

PINE LAKE PREPARATORY

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TITLE IX

Title IX: Training the Trainer

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Disclaimer

- This workshop is designed to meet training requirements for Title IX Coordinators, Investigators, Decision Makers and those handling appeals. It does not constitute legal advice for specific situations.
- Consult with your legal counsel regarding how best to address any specific situation
- Future legal developments may affect these topics

Overview

Title IX Purpose and Definitions

School District Obligations Under Title IX

Title IX Personnel

Title IX Reporting & Grievance Process

Title IX Process: Initiation

Informal Resolution Option

Formal Complaint Process

Appeals Process

Recordkeeping

Impartiality, Bias, and Conflicts of Interest

Relevance and Evidence

Case Studies

Title IX Purpose & Definitions

What is Title IX?

“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. Code §1681



Where Does Title IX Apply?

All school programs and activities, including:

- Academic
- Extracurricular
- Education
- Athletics
- On school transportation
- In school-sponsored programs taking place at another location (in the United States only).

Timeline of Title IX

- 1972 – Title IX enacted
- 1974 – Dept. of Health, Education, & Welfare issues regulations
- 1992 – Supreme Court said students may sue for money damages under Title IX for sexual harassment
- 1997 – Department began issuing guidance addressing sexual harassment
- 1998 and 1999 – Supreme Court decisions establish standards for school liability in employee-to-student and student-to-student sexual harassment cases (Gebser and Davis cases)
- 2011-2017 – Significant guidance released on issues of sexual harassment and sexual violence
- 2017 – Withdrawal of many Obama-era guidance documents
- 2020 – New Title IX regulations

What's changed with Title IX?

On May 6, 2020, the U.S. Department of Education (DOE) issued final Title IX regulations, which went into effect on August 14, 2020.

- These regulations made major changes from the Obama-era guidance
- New process for handling formal complaints of sexual harassment
- Applies to staff-to-staff, staff-to-student, student-to-staff, and student-to-student sexual harassment
- New notice, training, and record-keeping requirements
- New Board policies needed
- All K-12 staff are mandated reporters for Title IX
- New emphasis on due process and constitutional protections.



KEY TERMINOLOGY

Complainant

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

NOT a third party who reports alleged sexual harassment perpetrated against someone else

NOT the Title IX Coordinator, even if the TIXC "signs" a formal complaint

KEY TERMINOLOGY

Respondent

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

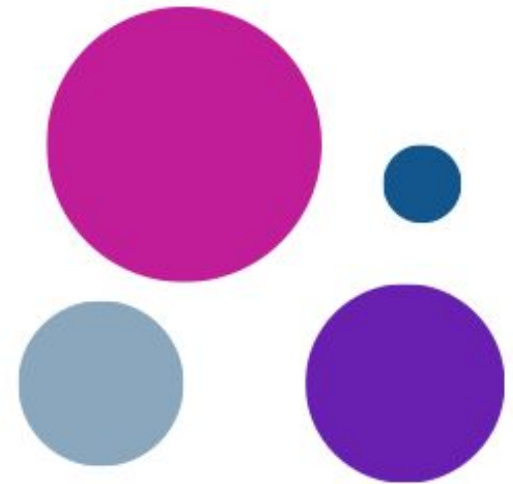
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Due Process & Constitutional Concerns

New Regulations and Commentary:

Emphasize protecting the Respondent's and Complainant's constitutional rights including:

- 1st Amendment - Exercising Free Speech rights is not retaliation
- 5th Amendment – Due Process Rights are highlighted to ensure fairness to all parties
- 14th Amendment – Equal Protection Clause



Due Process & Constitutional Concerns

- Due process is “critical part of a Title IX grievance process” for Complainants, Respondents, and schools
- Respondent presumed not responsible until determination made
- Grievance procedure must be “adequate, fair, and reliable”



Supreme Court Cases

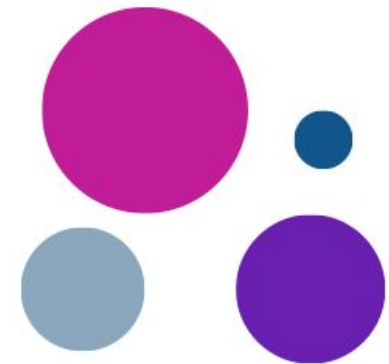
When is a district liable for sexual harassment?

*Gebser v. Lago Vista
Independent School
District (1998)*

- District is liable for harassment when it:
 - **Has actual knowledge** of allegations by an “**appropriate person**”; and
 - Responds to the allegations so deficiently that it amounts to “**deliberate indifference**.”

*Davis v. Monroe
County Board of
Education
(1999)*

- District is liable for harassment when it:
 - Has actual knowledge by an appropriate person;
 - Responds with deliberate indifference; **AND**
 - The harassing conduct was “**so severe, pervasive, and objectively offensive**” that it **denied the victim equal access to educational opportunities or benefits** .



TITLE IX



2020 Regulations

What has changed?

□ Sexual Harassment

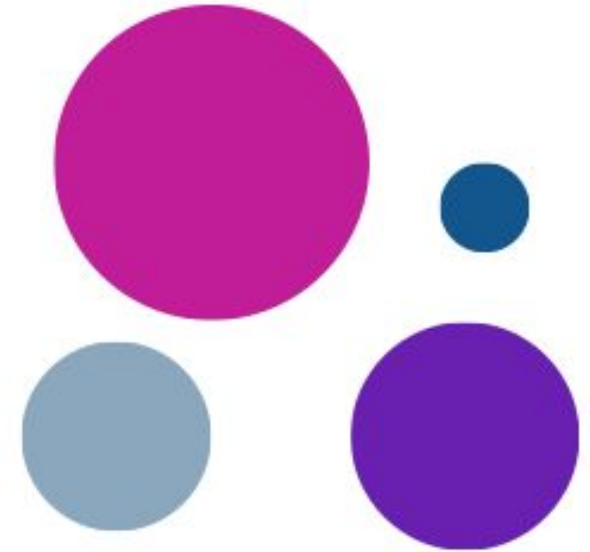
- The final regulations make several changes intended to narrow the definition of “sexual harassment” and sync that definition with the holdings in *Gebser* and *Davis*.
- 3 types of prohibited sex-based conduct
 - Quid Pro Quo
 - Unwelcome Conduct
 - Clery Act and the Violence Against Women Act (“VAWA”) Components

A Review of the Types of Sex Discrimination: Quid Pro Quo

Occurs when:

1. A school employee
2. Conditions access to educational benefits
3. On unwelcome sexual conduct

Note: This provision only applies to *employee* (as a Respondent) conduct; not applicable to volunteer or student conduct.



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A Review of the Types of Sex Discrimination:

Unwelcome Conduct

- Unwelcome conduct
- Determined by a reasonable person
- To be so severe **AND** pervasive **AND** objectively offensive that it **effectively denies** a person equal access to an education program or activity

NOTE: Severe conduct that constitutes sexual assault, dating violence, domestic violence, or stalking is covered by the third prong of the definition of sexual harassment.

A Review of the Types of Sex Discrimination: Unwelcome Conduct

- Conduct must be “unwelcome”
- Unwelcome conduct can take many forms
- However, the conduct still must meet the other two prongs of this definition:
 - severe, pervasive, AND objectively offensive; AND
 - serves to deny access to educational programs or activities.

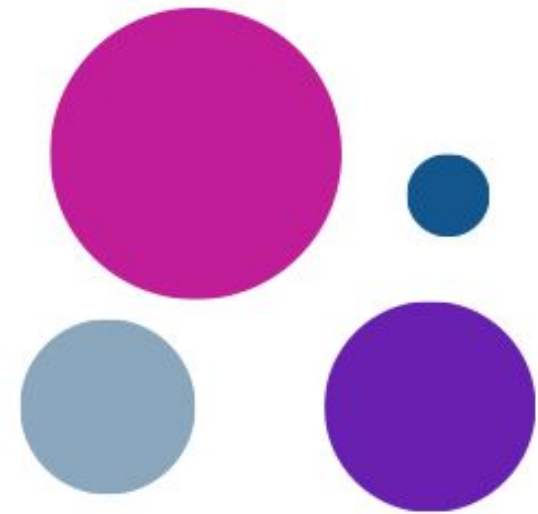


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A Review of the Types of Sex Discrimination: Unwelcome Conduct

Severe, Pervasive, AND Objectively Offensive

- Conduct must be severe, pervasive, and objectively offensive
- Determined based on a “reasonable person” standard



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A Review of the Types of Sex Discrimination: Unwelcome Conduct

Denies Equal Access to the Education Program or Activity:

- Does not require the complainant to have lost ALL access to the educational program/activity, but only EQUAL access
- Includes a student withdrawing from a class, quitting an extracurricular activity, experiencing falling grades
- May involve development of mental or physical health complications
- Other



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What is an “educational program or activity”?

- The district’s programs or activities include [34 CFR § 106.44(a)]:
 - Locations, events, or circumstances over which the district (recipient of federal funds) exercises substantial control over both the respondent and the context in which the sexual harassment occurs.
 - Behavior must take place in the United States to be covered by Title IX
 - Off-Campus Sexual Harassment:
 - Case-by-case analysis
 - Don’t know where misconduct occurred? – Investigate!
 - Not during school activity? – Consider effects of off-campus conduct!
 - Prevent additional harassment or retaliation
 - Consider applicable codes of conduct



A Review of the Types of Sex Discrimination: Clery Act & VAWA Components

The following offenses, as defined in Clery and VAWA, are now specifically included as forms of sexual harassment:

- Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)
- Dating Violence 34 U.S.C. 12291(a)(10)
- Domestic Violence 34 U.S.C. 12291(a)(8)
- Stalking 34 U.S.C. 12291(a)(30)

A Review of the Types of Sex Discrimination: Clery Act & VAWA Components

Sexual Assault, Dating Violence, Domestic Violence, Stalking

- Conduct covered by this prong of the sexual harassment definition need not be established as unwanted, or as severe, pervasive and objectively offensive.
- Conduct need not be demonstrated to have denied the complainant's equal access to the educational program.



Sexual Assault

20 U.S.C. 1092(f)(6)(A)(v)

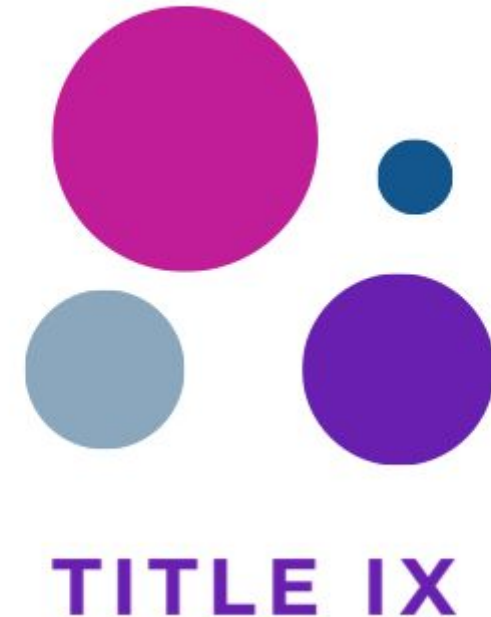
An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. Includes:

- Sodomy, sexual assault with an object, fondling which occurs without consent or where the individual is incapable of consent due to age or mental or physical incapacity.
- Rape, defined as carnal knowledge of an individual without consent or where the person is incapable of consent due to physical or mental incapacity.



Consent

- Board policy must define "consent"
 - Consent is not defined in the regulations, so up to the District to define.
- Recipients have “the discretion to select particular definitions of consent (and what constitutes a lack of consent) that best reflect each recipient's values and community standards.”
- NOTE: Sexual conduct between an employee and a student is prohibited AT ALL TIMES AND IN ALL CASES
 - Consent of the student is irrelevant



Examples of Definitions of Consent

1. Consent voluntarily given with sufficient knowledge and comprehension of the subject matter to enable the person giving consent to make a knowing decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion.
2. Voluntary expression of willingness, permission, or agreement to engage in sexual activity throughout a sexual encounter. Consent cannot be granted by an individual: who is less than the statutory age of consent under state criminal law, has a mental or physical condition or incapacity that prevents the giving of consent; or from whom ostensible "consent" is extracted through threat, coercion, or forcible compulsion.
3. Consent is informed, freely and affirmatively given through mutually understandable words or actions that indicate a willingness to participate in the sexual activity. Consent can be withdrawn at any time. There is no consent when there is force, expressed or implied, or when coercion, intimidation, threats, or duress is used. Whether a person has taken advantage of a position of influence over another person may be a factor in determining consent. Silence or absence of resistance does not imply consent. Consent to one type of sexual activity does not amount to consent to another type of activity. Prior consent or sexual relations with the same person do not imply future consent. The fact that both people are in a relationship does not, by itself, establish consent. A person cannot consent if they are unconscious, asleep, or impaired to the extent that they do not understand what is going on. Minors under the age of 16 are incapable of giving consent to sexual activity with a person more than four years older than the minor. Consent may never be given by mentally disabled persons if their disability was reasonably knowable to a sexual partner who is not mentally disabled. Consent between parties engaging in sexual activity does not prevent the school system from taking disciplinary action against the parties for violation of any other board policy. (*Note: this is definition suggested in the N.C. School Boards Association's model policy*)

Dating Violence

34 USC § 12291(a)(10)

Violence committed by a person:

- who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship;
 - The type of relationship;
 - The frequency of interaction between the persons involved in the relationship



Domestic Violence

34 USC § 12291(a)(8)

Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

Stalking

34 USC § 12291(a)(30)

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to— (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.



