

Train the Trainer: Title IX Decision-Maker Training Certification

Oregon School Personnel Association
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Jackie Gharapour Wernz
Partner

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Required Training

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T9SH Training Requirements

- Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must receive training on:
 - **The definition of sexual harassment**
 - **The scope of the education program or activity**
 - **How to conduct an investigation and grievance process including hearings (if used), appeals, and informal resolution processes**
 - **How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias**

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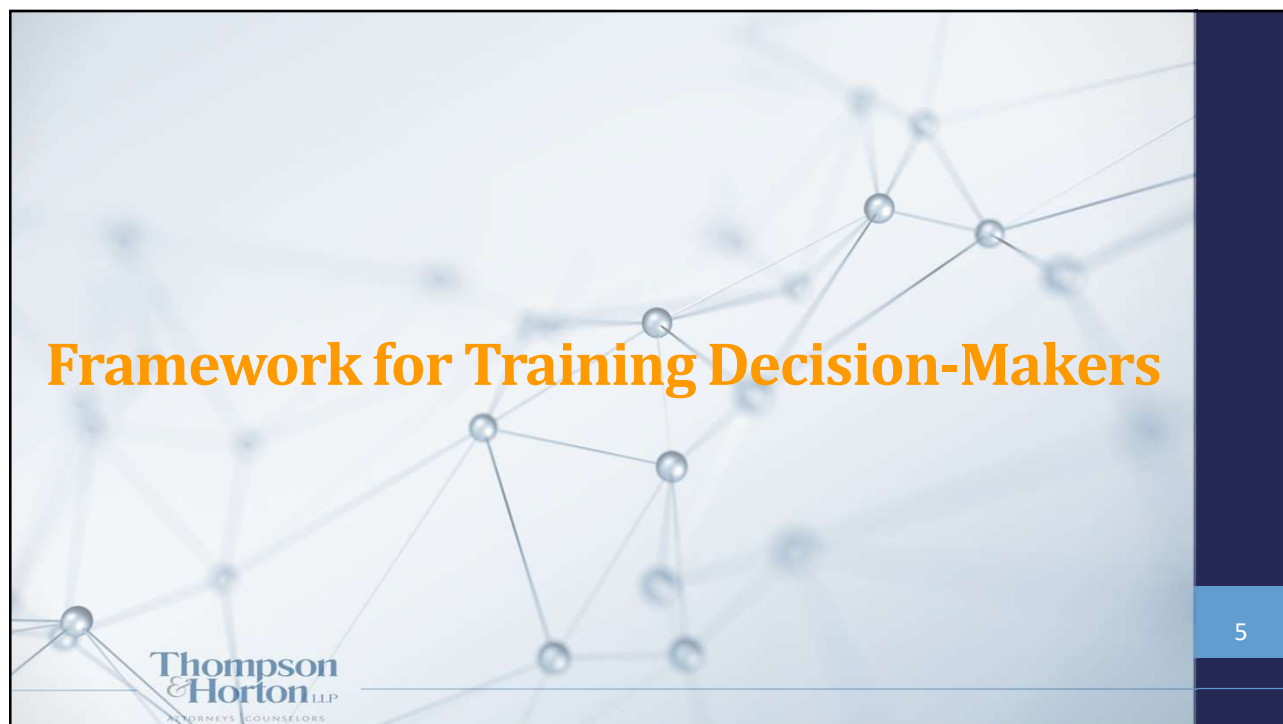
T9SH Training Requirements

- Decision-makers must receive training on:
 - **Any technology used at live hearings (if used)**
 - **Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant**

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Decision-Maker Framework

- **Initial Decision-Maker**
 - Written Cross Examination
 - Relevance Determinations
 - Written Determination
- **Appellate Decision-Maker**
 - Bases for Appeal and How to Apply Them
- **Both**
 - Understanding Relevance
 - Serving Impartially

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INITIAL
DECISION-
MAKER

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Title IX Coordinator

Investigator

Informal Resolution
Facilitator

Decision-maker

Appeal Officer


The same person can do all
three of these roles, but it is
not recommended

Must be two new people –
cannot be the same person,
cannot be the Coordinator,
Investigator, or IR Facilitator


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Initial Decision-Maker




- Must be objective and exercise independent judgment
- Must weigh relevant evidence and decide whether it meets school district’s standard of proof
- Cannot rely on investigator
- Must be free from conflicts of interest or bias:
 - For or against complainants and respondents, generally
 - For or against the individual Complainant and Respondent




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Initial Decision-Maker’s Role



- Submits the Investigation Report to the parties and notifies the parties of the right to submit a written response (unless Title IX Coordinator handles)
- Receives and reviews the Investigation Report, the evidence, and the parties’ written responses to the Investigation Report
- Communicates with Title IX Coordinator about potential need for dismissal based on Investigation Report and/or evidence
- Provides parties notice of the right to submit written questions
- Oversees the written question and answer process, including any follow-up questions and answers
- Prepares and issues a written Determination of Responsibility
- Notifies the parties of the Determination of Responsibility and their right to appeal the Determination



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Initial Decision-Maker Prep

- ✓ Formal complaint
- ✓ All relevant evidence gathered during the investigation
- ✓ Investigative report
- ✓ Written responses submitted by parties



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Title IX Forms for Decision-Making

- ☒ Forms and Documentation
 - ☐ Notice of Investigation Report and Right to Submit Response
 - ☐ Notice of Right to Submit Written Questions
 - ☐ Notice of Answers to Written Questions and Right to Submit Limited Follow-Up Questions
 - ☐ Determination of Responsibility
 - ☐ Letter sending Determination of Responsibility
 - ☐ **Notices of mandatory or discretionary dismissal***





