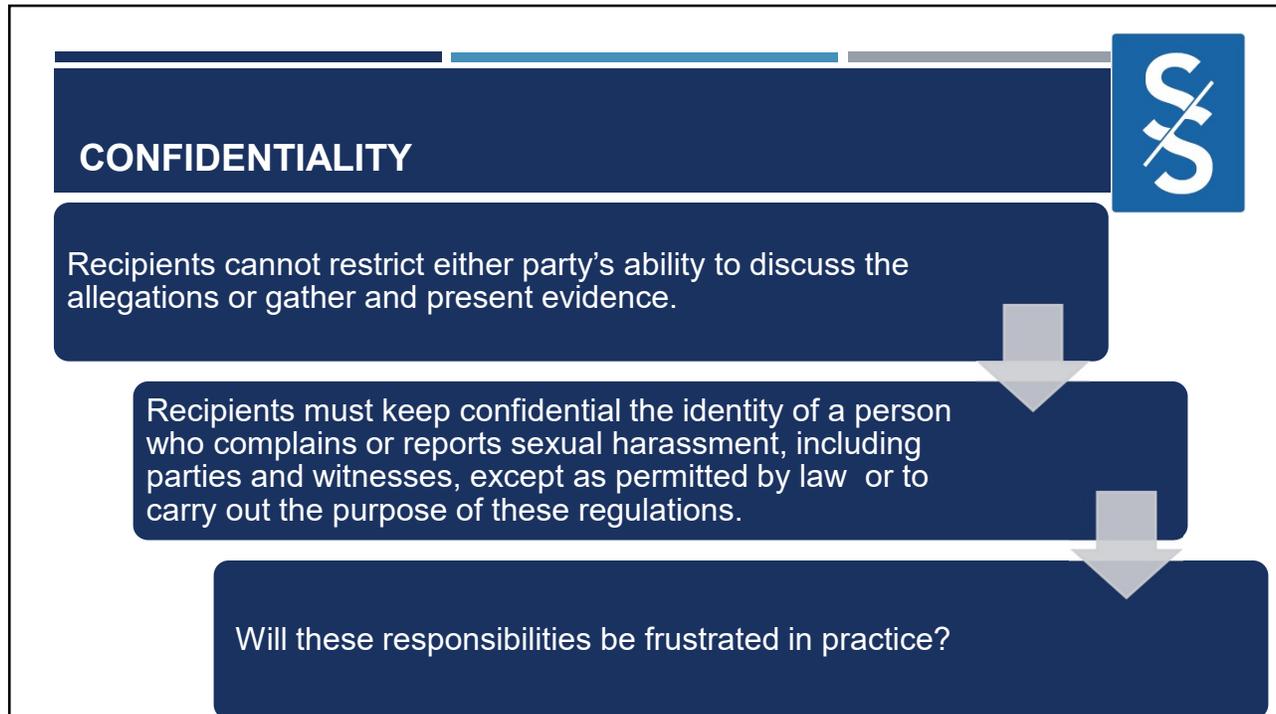
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MORE ON THE SEPARATION BETWEEN INVESTIGATOR AND DECISION-MAKER



- The Preamble to the Regulations says that an investigation report can reach a conclusion or recommendation. However, this is not recommended.
- In response to questions, the DOE has clarified that an investigator can testify to their opinions at a hearing and that decision-makers can have discussions with the investigator about their opinions.
- No matter how much sharing occurs between Investigator and Decision-Maker, it is the Decision-Maker's job to issue an independent and objective decision.

