



Promoting a Discrimination & Harassment Free School & Work Setting Title IX Coordinator Responsibilities

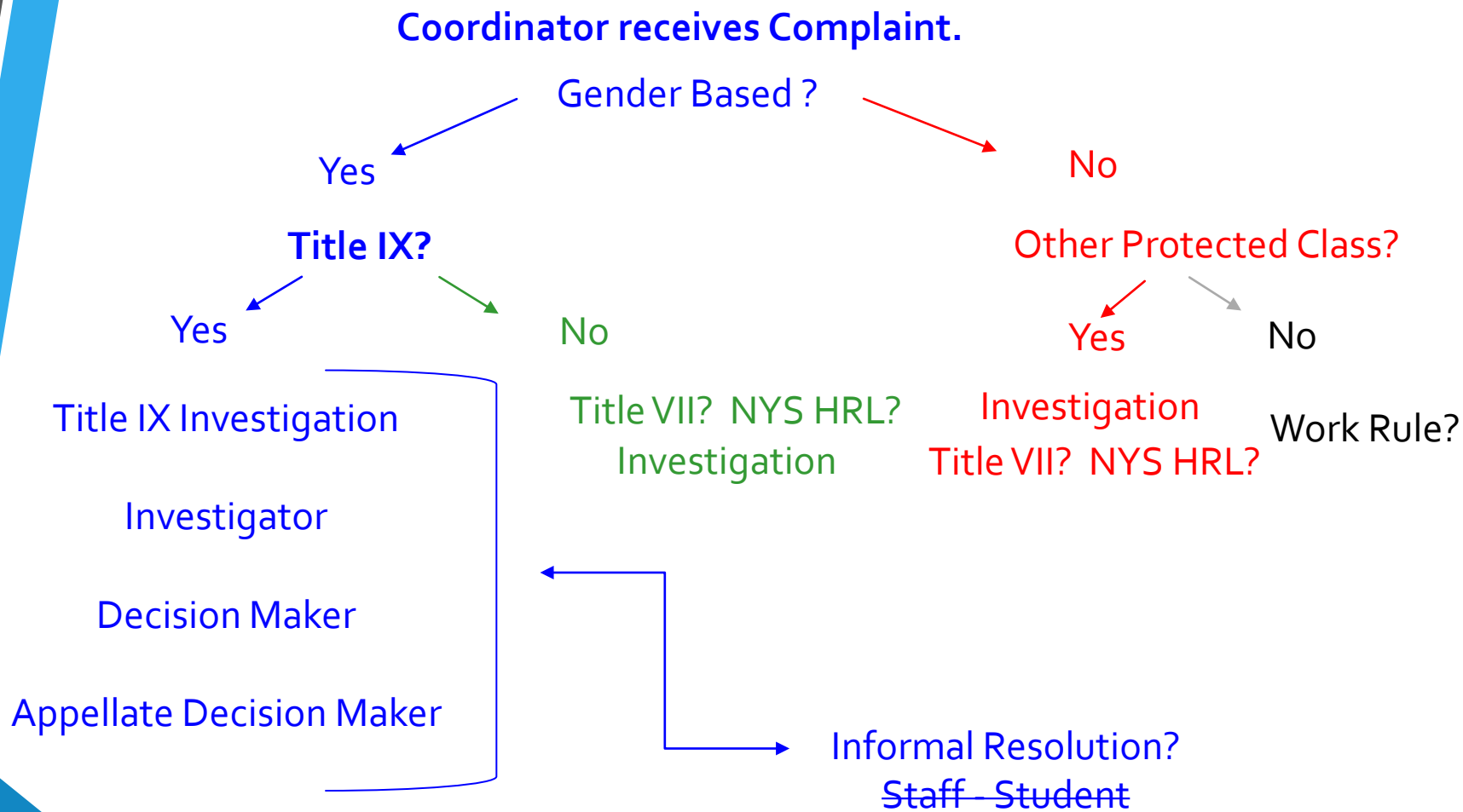
Responding to and handling Title IX Complaints
Helping the District to meet its obligations.

February 2 & 3, 2022

Nothing in this presentation is intended to constitute legal advice.

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Overlap – what policy and rules apply?





Questions and Answers on the Title IX Regulations on Sexual Harassment



Questions and Answers on the
Title IX Regulations on Sexual
Harassment (July 2021)



UNITED STATES
DEPARTMENT
OF EDUCATION
Office for Civil Rights
July 20, 2021



- <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

The 100' View

State and federal laws (e.g., NYS Human Rights Law , Title VII and **Title IX**) prohibit workplace discrimination and/or harassment in schools based upon protected classifications, **such as:**

Race

Color

National Origin

Religion

Sex

Sexual Orientation

Disability

Age

Citizenship status

Genetic information

Creed

Military Status

Marital Status

Domestic Violence Victim Status

Criminal History

Gender Identity

Students are protected too...

State and Federal laws (e.g., the Dignity for All Students Act, NYS Human Rights Law and **Title IX**) prohibit discrimination and/or harassment of students in a school setting based upon protected classifications, such as:

Race

Weight

National Origin

Religion

Sex

Disability

Sexual orientation

Gender identity

Title IX

Anti-Harassment & Non-Discrimination

Sexual harassment

a form of gender or sex discrimination.

Includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender.



Title IX

Title IX

... prohibits **sex discrimination** in programs and activities of all educational institutions, including school sponsored travel that occurs away from school, so long as the school receives federal financial assistance.

Title IX

... prohibits **different treatment on the basis of sex** in *all aspects of a school's educational programs or activities* – students & staff.

Title IX

... prohibits **retaliation** against an individual for opposing or reporting discrimination, complaining about discrimination, or participating in a discrimination investigation.

Title IX

... requires schools to **have policies and procedures** for prevention and correction.

August 14, 2020, Regulations Amended

Under Title IX, § 106.30



Title IX Process

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

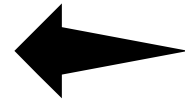
- 1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; [Quid Pro Quo]
- 2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's *education program or activity*; or [Hostile Environment]
- 3) "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).

August 14, 2020 It is clear.
Sexual harassment is a form of sex discrimination; expressly covers...

