

# UNDERSTANDING AND IMPLEMENTING THE NEW TITLE IX REGULATIONS

**Day 2 of 2**

**November 6, 2020**

## WELCOME BACK!

- We will begin the workshop at 1:30pm.
- I will be taking questions throughout the workshop via the Chat Box – and I will also be posting the links to the handouts and materials in the Chat Box once we begin.
- Participants must complete both Sessions to complete the required training.

# UNDERSTANDING AND IMPLEMENTING THE NEW TITLE IX REGULATIONS

**ROLES, RESPONSIBILITIES, AND LEGAL COMPLIANCE**

# TITLE IX

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## THE DECISION

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## INVESTIGATION

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- After the school has sent the investigative report to the parties but before reaching a determination regarding responsibility, 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.

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## SUBMITTED QUESTIONS



- Decision-makers **must** explain their reasons for excluding any irrelevant proposed questions.

## GRIEVANCE PROCESS

- An objective evaluation of all relevant evidence, inculpatory and exculpatory is required for the grievance process.
- Credibility determinations based upon a person's status as complainant, respondent, or witness must be avoided.
- There must be 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.

## GRIEVANCE PROCESS

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- The grievance process should include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frame.

## GRIEVANCE PROCESS

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- A school must notify the complainant of the range, list, or possible remedies that a school may provide.
- A school must notify the respondent of the disciplinary sanctions a school might impose on the respondent following a finding of responsibility.
- A school's grievance process must state whether the school has chosen to use the preponderance of the evidence standard ~~or the clear and convincing evidence standard~~ for all formal complaints of sexual harassment (including those where employees are respondents).

## GRIEVANCE PROCESS

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- Preponderance of the evidence is one type of evidentiary standard used in a burden of proof analysis. Under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.

## GRIEVANCE PROCESS

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- The grievance process must describe the school's appeal procedures.
- The grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived it.
- Any provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complains of sexual harassment, must apply equally to both parties.

## THE DECISION



- The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding:
  - Responsibility with findings of fact,
  - Conclusions about whether the alleged conduct occurred,
  - Rationale for the result as to each allegation,
  - Any disciplinary sanctions imposed on the respondent, and
  - Whether remedies will be provided to the complainant.
- The written determination must be sent simultaneously to the parties along with information about how to file an appeal.

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## DISCIPLINE

- Discipline may only follow an investigation and a finding of responsibility.

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## REMEDIES

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- Remedies are required to be provided to a complainant when a respondent is found responsible. The remedies must be designed to maintain the complainant's equal access to education and may include the same individualized services described as supportive measures.
- Remedies after a finding of fault may be disciplinary, punitive, and may burden the respondent.

## MAKING CREDIBILITY DETERMINATIONS

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- The Decision-Maker must make written findings as to credibility of witnesses.
- The Decision-Maker must give the testimony and information of each party or witness the degree of importance they reasonably believe it is entitled to receive.

## MAKING CREDIBILITY DETERMINATIONS

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- The Decision-Maker makes credibility determinations based upon:
  - Statements by any other witnesses to the alleged incident.
  - Evidence about the relative credibility of the complainant/respondent:
    - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth.
    - Is corroborative evidence lacking where it should logically exist?

## MAKING CREDIBILITY DETERMINATIONS

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- The Decision-Maker makes credibility determinations based upon:
  - Evidence of the complainant's reaction or behavior after the alleged harassment
    - Were there witnesses who saw that the complainant was upset?
    - Changes in behaviors? Work-related? School? Concerns from friends and family?  
Avoiding certain places?
      - May not manifest until later



## MAKING CREDIBILITY DETERMINATIONS

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- The Decision-Maker makes credibility determinations based upon:
  - Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred.
  - **But:** failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

## MAKING CREDIBILITY DETERMINATIONS

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- The Decision-Maker makes credibility determinations based upon:
  - Other contemporaneous evidence:
    - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
    - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?

## THE DECISION

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- Because the written decision must include findings of fact, along with rationale for the decision, it cannot be generic or non-specific.
  - Details in the written decision are what will prevent and ease questions of the decision's validity.

## THE DECISION

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Outline each allegation investigated, relevant facts, the Decision-Maker's analysis of the facts, and the conclusion(s) reached.

## THE DECISION

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- Keep an open mind until all evidence has been heard.
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the relevant evidence.

## THE DECISION

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- The Decision-Maker must render a sound, reasoned decision on every charge.
- The Decision-Maker must determine the facts in this case based only on the information presented.

## THE DECISION

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- The Decision-Maker must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence.
- The Decision-Maker should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party.

## THE DECISION

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- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the **weight** of the evidence, or its **strength** in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

## THE DECISION

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- Look to all the evidence in total, make judgments about weight and credibility, and then determine whether or not the burden has been met.
  - Include the burden in the final written decision.
    - “The preponderance of the evidence has been met because...”

## THE DECISION

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- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
  - Impact will be a consideration in the remedies phase. Impact is not a consideration in the responsibilities phase.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.

## REMEDIES

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- When considering remedies, the focus is on whether the remedies will be effective to:
  - Stop the harassment from occurring
  - Prevent future harassment
  - Remedy effects on victim

## TITLE IX

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### HOW TO SERVE IMPARTIALLY, CONFLICTS OF INTEREST, AND BIAS

## TITLE IX PERSONNEL

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- Title IX Personnel includes the Coordinator, investigators, decision-makers, and people who facilitate any informal resolution process.
  - All personnel are required to be “free from conflicts of interest or bias against complainants or respondents.”