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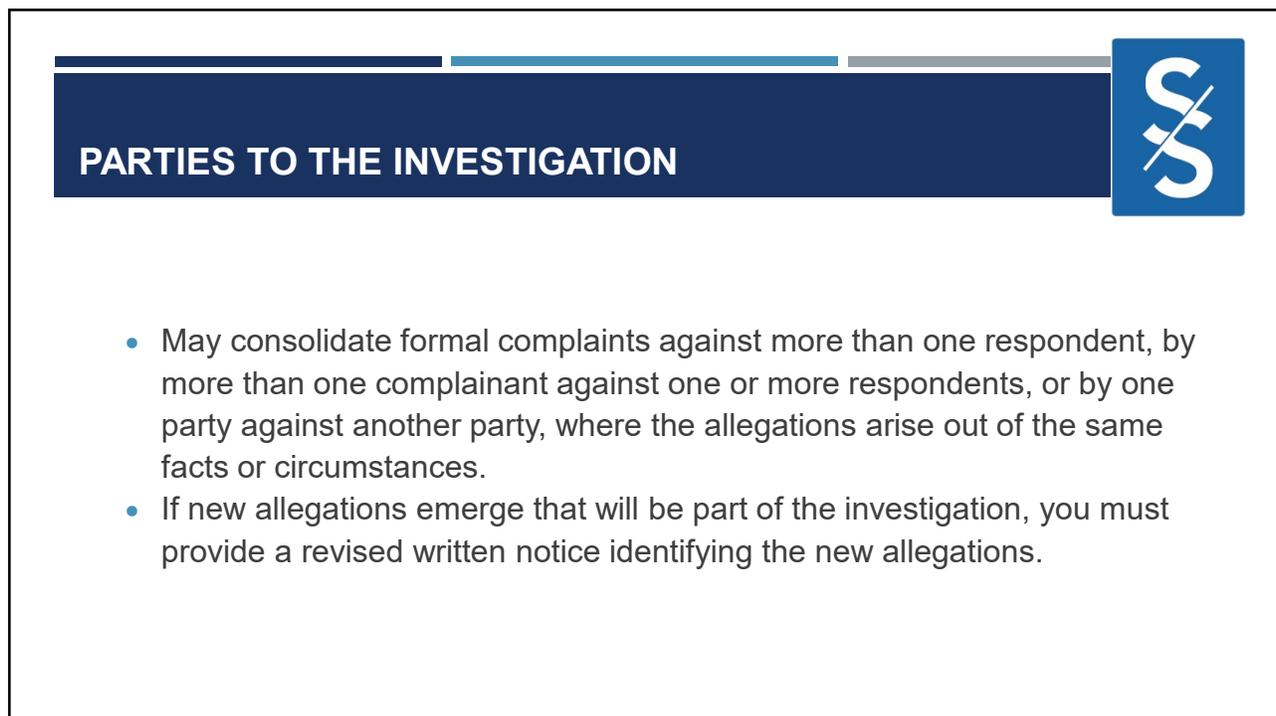
CONFIDENTIALITY

Recipients cannot restrict either party's ability to discuss the allegations or gather and present evidence.

Recipients must keep confidential the identity of a person who complains or reports sexual harassment, including parties and witnesses, except as permitted by law or to carry out the purpose of these regulations.

Will these responsibilities be frustrated in practice?

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PARTIES TO THE INVESTIGATION

- May consolidate formal complaints against more than one respondent, by more than one complainant against one or more respondents, or by one party against another party, where the allegations arise out of the same facts or circumstances.
- If new allegations emerge that will be part of the investigation, you must provide a revised written notice identifying the new allegations.

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MANAGING AN ADVISOR'S INVOLVEMENT



- Both parties have an equal opportunity to have others present during any grievance proceeding, including the opportunity to be accompanied by an advisor who may be, but is not required to be, an attorney.
- Employees will typically have a union representative and/or an attorney represent them.
- Students may bring a parent or advisor.
- Make sure to have a pre-interview discussion with representatives/advisors about the limitations of what they can do/say in the interview. (See Advisor Designation Form).
- You may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

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GATHERING EVIDENCE



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GATHERING EVIDENCE – COMPLYING WITH THE REGULATIONS



- Burden of proof rests on the Recipient at all times.
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Cannot restrict the parties from discussing the allegations under investigation or from gathering and presenting relevant evidence.
- Must provide to any party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

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GATHERING EVIDENCE – BEGIN WITH AN ORGANIZED FILE



- Binders are great. Set up an automatic protocol for each investigation. A binder with pre-determined tabs and a Table of Contents that you can fill in as you go.
- Tabs: Notice of Allegations, Advisor Forms, Complainant Interview, Respondent Interview, Witness Interviews, Text Messages and Social Media, Evidence from Complainant, Evidence from Respondent, Draft Report, Final Report, Correspondence with Complainant and/or Advisor, Correspondence with Respondent and/or Advisor, Notes, etc.
- Start a Timeline and a Witness List to use throughout your investigation.
- Remember that all of your evidence must be provided to the parties eventually, and so keep original copies of things clean.