As Title IX Coordinators, we know:

Title IX regulations:

- define “sexual harassment,” **and set forth procedures for how schools must respond** to allegations of sexual harassment;
- **codify** that sexual harassment, including sexual assault, dating violence, domestic violence and stalking is prohibited under Title IX;
- provide **due process protections** to those facing accusations of sexual harassment; and
- **requires specific training.**



What is
Harassment?

Title IX - Employees & Students

*But...what about others?
(vendors, visitors, etc.)*

Federal Statutes

Federal Regulations

NYS Statutes

NYS Regulations

Local Policy (BOE Policy)

Work Rules

Student Rules

Under Title IX, § 106.30



Title IX Process

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

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- 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 recipient's education program or activity; or [Hostile Environment]
- 3) "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).

August 14, 2020 It is clear.
Sexual harassment is a form of sex discrimination; expressly covers...

Title VII ←

Definition of Harassment

Other
Process

General definition of harassment created by Federal courts under Federal statutes (e.g., **Title VII** of the Civil Rights Act of 1964; *amended 2019*):

Harassment, *generally*, consists of subjecting an individual, **on the basis of his/her membership in a protected class**, to conduct and/or communications that are **sufficiently severe, pervasive or persistent** as to have the purpose or effect of:

- creating an intimidating, hostile, or offensive environment;
- substantially or unreasonably interfering with an individual's work or a student's educational performance, opportunities, benefits or well-being; or
- otherwise adversely affecting an individual's employment or educational opportunities.

NYS Human Rights Law (now applies to Students too).



Other
Process

NYS Human Rights Law, states:

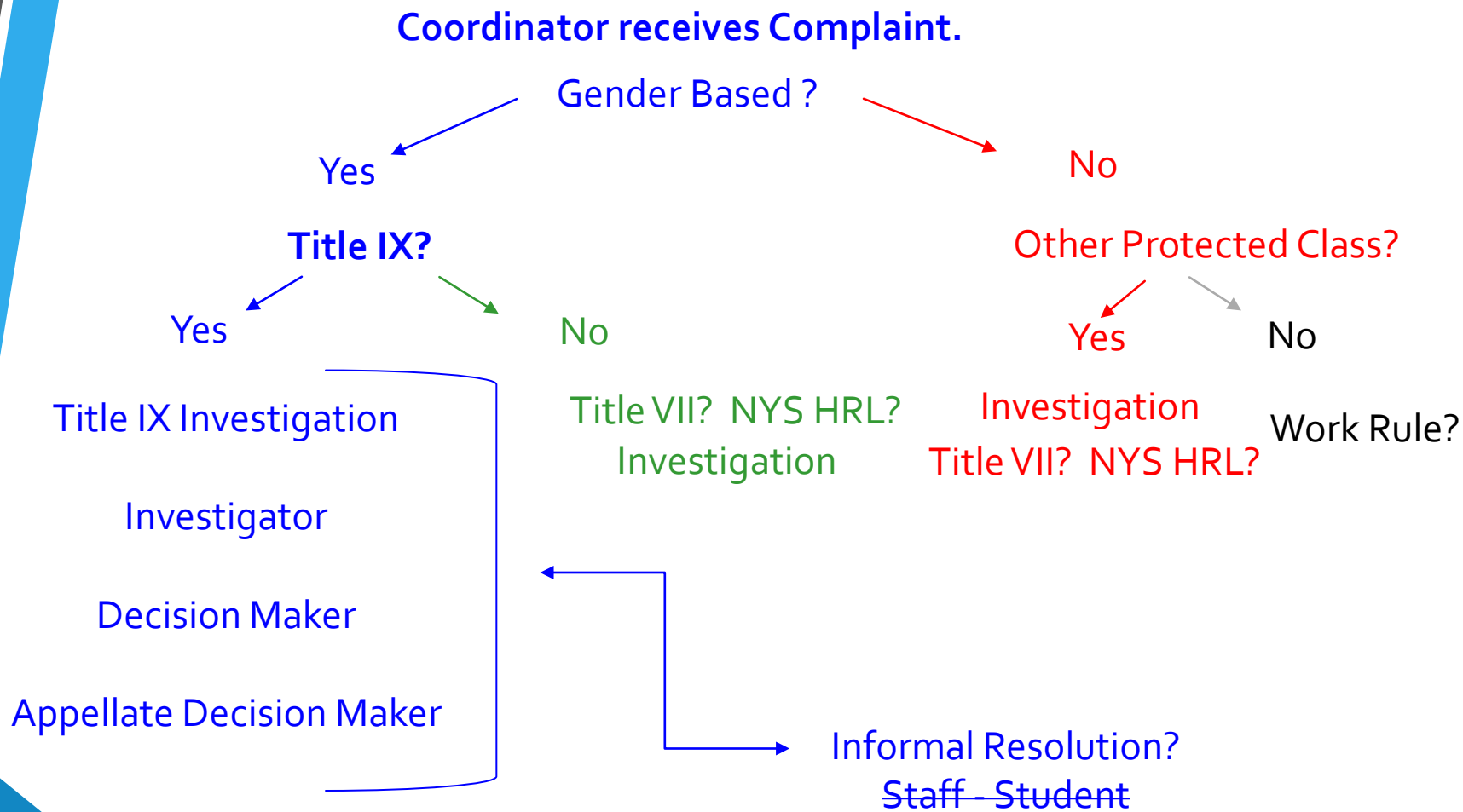
“it shall be an unlawful discriminatory practice for an educational institution to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, military status, sex, age, or marital status.” (2019 Legislative Amendment)

New York previously used the federal court standard for “Harassment” claims, however, in 2018:

New York set the standard for state harassment claims: whether the conduct subjects an individual to “**inferior terms, conditions or privileges of employment**” **based upon membership in a protected class**.

[Certainly, a lower standard. This means...]

Overlap – what policy and rules apply?



Some
other
concepts...

How can I tell if it is really sexual harassment?

“The Reasonable Person Standard”

- ...whether a “reasonable person” would perceive the conduct as being sexual **harassment...viewed from the eye of the Complainant**, including their particular circumstance.