## TITLE IX PERSONNEL TRAINING

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- Training of Title IX personnel must include training on:
  - the definition of sexual harassment in the Final Rule,
  - the scope of the school's education program or activity,
  - how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable,
  - and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Schools must ensure that decision-makers receive training on any technology to be used at a live hearing, if applicable.

## IMPARTIALITY

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Impartiality is integral to the Title IX formal grievance process.

- Serving impartially includes avoiding the following:
  - Prejudgment of the facts at issue
  - Conflicts of interest
  - Bias
- But what do each of these things mean (and how do you avoid them)?

## IMPARTIALITY

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Prejudgment refers to passing judgment prematurely or without sufficient reflection or investigation. For example:

*A Complainant was crying while making a sexual harassment report. You conclude that because the Complainant was crying when describing the conduct at issue, the Complainant must be telling the truth and the Respondent must be responsible for the actions alleged.*

Neither Complainants reporting sexual harassment, nor Respondents defending against allegations of sexual harassment, should be met with prejudice throughout the Title IX process.



## IMPARTIALITY

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Prejudgment often occurs when allegations involve sexual conduct, sexual history, drugs, and/or alcohol use. Examples of prejudging the facts:

- *The Complainant was drinking at the time of the incident so the investigator presumes his/her recollection of an event is not accurate.*
- *The Respondent and Complainant were in a consensual relationship previously so the Title IX coordinator assumes consent to particular conduct was given.*

## IMPARTIALITY

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Sex stereotypes also often lead to prejudgment – for example:

- *Men are sexually aggressive and/or likely to perpetrate sexual assault.*
- *Women have regret about sexual experiences and are likely lying about sexual assault.*
- *Men cannot be sexually assaulted.*
- *Women complaining about sex harassment are just jumping on the "#MeToo" bandwagon*

## IMPARTIALITY

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How do you avoid prejudging facts?

- ✓ Keep an open mind throughout the investigation process.
- ✓ Wait to hear all of the facts (there are two or more) sides to every story.
- ✓ Seek out additional facts and/or witnesses if you feel yourself jumping to conclusions – facts matter, assumptions do not!

## IMPARTIALITY

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*Ms. Jones is an investigator who conducts Title IX investigations for the school district. Ms. Jones frequently makes statements to her colleagues regarding how provocatively female students on campus dress and that they are “asking” for others to catcall and give them attention. In the case at hand, a female Complainant, who was wearing a crop top during class, reported that her lab partner made sexually harassing comments to her during a lab.*

- In terms of prejudgment of the facts, would you be concerned about Ms. Jones impartiality?

## IMPARTIALITY

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- The decision-maker(s) should not be the subordinates of the Title IX Coordinator.
  - This stems from a concern about pressure to accept investigator recommendations because of the inherent authority of the employment relationship.

## IMPARTIALITY

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- A “conflict of interest” occurs if, within a particular decision-making context, an individual is subject to two coexisting interests that are in direct conflict with each other and the decision-making process is disrupted or compromised in a manner that affects the integrity or the reliability of the outcomes.

## IMPARTIALITY

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- Conflict of interests may arise from family, friendships, employment relationships, financial investments, or other social factors.
  - Let's discuss if the following potential conflicts may affect impartiality:

## IMPARTIALITY

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- *The Title IX Coordinator is close family friends with a Complainant's parents.*
- *The Investigator and Respondent attend the same church.*
- *The Decision-Maker is on the Board of the local SAFE (Sexual Assault and Family Emergencies) Board of Directors.*
- *The Investigator shares news articles on their personal social media with their own commentary that women lie for attention about sexual assault.*

## IMPARTIALITY

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- An **actual** conflict of interest is a direct conflict between one's official duties and responsibilities, and a competing personal interest or obligation.
- A **perceived** conflict of interest is a situation where it could reasonably be perceived that a competing interest could improperly influence the performance of one's official duties and responsibilities.
- A **potential** conflict of interest arises where a personal interest or obligation could conflict with one's official duties and responsibilities in the future.

## IMPARTIALITY

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- **Actual Conflict:** *The Title IX Decision-maker's daughter is the Respondent in a sexual assault case.*
- **Perceived Conflict:** *The Title IX investigator previously had a relationship with the family member of the Respondent.*
- **Potential Conflict:** *The Title IX Coordinator and Complainant co-chair a community organization and socialize outside of work on occasion.*

## IMPARTIALITY

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- A **bias** is a tendency, inclination, or prejudice toward/against someone.
  - Biases are often based on stereotypes, rather than actual knowledge of an individual or a particular circumstance.
  - They are frequently based on a person's gender, race, or sexual orientation.
- In effect, biases are “shortcuts” our mind makes that can result in prejudgments, which lead to improper decisions or potentially discriminatory practices.

## IMPARTIALITY

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- Examples of Bias:
- *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

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- Ways to combat bias:
  - Pay attention to your language
  - Avoid generalizations
  - Question your thinking and challenge your assumptions
  - Listen!