When must schools respond to sexual harassment allegations?

A school must respond when it has “actual knowledge” of sexual harassment that occurred/is occurring “in the school's education program or activity” in a manner that is not deliberately indifferent.

- A recipient is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

“**Actual knowledge**” means a mandated reporter has notice of “sexual harassment or allegations of sexual harassment.”

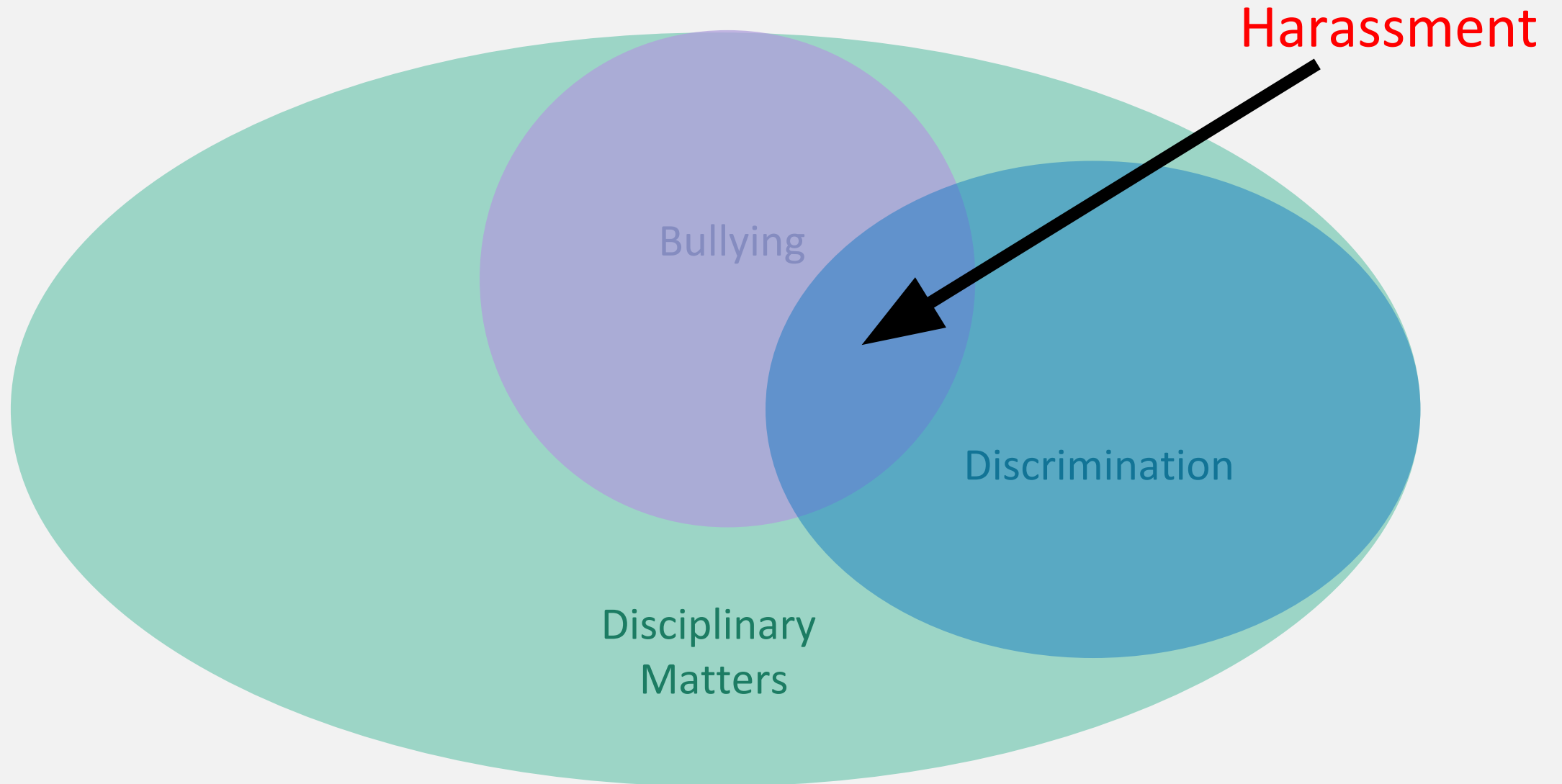
- Old rule required a school to respond when it “knows or should have known” about the sexual harassment.
- New rule: A school with “actual knowledge” of sexual harassment in a school program or activity must respond promptly and in a manner that is not deliberately indifferent.

NOTE: In the K-12 context, ALL employees are mandated reporters.

**“Actual
knowledge” of
sexual harassment
“in the school’s
education program
or activity.”**

- Reports of sexual harassment may be made by anyone, not just the alleged victim or a mandated reporter.
 - Reports can be made by phone, mail, email, letter, or by any means that result in the Title IX Coordinator receiving the report.
 - Reports can be made at any time, including non-business hours.
- “Program or activity” includes:
 - “Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.”
 - Includes off-campus education program or activity if behavior happened in the United States

Harassment v. Discrimination v. Bullying v. Discipline



School District Obligations

District Obligations

- Update policies to comply with new Title IX requirements
- Follow notice and posting requirements for antidiscrimination, Title IX policies, and training materials
- Train all employees involved in the Title IX process.
This includes:
 - Title IX Coordinators
 - Investigators
 - Decision-makers
 - Individuals who facilitate the informal resolution process
 - Individual who handle appeals



District Training Obligations for Employees Involved in Administering the Title IX Process

Training should include:

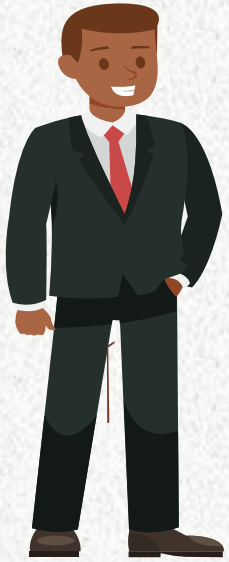
- The definition of sexual harassment
- The scope of the district's education program or activities
- How to conduct an investigation
- The grievance process, including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially and avoid prejudgment of facts at issue, conflicts of interest, and bias
- Issues of relevance of evidence



Title IX Personnel

“The Players”

The Players



Title IX Coordinator



Investigator



Decision-maker(s)



Informal Resolution
Facilitator



Appeal Officer



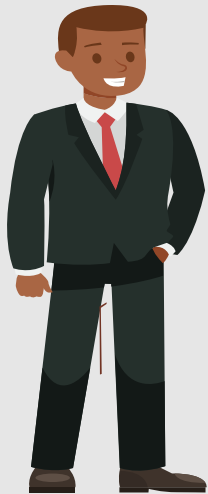
Advisors

Title


Responsibilities

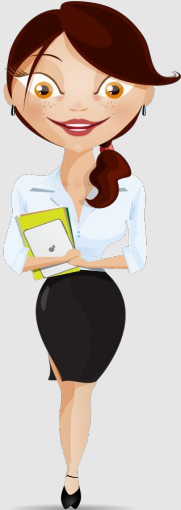
Who?

Title IX Coordinator



- Oversee and coordinate **all** Title IX responsibilities for the district
 - Oversee the district's response to Title IX reports and complaints
 - Implement supportive measures and remedies
 - Identify and address any pattern or systemic problem revealed by reports and complaints
 - Evaluate an alleged victim's confidentiality request, if one is made
 - File a formal complaint on behalf of a student/employee, if necessary
- Must be Employee
 - May Not Serve as Decision-Maker
 - Preferably will NOT serve as investigator (however may serve as investigator, if necessary)

Title	Responsibilities	Who?
<p>Investigator</p> 	<ul style="list-style-type: none"> • Conduct a Fair, Objective and Impartial Investigation • Differentiate between Related & Relevant Evidence & Privilege • Differentiate between Inculpatory and Exculpatory Evidence and how to analyze 	<ul style="list-style-type: none"> • Staff or External • May Not Serve as Decision-Maker • Could be Title IX Coordinator • <u>Note</u>: Your District should consider training multiple Investigators to avoid potential conflicts of interest

Title	Responsibilities	Who?
Decision Makers 	<ul style="list-style-type: none"> • Evaluate Evidence • Make & Write Decision regarding Responsibility • “Rule” on Relevancy during Cross Examination (if there is a hearing) 	<ul style="list-style-type: none"> • Staff or External • Cannot Serve in Any Other Capacity

Title

Responsibilities

Who?

Advisor(s)

- Question Opposing Party & Witnesses
- Attend Meetings, Interviews, and Hearings
- Advise Complainant or Respondent



- Provided by the Party, if desired
- Could be Staff
- Could be attorney
- External (including an attorney)
- Cannot Serve in Any Other Capacity

Title

Responsibilities

Who?

Appeal Officer



- Hears appeals of dismissal and determines responsibility
- Hears Appeals of Decisions

- Staff
- External
- Cannot Serve in Any Other Capacity
- Could be a Board or hearing panel

Title

Responsibilities

Who?

**Informal
Resolution
Facilitator**

Informal Resolution Processes

- Staff
- External
- Could be Title IX Coordinator



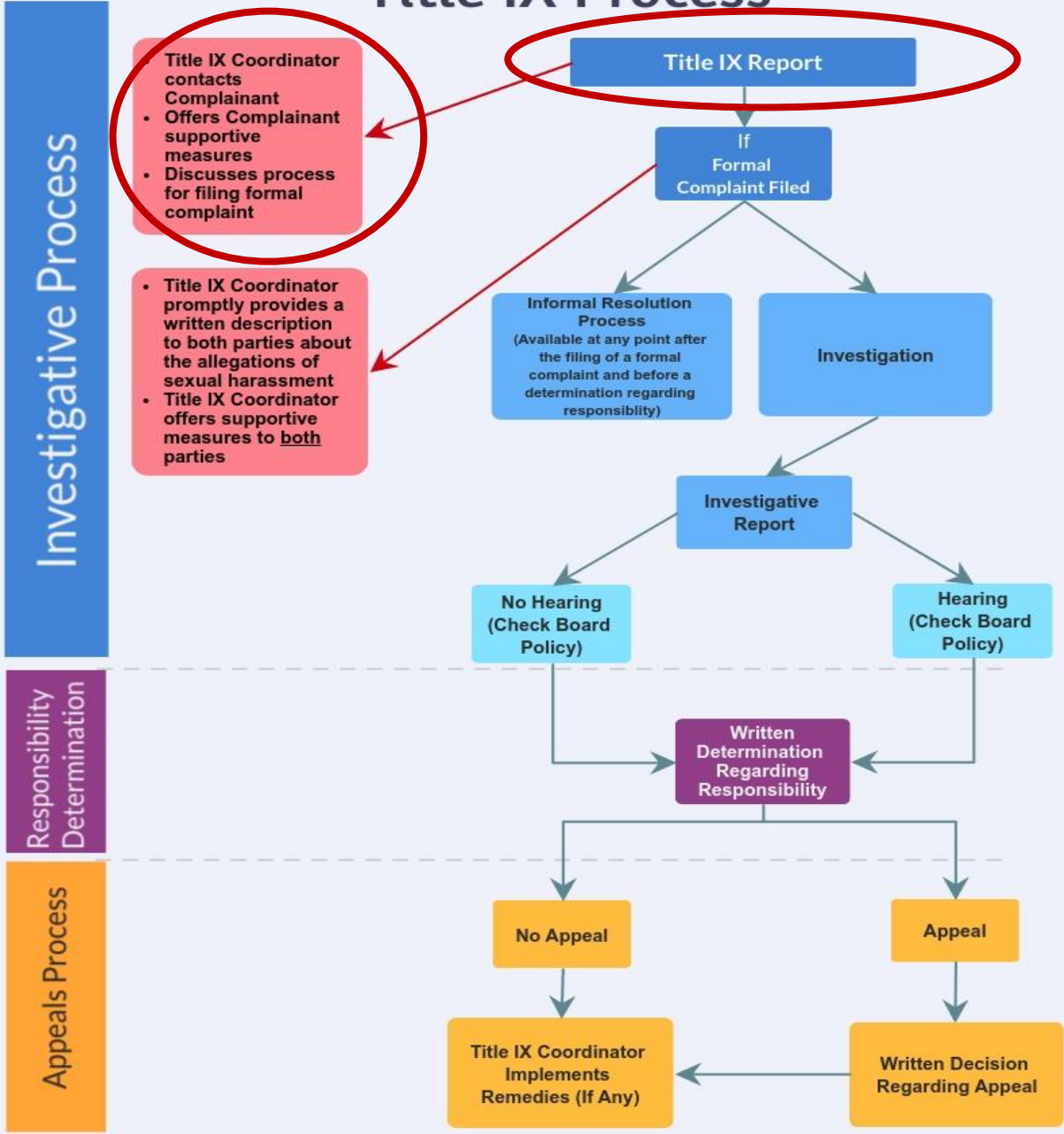
IMPORTANT NOTE!