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INTERVIEW CONSIDERATIONS



- Identify potential witnesses.
 - Consider order of witnesses; what witnesses the parties have identified.
- Determine what questioning is appropriate based on the following factors:
 - Age of the student(s);
 - Nature of the offense;
 - Involve students?
 - Staff?
 - Sexual background of Complainant?
 - Video or other evidence available;
 - Trustworthiness/credibility of witnesses; and
- Balance thoroughness and disruptiveness.

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TAKING STATEMENTS

- Begin interview process as soon as possible.
- Never promise confidentiality, but explain the safety precautions the District will take (e.g., no disclosure of personally identifiable information in public records).
- Consider the role of the parents: Notification? Representation?
- Get their story in their own words, first in general, then more specifically.
- Follow up to get specific facts, not generalities.
- Don't forget "anything else?"

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INTERVIEWING CHILDREN



- Interview Structure:
 - Introductory--set general ground rules regarding discussion.
 - Agreement to tell the truth.
 - Reminder they should not guess.
 - Correct you if you are wrong.
 - Rapport-Building--talk about things other than the target incident.
 - Free-Recall—ask open-ended questions.
- Open-ended questions provide higher quality information.
 - Ex: “Where were the other students?” v. “Were the other students in the hallway?”
- Young students – look for the core of the story to be true; minor inconsistencies are common and do not speak to the larger credibility of the narrative.

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SPECIAL WITNESS CONSIDERATIONS: DIFFICULT WITNESSES



- What if a student witness refuses to cooperate?
- Do not allow witnesses or parties to provide ambiguous answers, or to not fully answer your question.

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SPECIAL WITNESS CONSIDERATIONS: DIFFICULT WITNESSES



- What if a Respondent-Employee refuses to testify?
- You may be able to force testimony under *Kalkines v. United States*, 473 F.2d 1391, 1393 (Fed. Cir. 1973).
- Failure to cooperate may result in disciplinary action, including dismissal.
- Note: testimony provided in the above scenario may not be used for a criminal prosecution.

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SPECIAL WITNESS CONSIDERATIONS: CONDUCTING A TRAUMA-INFORMED INTERVIEW



Trauma-informed investigating and interviewing include the following key components:

- 1) understanding the impact of trauma on a neurological, physical, and emotional level;
- 2) promoting safety and support;
- 3) knowing positive ways to respond that avoid re-traumatization; and
- 4) providing choice with a goal of empowerment.

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SPECIAL WITNESS CONSIDERATIONS: CONDUCTING A TRAUMA-INFORMED INVESTIGATION



- Making the interview more comfortable and build rapport– having a box of tissues in the room; letting them choose their drink; maybe a white noise machine if it is in a busy space; letting them choose their seat/side of the table.
- Never “rank” the trauma (e.g., “you’re lucky you don’t remember” or ranking based on whether you were drugged or not drugged, or whether it was someone you know or a stranger, etc.)
- Avoid Asking “why” questions. “Why did you...” It sounds too judgmental.
 - Why assumes that there was another option that they didn’t choose.
 - Instead, can ask “how did it happen that...?”

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SPECIAL CONSIDERATIONS – DELAYS



- Grievance process allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.
- Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

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TURNING EVIDENCE INTO A DRAFT REPORT



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✓ Fairly summarize relevant evidence.

✓ Evaluate all relevant evidence objectively, including both inculpatory and exculpatory evidence.

✓ Make credibility determinations that are not based on a person's status as a Complainant, Respondent, or Witness.