May I Require Confidentiality? [TITLE IX](#)

- The recipient 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 FERPA, or as required by law, or to carry out the purposes of Title IX Regulations.**
- Not restrict the ability of **either party** to discuss the allegations under investigation or to gather and present relevant evidence

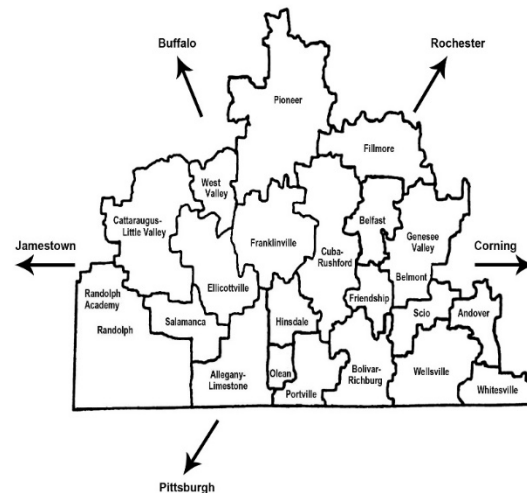
Title IX

Scope of Education Program or Activity

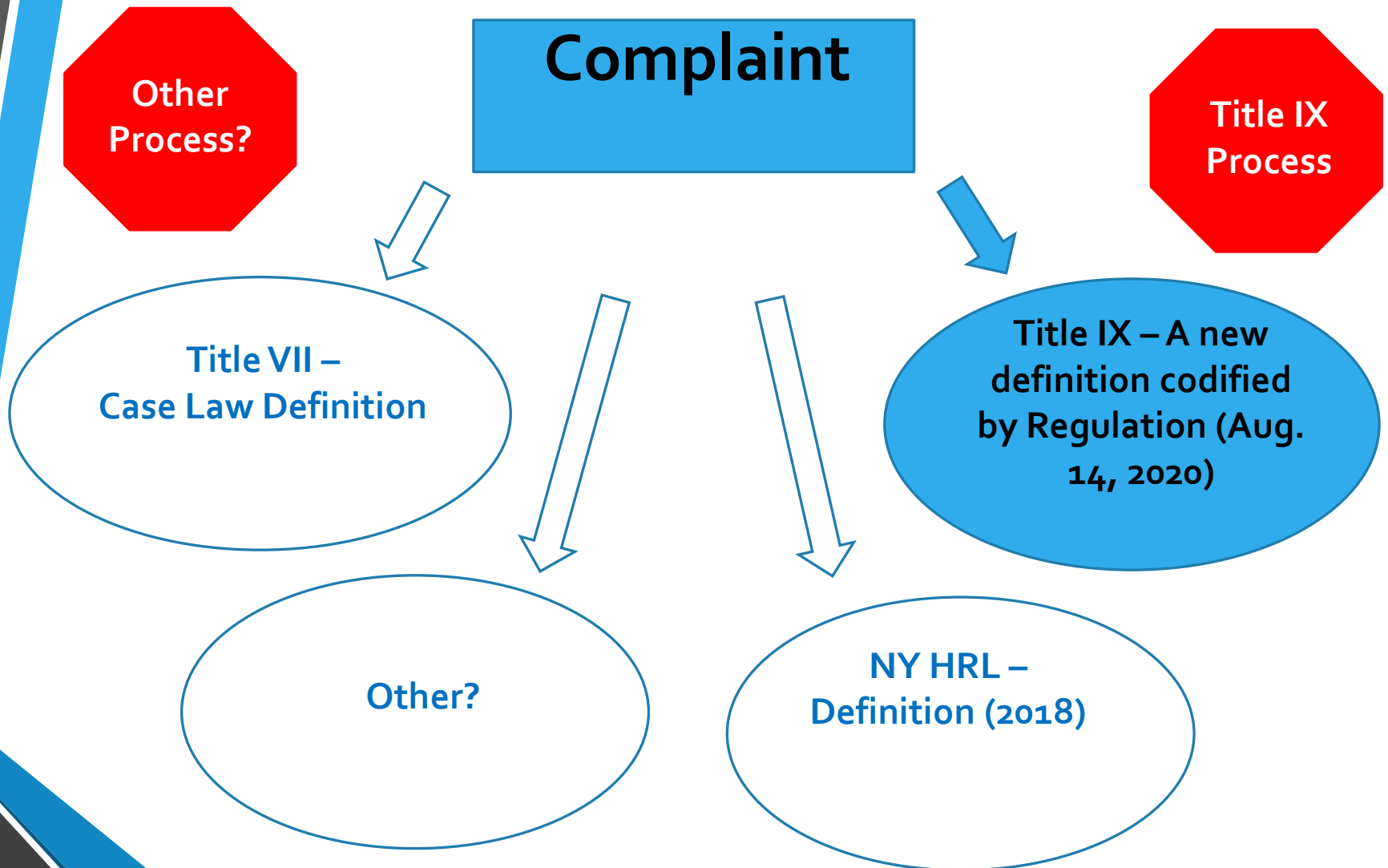
Consider your school

What is the scope of your District's education program & 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)?

- ☐ District Website
- ☐ Your District's Board Policies
- ☐ Ask – what “all” do we do?



The Process...for example





Let's pause. (2)

Who handles this?

[Back to Title IX](#)

Complainant

The person who brought the complaint – the accuser (must be participating in or attempting to participate in the education program or activity (or a parent of a minor doing so)).

Recipient

The school.

Formal Complaint - a document **filed** by a Complainant **or signed** by the Title IX Coordinator **alleging sexual harassment** against a respondent **and requesting that the recipient investigate** the allegation of sexual harassment.

Respondent

The accused.

Our Obligations

“The Title IX Rule states in § 106.8(a): “Each recipient must designate and authorize at least one employee to **coordinate its efforts to comply with its responsibilities** under this part, which employee must be referred to as the “Title IX Coordinator.””

Respond	Resolve	Implement	Treat
respond promptly and supportively;	resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment; and	<u>effectively</u> implement remedies for victims [Title IX Coordinator responsibility].	treat complainants and respondents (the accused) equitably;

Coordinators
know:

Training
is
critical.

“We will not be
deliberately
indifferent.”