## IMPARTIALITY

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- Understanding bias is particularly important in the Title IX context because:
  - Most evidence is circumstantial rather than direct
  - There are social stigmas associated with sex, alcohol, and drugs
  - Improper sex-based bias is prevalent and prevents reliable outcomes
  - There are also potential biases related to economic status, gender, race/ethnicity, and academic standing

## IMPARTIALITY

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- Illinois “Sample” Jury Instructions:
- *It is your duty to resolve this case by determining the facts based on the evidence and following the law. Your decision must not be based upon speculation, prejudice, or sympathy. Each party should receive your same fair consideration.*

## IMPARTIALITY

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- Illinois “Sample” Jury Instructions:
- *Facts may be proven by evidence or reasonable inferences drawn from the evidence. Evidence consists of the testimony of witnesses you will hear and of exhibits you will read. You should consider all the evidence without regard to which party produced it. You may use common sense gained from your experiences in life, in evaluating what you see and hear during the investigation.*



## IMPARTIALITY

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- Illinois “Sample” Jury Instructions:
- *In evaluating the credibility of a witness, you may consider that witness' ability and opportunity to observe, memory, manner, interest, bias, qualifications, experience, and any previous inconsistent statement or act by the witness concerning an issue important to the case.*

## IMPARTIALITY

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- Illinois “Sample” Jury Instructions:
- *You should not do any independent investigation or research on any subject relating to the case. What you may see or hear outside the investigation is not evidence.*

## IMPARTIALITY

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- Treat all informal reports of sexual harassment equally, regardless of the form of the report or the demographics of the Complainant or Respondent.
- Make no assumptions about the allegations based on the demographics of the Complainant or Respondent.
- Offer supportive measures to Complainants and Respondents equally.

## IMPARTIALITY

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- Keep an open mind and actively listen to all the facts presented.
- View all relevant evidence objectively.
- Remember that each case is unique.

# IMPARTIALITY

*John, a Title IX Coordinator, is a self-professed feminist, a former victim advocate, and regularly blogs about issues of sexual assault. His Twitter bio includes the phrase “Believe all women.” He has supported organizations that work to prevent sexual assault for years.*

- Issue?

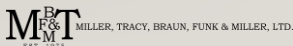


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# IMPARTIALITY

*Betty is an assistant principal who conducts informal resolution for parties that elect it under the formal grievance process. Betty also serves as the school’s athletic director, and was previously the school’s volleyball coach for 15 years. Betty remains an active fundraiser and supporter of the volleyball team. A student (who is a current volleyball player) made a formal complaint alleging that a classmate (the high school starting quarterback with a major scholarship) sexually harassed them in the school library while completing work on a group assignment. The two elect informal resolution.*



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# TITLE IX

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## ISSUES OF EVIDENCE, RELEVANCE AND OTHER PROTECTIONS

# TITLE IX PERSONNEL TRAINING

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Training of Title IX personnel must include training on:

- the definition of sexual harassment in the Final Rule,
- the scope of the school's education program or activity,
- how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable,
- and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

## TITLE IX PERSONNEL TRAINING

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- The regulations require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness.

## EVIDENCE

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**Related-to  
vs.  
Relevant**

### Related-to

Investigator must collect all evidence that is related to the allegations whether or not relevant (excluding evidence subject to privilege, medical records)

### Relevant

Relevant evidence is all evidence related to, except that which is protected under the rape shield provisions (and not otherwise privileged, medical records)

## RELEVANCE

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- **Federal Rule of Evidence No. 401- *Test for Relevant Evidence.***
- 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.

## RELEVANCE

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- The relevance standard is pretty easy to meet.
- It just asks if whether the “evidence” is likely to make the allegation more or less true. While there are other concerns, like whether it might be privileged or hearsay, nearly everything that actually relates to allegation is relevant.

## HEARSAY

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- **Avoid hearsay**

- What does the witness “know” vs what do they have firsthand knowledge of?
- Focus on firsthand information
- What did the witness see or hear?
- If the witness has secondhand information, allow them to present it, but determine who they received it from (because you may need to go talk to the person they heard it from and use the person they heard it from as the witness.)
  - Including social media

## RAPE SHIELD PROTECTIONS

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- A school’s decision-makers and investigators must receive training on issues of evidentiary relevance, including how to apply the rape shield protections provided only for complainants.

## RAPE SHIELD PROTECTIONS

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- Rape shield laws deem questions and evidence about a complainant's prior sexual behavior irrelevant unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.
- Illinois courts have held that a defendant's right to confrontation doesn't include a right to present irrelevant evidence such as the victim's reputation and sexual acts with other people.

## RAPE SHIELD PROTECTIONS

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Questions and evidence about the Complainant's prior sexual behavior are **NOT RELEVANT**, unless offered to prove

- "Mistaken Identity": that someone other than the respondent committed the conduct alleged by the complainant, or
- Consent: concern specific incidents of the complainant's *prior* sexual behavior with respect to the respondent and are offered to prove consent.
- Note that questions about a Complainant's predisposition are never allowed, they are not subject to the exception.



## PRIVILEGED EVIDENCE

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Investigations cannot 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 in writing.

- Patient-doctor
- Attorney-client
- Spousal communication privilege

## PRIVILEGED EVIDENCE

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Treatment records from doctor, psychologist, or any other health or mental health provider may not be used without prior written consent of the party.

## EVIDENCE GATHERING

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- The burden of gathering evidence and the burden of proof is on the school, not the parties.
- Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- Parties must have the same opportunity to select an advisor of the party's choice who may be, but need not be, an attorney.
- Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no "gag orders").
  - Could prevent parties from finding witnesses and could cause First Amendment issues

## EVIDENCE GATHERING

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- Evidence is likely to include physical documents, electronic records, witness statements, and interviews with witnesses.
- Testimony is evidence, and is oftentimes the most important evidence.

## WITNESS STATEMENTS

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- General Guidelines:
  - Witnesses should be instructed to be as specific as possible about dates, times, locations, and events, but should **never** be given prompts or suggestions regarding wording.

## WITNESS STATEMENTS

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- General Guidelines:
  - Witness statements must be legible.
  - Allowing the witness to type their statement may be preferable in certain cases.
  - Statements should be signed and dated by the witness.