The Investigator, Decision Maker and Appeals Officer (or panel deciding appeals) must all be different people!

Title IX Reporting & Grievance Process

Title IX Process: Initiation

Title IX Process



Title IX Process: Initiation

- Begins with the initial report of sexual misconduct made to the Title IX Coordinator
- Both complainants and respondents should be treated equitably in a predictable process
 - The respondent is presumed to be not responsible for the alleged conduct and does not have to prove innocence.
 - No disciplinary sanctions will be imposed before the grievance process is completed.



Title IX Process: Initiation

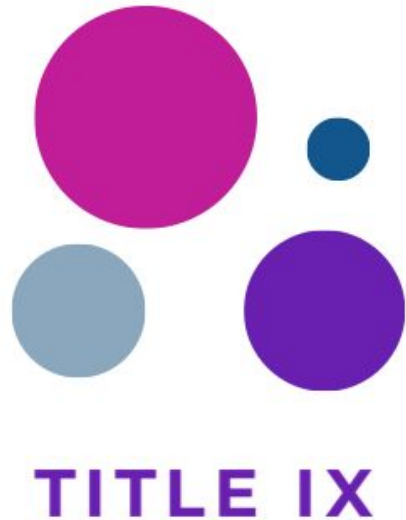
- Upon receipt of a report of sexual harassment, the Title IX Coordinator must promptly contact the complainant to discuss:
 - The availability of supportive measures with or without filing a formal complaint
 - Supportive measures must be offered even if a complainant does not wish to initiate or participate in a grievance process
 - The complainant's wishes with respect to supportive measures, and
 - The process for filing a formal complaint.

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Supportive Measures

- The Title IX Coordinator should discuss with the parties (both the complainant and the respondent) the availability of supportive measures and whether they wish to utilize any such measures. Supportive measures must be non-disciplinary, non-punitive, and individualized and can include:
 - Counseling
 - Classwork modifications/extensions of deadlines
 - Classroom changes
 - Seating changes
 - Mutual restriction on contact between the parties
 - Other
- Purpose is to ensure equal access to the education program/activity without unreasonably burdening the other party.
- Document the supportive measures offered and whether they were accepted.
- Keep the supportive measures confidential to the extent possible.
- If any supportive measures are requested and the District does not provide them, document why this decision was made and that the District was not being deliberately indifferent to claimed harassment

Title IX Process: Initiation



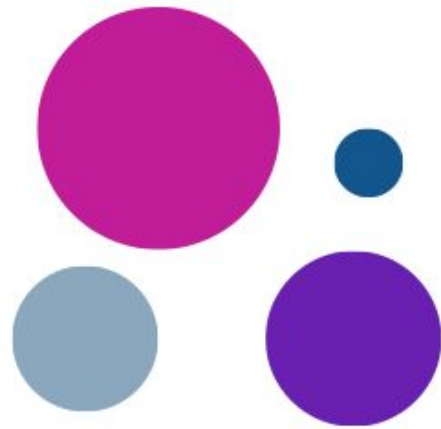
The Title IX Coordinator should generally respect the wishes of the complainant with respect to filing a formal complaint. However, in certain instances where a complainant is not willing or able to do so, the Title IX Coordinator may sign a complaint against a respondent to ensure the district is not deliberately indifferent.

Some examples of when a Title IX Coordinator may sign a complaint include:

- The district has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority
- The district wishes to investigate allegations in order to determine whether it has probable cause of employee sexual misconduct
- A Title IX Coordinator receives multiple reports of sexual harassment against the same respondent.

NOTE: If Title IX Coordinator signs the complaint, the Respondent is entitled to know the name of the Complainant.

Title IX Process: Initiation



TITLE IX

Parent/Guardian Initiation of Complaint

- Parent(s)/Guardians have the legal right to act on behalf of a minor who is a complainant, respondent, or other individual.
- This includes, but is not limited to, a parent/guardian's right to file a formal complaint on behalf of a minor student.

Emergency Removals

STUDENTS

- An accused student can be removed from the education program or activity on an emergency basis.
- School must conduct an individualized safety and risk analysis and determine that there is:
 - An immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment; and
 - This immediate threat justifies removal from the education program/activity.
 - The accused student must be provided with notice and an opportunity to challenge the decision “immediately” following the removal.

EMPLOYEES

- The final regulations do not limit an institution’s ability to place an employee on administrative leave during the pendency of a complaint. Whether such leave is paid or unpaid is at the institution’s discretion.

NOTE: These provisions do not in any way modify rights under IDEA (e.g., “change in placement”), §504, or the Americans with Disabilities Act.



Title IX Process: Notice of Allegations

Once a formal complaint is filed, the Title IX Coordinator must promptly provide a written description to both parties about the allegations of sexual harassment, including date, location, identities of parties (if known), and the alleged misconduct that constitutes sexual harassment.

- The notice will include:
 - A statement that the respondent is presumed not responsible for the conduct alleged and that a determination regarding responsibility will be made at the end of the grievance process;
 - A description of the grievance process (including the possibility of informal resolution), standard of evidence, summary of possible sanctions, each party's right to select an advisor, each party's right to inspect and review evidence, appeal rights, and supportive measures;
 - Details known at the time sufficient to allow the parties to prepare a response before any initial interview;
 - Information regarding any code of conduct (or other) policies that prohibit knowingly making false statements or submitting false information during the grievance process.
- NOTE: Notice must be supplemented if new allegations arise during the investigation.

Title IX Process: Bifurcating or Consolidating the Investigation

Bifurcation: If the complained-of conduct includes allegations implicating other Board policies (including other harassment/discrimination policies), the investigation can be bifurcated.

- IMPORTANT: The Title IX sexual harassment complaint MUST be investigated and resolved pursuant to the Title IX regulations.

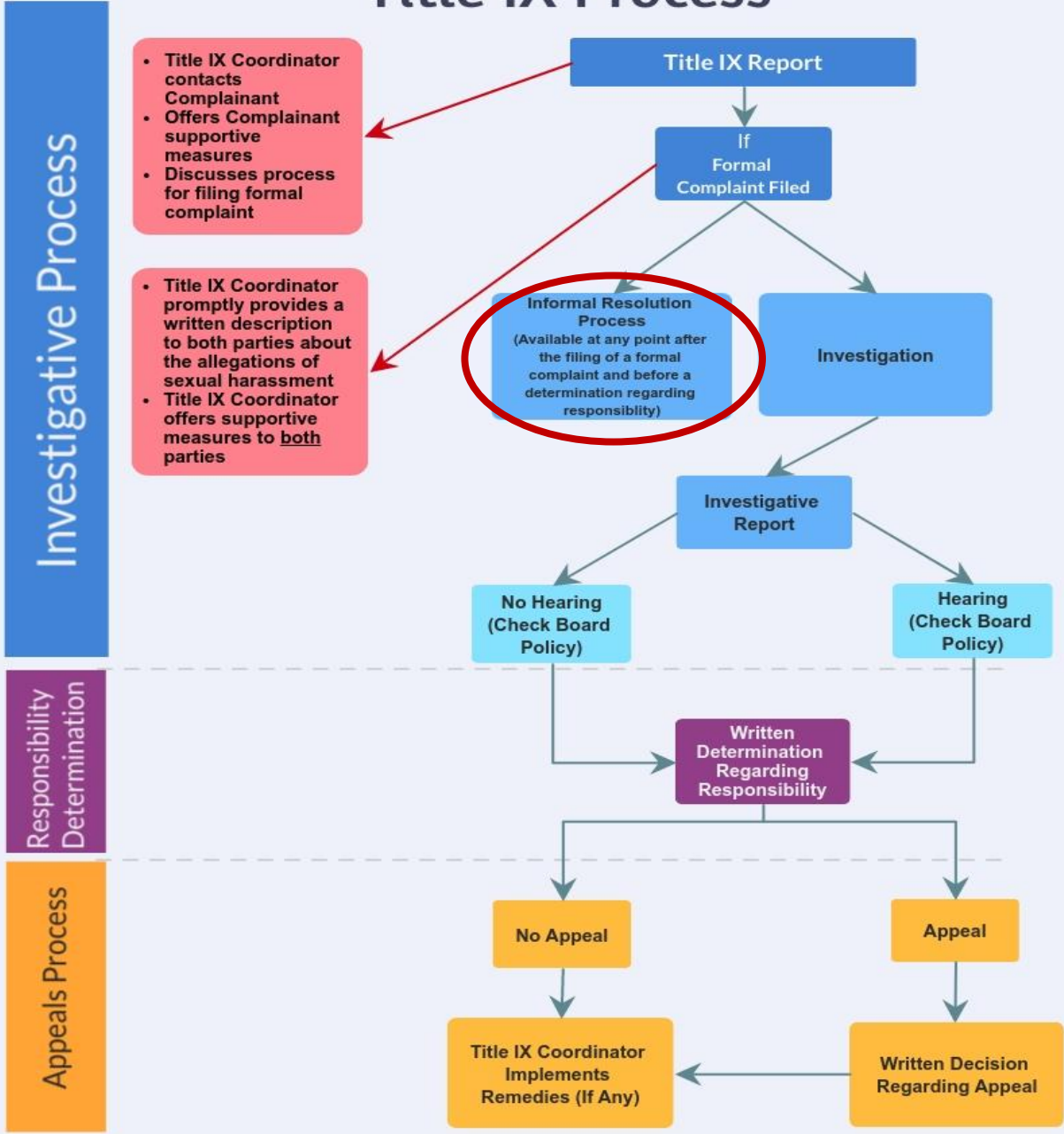
Consolidation: If there are multiple Formal Complaints alleging the same facts or against the same Respondent, the Formal Complaints may be consolidated to streamline the grievance process.

- Check your Board policies on this!



Informal Resolution

Title IX Process



Title IX Process: Informal Resolution

- If a formal complaint has been filed, an informal resolution process may be used only if all parties agree to participate in an informal resolution process that does not involve a full investigation and adjudication.
- Informal Resolution can be used any time before a determination of responsibility in the Formal Complaint Process but may only be offered after a formal complaint has been filed.
- The Title IX Coordinator will appoint a facilitator who is free from conflicts of interest or bias and who has received special training for the role.
- Any party may decline or terminate an informal resolution process at any time prior to agreeing to a resolution, without penalty.
- The informal resolution process does not require a full investigation.
- Resolved issues may not be re-investigated, even if breach of agreement.
- Can use a broad range of strategies in accordance with the needs of the parties/situation (e.g., mediation, training, restorative justice, disciplinary sanctions, if both parties agree)
Voluntary

NOTE: The informal resolution process may not be used to resolve allegations that an employee sexually harassed a student.

Title IX Process: Informal Resolution

- Title IX Coordinator or Investigator must:
 - Provide both parties written notice of their rights in an informal resolution
 - Written notice must include:
 - Allegations;
 - Informal resolution requirements, including when informal resolution would preclude resuming a Formal Complaint arising from the same allegations;
 - Right to withdraw from informal resolution and resume the grievance process; and
 - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and
 - Obtain written, voluntary consent from both parties to the informal resolution process.



Title IX Process: Dismissing a Formal Complaint

The Title IX Coordinator must decide if Title IX applies to the reported allegations. The complaint **MUST** be dismissed if the alleged conduct:

- Would not constitute sexual harassment even if proved;
- Did not occur in the school district's education program or activity; or
- Did not occur against a person in the United States.
 - Note: You must dismiss a Title IX Formal Complaint if the alleged sexual harassment occurred outside the United States. However, if allowed in Board policy, allegations of sexual harassment that occurred outside the U.S. can be investigated using Title IX Procedures.

Written notice of the dismissal should promptly be given to both parties simultaneously and should:

- State the reasons for the dismissal
- Provide notice of the right to appeal

It is important for the Title IX Coordinator to document the decisions made and actions taken during the Title IX process, including any reasons for dismissal.

The dismissal of the complaint does not preclude the district from taking disciplinary action under other district policies. However, you must wait until the conclusion of the Title IX process to take action under a different Board policy.