Effective August 14, 2020

- Train **all** employees – K-12 schools must respond whenever **any employee** has notice of sexual harassment, including allegations of sexual harassment.
- **Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process...**

Who will play these roles in
my school?
Have they been trained?

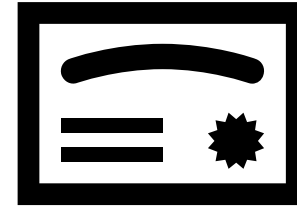
Recipient

Complainant

Respondent

- **The Coordinator(s)**
 - Coordinates efforts to comply with Title IX.
 - Acts without conflict of interest or bias.
 - May not be the same person as Decision Makers & Decision Makers for Appeal.
- **The Investigator(s)**
 - Conduct investigation without conflict of interest or bias.
 - Create an “investigative report” that fairly summarizes relevant evidence.
 - May not be the same person as Decision Makers & Decision Makers for Appeal..
- **The Decision Maker(s)**
 - Arrive at decision without conflict of interest or bias.
 - Issue written determination regarding responsibility.
 - May not be the same person as the Title IX Coordinator or Investigator, or Decision Maker for Appeal.
- **The Decision Maker(s) for the Appeal**
 - May not be the same person as the Decision Maker, the Investigator or Coordinator.
- **Any Person who facilitates an Informal Resolution**
 - *Must also be trained.*
 - Acts without conflict of interest or bias (like others).

Training



Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process...must be trained on:

- Definition of sexual harassment
- Scope of education program or activity
- How to conduct an investigation and grievance process including appeals and informal resolution process
- How to serve impartially, including by avoiding prejudgment of the facts, conflicts of interest and bias

Training Requirements Also Include:

- Investigators
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Decision Makers
 - Technology for a live hearing (likely not applicable for K-12)
 - Issues of relevance of questions and evidence (including relevance of sexual predisposition or prior sexual behavior)

All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be made publicly available on the District's website. **What are the training materials?**



Let's Pause (3)

Who will play these roles in my school?

Some Title IX Requirements

Effective August 14, 2020:

[Back to Title IX](#)

- ☐ **Respond promptly** when **ANY school employee** has notice of sexual harassment, including sexual assault.
- ☐ Schools must take **immediate and appropriate action** to investigate or otherwise determine what happened.
- ☐ The inquiry must be **prompt, thorough & impartial**.
- ☐ Procedures must provide **equal opportunity** for both parties to appeal a determination and decision.
- ☐ New regulation extends to **all aspects** of a school's education program or activity controlled or operated by the school or any building owned or controlled by the school.
- ☐ If harassment occurs, schools must take **prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, and prevent it from happening again** to the victim or others.

Supportive Measures: Attention Coordinators



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.**

The recipient 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.**

... may include:

counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, escorts, mutual restrictions on contact between the parties, changes in work location, leaves of absence, increased security and monitoring of certain areas of the school/campus, and other similar measures.

Supportive Measures – the Complainant & Respondent

A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30 [even without a formal complaint],

- consider the complainant's wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint,
- and explain to the complainant the process for filing a formal complaint.

Interim Action – Removal

3214?

- *Emergency Removal* – Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the **physical health or safety** of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with **notice and an opportunity to challenge** the decision immediately following the removal. **This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.**
- *Administrative leave* – Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

Coordinator(s)

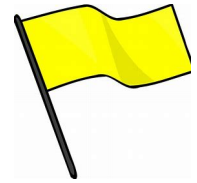
Person(s)
designated to
facilitate an
informal resolution
process

Investigator(s)

Decision Maker(s)

Decision Maker(s)
on Appeal

- ☐ **Do NOT pass judgment prior to obtaining and evaluating all relevant information**
- ☐ **Ensure you are free from conflict**
- ☐ **Do NOT allow bias to cloud your judgment**



Prejudgment

- Prejudgment is when judgment is made without sufficiently investigating and/or evaluating the situation.
- Neither a Complainant nor a Respondent should be subjected to prejudgment
- Prejudgment may be caused by the stereotypes and biases that an individual believes to be true
- Prejudgment may be caused by the way a Complainant and/or Respondent act during the preliminary stages of the Title IX process

Avoid Prejudgment

- Remember there are at least two sides to every story
- Gather ALL the facts before reaching a conclusion
- Keep an open mind

There is a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

Avoid Conflicts of Interest

- Conflicts of Interest are situations in which a person is in a position to derive personal benefit from actions or decisions made in their official capacity
- These situations may be the result of familial relations, emotional connections, financial situations, past circumstances, etc.
- Any situation in which an individual does not have the ability to assess the situation and participate impartially is a conflict of interest, whether the conflict is perceived, potential, and/or actual.

Bias

- Bias is prejudice in favor of or against one thing, person, or group compared with another
- Bias is commonly attached to preconceived notions we hold about particular characteristics and/or traits (i.e. age, race, sex, etc.)

Avoiding Bias

- Do NOT make assumptions based on beliefs
- **Pay attention to facts as they come out**
- Think critically while assessing the facts and make a conscious effort to avoid applying what you think you know to the situation

Let's pause.

Conflict? Bias? Pre-Judgment?

- He is my neighbor.
- I went to high school with her. We weren't good friends, but we were in marching band together.
- I've publicly recognized what a good teacher he is.
- She is my cousin!
- He's my father in law's stepson.
- My son plays little league with his son.
- He is my daughter's summer softball coach.
- "I can't stand that guy. He's a jerk!"
- I dated him/her.

Take-Away

- Equality – treat all parties equally and fairly, regardless of their involvement in the situation at hand and who they are.
- Gather ALL the facts prior to formulating any type of opinion.

Evidence

*"A recipient also must ensure that investigators receive training on **issues of relevance** to **create an investigative report that fairly summarizes relevant evidence**, as set forth in paragraph (b)(5)(vii) of [the Regulations]."*

*"A recipient must ensure that decision-makers 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 or not relevant...**"*

Issues of Relevance

- Evidence is **relevant if**: (a) it **has any tendency to make a fact more or less probable than it would be without the evidence**; and (b) the fact **is of consequence in determining the action**.
 - Inculpatory evidence is **evidence that shows, or tends to show, a person's involvement in an act, or evidence that can establish guilt**.
 - Exculpatory evidence is **evidence favorable to the respondent. (i.e., that exonerates or tends to exonerate the respondent of guilt)**

Remember “Rape Shield” Protections

- A complainant **may not be asked prior sexual conduct or sexual predisposition**, nor may evidence to prove the same be admitted, 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**.