✓ "Show your work" for all of the above in order to have a complete report.

Written Investigation Report

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FAIRLY SUMMARIZING RELEVANT EVIDENCE



Do...

- Be specific.
- Memorialize witnesses interviewed, records reviewed/created.
- Document the District's efforts. (e.g., if a witness would not cooperate/be interviewed).
- Come to a factual conclusion about what happened and make credibility determinations.
- Come up with an action plan – Safety Plan, Professional Development, etc. and document it.

Don't...

- Be too general.
- Use legal definitions or terms.
- Refer to conversations with legal counsel.
- Refer to conversations with insurers.
- Make conclusions to make someone happy. This is our one chance to get it right.
- Be afraid to take action if there is misconduct that just doesn't fall into the definitions investigated.

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FAIRLY SUMMARIZING RELEVANT EVIDENCE



DON'T	DO
"He has the party classroom."	"Mr. Jones stays after school every day for at least 1.5 hours and allows students to come to his classroom to listen to music and socialize with the classroom door shut."
"He stalked her every day."	"Michael left his last period class every day last week in order to be at Melinda's class when it ended. He then followed her to her locker and out to her car."
"The coach used sexual innuendo as jokes."	"The coach made the comment that No. 6 and No. 9 were standing right next to each other."

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TURNING EVIDENCE INTO A REPORT ASSESSING CREDIBILITY



- Credibility is the process of weighing the accuracy and veracity of evidence.
- Evaluate the source, content, and plausibility of testimony in light of other evidence.
- Assessment of credibility does not include making conclusions about whether a witness or evidence is credible, or judging the comparative credibility of evidence or witnesses. It stops just short of that, pointing to discrepancies without deciding them.

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EVALUATING INFORMATION: EVALUATING CONFLICTING EVIDENCE



- You are the finder of fact.
- Use common sense and credibility determinations.
- Consider the witnesses' opportunity to observe what happened versus hearsay.
- Consider whether testimony matches up with hard evidence such as texts, photographs, videos, social media, etc.
- Demeanor of witnesses. What do they have to lose/gain?

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TURNING EVIDENCE INTO A REPORT AVOIDING BIAS



- Distinguish undisputed evidence from contested evidence.
- Let the evidence lead to a conclusion – do not interpret the evidence with a goal to reach a particular conclusion.
- Avoid having a “hunch” from the beginning or judging based upon appearance or the “type” of girl/boy.
- Avoid “first impression bias.”
- There will be gaps in evidence – if you cannot fill those gaps, do not use your assumptions or speculation.

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PROVIDING THE PARTIES WITH EVIDENCE



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OBLIGATION TO PROVIDE EVIDENCE



- Must provide both parties an equal opportunity to inspect and review any evidence obtained as a part of the investigation that is **directly related to the allegations raised in a formal complaint**, including the evidence upon which the recipient does not intend to rely in reaching a determination.
- Must do this at this time so that each party can “meaningfully respond to the evidence prior to the conclusion of the investigation.”
- You must provide the evidence in an electronic format or hard copy and give the parties at least 10 days to submit a written response. If a written response is provided, consider it in completing your final report.

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DETERMINATION OF RESPONSIBILITY



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NEXT STEPS – AFTER INVESTIGATION



- Must give the final report to both parties at least 10 days prior to a hearing, or determination, for their review and written response.
- The decision-maker either conducts a hearing or a question exchange.
- **Question Exchange:** After receiving the investigation report and before reaching a determination of responsibility, the decision maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

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DECISION MAKING PROCESS – ALLOWING QUESTIONING



- The decision maker may only allow **relevant** questions.
- What is a relevant question?
 - “Relevance” is not generally defined in the regulations.
 - Under the Federal Rules of Evidence, evidence is relevant if:
 - It has any tendency to make a fact more or less probable than it would be without the evidence; and
 - The fact is of consequence in determining the action.

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NEXT STEPS – AFTER INVESTIGATION



- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.
- Decision-maker renders a determination of responsibility.