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Title IX Process: Dismissing a Formal Complaint

The Title IX Coordinator **MAY** dismiss a complaint if:

- Complainant wants to withdraw complaint or any allegation therein
- Respondent is no longer enrolled or employed
- Specific circumstances prevent school from gathering evidence sufficient to reach a determination

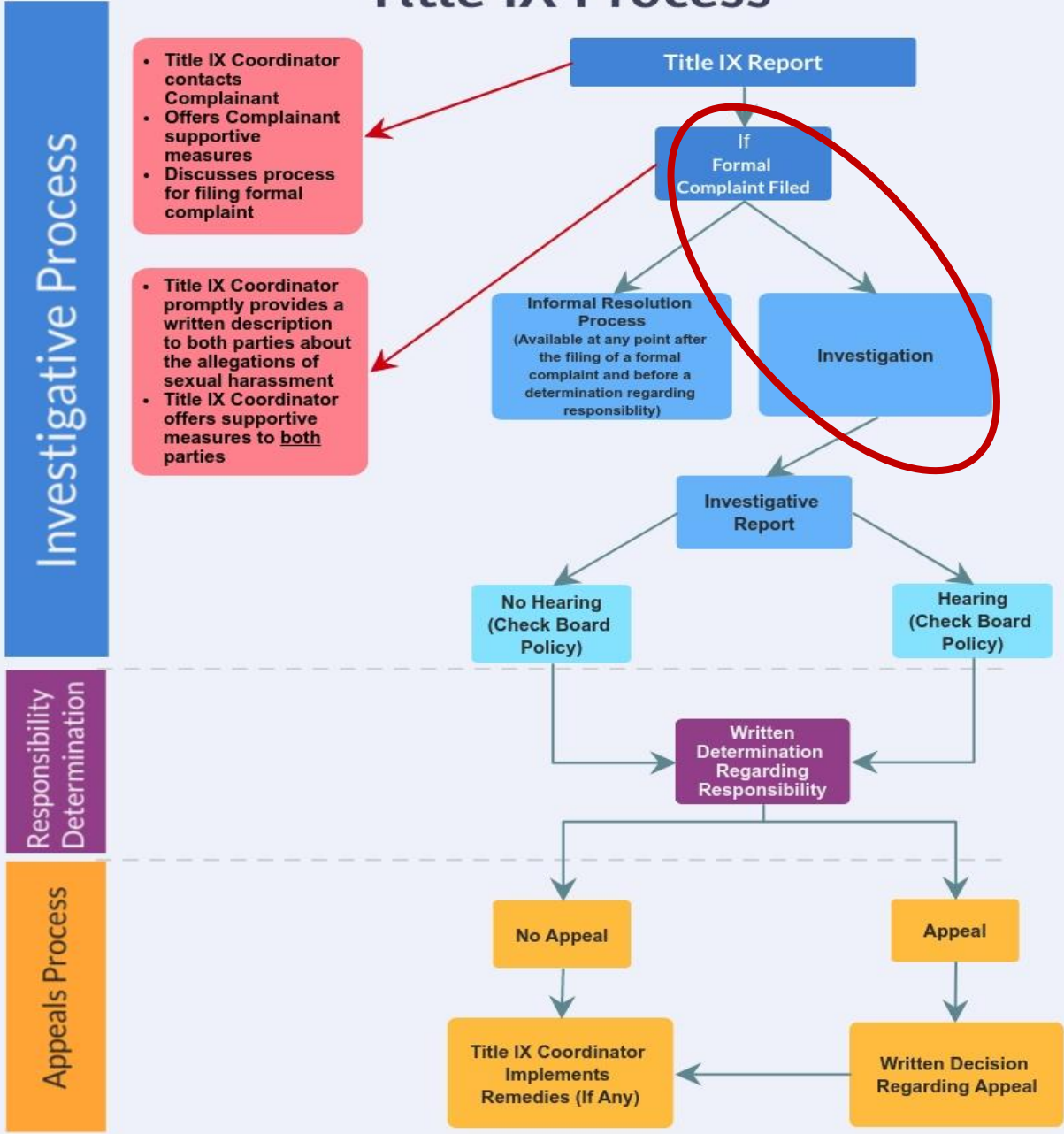
The dismissal of the complaint does not preclude the district from taking disciplinary action under other district policies.

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Formal Complaint

Title IX Process



Title IX: Conducting an Investigation

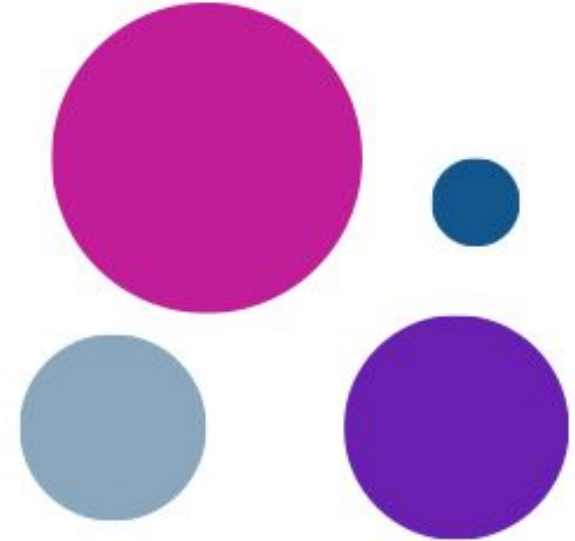
If the parties decline an informal resolution process, reported sexual misconduct of any kind must be adequately, reliably, and thoroughly investigated, regardless of whether the incident is the subject of a separate criminal investigation.

- The investigator should gather all evidence, inculpatory and exculpatory, directly related to the allegations.
- Law enforcement involvement does not relieve a District of its Title IX obligation to investigate.
 - Do **NOT** wait for the conclusion of a police investigation to proceed through the District's Title IX process.



Title IX: Conducting an Investigation

- School has burden of proof and burden to “gather evidence sufficient to reach a determination of responsibility”
- Standard of evidence must be same for all complaints (employee and student)
- Reasonably prompt timeframes
- Consider law enforcement and other obligations
- Consult your policy for specific procedures!



TITLE IX

Title IX Process: Investigation Procedures

- Title IX Coordinator will appoint an investigator (who may be the Title IX Coordinator himself or herself) who will thoroughly search for facts and evidence relevant to the claims made in the initial report or complaint.
 - The investigator must be properly trained and free from conflicts of interest or bias.
 - Things to consider when selecting an investigator:
 - Investigator's supervisor is the accused
 - Area of law investigator is not comfortable with
 - Personal conflicts (actual or perceived)
 - Personality conflicts/workplace issues
 - Unfair (even if not unlawful)
- Throughout the course of an investigation, both parties should have an equal opportunity to discuss the allegations or gather evidence and to present the relevant evidence that they gather.

Initial Contact with Reporting Party

- Remember, when the Title IX Coordinator/Investigator makes initial contact with the Complainant, it is important that the Title IX Coordinator/Investigator:
 - Clarify the complaint;
 - Provide resources ; and
 - Discuss supportive measures



Conducting Investigatory Interviews



Remember

Remember that both complainant and respondent are entitled to an advisor during their interviews, advance notice of interviews, and access to any available evidence. It is also recommended that you provide advance notice of an interview to a non-Party witness.

District **MAY NOT** restrict who serves as an advisor (can be parent, staff member, attorney, etc.) but can restrict the extent to which the advisor participates in the process (any restrictions must apply equally to both parties).



Prepare

Prepare an outline of questions, but be prepared to deviate

The investigator should provide written notice in advance to parties who will be interviewed or requested to attend a meeting, allowing sufficient time for the parties to prepare to participate.

This written notice will include date, time, location, participants, and purpose of any interview or meeting.



Decide

Decide how to record the interview(s) (handwritten notes, audio recording)



Determine

Determine order of interviews

Interview complainant and respondent separately, and interview witnesses separately

Conducting Investigatory Interviews

Obtain	Obtain current and accurate contact information for all individuals interviewed
Explain	Explain allegations, if applicable and that retaliation is prohibited
Establish	Establish guidelines with advisor and interviewee, and anyone else present (parent/guardian, representative)
Remind	Remind individual of duty to maintain confidentiality and cooperate
Be	Be direct and ask open-ended questions
Disclose	Disclose to individual only what is necessary to question him/her and/or required by policy

Conducting Investigatory Interviews

Practice	Practice active listening and ask the witness to reiterate or restate responses to ensure accuracy, if necessary
Ask	Ask about awareness of applicable policies, rules, codes of conduct Ask who else might have useful information, anything that you did not ask but that you should know
Repeat	If confused, repeat what you think you have heard, then ask the individual whether your understanding is correct (be sure <u>NOT</u> to add to/detract from statement). DON'T PUT WORDS IN THE MOUTH OF A WITNESS!
Ask	Ask for relevant documents/records that the individual may refer to/have access to • Emails, texts, calendars, diary, social media, etc.
Assess	Assess individual's credibility, without bias, partiality, stereotypes, prejudgment, or assumptions.
Re-interview	Re-interview complainant, respondent, or witnesses, if needed
Be	Be cognizant of implicit bias or conflicts of interest

Conducting Investigatory Interviews

The District:

- Has the burden of proof and the burden to gather evidence sufficient to reach a determination of responsibility
- Cannot, generally, use questions or evidence that constitute, or seek disclosure of, legally privileged information
- Cannot access, consider, disclose, or otherwise use a party's medical records, including mental health records, unless the District obtains that party's voluntary, written consent to do so
- Watch out for bias, prejudice or conflicts of interest

Interviewing the Complainant and/or Respondent

- When interviewing the Complainant and/or Respondent, it is important to recognize that he or she may be suffering from trauma
- It is important the investigator do the following:
 - Acknowledge the pain/difficult situation
 - "If you do not remember every, single detail, that's okay. Focus on what you can or do remember"
 - Fill in details later in the interview
 - Ask open-ended questions
 - It is not always advisable or necessary to start at the beginning and demand that the witness provide every detail



Interviewing the Respondent

- Avoid using the terms "guilty," "innocent," "victim," "survivor," "the accused," "perpetrator," "assailant," etc.
- Remember, the Respondent is presumed not responsible until a written determination is issued

Acknowledge the difficulties of the situation

Warn of the risks of speaking about the Complainant
(avoid "gag order")



Interviewing Witnesses

Remember to only share necessary information when interviewing witnesses, ask open-ended questions, and consider appropriate deference to be given to witness (relationship to the parties, level of experience).

Conducting Investigatory Interviews

Employees

- School Officials

- Duty to cooperate

- Garrity

- You are required to cooperate with our investigation and answer our questions without waiving any Fifth Amendment privilege against self-incrimination that might apply. If there is any investigation conducted by law enforcement into this situation, the information obtained from this interview could not be used against you by such authorities

- Debnam

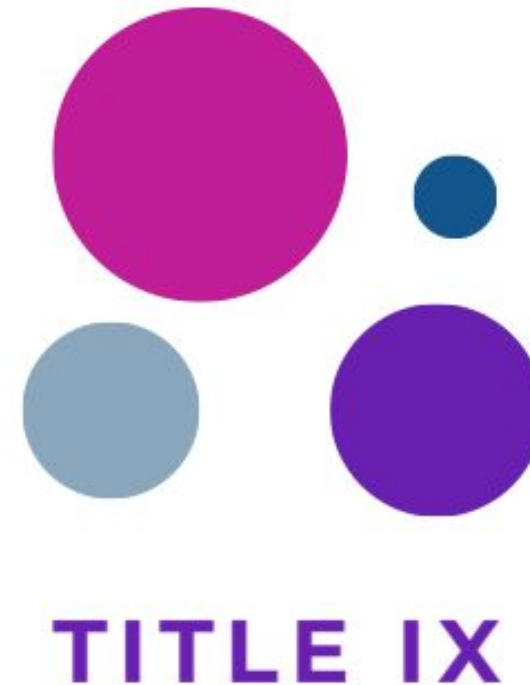
- Employees are required to answer questions in an internal investigation and failure to answer legitimate job-related questions may be considered insubordination

Collecting Evidence: Types of Evidence

- **Photographs and videos**
- **Roster and seating charts**
- **Schedules**
- **Attendance records**
- **Student records**
- **Personnel records**
- **Desk contents**
- **Documents and other records, including electronic records**
- **Written reports**
- **Project files**
- **Court documents**
- **Computer history logs**
- **Emails, social media posts, text messages**
- **Letters or written messages**
- **School Lockers**
- **Personal documents**

Collecting Evidence

- Important Considerations
 - Chain of Custody
 - Search and Seizure
 - Fourth Amendment
 - Board Policy



Reviewing the Evidence

- Parties and advisors must be provided an opportunity to inspect and review the evidence:
 - Evidence that is directly related to the allegations raised in the Formal Complaint
 - Statements, notes of interviews, and other types of evidence the District plans to use before reaching a determination AND evidence the District does not think it will use
 - Provide evidence to the parties and advisors in an electronic or hard copy format
- Parties must be given at least 10 days to review all the evidence and submit written responses about the evidence to the investigator



Assessing Witness Credibility

Gather

Gather facts to assist the decision-maker

Ask

Ask questions that test the witness's memory

Identify

Identify where the witness may corroborate or contradict his/her testimony, or other witnesses, and physical evidence

Monitor

Monitor consistency or inconsistencies; consider if there is a motivation to lie

Title IX Process: Investigation Procedures



- At the conclusion of the investigation, the parties will be allowed a period of time (**REFER TO YOUR LOCAL BOARD POLICY FOR THE SPECIFIC TIME PERIOD**) to inspect and review copies of any evidence directly related to the allegations.
 - Information directly related to the allegation may not be redacted regardless of whether it is sensitive, confidential, or prejudicial.
- The parties may submit a written response to the investigator. The investigator must consider the written response prior to completing the final report.

Title IX Process: Delays and Extensions

- Temporary delays in the investigation timeline can occur for “good cause.”
 - Must provide the parties with written notice of the delay
 - What is "good cause?"
 - Highly complex investigation
 - Concurrent law enforcement investigation with time-dependent release of evidence
 - Absence of parties or witnesses
 - Need to provide accommodations for a disability

A hand holding a magnifying glass over the word 'Investigations'. The word is written in a large, purple, serif font. The magnifying glass is held by a hand with dark nail polish, and the lens is focused on the word. The background is a blurred outdoor scene with trees and a bright sky.