## WITNESS STATEMENTS

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- **General Guidelines:**
  - Ideally, witness statements should be given as close to the event in question as possible.
  - The time duration between the event in question and the witness statement should be noted in the investigation notes.

## WITNESS STATEMENTS

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- **General Guidelines:**
  - The investigator should note when and where the statement was given and who was present.
  - The investigator should note whether witnesses had an opportunity to discuss events among themselves before giving statements.

## WITNESS STATEMENTS

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- Witnesses should be allowed to supplement or change their statement upon request.
- Copies of both the “before” and “after” versions of the statement should be maintained.
- Supplementation and/or changes to a witness statement may require additional investigation.

## WITNESS STATEMENTS

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- When witnesses use only first names, last names, or nicknames, the investigator should question the witness and document in writing the full names of each individual.
- Using a copy of the witness statement to document additional information may be helpful.

## WITNESS STATEMENTS

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- When witnesses uses slang or describes events in a manner in which the meaning is not readily apparent, the investigator should question the witness and document in writing the meaning of slang in question
- Using a copy of the witness statement to document additional information may be helpful.

## WITNESS STATEMENTS

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- When witness statements must be redacted, the investigator must take care to preserve an unredacted original.
- When multiple names must be redacted from the same statement, an individual specific “placeholder” or “code” should be inserted for clarity.

## WITNESS STATEMENTS

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- Example (Statement of Student A):
  - “I was walking to class with XXXX when XXXX and XXXX started yelling at us. XXXX then punched XXXX.”
  - “I was walking to class with B when C and D started yelling at us. C then punched B.”

## WITNESS STATEMENTS

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- When multiple witness statements reference the same event, the redaction codes should be standardized across all statements.
  - This means, B should be used across all statements to mean the same person.

## WITNESS STATEMENTS

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- Gender specific pronouns may need to be redacted and replaced with “he/she” or use the person’s “code” like “A’s friend” instead of “her friend”.
- If redaction makes witness statements illegible, consider typing the statement.
- Typing witness statements may also be necessary if there are concerns regarding disclosing witness handwriting.

## WITNESS STATEMENTS

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- If witness statements are typed, they should be reproduced verbatim.
  - Include profanity
  - Include misspelling
  - include poor grammar



## WITNESS STATEMENTS

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- Witness statements are **NOT** a substitute for a thorough investigation, interview, and/or detailed investigation notes.
- Witness statements may not be admissible in every setting and/or may require specific information to be included in the record (such as a legitimate concern of retaliation) before they can be used.

## CONDUCTING INTERVIEWS

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- Consider who should be present during interview:
  - Note taker? –would not necessarily require Title IX training
  - Additional trained investigator?
  - Social worker/counselor? –trauma informed
    - Be very careful to not stack the table with “authority” that may overwhelm or frighten witnesses
- Consider whether additional individuals must or should be included in the interview (parents or union representation).

## CONDUCTING INTERVIEWS

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- Conduct interviews as soon as possible after the event in question
- If time permits, draft or outline questions in advance.
  - Consider having a set of prepared questions that you'll always ask ready at all times. You can then add the situation specific questions to it more quickly.
  - See *PRESS Policy 520-AP for Sample Questions*
- If available, and if time permits, review security footage before the interview.

## CONDUCTING INTERVIEWS

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### Sample of general questioning:

- What happened?
- When did it happen?
- Where did it happen?
- If a witness, do you know what is alleged to have happened? – If so, where were you when it happened?
- If a witness, do you know the respondent and complainant? – If so, how long have you known them and how would you describe them (friend, acquaintance)?
- Have you talked to others about what happened? Who and when?
- Did you write down what happened? (diary [video or otherwise], notes, blog)
- Have you posted or seen anything posted on social media about this incident?

## CONDUCTING INTERVIEWS

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- Interview the complaining party first.
- Interview each participant, victim and/or witness separately.
- Approach each interview individually.
  - Start from the beginning each time.
  - Do not assume facts disclosed in previous interviews.

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## CONDUCTING INTERVIEWS

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- Do not disclose information obtained in separate interviews.
  - If disclosure is necessary, disclose as little as possible.
  - Start with broad questions and move to specific questions.
- Have you ever sexually harassed anyone?
  - Have you had conversations with anyone in your class that could be considered sexual harassment?
  - What occurred in Spanish class last week?
    - What did you say in Spanish class last week to Becky? (here is when disclosure becomes necessary)

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## CONDUCTING INTERVIEWS

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- Avoid making assumptions
- Ask follow-up questions
- Slow and deliberate questions produce better information
- Avoid being accusatory
- Avoid anything that resembles an interview or interrogation from a TV drama.

## CONDUCTING INTERVIEWS

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- Know and respect the difference between an interview and a search
- Students are subject to 4<sup>th</sup> Amendment protection from unreasonable searches.
  - Asking to see photos on phone is a search
  - Asking to see notebook is a search

## CONDUCTING INTERVIEWS

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- Take notes
- Take Notes
- TAKE NOTES
- **TAKE NOTES!!!!**

## CONDUCTING INTERVIEWS

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- Write your interview summaries in narrative form so you can easily include them in the report.
- Be consistent in terminology – clarity is key.
- Be clear as to the source of information – compare:
  - “Bob stated that this happened.”
  - ~~“This happened.”~~

## CONDUCTING INTERVIEWS

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- **Structure of an Interview Summary:**
- Who, when, where, via what medium?
- Did they have an advisor?
- Did you discuss your role? Their role?
- Did you discuss the prohibition on retaliation?