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INVESTIGATIVE REPORT VS. DETERMINATION OF RESPONSIBILITY

Investigative Report

- The investigator should be a **fact finder**.
- Focus: Are the factual allegations accurate? What happened?
 - Gather the facts.
 - Provide sufficient details to provide context and information on the importance of specific evidence.
 - Explain what questions were asked, what evidence was reviewed, and why the investigator made the choices to ask those questions and review that evidence.
 - Explain what evidence the investigator believes is most important and why. Explain what evidence the investigator believes is unimportant and why.
 - Explain why the investigator thinks certain evidence or statements are more or less credible.

Determination of Responsibility

- The decision maker should be a **decision maker**.
- Focus: Does what happened violate the policy and amount to sexual harassment?
 - Make credibility determinations, including whether parties and witnesses were telling the truth.
 - Make determinations about what happened and when.
 - Make determinations about the relative importance of facts and evidence.
 - ***Make a determination regarding whether the Respondent sexually harassed the Complainant that is supported by the facts, as presented by the investigative report and reviewed by the decision maker.***
 - ***Make determinations regarding appropriate sanctions and remedies.***

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WHAT RULES APPLY TO THE DECISION MAKER'S CONSIDERATION OF THE EVIDENCE?



- Objectively evaluate all relevant evidence, both inculpatory and exculpatory.
 - “Inculpatory evidence” is evidence that shows, or tends to show, a person’s involvement in an act, or evidence that can establish responsibility.
 - “Exculpatory evidence” is evidence that tends to excuse, justify, or absolve the alleged fault or responsibility as a Respondent.
- Make credibility determinations that are not based on a person’s status as a complainant, respondent, or witness.
- Continue to presume that the Respondent is not responsible for the alleged conduct until a **final** determination regarding responsibility is made.
- Remember that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the **District**, not the Complainant or Respondent.

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APPEALS



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GROUNDS FOR APPEAL



Both parties have the right to appeal a determination of responsibility or a dismissal for the following reasons:

1. A procedural irregularity affected the outcome;
2. New evidence that was not reasonably available at the time of the determination and could affect the outcome;
3. Conflict of interest on the part of the Title IX Coordinator, Investigator, or Decisionmaker that affected the outcome; or
4. Other reasons as permitted by the recipient.