Investigations

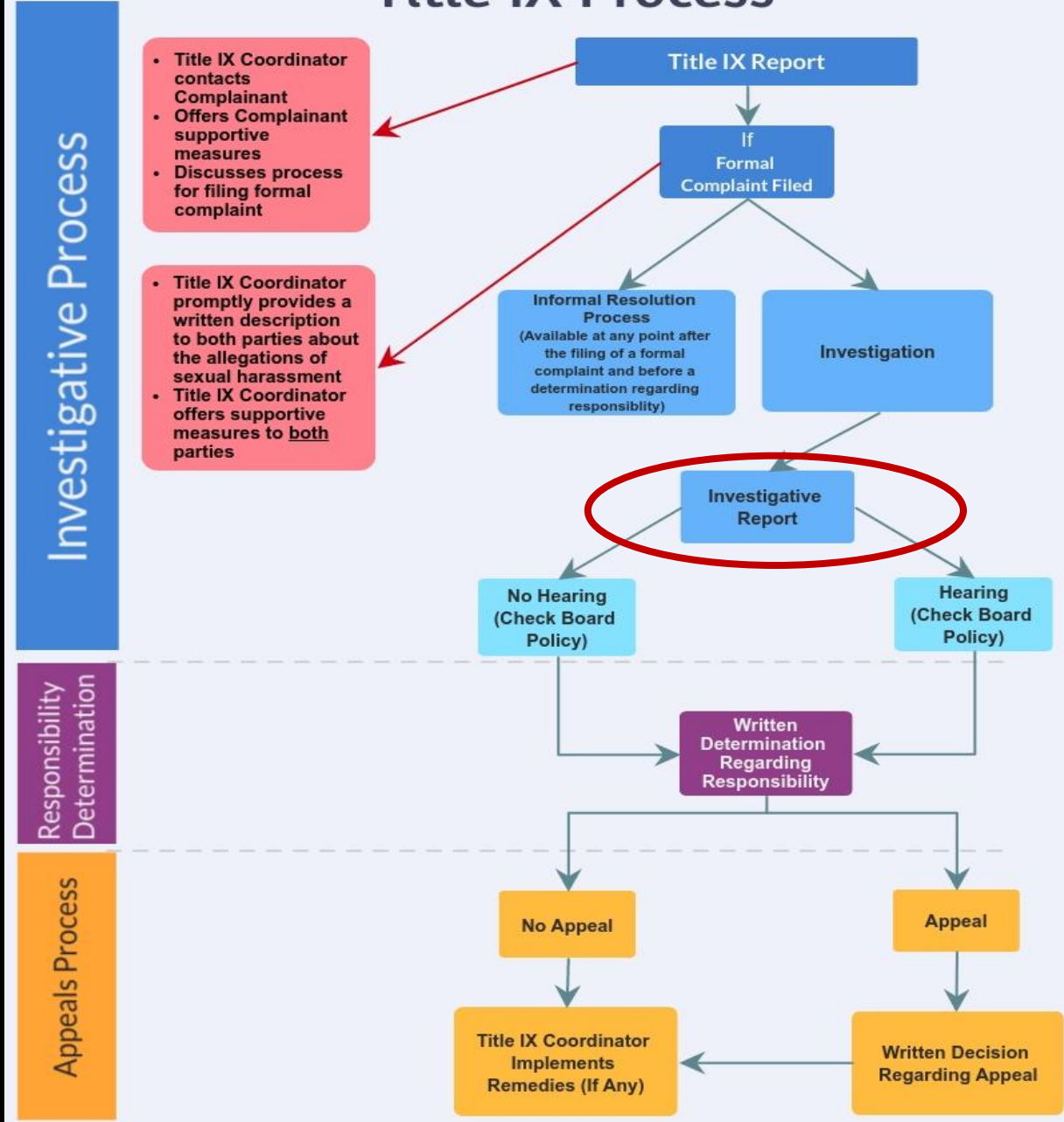
Creating the Investigation File

- What should be included in an investigation file?
 - Policies considered
 - Interview notes (including outlines)
 - Interview log
 - Record of efforts to schedule interviews
 - Documents/evidence collected
 - Report/recommendations



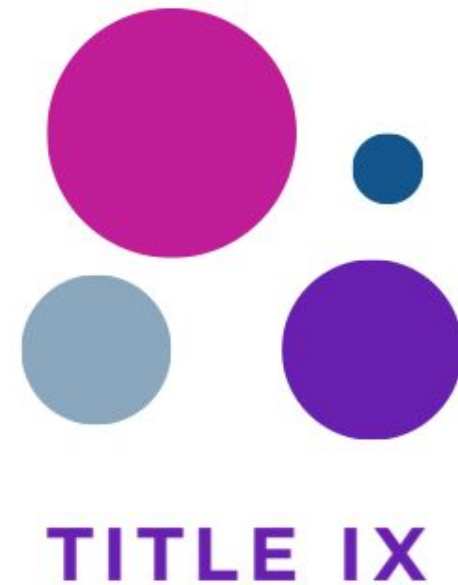
Investigative Report

Title IX Process



Title IX Process: Investigative Report

At the conclusion of the investigation, the investigator must prepare a written investigative report that fairly summarizes all directly related and relevant evidence, including inculpatory and exculpatory evidence.



The Title IX Process: Investigative Report Structure

- Structure of the Report:
 - Allegations
 - Parties' positions
 - Legal Standard
 - Analysis
 - Conclusion

The Title IX Process: Investigative Report Contents

- Date, Recipients, Name of Advisor(s) (if any)
- Address any need for confidentiality with regard to complainant, witnesses, etc. It may be advisable to use pseudonyms and a key be maintained in a separate document
- Investigator name/title; statement that investigator does not have conflict of interest/bias
- Summary of Allegations; identification of any additional allegations that were made or discovered, and whether the new allegations were investigated or not.
- Timeline and chronology of the investigation (including dates/times of interviews, date investigator sent notices to parties, etc.)
- Relevant policies, procedures, ordinances, handbook provisions, etc.
- Fairly summarize all relevant evidence and party response to evidence, if any
- Analyze the evidence and, if necessary, weigh credibility of witnesses
- Describe fact-finding
- If making a credibility determination – provide facts that led to the determination of credibility
- Site visits, record review, hearings
- Statements relied upon, credibility determinations

The Title IX Process: Investigative Report Contents, Cont.

- Findings of fact
- Separate findings for each alleged policy violation
- Focus on material facts – the facts that impact/affect the outcome
- Describe undisputed and disputed facts separately
- "Show your work" and reasoning for disputed facts
- Apply the appropriate evidence standard as determined by Board policy
 - Preponderance of the Evidence: Review the evidence to determine whether it is more likely than not that the alleged conduct occurred
 - Clear and Convincing Evidence: Review the evidence to determine whether it is highly and substantially more likely to be true than not that the alleged conduct occurred
- Statement that this Investigative Report demonstrates the District's response is not "deliberately indifferent"
- Conclusions
- Recommendations
- Note: The report should show that the investigator considered the parties' written responses regarding the evidence and address whether it comports or contradicts other evidence

NOT Final Decision!

IMPORTANT NOTE!

The Investigator is NOT the Decision Maker and does not make a finding of responsibility.

The Title IX Process: Investigative Report

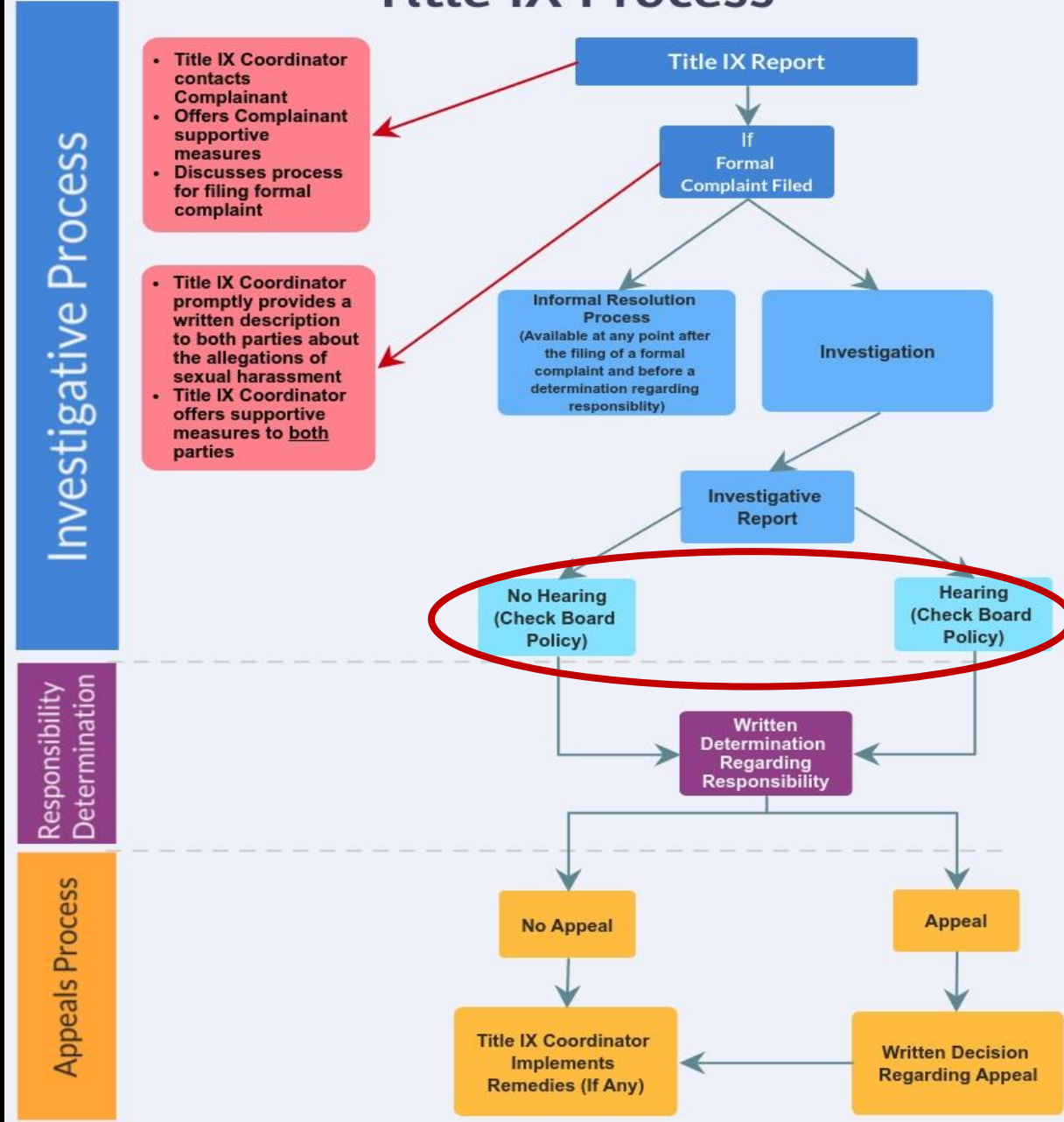
- The investigator will simultaneously provide both parties with a written copy of the investigative report, and they will have at least 10 days (**REFER TO YOUR LOCAL BOARD POLICY FOR THE SPECIFIC TIME PERIOD**) before a *hearing** or other type of determination regarding responsibility.
- The report can be provided electronically or in hard copy but must be presented to both sides simultaneously.
- Both parties must be given at least 10 days to review and submit a written response regarding the investigation report to the decisionmaker before any final determination of responsibility.

*K-12 school district policies may, but are not required to, provide for a hearing. Refer to your local board policy to see if it allows for a hearing



Hearings?