## CONDUCTING INTERVIEWS

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- **Structure of an Interview Summary:**
- **Background:**
  - How does this person connect with the parties and witnesses?
  - Age, year in school?
  - Length of employment, position?

## CONDUCTING INTERVIEWS

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- **Structure of an Interview Summary:**
- Summary of Facts and Evidence
  - Details
  - Direct quotes where possible
  - Include inculpatory and exculpatory information

## CREDIBILITY

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- Credibility is the process of weighing the accuracy and veracity of evidence. To assess credibility, evaluate the source, content, and plausibility of what is offered in light of other evidence.

## CREDIBILITY

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- A decision can still be made that an incident occurred when the evidence of the allegation(s) is credible, even if there were no witnesses to the incident. Put another way, **a preponderance can be established simply because you believe one party and not the other based on the assessment of the credibility of the parties and the evidence provided.**

## CREDIBILITY

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- Credibility is best established through corroboration, which is provided through sufficient independent evidence to support the facts at issue.
- Corroboration is not merely a second witness who agrees with the first witness, because for instance, they could be lying to support each other. Rather, it is evidentiary support for what a witness contends after evaluating source, content, and plausibility.



## CREDIBILITY

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- The behavior continued after the responding party was informed that the behavior was unwelcome. If established, this would add credibility to the reporting party's account as corroborative.

## CREDIBILITY

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- Major inconsistencies in testimony would likely detract from credibility. Minor inconsistencies usually would not detract from credibility, and may even be the result of trauma. Even lying is not a 100 percent credibility killer. We all lie. The job of investigators, as noted earlier, is to determine why someone is lying, or what the lie is about. Lying about alcohol consumption to avoid an alcohol violation does not prove or disprove an underlying interpersonal violence allegation.

## CREDIBILITY

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- A delay in reporting harassment does not detract from credibility. Individuals may delay reporting over fear of retaliation, because they don't know or trust the policy, over fear of being blamed for causing the harassment or incident, not due to a lack of understanding that it was harassment, etc.

## CREDIBILITY

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- Changes in the behavior of a reporting party after an incident might add to credibility. For example, after being harassed, the reporting party cried, was upset, avoided class (or meetings, or certain areas), their academic performance deteriorated, etc.

## CREDIBILITY

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- However the absence of such changes does not mean that the allegation is not credible, only that the individual who complained perhaps has been affected differently, less intensely than others might, or does not express emotions openly.

## CREDIBILITY

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- Documents such as diaries, texts, emails, calendar entries, journals, notes, or letters describing the incident(s) can add to credibility, but can also be manufactured after the fact. The adage, “Trust, but verify,” applies, especially in the age of *www.iphonefaketext.com*.

## CREDIBILITY

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- Telling other people about the incident may add to credibility, but if the accounts provided to others vary meaningfully, that can also undermine credibility or help investigators to identify that a trauma response is in play.
- Other similar allegations about a responding party can add to credibility of the allegation.

## CREDIBILITY

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- The fact that a relationship was at one time or in some aspects consensual does not detract from credibility, nor is it a defense against a subsequent charge of sexual harassment. Consensual relationships can be followed by sexual harassment when one person tries to end the relationship and the other person tries to intimidate the former partner into staying in the relationship. People can be assaulted after consensual sexual acts, or engage in consensual sexual acts after having been assaulted.

## CREDIBILITY

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- The fact that the person who made the allegation(s) did not tell the alleged harasser that the behavior was offensive does not affect credibility. Many people are fearful of doing so.
- Additionally, there is no obligation for the reporting party to inform the responding party that behavior is offensive.

## CREDIBILITY

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- Explanations of why the harassment occurred do not add to credibility. People who have sexually harassed others often acknowledge their behavior but explain and defend it in ways that do not justify their actions.
- To the contrary, such excuses should be seen as admissions of having engaged in sexually harassing behaviors.

## CREDIBILITY

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The following do not add or detract from the credibility of the responding party because they are **irrelevant**:

- Character witnesses. (*“He is such a good guy; I know he would never do that.”*)
- Popularity with staff and other students. (*“Everybody likes him; I just don’t believe he would do that.”*)
- No history of past problems. (*“She’s never been in trouble before.”*)
- Academic performance. (*“But she’s a really good student. Her teachers really like her.”*)

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## CREDIBILITY

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The following do not add or detract from credibility of the reporting party:

- Clothing. (*“Just look at what she was wearing.”*) Clothing does not cause sexual harassment, nor do they give anyone permission to touch someone or make sexual remarks.
- Appearance. (*“She is so pretty; no wonder he did it,”* or *“She is so unattractive! I don’t believe anyone would do that to her.”*)
- Flirting behavior. (*“He’s always flirting with the boys. What did he expect?”*)
- Males as victims. (*“He should have realized she meant it as a compliment.”*)
- Sexual orientation of victims (*“Listen, he came out and told everyone. He should have expected that people would act like this.”*)

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## CONFIDENTIALITY

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### Schools must keep confidential the identity of any individual

- Who has made a report or filed a complaint
- Who has been reported as a perpetrator
- Who has been a witness

### Exceptions

- FERPA
- Legal obligations
  - Mandated reporter
  - Contacting law enforcement
- Carry out the purposes of these regulations
  - Disclosure of identities may be necessary to carry out Title IX investigation

## CONFIDENTIALITY

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- [Letter to Soukup, 115 LRP 18668 \(FPCO 02/09/15\)](#)
- According to the Family Policy Compliance Office, FERPA does not conflict with Title IX's "notice of outcome" requirements outlined in a *Dear Colleague Letter* reported at 111 LRP 23852 (OCR 04/04/11). It concluded that a California district's proposed discrimination procedures, which obligated it to disclose certain information to parents regarding the outcome of its harassment investigations, did not violate FERPA's confidentiality provisions. While FERPA generally prohibits a district from disclosing students' personally identifiable information to third parties without parental consent, there's an exception to this rule in cases involving unlawful discriminatory harassment. A district may inform the parents of a harassment victim of the disciplinary sanction imposed on the perpetrators of the harassment when that sanction directly relates to the victim, such as an order that the harasser stay away from the harassed student.