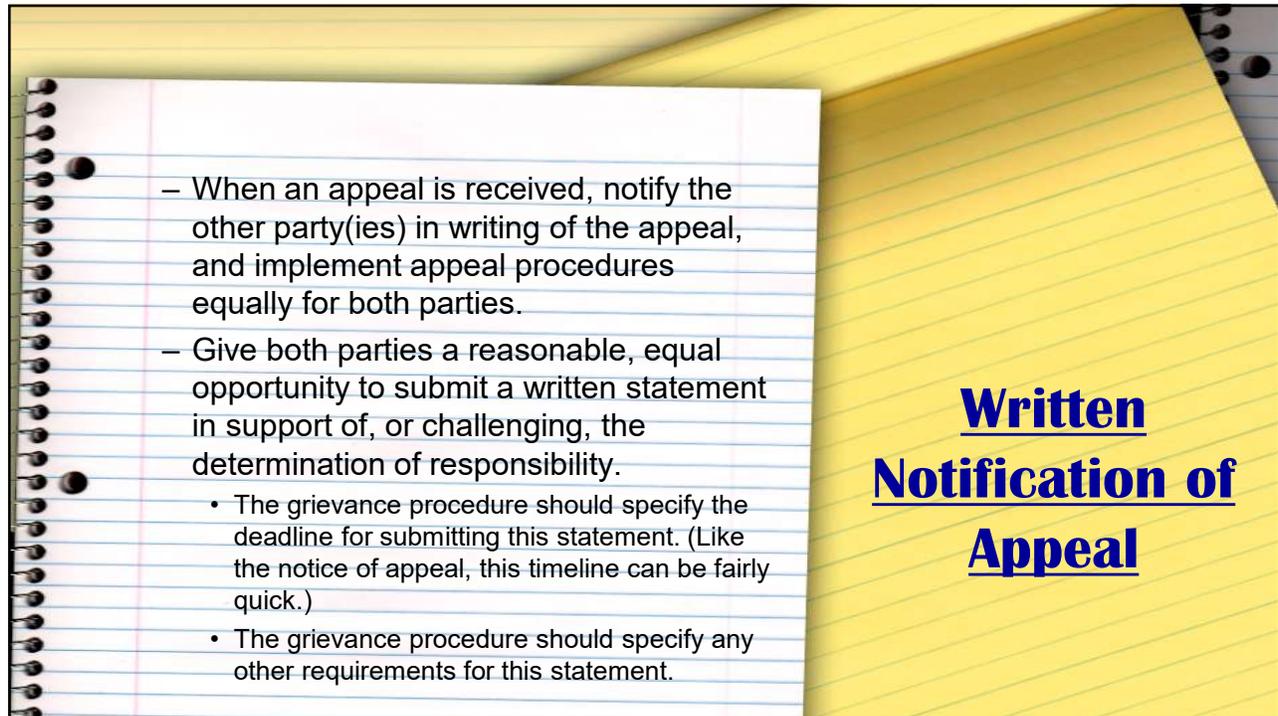
87

PROCEDURES FOR APPEALS – NOTICE OF APPEAL



- Include appeal procedures, including deadlines, in your district's grievance process.
 - Whom should parties notify of their appeal? (Title IX Coordinator?)
 - What will the deadline be to notify the district of the appeal?
 - The deadline can be fairly quick, e.g., between 3 and 5 days.
 - The grievance process can allow for limited, equitable extension of time for good cause.
 - How should the party notify the appropriate person of the appeal (e.g., in writing, at a particular email address, via mail).
 - What information must be included in the notice of the appeal?
- Restate the appeal procedures outlined in the grievance process in each written determination of responsibility, and also refer the parties to the grievance process.

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– When an appeal is received, notify the other party(ies) in writing of the appeal, and implement appeal procedures equally for both parties.

– Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the determination of responsibility.

- The grievance procedure should specify the deadline for submitting this statement. (Like the notice of appeal, this timeline can be fairly quick.)
- The grievance procedure should specify any other requirements for this statement.