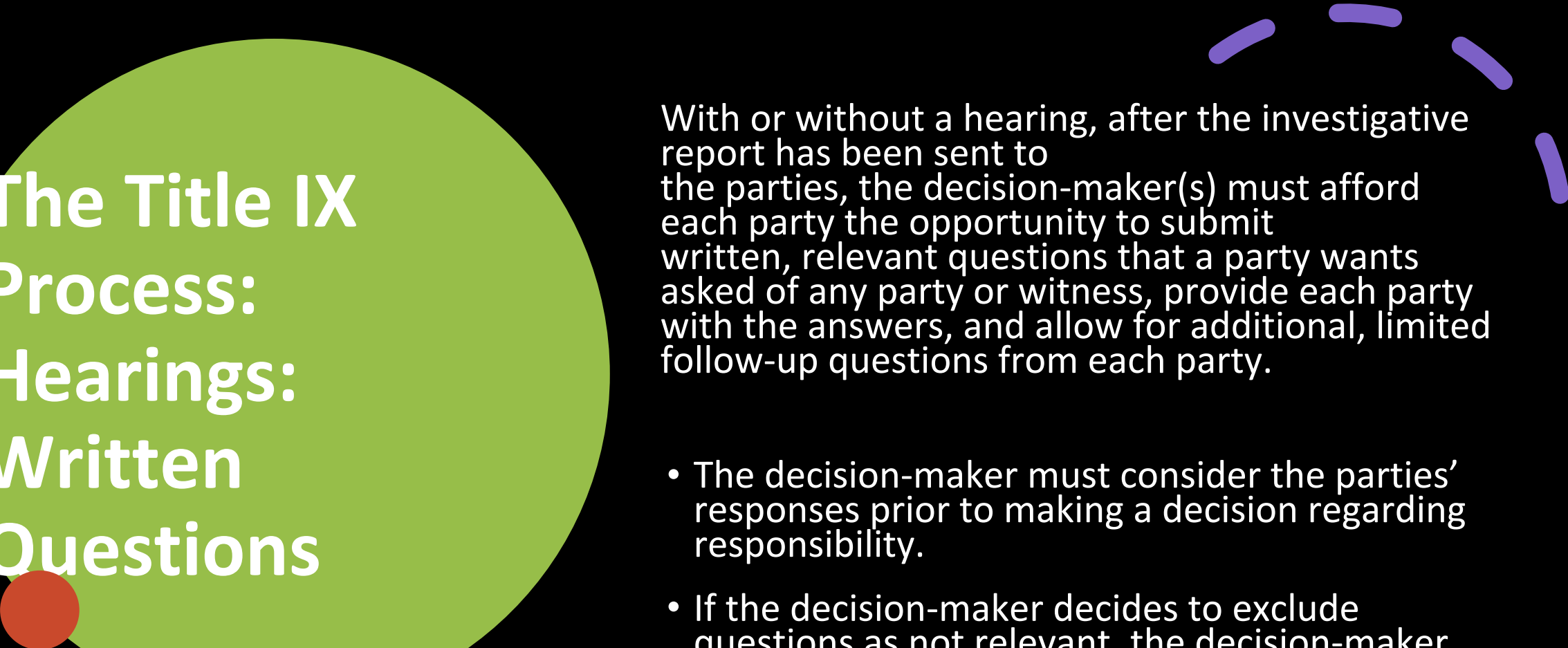
Title IX Process





Title IX Process: Hearings

- Live hearings and cross-examination are **NOT** required for K-12 (unless your Board policy provides otherwise)
- A hearing is an opportunity for parties to tell their side of the story through witness testimony, documentation, recordings, video, audio, and any other relevant evidence



The Title IX Process: Hearings: Written Questions

With or without a hearing, after the investigative report has been sent to the parties, the decision-maker(s) 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.

- The decision-maker must consider the parties' responses prior to making a decision regarding responsibility.
- If the decision-maker decides to exclude questions as not relevant, the decision-maker must explain that decision.



Title IX Process: Hearings

- Scheduling a Hearing:
 - Advisors can attend and may ask questions
 - Parties must be able to view testimony and evidence equally
 - Training is required on any technology that may be used during a hearing

Title IX Process: Hearings

- Hearing procedures:
 - Introduce Hearing Officer or Panel, parties, advisors, and anyone else present
 - Describe previous steps taken in the grievance process
 - Describe allegations
 - Explain evidentiary standard
 - Statement that Hearing Officer or Panel Members have no conflict of interest, bias, and can be impartial
 - Questioning (voir dire) to ask about conflict of interest, bias, and impartiality may be allowed at the start of a hearing



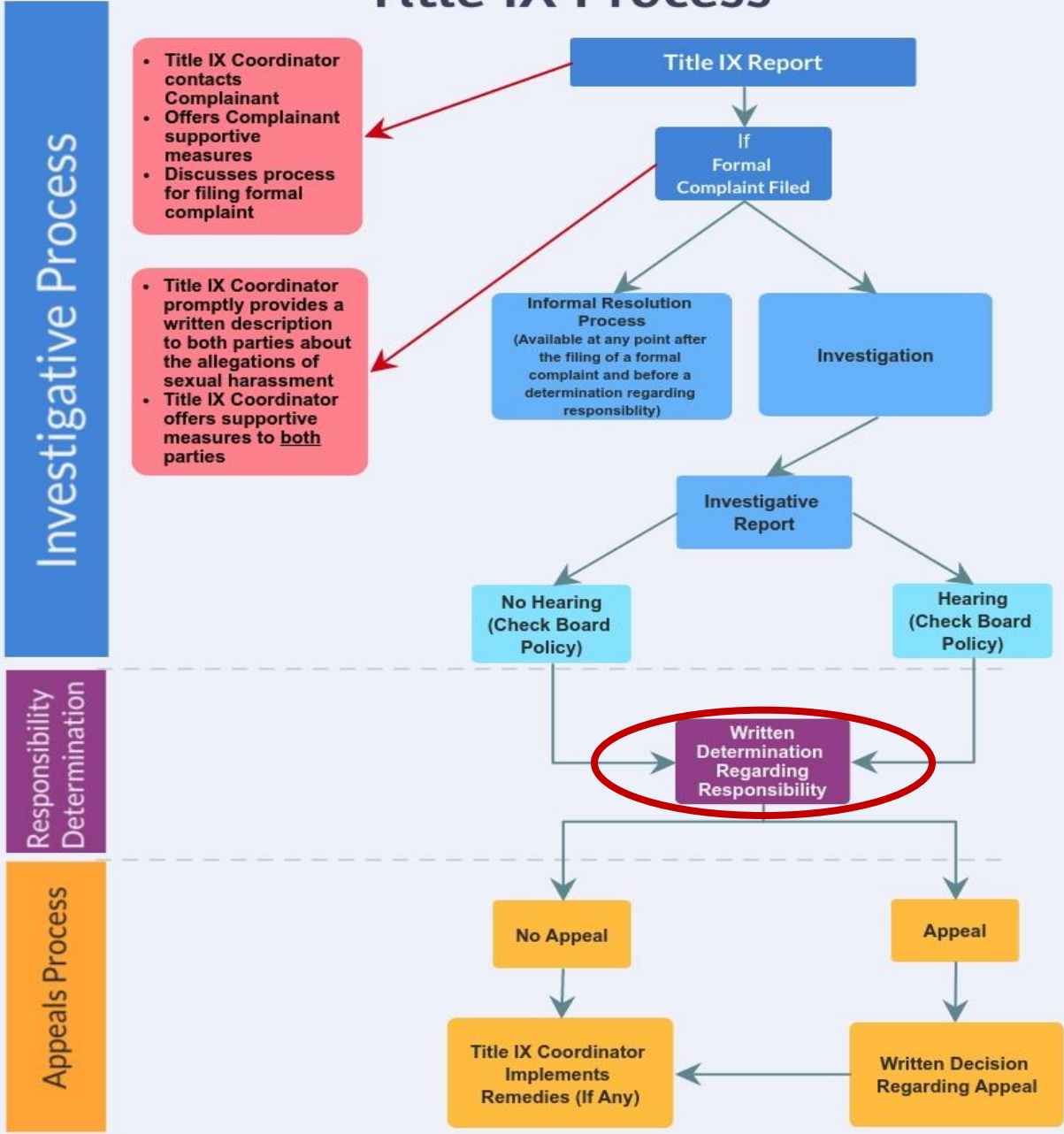
Title IX Process: Hearings

Hearing procedures:

- Presentation of opening statements
- Presentation of testimony and evidence
 - Each party is permitted to ask the other Party and witnesses relevant and follow-up questions
 - Such questions may challenge credibility
 - Questions may be asked directly or indirectly
 - NOTE: Cross-examination must be handled by the advisor or decision-maker, not the parties
- Presentation of closing statements
- Hearing Officer or Panel determines the relevancy of testimony and evidence presented

Written Decision Regarding Responsibility

Title IX Process



Title IX Process: Determination Regarding Responsibility

- The independent, trained, decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.
- To reach this determination, the District must apply the standard of evidence set forth in board policy. The standard of evidence will be either:
 - Preponderance of the Evidence; or
 - Clear and Convincing Evidence.
- Decision must be objective and unbiased

REFER TO YOUR LOCAL BOARD POLICY TO DETERMINE THE STANDARD OF EVIDENCE TO BE USED.



Title IX Process Determination Regarding Responsibility: Standard of Evidence

- Preponderance of Evidence
 - Requires that the evidence be “more likely than not” to prove the matter at hand.
 - In other words, evidence only needs to be greater than a 50% likelihood of being true under the preponderance of evidence standard.
- Clear and Convincing Evidence
 - Means that the evidence being presented must be “highly” and substantially more probable to be true rather than untrue.
 - Higher standard than preponderance of the evidence standard.

REFER TO YOUR LOCAL BOARD POLICY TO DETERMINE THE STANDARD OF EVIDENCE TO BE USED.



Title IX Process: Determination Regarding Responsibility

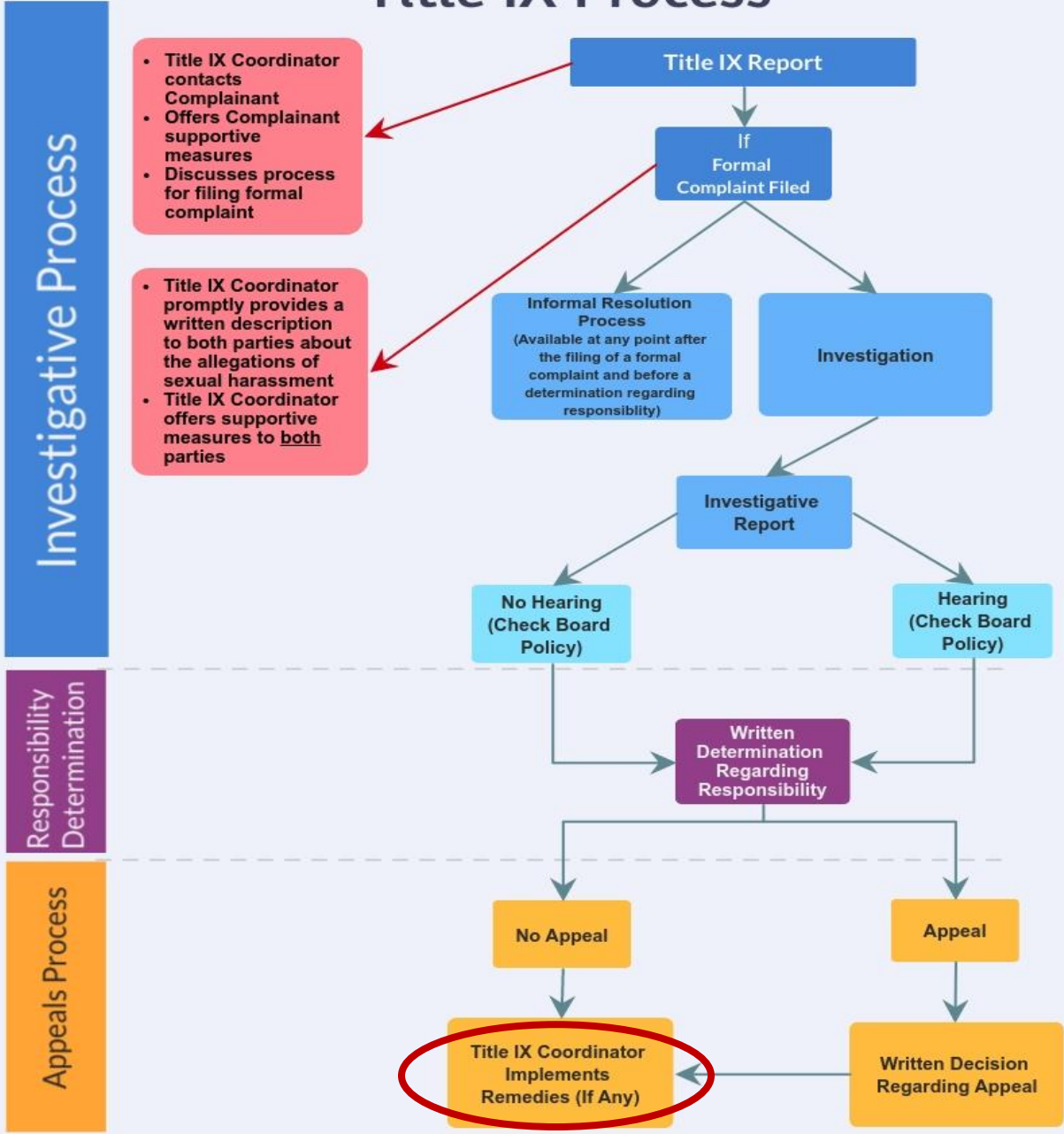
- Decisionmaker receives and reviews the investigation report and evidence
- Decisionmaker receives and reviews the parties' responses to the investigation report
- Decisionmaker reviews the information gathered in the question and answer process, including any follow-up questions and answers
- Decisionmaker issues the written decision that complies with the Title IX regulations, including making a determination of responsibility
- Decisionmaker notifies the parties of the determination and their right to appeal

Title IX Process: Written Determination Regarding Responsibility

- The written determination must be provided by the Decision Maker to both parties simultaneously and must include:
 - Identification of the allegations potentially constituting sexual harassment;
 - A description of the procedural steps taken from the receipt of the formal complaint 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 fact supporting the determination;
 - Conclusions regarding the application of the district's code of conduct to the facts;
 - A statement of, and rationale for, the result as to each allegation, including:
 - a determination regarding responsibility,
 - any disciplinary sanctions to be imposed on the respondent, and
 - whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided to the complainant.
 - The district's procedures and permissible bases for the complainant and respondent to appeal.