Your School **Attorney?**

Retaliation

ALERT: the new Title IX Rules contains an **anti-retaliation provision** to protect individuals from suffering intimidation, threats, coercion, or discrimination that might curtail the person's rights under Title IX.

- Schools are prohibited from retaliating against an individual because the individual has **asserted a right protected by Title IX**; made a Title IX **complaint or participated** in a Title IX investigation, proceeding or protested sex discrimination.
106.71, 100.7(e)
 - **Opposing or reporting discrimination, complaining about discrimination, or participating** in a discrimination investigation.

Retaliation continued (106.71)

- No recipient 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 **recipient 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 statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, ***or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.***
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

Retaliation: 1st A and False Statements



The exercise of rights protected under the First Amendment does not constitute retaliation.



Charging an individual with a code of conduct violation for making a materially false statement ***in bad faith*** in the course of a grievance proceeding under this part 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.

No Retaliation if:

A negative employment action that merely occurs after an employee engages in protected activity is not per se retaliation.

Employees continue to be subject to all job requirements and rules of the employer after having engaged in such protected activity.

Think about this...



Your School's policy

What is your standard?

- Designate & authorize your **Title IX Coordinator** & describe role.
- **Define** sexual harassment for purposes of Title IX & describe when a **Formal Complaint** may be filed.
- Process for responding to a Formal Complaint (**grievance process**), including appeals.
- Requirement for **training**.
- Description of potential **sanctions** to be imposed upon harasser.
- The “**evidentiary standard**”.
 - the *preponderance of the evidence* standard or the *clear and convincing evidence standard*,
 - apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and
 - apply the same standard of evidence to all formal complaints of sexual harassment.

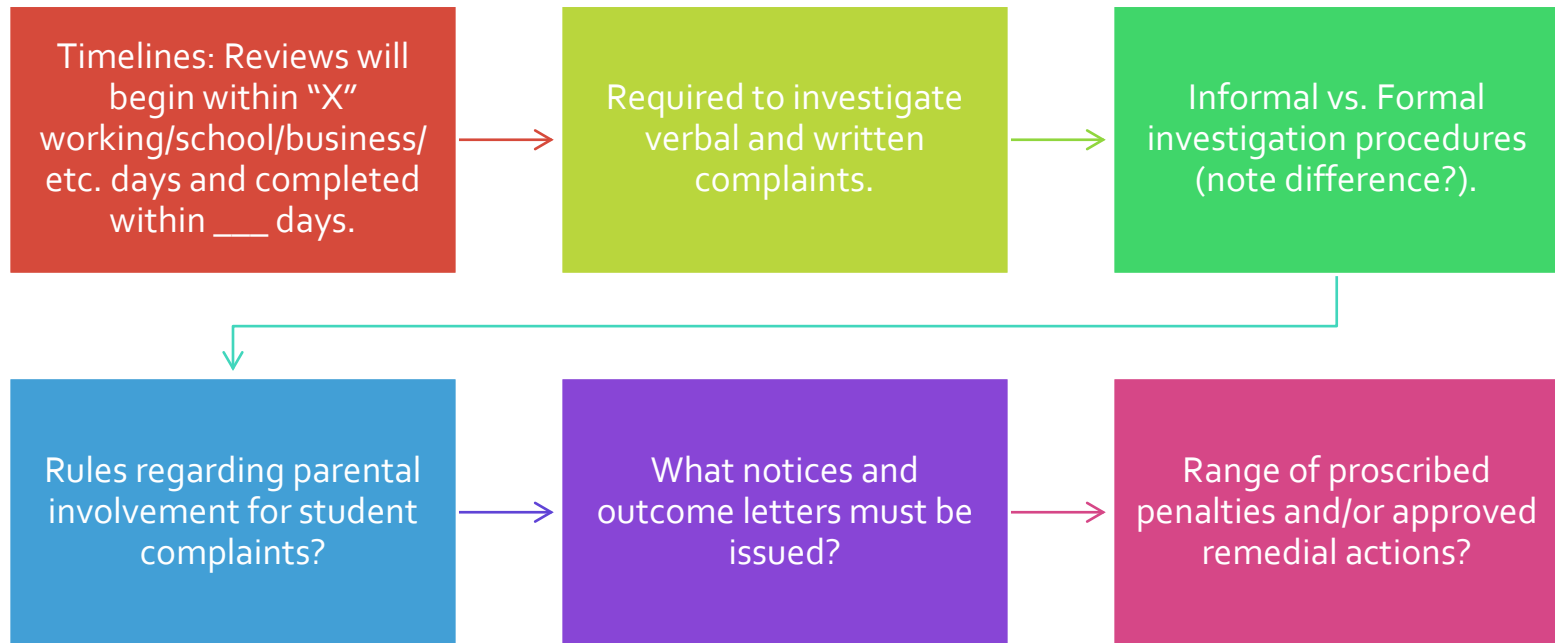
What is your standard of evidence?

preponderance of the evidence or clear and convincing evidence

What does your policy state?

- Under the “**preponderance of evidence**” standard, the burden of proof is met when the party with the burden **convinces the decision maker** that there is a **greater than 50% chance that the claim is true**.
- Under the “**clear and convincing**” standard, the burden of proof is met when the **evidence shows that the claim is highly and substantially more likely to be true than untrue**; the decision maker must be convinced that the contention is **highly probable**.

Your Title IX Policy & Grievance Process – look for...



Also keep in mind: Code of Conduct, other policies, collective bargaining agreements?

The Coordinator...

“Coordinates efforts to comply with Title IX.”