## CONFIDENTIALITY

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- [Letter to Anonymous](#), 20 FAB 7 (FPCO 2016).
- FCPO advised a district to consider informing all appropriate district officials of FERPA's consent requirements as they pertain to information about bullying incidents at school. Generally, they should avoid answering a parent's question about another student at school when the information sought could be part of the student's education records. Here, a principal allegedly disclosed protected information about a student's involvement in a bullying incident when talking to the parent of another student on the phone. The principal could have avoided the alleged violation by declining to respond to questions regarding another students' educational records.

## TITLE IX

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### REVIEW OF THE GRIEVANCE PROCESS



## GRIEVANCE PROCESS-NOTIFICATION REQUIREMENTS



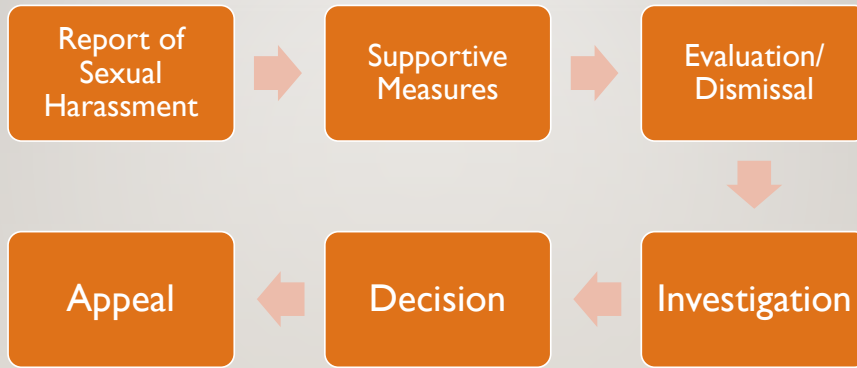
- A school must investigate the allegations in any formal complaint and send written notice to both the complainant and respondent of the allegations upon receipt of a formal complaint.
- Schools must send written notice of any investigative interviews, meetings, or hearings.

## GRIEVANCE PROCESS-NOTIFICATION REQUIREMENTS



- Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence.
- Schools must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond.