Remedies/Sanctions

Title IX Process



Remedies and Sanctions

- The final determination must include whether the Complainant will receive remedial measures
 - Title IX Coordinator should directly communicate with Complainant about specifics
- Remedies should be designed to restore and preserve equal access to the District's education program or activity. They can be disciplinary and punitive, if needed.
 - Examples:
 - Escort
 - School-based counseling
 - Academic support services
 - Adjusting schedules
 - Moving workspace or locker
 - "No Contact" directives
 - Other
- Remedies are available to more than just the Complainant
- Consider systemic remedies (i.e., training)
- Remember that if the students involved are students with disabilities, it may be necessary to convene an IEP or Section 504 meeting(s).

Sanctions

IF THE SANCTION INVOLVES A LONG-TERM SUSPENSION

North Carolina law still applies!

NC Gen. Stat. 115C-390.7 requires that:

- the student's parent be given written notice of the recommendation for long-term suspension and
- the student be given the opportunity for a formal hearing

IF THE SANCTION INVOLVES AN EXPULSION

North Carolina law still applies!

NC Gen. Stat. 390.11 requires that:

- the local board conduct a hearing to determine whether the student's continued presence in school constitutes a clear threat to the safety of other students or school staff

NOTE: The Title IX Coordinator is responsible for effective implementation of any remedies/sanctions

- **Board policy will outline the permissible list of sanctions for Title IX violations.**

Sample Title IX Investigation Timeline

Note: This is a sample timeline of a Title IX investigation. There are two mandatory 10-day periods that cannot be reduced, however the remainder of the timeline can be adjusted to fit the particular needs of each investigation.

November 2021

MON	TUE	WED	THU	FRI	SAT	SUN
1 Formal Complaint Filed	2	3 Title IX Investigator provides notice of allegations to the parties	4 Review Grounds for Dismissal of the Formal Complaint; Notify Investigator if Complaint will proceed.	5 Investigator begins collecting evidence, conducting interviews	6	7
8	9	10 Interviews	11 Interviews	12	13	14
15 Investigator prepares an investigative report that fairly summarizes the relevant evidence and provides the report to the parties. MANDATORY: PARTIES HAVE 10 DAYS TO PROVIDE WRITTEN RESPONSE	16	17	18	19	20	21
22	23	24	25	26	27	28
29 DAY TEN Receive and consider written comments from parties as to evidence	30					

Sample Title IX Investigation Timeline

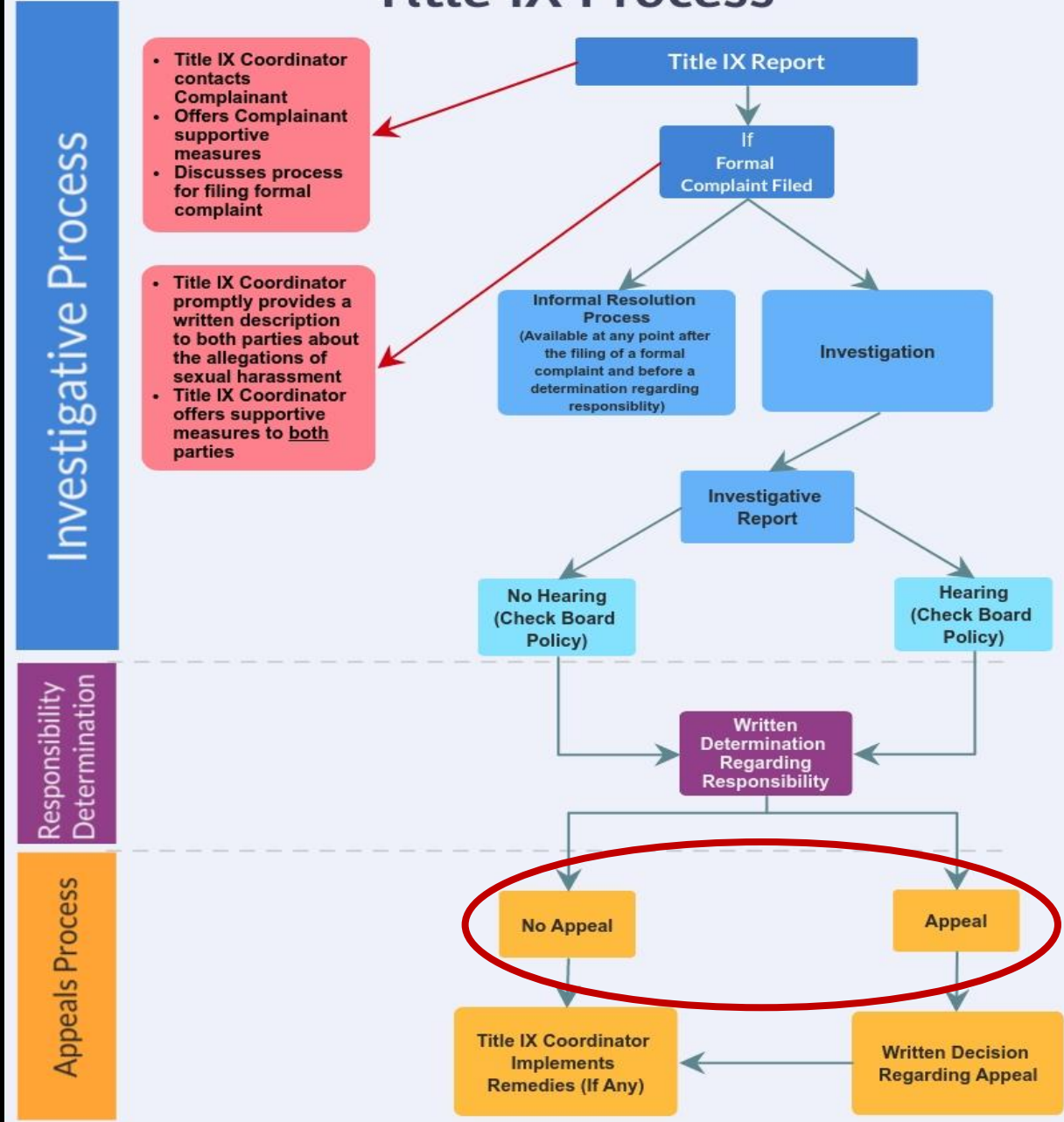
Note: This is a sample timeline of a Title IX investigation. There are two mandatory 10-day periods that cannot be reduced, however the remainder of the timeline can be adjusted to fit the particular needs of each investigation.

December 2021

MON	TUE	WED	THU	FRI	SAT	SUN
29	30	1	2	3	4	5
		Issue investigative report to each party and his/her advisor for their review and response. <u>MANDATORY: PARTIES HAVE 10 DAYS TO PROVIDE WRITTEN RESPONSE</u>	TEN	DAY	PERIOD	
6	7	8	9	10	11	12
TEN		DAY		PERIOD		
13	14	15 DAY TEN	16	17	18	19
TEN	DAY	PERIOD	Investigator provides the decision-maker a copy of the investigative report, the relevant evidence, and the parties' written responses to the report and initial sets of written questions			
20	21	22	23	24	25	26
27	28	29	30	31		

Appeals

Title IX Process



Title IX Process: Appeals



A district must offer both parties an appeal from a determination regarding responsibility, and from any dismissal of a formal complaint or any allegations therein, on the following bases:

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent, that affected the outcome of the matter.

NOTE: A district may offer an appeal equally to both parties on additional bases.

Check your policies!

Title IX Process: Appeals Process

For all appeals, the district must:

- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome of the investigation;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.

Retaliation

"No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right of 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."

- Exercise of First Amendment rights does not constitute retaliation prohibited by Title IX
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding is not retaliation prohibited by Title IX
- Charges for "collateral misconduct" may be retaliation



Title IX and FERPA

- Generally, the school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.
- However, where FERPA might traditionally prevent a disclosure of a record without permission of the student identified, Title IX allows the disclosure of student records that otherwise might be shielded from disclosure under FERPA to protect the due process rights of students.



FERPA

Title IX and FERPA

FERPA

Parties to the Title IX complaint are allowed access to all evidence directly related to a formal complaint.

Specifically, the Title IX regulations state:

"Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient [i.e. the school/district] does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation."

Title IX and FERPA

Redactions

- As with FERPA, Title IX does not prohibit redactions, but it does limit them to information not directly related to the allegations raised in a formal complaint.
- This means the majority, if not all, of the evidence included in the investigative report as well as any witness statements would not be redacted.



FERPA

Recordkeeping

A district 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 of a live hearing, 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;
 - Any informal resolution and the result; and
 - All materials used to train Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process.
- A district must make these training materials publicly available on its website.

Impartiality, Bias, & Conflict of Interest

Impartiality, Bias, & Conflict of Interest

- Title IX Coordinators, investigators, decisionmakers, and persons who facilitate informal resolutions are prohibited from having conflicts of interest or bias against complainants or respondents generally, or against an individual complainant or respondent.



Impartiality, Bias, & Conflict of Interest (cont.)

- Objective evaluation of all relevant evidence – inculpatory and exculpatory
 - Inculpatory
 - Exculpatory
- Credibility determination may not be based on a person's status as a complainant, respondent, or witness
- Complainants and Respondents must be treated equitably
- Respondent is presumed not responsible for alleged conduct until a determination of responsibility is made at the conclusion of the grievance process
- Uniform application of the selected evidentiary standard throughout the process
 - Preponderance of the Evidence
- or -
 - Clear and Convincing Evidence

Impartiality, Bias, & Conflicts of Interest (cont.)

- "No complainant reporting Title IX sexual harassment or respondent defending against allegations of sexual harassment should be ignored or be met with prejudice"
- Prejudgment:
Complainant began crying while making a report of sexual harassment. You conclude that because the complainant is crying while describing the conduct at issue, the Complainant is telling the truth and the Respondent must be responsible.
- Recipients are required to be impartial and "**free from bias**"
 - Explicit/Conscious Bias
 - Implicit Bias: Attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner

Impartiality, Bias, & Conflicts of Interest (cont.)

Appearance of Bias vs. Actual Bias

- How do you assess bias?
- "Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased."
- Department cautions against applying generalizations that might "unreasonably conclude" that bias exists
 - Assumption that all "self-professed feminists" or "self-described survivors" are "against men"
 - Assumption that "a male is incapable of being sensitive to women"
 - Assumption that prior work as a defense attorney or victim advocate renders a person biased for/against complainants or respondents
 - Assumption that Complainants usually are telling the truth and Respondents are lying to protect themselves.



Impartiality, Bias, & Conflict of Interest (cont.)

- Examples of Bias

IX

Title IX

- When talking with Title IX Complainants, the Title IX coordinator begins each initial meeting by asking who the Respondent is and what “he” did to the Complainant (assuming the Respondent is a male)
- A Title IX Decision-maker finds a Respondent in a case more credible than a Complainant because the Respondent speaks "perfect English" while the Complainant, who only knows English as a second language, does not.

Impartiality, Bias, & Conflict of Interest (cont.)

Actual

Direct conflict between one's official duties and responsibilities, and a competing personal interest or obligation

Example: The Title IX Decision-maker's daughter is the Respondent in a sexual assault case

Perceived

A situation where it could reasonably be perceived that a competing interest could improperly influence the performance of one's official duties and responsibilities

Example: The Title IX investigator previously had a relationship with a family member of the Respondent

Potential

Where a personal interest or obligation could conflict with one's official duties and responsibilities in the future

Example: The Title IX Coordinator and Complainant's father co-chair a faculty committee and socialize outside of work on occasion

Impartiality, Bias, & Conflicts of Interest (cont.)

- Questions to consider:
 - Is a paid staff member biased in favor of the District (Institutional Bias)?
 - What are the relationships between and among the individuals?
 - Have the adjudicative and administrative roles been confused?
- Keys:
 - Consider all evidence and testimony
 - Keep an open mind
 - Practice active listening
 - Be keenly aware of implicit bias



Impartiality, Bias, & Conflict of Interest (cont.)