- **Review your Policy** – It should contain or refer to the Grievance Process the District must follow.
- **Review the Complaint:**
 - Ask: is there an alleged violation on the face of the complaint **that falls within the scope of Title IX?** (Other policy/rule?)
 - Inform Complainant of the range of **Supportive Measures** and **consider the Complainant's wishes** regarding Supportive Measures (also discuss with the Respondent).
 - **Explain to the Complainant the process** for filing a Formal Complaint.
 - If a Title IX “Formal Complaint” – may offer **informal resolution process**.
 - If Title IX – identify the Investigator? Decision Maker? Decision Maker on Appeal?
 - If Title IX - hand off to Investigator (can be Coordinator).



The Coordinator - Verbal Complaint

If a verbal complaint:

- Detail the questions/responses.
- Narrow down specific details of each allegation – who, what, where, when, why?
- End Interview with:
 - “Is there anything else you would like to add that I have not asked you about?”
 - “Is there anything you would like to correct or clarify?”
- THEN, draft a statement outlining the allegations as described by the Complainant in the interview, at the end of that document write a statement such as: “*The above statement is accurate and complete as to the events described and are true to the best of my recollection.*” Ask Complainant to review, sign and date the document if it is in fact accurate. **If Complainant refuses, determine if you (the Coordinator) will sign the Complaint** and thereby initiate a “Formal Complaint” and grievance process.

The Grievance Process

Dismissal of Complaints

The recipient must investigate the allegations in a formal complaint, but...

The recipient **must dismiss** the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX:

- if the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved,
- the conduct did not occur in the recipient's education program or activity, or
- the conduct did not occur against a person in the United States.

The recipient **may dismiss** the formal complaint or any allegations therein:

- if at any time during the investigation or hearing: **a complainant notifies the Title IX Coordinator in writing** that the complainant would like to withdraw the formal complaint or any allegations therein;
- the **respondent is no longer enrolled or employed** by the recipient; or
- **specific circumstances** prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Upon a dismissal required or permitted, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

The Coordinator



Be familiar with your Policy
and Complaint Procedure

Initial Referral and/or Complaint

- Review Policies & Procedures (...again) – Check time requirements.
- Review **the Complaint** initially.
 - Is it on the District's complaint form?
 - Does it outline the facts and allegations?
 - Is it signed and dated?
 - Does it request the recipient investigate the allegation of sexual harassment?
- If "Verbal" – still have an obligation to investigate.
 - Note who received it, when and how?
 - Have recipient memorialize the nature of the complaint as completely as possible.
 - Ask: is this a "Formal" or "Informal" Complaint?
- If "Formal" – issue a "Notice of Allegations" to both parties.

If a "Formal
Complaint" - **may
offer informal
resolution process.**

Notice of the Allegations



(2) *Notice of allegations*—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

- (A) **Notice of the recipient's grievance process** that complies with this section, including any informal resolution process.
- (B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, **including sufficient details** known at the time and **with sufficient time to prepare a response before any initial interview**.
 - Sufficient details include the **identities** of the parties involved in the incident, if known, the **conduct allegedly constituting sexual harassment** under § 106.30, and **the date and location of the alleged incident**, if known.
 - The written notice **must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process**.
 - The written notice must inform the parties that they **may have an advisor of their choice, who may be, but is not required to be, an attorney**, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.
 - The written notice must inform the parties of any provision in the **recipient's code of conduct** that **prohibits knowingly making false statements or knowingly submitting false information** during the grievance process.
- (ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient **must provide notice of the additional allegations to the parties** whose identities are known.

New/additional claims or allegations arise?
New notice must be issued to the accused for those allegations.

Informal Resolution Process



- A formal complaint must be filed first.
- A recipient **may not require** as term of employment, etc.
- A recipient **may not require** the parties to participate.
- At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, **such as mediation**, that does **not** involve a full investigation and adjudication, **provided that the recipient** –
 - (i) Provides to the parties a **written notice** disclosing: 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;
 - (ii) Obtains the parties' voluntary, **written consent** to the informal resolution process; and
 - (iii) **Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.**

Informal Resolution Process (Cont.)

In cases of a “Formal Complaint”

- ...any person who facilitates an informal resolution process, must not rely on sex stereotypes...
- Person designated to conduct informal resolution process must be trained.
- **No bias or conflict** (like others).
- Be a “mediator.” What does this mean?
- Who is best to serve this role?

The Investigator

Steps include:

- ☐ Review Policy.
- ☐ Review Complaint.
- ☐ Prepare to interview the Complainant.
- ☐ Interview the Complainant.
- ☐ Review work histories to extent appropriate.
- ☐ Secure documentary evidence.
- ☐ Identify and interview fact witnesses.
- ☐ Secure other evidence?
- ☐ Interview the Accused.
- ☐ Final evidentiary follow up.
- ☐ Create draft report.
- ☐ Provide (draft report and) evidence to parties, and give opportunity to respond.
- ☐ Consider responses and finalize report.
- ☐ Provide final report to both parties, their advisors and the Title IX Coordinator.

Interview the Complainant

generally...

After reviewing policy & complaint (memorialized verbal/written), interview Complainant, secure evidence, interview witnesses and interview the accused.

Follow Policy (but...try to interview within 5 days of initial complaint (**sooner the better**), provide written notice of investigative interview (date, time, location, participants and purpose with sufficient time to prepare to participate)).

Interviews:

- Use an opening **script/talking points outline**
- Audio tape?**
 - Union/Attorney/Other representatives? ("**Advisor of Choice**")
 - Provide the parties with the **same opportunities to have others present** during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient 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.*

Interview the Complainant, cont.

The Investigator:

- Narrow down specific details of each allegation – who, what, where, when, why?
- Identify witnesses, date and time, location, circumstances and specific words used.
- End Interview with:
 - “Is there anything else you would like to add that I have not asked you about?”
 - “Is there anything you would like to correct or clarify?”
 - Retaliation



Let's pause. (4)

How about an
informal resolution?



Let's pause, cont.

What is relevant?

Documentary
Evidence –
Remember:
Consider
Relevance

Immediately request and secure video evidence.

Request and review personnel file/student file of complainant and respondent.

Request and review personnel file/student file of critical fact witnesses.

If necessary, interview supervisor not involved with substance of complaint regarding work history of the complainant and respondent.

The Complaint should drive the document/evidence request(s).