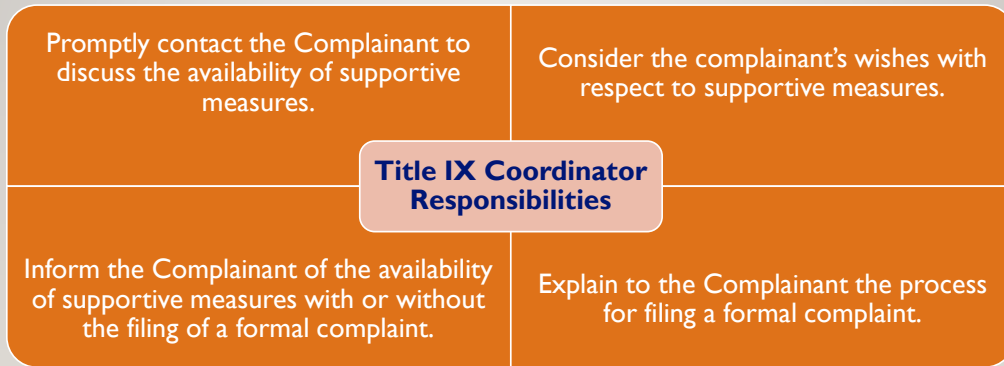
## THE GRIEVANCE PROCESS



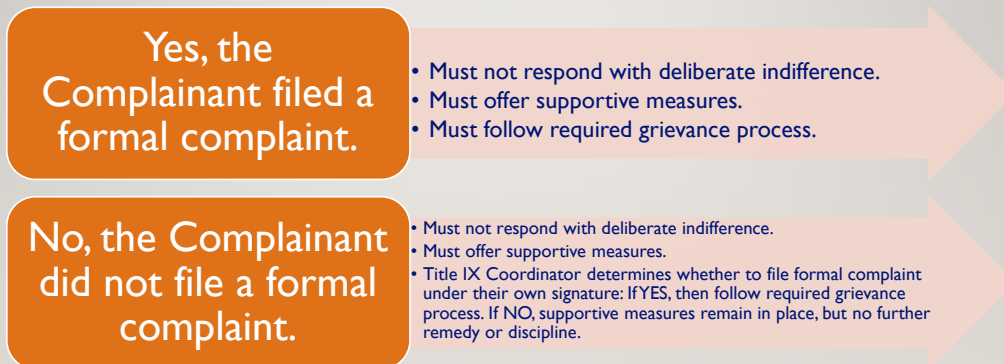
## THE GRIEVANCE PROCESS



# THE GRIEVANCE PROCESS



# THE GRIEVANCE PROCESS



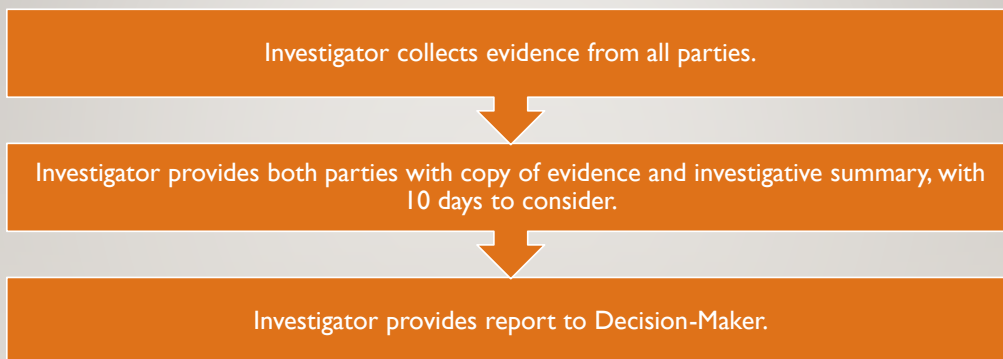
## THE GRIEVANCE PROCESS



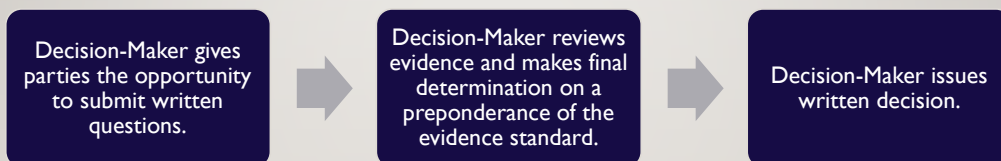
✓ If any are not present, complaint must be dismissed.

✓ Consider other available basis for dismissal.

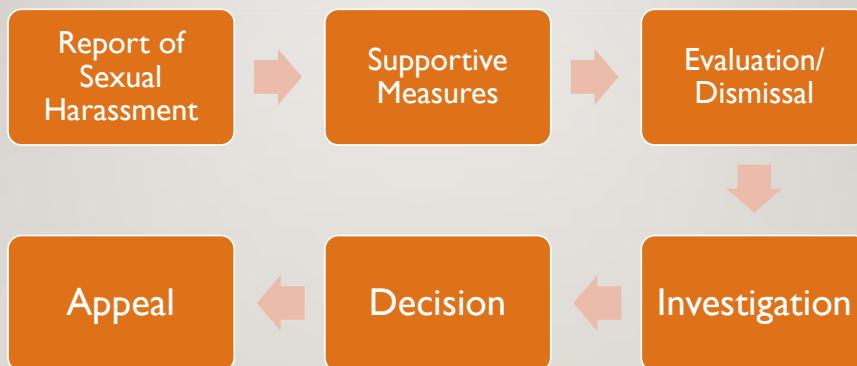
## THE GRIEVANCE PROCESS



## THE GRIEVANCE PROCESS



## THE GRIEVANCE PROCESS



# TITLE IX

## APPEALS PROCEDURE

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## APPEALS



- The school must offer both parties an appeal from a determination regarding responsibility.
- The school must also offer both parties an appeal if the school dismisses a formal complaint or any allegations therein, as well as the following bases:
  - Procedural irregularity that affected the outcome of the matter,
  - Newly discovered evidence that could affect the outcome of the matter, and/or
  - Title IX personnel had a conflict of interest or bias, that affect the outcome of the matter.
- A school may offer an appeal equally to both parties on additional bases as well.

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## APPEALS

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- PRESS procedures provide for 10 school business days after receiving the Initial Decision-Maker's written determination to make a written request to appeal. The written appeal is made to the Title IX Coordinator.

## APPEALS

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- Upon receiving an appeal, the Title IX Coordinator must:
  - Notify the other party in writing of the appeal.
  - Provide both parties 5 school business days to submit a written statement in support of, or challenging, the outcome.
  - Forward these materials to the Appellate Decision-Maker.

## APPEALS

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- Who should the Appellate Decision-Maker be?
- *If it is the Board of Education...*
  - Aligns with Uniform Grievance Procedure
  - Must have required training
  - Concerns about impartiality in other related hearings (i.e., student disciplinary hearing, employee discipline/dismissal)

## APPEALS

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- Who should the Appellate Decision-Maker be?
- *If it is not the Board of Education...*
  - Outside consultant or attorney?
  - Retired administrator?
  - Trained administrator from neighboring school district?
  - Other appellate officer?



## APPEALS

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- Within 30 school business days, the Appellate Decision-Maker will affirm, reverse, or amend the initial decision.
- Appellate Decision-Maker issues a written decision on the appeal transmitted to both parties simultaneously.
- Written decision must include rationale for the result.

## APPEALS

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A Written Determination becomes “final” only after:

- The time period to file an appeal has expired, or
- If a party does file an appeal, after the appeal decision has been sent to the parties.

# TITLE IX

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## INFORMAL RESOLUTION OF COMPLAINTS

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## INFORMAL RESOLUTION

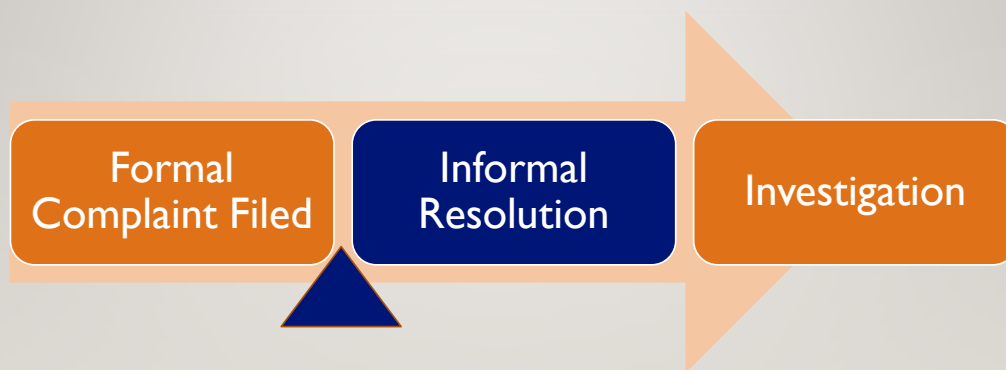
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- Informal resolution may not be used unless a formal complaint has been filed.