Written
Notification of
Appeal

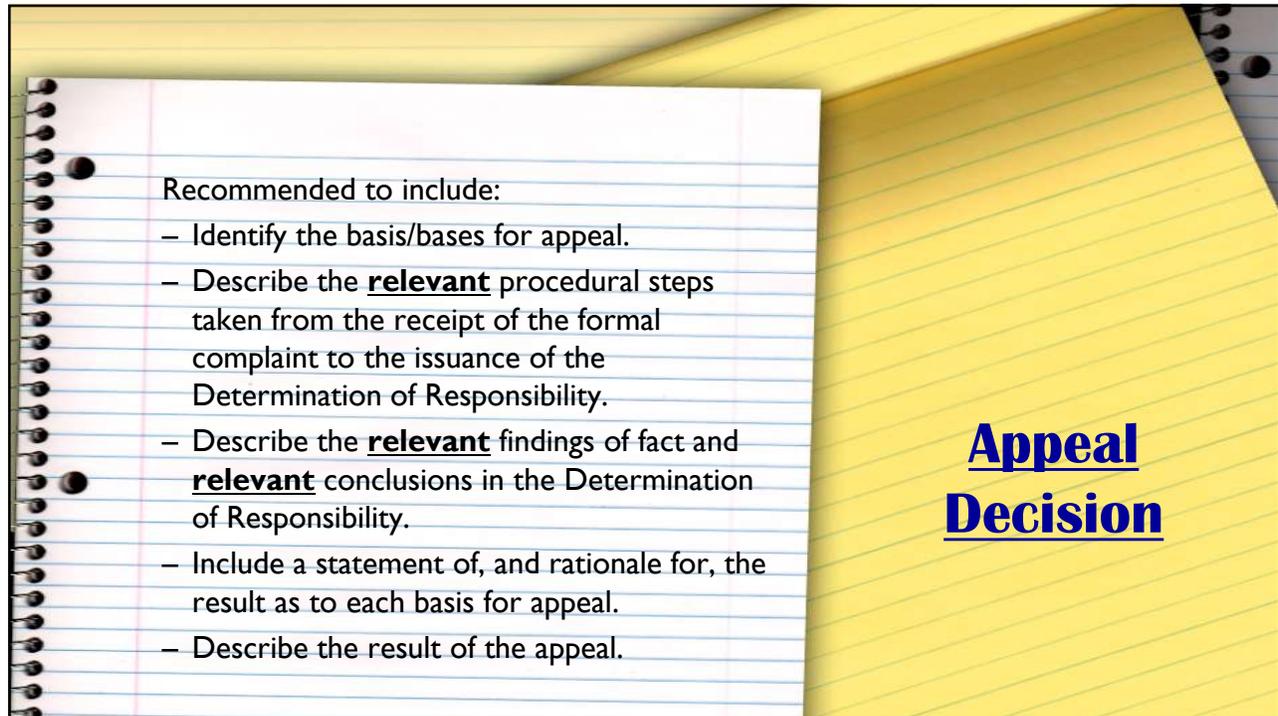
89

DECIDING THE APPEAL



- The Appeal is not a Re-Do, but a Review.
 - Confine the review of the Determination of Responsibility to the specific issue raised in the Appeal and the statements the parties submitted in the Appeal.
 - The Appeals Decision Maker should not substitute his/her judgment for that of the Decision Maker, especially regarding factual determinations.
 - If no additional investigation is needed, the Appeals Decision Maker should identify the error and correct it, explaining how that changes the Determination of Responsibility, sanctions, and/or remedies.
 - If additional investigation is needed, the Appeals Decision Maker should “remand” the Complaint to the Decision Maker, with instructions on how to correct the error and appropriately revise the Determination of Responsibility.

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Recommended to include:

- Identify the basis/bases for appeal.
- Describe the **relevant** procedural steps taken from the receipt of the formal complaint to the issuance of the Determination of Responsibility.
- Describe the **relevant** findings of fact and **relevant** conclusions in the Determination of Responsibility.
- Include a statement of, and rationale for, the result as to each basis for appeal.
- Describe the result of the appeal.

Appeal
Decision

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THE WRITTEN APPEAL DECISION



- What are possible results of the appeal?
 - The Determination of Responsibility is “affirmed.”
 - The Determination of Responsibility is completely or partially “reversed,” and the Appeals Decision Maker comes to a different final conclusion.
 - The complaint is “remanded” to the Investigator for limited further investigation in accordance with specific instructions from the Appeal Decision.

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PROCEDURES FOR APPEALS – NOTIFYING PARTIES OF THE RESULT



- Issue a written appeal decision describing the result of the appeal and the rationale for the result.
- Simultaneously provide the written appeal decision to both parties.

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SANCTIONS & REMEDIES



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SANCTIONS



- The district may not impose any disciplinary sanctions or other actions that are not supportive measures against a Respondent until the grievance process has concluded.
- The Determination of Responsibility becomes final either on the date the appeal is resolved or the date the appeal is no longer timely.
- The sanctions must be among those listed or described in the grievance process as within the range of possible disciplinary sanctions and remedies.
- The Title IX Coordinator is responsible for effectively implementing any sanctions and/or remedies.

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REMEDIES



- The Determination of Responsibility must include a statement of whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the Complainant.
- Remedies may be the same as supportive measures, but after the Determination of Responsibility becomes final, need not be non-disciplinary or non-punitive, and need not avoid burdening the Respondent.

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HOT TIX TAKES FROM 2020-2021 SCHOOL YEAR



- Default to supporting students.
- District can defer to students/adults wishes on whether to file a complaint.
- A district CANNOT issue student discipline for sexual harassment unless it follows the Title IX process.
- Communication regarding reports of sex harassment or potential sex harassment is critical. Involve the Title IX Coordinator ASAP.
- Don't go it alone!

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THANK YOU!



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