After Interviewing Complainant and Identifying Relevant Evidence – Investigator “Pause”

- After interviewing the Complainant & reviewing Documentation, review the Notice of Allegations.
 - “Do I need to issue a **new/revised Written Notice of Allegations** to the Complainant and Accused?” (Inform Coordinator) 
 - Have I **preserved the evidence** (for Complainant and Respondent?)
- Identify & prepare to interview fact witnesses, if any (Remember - Consider Relevance).
- Reminder – Before interviewing the accused:
 - A New Notice of Allegations should be issued before interview with accused? 
 - Sufficient time should be provided for accused to have a representative present as required under Title IX. 

Continue to Consider - Informal Resolution Process?

Interview “Fact” Witnesses

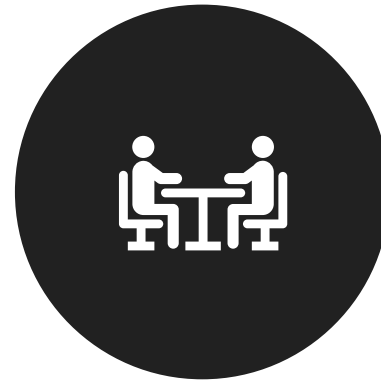
Conduct sooner rather than later (Consult Policy).

- ☐ Who – What – Where – When – Why? (Challenge as appropriate with evidence, recordings, etc.)
- ☐ Inform the importance of truthfulness/cooperation...
- ☐ Contemporaneously memorialize the witness' account.
- ☐ **Retaliation**
- ☐ Confidentiality?

What if the witness is uncooperative or you suspect untruthful?



UNTRUTHFUL? ATTEMPT TO
REDIRECT TO TRUTHFUL
ANSWERS.



IF NECESSARY, SUSPEND THE
INTERVIEW AND RESCHEDULE
WITH A UNION REP PRESENT.

Following interviews...

Request updated evidence as necessary.

Conduct re-interviews for any discrepancies or clarifications between competing witness statements.

Am I ready to interview the accused (the Respondent)?

Remember, if appropriate, a “New Notice of Allegations” should be issued before interview with accused.

Provide sufficient time for accused to have a representative present as required under Title IX.

Interview the Accused



Should be the last interview – issue appropriate notice of interview (date, time, etc.).



Consider having someone accompany you to take notes?



Use a script or talking points outline.



Interview the accused.

The Accused has rights...

Weingarten (Union) rights should be stated (right to rep).

- Any waiver of Union representation should be in writing.

Garrity Rights *where necessary* stated (the govt cannot compel someone to be a witness against himself/herself).

Cadet Rights – be aware.

Regardless of a refusal to answer – ask every question.

"I, [insert name] have been advised of my right to have a Union representative present at my interview on [insert date], and I waive such right. I recognize that anything I say during the interview may be used by my employer for disciplinary purposes."

Interviewing the Accused, cont.



Ending the Interview with the Accused

Emphasize:

- No retaliation (others also)
 - No comments/contacts with the Complainant about the nature of the complaint or allegations.

PAUSE: Final Round-Up of Evidence

- ☐ Other/Outstanding requests for evidence/records?
- ☐ Discrepancies between witness statements and the accused? Conduct final interviews.
- ☐ Include relevant Title IX Policies, Code of Conduct, etc.
- ☐ Create timeline with supporting statements/evidence. 
- ☐ Organize supporting statements & documentation to be included in report.

Create the Investigative “Report”

Mark the Report: “Confidential.”

Structure your Report & Include details.

- Background
 - Initial referral and credentials (received training, certified administrator, etc.)
- Initial Complaint
- Statement of Allegations
- Applicable Board Policies
- Interviews conducted.
- Documentary communications, evidence & records (relevant)
- Other information provided during the course of the investigation, including evidence upon which recipient does not intend to rely in reaching a determination (along with an explanation why)

The Investigative Report

"The complainant, Jack, frequently contradicted himself with respect to his complaint that he was sexually harassed. ~~Jack is lying about the conduct in question and his complaint should therefore be dismissed.~~"

The investigator gathers, assesses, and synthesizes evidence, **but engages in no policy analysis, and renders no conclusions** (a finding of responsibility) or recommendations as part of the report.

The “Initial” or “Draft” Investigator’s Report (before completing the Final Report)

- The Recipient **must send to each party (and the party’s advisor, if any) the evidence subject to inspection and review** (the draft report and attachments, including all evidence (e.g., exculpatory evidence)) in an electronic format or hard copy. The parties must have at least 10 days to submit a written response.
- **The Investigator will consider the written responses prior to completing the Final Investigative Report.**

The Final Investigative Report

Must fairly summarize relevant evidence.

At least 10 days prior to Decision Maker's determination (or hearing)
regarding responsibility:



(10 days prior to finalizing report, chance to respond + 10 days prior to decision maker's determination re: responsibility)

- send the Final Investigation Report to each party (and the party's advisor, if any) in electronic or hard copy format for their review and written response
- *(and provide a copy to the Title IX Coordinator and Decision Maker – See your School Policy).*

Decision Makers and Appellate Decision Makers



The Decision Maker(s):

cannot be the same person as the Title IX Coordinator or the Investigator(s);

must issue a written determination regarding responsibility using the District's standard of evidence (clear and convincing; or preponderance of the evidence).



The Recipient must provide the Decision Maker's written determination to the parties simultaneously.



The Determination is deemed final either:

- 1) if appealed, the date the written determination of the appeal is filed or**
- 2) if not appealed, the date on which an appeal is no longer timely.**

After receiving final investigative report and
prior to a decision... (during the ten day period)

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.*
 - [NOTE]:...***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.
- **The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.**

The Decision Maker(s)

Your Policy will help.

- **Again - Review your Policy.** Look for definitions (i.e., “Sexual Harassment”) and guidelines for determination, including which *standard of evidence* to apply.
- Evaluate the **totality of circumstances**. In making a determination whether conduct constitutes “Sexual Harassment” consider such factors as:
 1. the degree to which the conduct affected the ability of the student/employee to participate or benefit from his/her education or altered the conditions of the student’s learning environment or employee’s work environment;
 2. the type, frequency and duration of the conduct;
 3. the identity of and relationship between the alleged harasser and the subject of the harassment (i.e., authority figure?);
 4. the number of individuals involved;
 5. the age of the alleged harasser and the subject of the harassment;
 6. the location of the incidents and context in which they occurred; and
 7. other incidents – the school or school related.