Avoiding Conflicts of Interest

- Adhere to investigation policies and procedures
- Avoid pre-determined conclusions
- Conscious awareness of institutional bias
- Actual, perceived, or potential

Avoiding Bias

- Consider the relationship between and among the investigator, decision-maker(s), and the parties, if any
 - Coach/Player, Teacher/Student
 - Prior Involvement in Title IX Complaints
- If either party has a history of conflict with the district, or the Title IX Coordinator, investigator, or decision-maker, consider a third-party investigator
- Conscious awareness of personal biases

Sex Stereotypes

- Sex Stereotyping occurs when someone has a preconceived idea about how someone should be, act, or behave on the basis of that person's sex
- Examples of sex stereotyping:
 - Women have regret about sex and lie about sexual assault
 - Men are sexually aggressive or likely to perpetrate sexual assault
 - Men cannot be sexually assaulted
 - Women complaining about sexual harassment are just jumping on the #MeToo bandwagon

Sex Stereotypes → Deliberately
Indifferent Responses

Sex Stereotypes → Deliberately Indifferent Responses

"Boys will be boys" - "Girls can be overly sensitive" - "I am sure they didn't mean anything by what they said" - "If it keeps on happening, then let me know"- "You know how girls can be at this age" - "If there weren't any witnesses, there is nothing I can do" - "If you expect me to do anything, you will have to file a signed, written complaint" - "There are no laws that control hormones – especially during the middle school years" - "I doubt she would have reacted that way if it weren't that time of the month" - "If it really happened, why didn't you tell someone before now" - "What you have described sounds like nothing more than typical adolescent behavior" - "That's just her way of flirting" - "What did you do to encourage this behavior" - "Get used to it – it's just part of growing up" - "If you didn't report it at the time it happened, there is not much I can do about it now" - "I'm sure they mean it as a compliment" - "If you don't want to attract that sort of attention, maybe you should start wearing loose-fitting clothes" - "We can't punish someone for the way you think they were looking at you" - "If you weren't looking for a reaction, why did you have it pierced in the first place" - "Why don't you just learn to ignore it" - "If there was no touching, then there was no harassment"

Impartiality, Bias, & Conflict of Interest (cont.)

Hypothetical

Sarah is an investigator who conducts Title IX investigations. Sarah frequently makes comments to her colleagues that women who dress provocatively are "asking for it" and shouldn't be surprised when they're catcalled, ogled, and the like. A female student makes a report of sexual harassment against a classmate for making sexually inappropriate comments to her and groping her behind. During Sarah's investigation into the incident, the female student describes that she was wearing a low-cut, tight sweater and tight skirt when the incident occurred.

In terms of prejudgment on the facts, would you be concerned about Sarah's impartiality?

Impartiality, Bias, & Conflict of Interest (cont.)

Hypothetical

Sarah is an investigator who conducts Title IX investigations. Sarah frequently makes comments to her colleagues that women who dress provocatively are "asking for it" and shouldn't be surprised when they're catcalled, ogled, and the like. A female student makes a report of sexual harassment against a classmate for making sexually inappropriate comments to her and groping her behind. During Sarah's investigation into the incident, the female student describes that she was wearing a low-cut, tight sweater and tight skirt when the incident occurred.

In terms of prejudgment on the facts, would you be concerned about Sarah's impartiality?

Yes. Sarah's belief that the way female students dress may inherently invite a certain type of response from other students (including catcalling) is a prejudgment based on a sex stereotype that women should dress a certain way or expect sexually harassing behavior. This belief and prejudgment could unfairly impact how she approaches a Title IX investigation, particularly based on the facts of this complaint.

Issues of Relevancy of Questions & Evidence

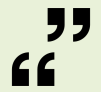
Issues of Relevancy of Questions & Evidence



The Rules of Evidence do not apply and cannot apply



"The final regulations do not allow a recipient to impose rules of evidence that result in the exclusion of relevant evidence; the decision-maker must consider relevant evidence and must not consider irrelevant evidence"



Relevant Evidence is evidence that is probative of a material fact concerning the allegations;
Low bar to meet



Evidence that is **NOT** relevant:

- 1) Information protected by a legally recognized privilege;
- 2) Evidence about a complainant's prior sexual history;
- 3) Medical, psychological, and other treatment records (without written consent)

Relevancy Determinations: Legally Privileged Information

- **NOT** RELEVANT ABSENT WRITTEN CONSENT
- During the investigation of a formal complaint, a recipient:
 - "Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional...made and maintained in connection with the provision of treatment to that party **UNLESS** the recipient obtains that party's voluntary, written consent" Section 106.45(b)(5)(i)
 - A recipient's grievance process must not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege unless the person holding such privilege has waived the privilege.



Title IX



Title IX

Relevancy Determinations: Legally Privileged Information

- Other legally privileged information:
 - Attorney-client
 - Patient-doctor
 - Spousal privilege
 - Clergy-penitent
- NOTE: Information told to a school guidance counselor is not privileged. The school guidance counselor is required to report Title IX sexual harassment if he or she has actual knowledge.
- However, records made or maintained by a school psychologist made in his/her professional capacity are privileged and cannot be accessed without consent. The school psychologist must report a potential Title IX violation to the Title IX Coordinator

Relevancy Determinations: Prior Sexual History or Conduct

- Evidence or questions about a complainant's prior sexual history or prior sexual conduct are **NOT** relevant **UNLESS** offered to prove that:
 - Someone other than the respondent committed the conduct alleged by the complainant; or
 - The questions and evidence concerning specific incidents of the complainant's prior sexual behavior with respect to the respondent are offered to prove consent
- How does your Board policy define "consent" ?

IX

Title IX

Case Studies

Case Study 1

A female student needs three letters of recommendation to apply to college, including one from a current teacher. She really likes her math teacher and has done well in his class. One day after class she asks the male teacher (she's considered the teacher's pet and hangs out in his classroom sometimes) to write her a letter of recommendation. He tells her that he would be happy to write a letter of recommendation for her if she sends him sexy photos of herself. The student reports this behavior to the assistant principal.

- Is this behavior a Title IX violation? If so, what type of violation?
- What are the assistant principal's responsibilities?
- Can the informal resolution process be used to resolve this issue?

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- Is this behavior a Title IX violation? If so, what type of violation?
 - Yes, this is quid pro quo sexual harassment as defined by Title IX.
- What are the assistant principal's responsibilities?
 - The assistant principal must report this behavior to the Title IX Coordinator.
- Can the informal resolution process be used to resolve this issue?
 - No the Informal Resolution process cannot be used to resolve this issue because the alleged misconduct involves a teacher-student.

Case Study 2

The men's and women's swim teams practice at the same time and the same public swimming pool after school. The coach assigns the swimmers to lanes based on their lap times. A female swimmer, who performed very well at the last meet, is assigned to the lane with the fastest male swimmers. At the end of practice, one of the male swimmers pins the female swimmer against the wall at the end of the lane and gropes her. Another teammate witnesses it, and he tells the assistant coach, who is an instructional assistant.

- ▶ Is this behavior a Title IX violation? If so, what type of violation?
- ▶ What are the instructional assistant's responsibilities?
- ▶ What supportive measures can be offered to the Complainant?
- ▶ Can the male swimmer be removed or suspended from the team?

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- ▶ Is this behavior a Title IX violation? If so, what type of violation?
 - ▶ **This may be unwelcome conduct but additional investigation is needed.**
- ▶ What are the instructional assistant's responsibilities?
 - ▶ **The instructional assistant must report this behavior to the Title IX Coordinator.**
- ▶ What supportive measures can be offered to the Complainant?
 - ▶ **Counseling, escort, modifications to academic and extracurricular schedule, change swim lanes.**
- ▶ Can the male swimmer be removed or suspended from the team?
 - ▶ **No, not until the investigation is concluded and a written determination of responsibility issued.**

Case Study 3

Ms. Alcindor is a parent to Kareem and a volunteer in Mr. Haskell's first grade classroom. The long-term substitute teacher for the second-grade classroom, Mrs. Cleaver, notices that Ms. Alcindor appears to be very uncomfortable every time Mr. Haskell is near. When Mrs. Cleaver asks her if anything is wrong, Ms. Alcindor confesses that Mr. Haskell sends her text messages containing sexually inappropriate images several times a week. When Ms. Alcindor told Mr. Haskell not to send those types of messages, Mr. Haskell threatened that Kareem would not pass the first grade if Ms. Alcindor told anyone.

Mrs. Cleaver encouraged Ms. Alcindor to make a report of Mr. Haskell's conduct to the district's Title IX Coordinator, but Ms. Alcindor was afraid that Mr. Haskell would ensure Kareem fails the first grade.

- If a complaint is filed, must this complaint be dismissed? Why or why not?
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- Is this behavior a Title IX violation? If so, what type of violation?
- What are Mrs. Cleaver's responsibilities?
- If a Title IX formal complaint is filed and an investigation begun, what evidence should the investigator obtain? Whom should the investigator interview?
- Can there be an informal resolution?

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Mrs. Cleaver encouraged Ms. Alcindor to make a report of Mr. Haskell's conduct to the district's Title IX Coordinator, but Ms. Alcindor was afraid that Mr. Haskell would ensure Kareem fails the first grade.

- If a complaint is filed must this complaint be dismissed? Why or why not?
 - **No, a complaint must be dismissed only if the alleged conduct: would not constitute sexual harassment even if proved; did not occur in the school district's education program or activity; or did not occur against a person in the United States.**
- May this complaint be dismissed? Why or why not?
 - **It may be dismissed at the complainant's request or if Mr. Haskell is no longer employed with the district. It may also be dismissed if specific circumstances prevent school from gathering evidence sufficient to reach a determination (unlikely in this case).**
- Is this behavior a Title IX violation? If so, what type of violation?
 - **Yes, this is likely unwelcome conduct. Ms. Alcindor, as a volunteer, is covered by Title IX.**
- What are the substitute teacher's (Mrs. Cleaver's) responsibilities?
 - **Mrs. Cleaver must report the behavior to the Title IX Coordinator.**
- If a Title IX formal complaint is filed and an investigation begun, what evidence should the investigator obtain? Whom should the investigator interview?
 - **Ms. Alcindor, Mr. Haskell, Mrs. Cleaver. Text messages and any other documentary evidence (e.g. security camera footage).**
- Can there be an informal resolution?

- **Yes, if both parties agree to informal resolution in writing**

Case Study 4

The female principal and male assistant principal ("AP") get into a disagreement during a staff meeting about certain aspects of the school's re-opening plans. The female principal becomes very frustrated with the male AP, and the male AP tells her to "calm down," asks if she is "on her period," and exclaims that she must be "PMS-ing," in front of all staff in attendance. The female principal's face turns bright red and her eyes well up with tears. She ends the meeting early and informs her staff she will reschedule. The next day, during a school district-wide administrator meeting at central office, the male AP approaches the female principal and hands her a bottle of Midol and whispers that this may help. The female principal becomes very upset and rushes out of the meeting room.

► Is this behavior a Title IX violation? If so, what type of violation?

Case Study 4

The female principal and male assistant principal ("AP") get into a disagreement during a staff meeting about certain aspects of the school's re-opening plans. The female principal becomes very frustrated with the male AP, and the male AP tells her to "calm down," asks if she is "on her period," and exclaims that she must be "PMS-ing," in front of all staff in attendance. The female principal's face turns bright red and her eyes well up with tears. She ends the meeting early and informs her staff she will reschedule. The next day, during a school district-wide administrator meeting at central office, the male AP approaches the female principal and hands her a bottle of Midol and whispers that this may help. The female principal becomes very upset and rushes out of the meeting room.

- ▶ Is this behavior a Title IX violation? If so, what type of violation?
 - ▶ This could be considered “unwelcome conduct” on the basis of sex and a report should be made so that the District can respond promptly and in a manner that is not “deliberately indifferent.”
 - ▶ Is the conduct unwelcome? Is it severe, pervasive, and objectively offensive?
 - ▶ In any event, this behavior can be addressed regardless of whether a Title IX complaint is filed.

Case Study 5

After some mutual flirtation, the male baseball coach asks a first-year female social studies teacher out on a date. Both are single. While flattered, she turns him down. However, the baseball coach does not take "no" for an answer. She stops flirting with him because she realizes he wants more, but says nothing about it to him. He asks her out three more times and each time she says "no." The female teacher begins to find love notes from the baseball coach on her car, and flowers are delivered to her classroom. The teacher notices that the baseball coach is frequently walking by her classroom during the day and sometimes following her out to her car at the end of the school day. Uncomfortable, she asks a guidance counselor to walk her to her car each evening and refuses to remain in her classroom alone. When a fellow teacher asks why, she explains that the male baseball coach will not leave her alone.

- Is this behavior a Title IX violation? If so, what type of violation?
- What are the guidance counselor's responsibilities?
- What supportive measures can be offered to the complainant? To the respondent?

Case Study 5

After some mutual flirtation, the male baseball coach asks a first-year female social studies teacher out on a date. Both are single. While flattered, she turns him down. However, the baseball coach does not take "no" for an answer. She stops flirting with him because she realizes he wants more but says nothing about it to him. He asks her out three more times and each time she says "no." The female teacher begins to find love notes from the baseball coach on her car, and flowers are delivered to her classroom. The teacher notices that the baseball coach is frequently walking by her classroom during the day and sometimes following her out to her car at the end of the school day. Uncomfortable, she asks a guidance counselor to walk her to her car each evening and refuses to remain in her classroom alone. When a fellow teacher asks why, she explains that the male baseball coach will not leave her alone.

- Might this behavior constitute a Title IX violation? If so, what type of violation?
 - Yes, the conduct is likely a Title IX violation. The conduct may be considered unwelcome conduct or stalking, both of which are prohibited under Title IX.
- What are the guidance counselor's responsibilities?
 - The guidance counselor must report the conduct to the Title IX Coordinator.
- What supportive measures can be offered to the complainant? To the respondent?
 - Complainant: Escort, different parking spot, different classroom, "no contact" order; Respondent: "no contact" order

Possible Changes & Interpretations

- NOTE: Future guidance from the Department of Education and/or court decisions may affect interpretation of the Title IX regulations.

Questions?