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## INFORMAL RESOLUTION

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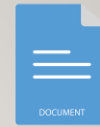


## INFORMAL RESOLUTION

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- Informal resolution may not be used to resolve an allegation that an employee or staff member sexually harassed a student.

## INFORMAL RESOLUTION



- A school has the discretion to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, as long as both parties give voluntary, informed, **written** consent to attempt informal resolution.

## INFORMAL RESOLUTION LIMITS

- A school may not require for admission, enrollment, or employment, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment.

## INFORMAL RESOLUTION

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- If parties agree to participate in an informal resolution process, either may withdraw from the process at any time and resume the grievance process through the formal complaint process as long as it is prior to agreeing to a resolution.

## INFORMAL RESOLUTION

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### **Initial Consideration: Meeting Separately?**

- When issues are very emotional, as they often are in Title IX disputes, keeping parties separate during the facilitating may be the best way for the parties to move forward.
- “Shuttle Diplomacy”

## INFORMAL RESOLUTION

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- (1) Separate the People and the Issues.
  - Understand the other's experiences
  - Identify misconceptions
  - Allow for the communication of emotions
- (2) Focus on interests. - "Your position is something you have decided upon. Your interests are what caused you to so decide." - Parties need to share interests with one another
- (3) Generate options to address interests.

## INFORMAL RESOLUTION

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### Resolution agreements:

- If the parties reach a resolution, **document the terms**.
- Have both parties review the terms.
- Have both parties **sign** the agreement

## INFORMAL RESOLUTION

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If not resolved, then the case returns to the formal investigation track.

## TITLE IX

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PUTTING IT TOGETHER AND PUTTING IT IN PRACTICE:  
NEXT STEPS

## RECORD-KEEPING

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- Schools are required to retain all records regarding a Title IX proceeding for seven years (starting at the date of creation), including proceedings where there was a finding of “no responsibility” or the formal complaint or allegations therein were dismissed.

## RETALIATION

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- Retaliation is expressly prohibited.
- Individuals may not be charged with code of conduct violations that arise out of the same facts or circumstances as a report or formal complaint of sexual harassment for the purpose of interfering with any right or privilege secured by Title IX.



## RETALIATION

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- The exercise of rights protected under the First Amendment **by a party** does not constitute retaliation.
  - A party has the right to discuss the allegations under investigation and a right to gather and present evidence.
  - “[A] recipient should not, under the guise of confidentiality concerns, impose prior restraints on students’ and employees’ ability to discuss the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.
  - A party’s right to publish articles and essays criticizing the handling of the Title IX investigation or approach to Title IX is protected, as long as it is consistent with the First Amendment.

## RETALIATION

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- The **school** must keep confidential the identity of complainants, respondents, and witnesses, except as permitted by FERPA, required by law, or as necessary to carry out a Title IX proceeding.

## RETALIATION

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- A code of conduct charge for an individual making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation.
- A determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith, materially false statement.

## RETALIATION EXAMPLES

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- Conduction violation charges arising from same circumstances of sexual harassment for **the purpose of deterring the Title IX complaint** are retaliation
  - An alcohol consumption conduct violation if respondent does not admit to the sexual harassment claim
  - A physical violence conduct violation for the complainant who tried to fight off aggressor if they don't withdraw their Title IX complaint
  - Any non-compliance violation for not participating in the grievance process
  - A conduct violation for sexual activity on school grounds

## TITLE IX

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- Definition of sexual harassment and the scope and application of Title IX is significantly narrowed under the new regulations. The formal grievance process is triggered only upon the filing of a formal complaint and only if within the strict definition, scope and jurisdiction of the rule.

## TITLE IX

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- The school carries the burden of proof and a respondent is presumed not responsible until application of the grievance process and a determination of responsibility.

## TITLE IX

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- **District Obligations:**

- Update district policies
- Address complainant and provide supportive measures
- Mandatory reporting
- Informal resolution
- Investigation
- Formal grievance process: - Notice - Report - Decision - Appeal

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## TITLE IX

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- **Employee Obligations:**

- Know who the District Title IX Coordinator is (their information will be posted on the school's website)
- Recognize a potential Title IX violation
- Report any potential Title IX violation to the Title IX Coordinator immediately upon receiving notice of it
- Review the district's anti-discrimination and anti-harassment policies as soon as they are updated
- Recognize responsibility to report any acts of retaliation
- Understand supportive measures you may need to help implement

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## TITLE IX

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- Title IX Regulations (Published May 6, 2020; Effective August 14, 2020) regarding sex discrimination, sexual harassment, and sexual assault.
  - Adopt PRESS Policy (and Procedures) ASAP
  - Handbooks – *any need to update, particularly contact info?*
  - Title IX Coordinator + Publish Contact Info
  - Grievance and Complaint Investigation Procedures
  - Both Employee and Student Complaints
  - **TRAINING, TRAINING, TRAINING**

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