The Written Determination

(must be provided to the parties simultaneously)

Must include:

- ☐ the **allegations** potentially constituting sexual harassment as defined in Section 106.30
- ☐ A description of the **procedural steps** taken through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- ☐ **Findings of facts supporting the determination;**
- ☐ **Conclusions** regarding the application of the recipient's code of conduct to the facts;
- ☐ **A statement of, and rationale for, the result as to each allegation,** including a determination for responsibility, any disciplinary sanctions the recipient imposes on the respondent, whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
- ☐ **The recipient's procedures and permissible basis for the complainant and respondent to appeal.**

Decision Maker on Appeal

34 CFR 106.45

- Both parties have a right to appeal a determination regarding dismissal of a formal complaint or any allegations.
 - Procedural irregularity that affected the outcome.
 - New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal that could affect the outcome.
 - The Title IX Coordinator, investigator(s) or decision makers had a **conflict of interest or bias** for or against the complainant or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
 - Or any other basis the District deems appropriate.

In sum...

Appeal? The District must...



Notify

Notify the other party in writing when appeal is filed & implement appeal procedures for both parties.



Ensure

Ensure the decision maker for appeal is not the same person as the decision maker that reached the determination, the investigator, or the Title IX Coordinator;



Ensure

Ensure the decision maker for appeal complies with standards set forth in 106.45(b)(1)(iii);

Appellate Decision Maker

Give

Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging the outcome;



Issue

Issue a written decision describing the result of the appeal & the rationale for the result; and

Provide

Provide the written decision simultaneously to both parties.

Consult your District Policy and Grievance Procedure regarding the appropriate steps and responsibilities for your District.

State and Federal Agencies

- **New York State Division of Human Rights** (www.dhr.ny.gov)
 - A complaint of harassment or discrimination under New York Law may be filed with either the Division of Human Rights or State Supreme Court.
 - A complaint may be filed with the Division of Human Rights ***within one year*** of the alleged discrimination (*three years for sexual harassment in employment cases*), and you do not need an attorney.
 - A complaint may be filed in State Supreme Court ***within three years*** of the alleged discrimination. (*Complaints of certain alleged conduct against students may be filed, under the Child Victims' Act, many years after it is alleged to have occurred.*)
- **U.S. Equal Employment Opportunity Commission (EEOC)** (www.eeoc.gov)
 - A complaint of harassment or discrimination under federal law may be filed with the local EEOC office ***within 300 days*** of the alleged discrimination, and you do not need an attorney.
- **Office of Civil Rights (OCR) – US Dept' of Education – Investigation, Fed. Funding**

Recordkeeping

- A recipient must maintain for a period of seven years records of –
 - Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
 - Any appeal and the result therefrom;
 - Any informal resolution and the result therefrom; and
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.
- For each response to a complaint (including reports that don't result in a formal complaint), a recipient must create, and maintain for seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the **basis for its conclusion that its response was not deliberately indifferent**, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

See your District's policies for specific guidance.



Has Your
District?

- ☐ *Designated and authorized "Title IX Coordinator."*
- ☐ *Adopted an updated policy and grievance process.*
- ☐ *Updated Resources and Published appropriate notices.*
- ☐ *Considered available supportive measures.*
- ☐ *Has everyone necessary been trained?*

Title IX Harassment – Publication & Procedures

Sec. 106.8 & 106.45



Schools are required to comply with and make available certain procedural requirements, important for the prevention and correction of sex discrimination.

- Publish and Distribute **Notice of Nondiscrimination**
 - Must state that the recipient [school] does not discriminate on the basis of sex in the educational activities and programs it operates, and that it is required by Title ix and the regulations not to discriminate in such a manner, and that it extends to admission and employment.
 - Notice must be widely distributed to students, employees, prospective students and employees and other relevant individuals.
 - Must state inquiries about application of Title IX may be referred to Title IX Coordinator (with contact info) or to the Office of Civil Rights.
- ***Notify applicants, students, parents/legal guardians, unions and employees*** of the name or title, office address, email address and telephone number of the **Title IX Coordinator.**

FYI: More Publication & Procedures

- Adopt and publish **grievance procedures** providing for prompt and equitable resolution of sex discrimination complaints;
 - Policy must address process for handling Formal Complaints under Title IX.
 - Provide *applicants, students, parents/legal guardians, unions and employees* notice of the 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 recipient will respond.
- **Publications** – Recipient must prominently display the contact information of the Title IX Coordinator and the policy on its **website, and in each handbook or catalog** that it provides to any of the people listed in previous slide (*applicants, students, parents/legal guardians, unions and employees*).



See your District's policies for specific guidance.

Read your Sexual Harassment & Title IX Policies



Follow your District's Policy & Grievance Process

Referral – Investigation – Decision – Appeal

- **Timelines?** General Requirements *such as* all reviews begin within 5 working days of initial complaint and be completed within 30 days absent extenuating circumstances.
- **Definition** of Sexual Harassment. Requirement to investigate **verbal vs. written** complaint.
- **Informal vs. Formal investigation** procedures.
- Rules regarding parental involvement for student complaints.
- Requirements for **notifications** or outcome **letters** to complainants “and” respondents (the accused).
- Range of proscribed penalties and/or approved remedial actions.
- Maintenance of complaint records. Check your record retention processes and rules.

Behavior may not rise to the level of “Sexual Harassment,” but could still violate District work or school rules (other policies) such as unprofessional conduct or inappropriate conduct under the Code of Conduct.

REMEMBER...

§ 106.44 Recipient's response to sexual harassment.

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, **must respond promptly in a manner that is not deliberately indifferent**. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.



Let's Pause

What resources and support are available to your District?

LR Service

School Attorney

OCR Resources & FAQ

Other



More Training?

Questions arise?

Feel free to contact the LR office for additional training.

A Hearing?

If your District policy allows for and your grievance process includes a hearing, please contact our office or another resource for additional training.

Questions? Thank you.
("We welcome your feedback")



Nothing in this presentation is intended to constitute legal advice.

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