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Investigation Report Notice to Parties

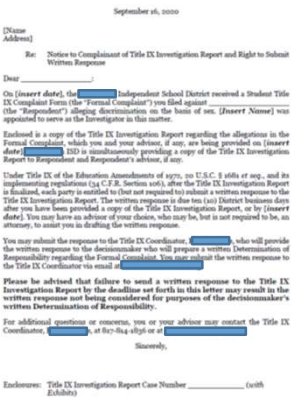
- Provide the parties notice of the Investigation Report and the right to submit a written response
- The Investigation Report needs to be sent to each party and the party’s advisory, simultaneously
- The parties should have 10 District business days to submit a written response






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Notice of Investigation Report and Right to Submit Written Response



- ✓ Notices to both Complainant and Respondent
- ✓ Attaches the Investigation Report and informs the parties that each party is receiving a copy of the Report
- ✓ Advises that each party is entitled to submit a written response to the Report, but the parties are not required to do so
- ✓ Provides the 10-day deadline to submit a written response
- ✓ Advises that failure to submit a written response by the deadline may result in the written response not being considered by the decisionmaker in the Determination of Responsibility



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Written Response to Investigation Report

- Parties are not required to submit a written response
- The Decisionmaker should not make any inferences from a party's decision to submit or not submit a written response
- The Decisionmaker must consider any written response that is timely submitted in the Determination of Responsibility



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Initial Decision-Maker's Review of the Report and Evidence

- The Decisionmaker should review the Investigation Report and all relevant evidence as part of the decision-making process
- The review should apply school district's selected standard of proof: likely the preponderance of the evidence
- The Investigation Report should include all witness testimony and a discussion of the relevant evidence necessary to reach a Determination of Responsibility



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Decisionmaker's Review of the Report and Evidence

- The Decisionmaker should limit review to the Investigation Report and evidence, any evidence submitted by the parties, and the parties' written response
- The Decisionmaker should not conduct further investigation
- If further investigation is needed to reach a Determination of Responsibility, the Decisionmaker should send the matter back to the investigator for completion



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Review the Scope of the Title IX Formal Complaint Process

Remember:

- The Formal Complaint sets forth the scope of the Title IX investigation and the Decisionmaker's Determination of Responsibility
- The investigation should be limited to the allegations in the Formal Complaint
- If the investigation goes beyond the allegations in the Formal Complaint, confirm that both parties have been properly notified of the expanded scope of the allegations



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Decisionmaker's Role in Dismissal of Formal Complaints

- Generally, the Title IX Coordinator will make the dismissal decision
 - Compares the allegations in the Formal Complaint with the definition of sexual harassment and the grounds for mandatory or discretionary dismissal under the Title IX regulations
- In some circumstances, the investigation and evidence may reveal there are grounds for dismissal that were not apparent in the Formal Complaint
- The Decisionmaker should consider **whether dismissal is warranted** before proceeding with the written question and answer process or the preparation of the Determination of Responsibility and notify the Title IX Coordinator if there are concerns

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Training Decision-Makers on Issues of Relevancy and Evidence


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Evidence Submitted by Parties

- Both parties must have the ability to submit evidence and testimony
- This can include expert witness testimony
- Ensure both parties had equal ability to submit evidence
- The parties should be advised that the evidence they submit must be shared with the other party
- Ensure any evidence provided by one party has been provided to the other party and that the other party had an opportunity to respond to the evidence



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Issues of Relevance

- Must objectively evaluate questions and make determinations on relevancy
- Includes inculpatory and exculpatory evidence
 - Inculpatory: tends to provide policy violation
 - Exculpatory: tends to exonerate the accused


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Relevant Evidence


- Train decision-makers to identify **relevant** evidence



(1) Does this evidence apply or relate to a “fact” in this matter?

(2) If so, does it have a tendency to make the fact more or less probable?


If “yes” to both – likely relevant



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Inculpatory Evidence

- Favorable to the Complainant
- Evidence that shows or tends to show an individual’s involvement in an act or indicate their responsibility
 - In the context of a Title IX investigation – it tends to show an individual’s involvement in the alleged sexual harassment
- Evidence tending to incriminate a Respondent or indicate their responsibility



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Exculpatory Evidence

- Favorable to the Respondent
- Evidence that exonerates the Respondent
- Evidence that tends to show the Respondent is not responsible for the alleged sexual harassment incident

Relevance & Rape Shield Protections

- Evidence and questions related to a Complainant's sexual history or prior sexual behavior are **not relevant** to the investigation
 - Does NOT apply to Respondent
- Investigators **MUST** be trained **to not ask questions** regarding the Complainant's previous sexual history or sexual behavior
- Exceptions in two **narrow** circumstances

Relevance & Rape Shield Protections

- Narrow Exceptions:
 1. Offered to prove someone other than the Respondent committed the alleged sexual harassment
 2. Relates to the sexual behavior between the Complainant and Respondent and is offered to prove consent



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Treatment Records

- Do not allow questions that would lead to access, considering, disclosing, or using information from medical records made by a physician, psychologist, or other recognized professional made and maintained in connection with the provision of treatment
- Unless the party gives voluntary, written consent
- CONSIDER: What if the party puts their own records in dispute? Must agree to allow limited, relevant questions for decision-maker to consider the evidence?



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Legally Privileged Information

- Do not allow questions that seek disclosure of legally privileged information, **unless waived**
- Consider:
 - Attorney-client communication
 - Privilege against self-incrimination
 - Confessions to a clergy member or religious figure
 - Spousal privilege



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Cross-Examination




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The Written Q&A Process

After the District sends the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker must afford each party the opportunity to submit written, **relevant** questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

34 C.F.R. § 106.45(b)(6)(ii)






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Hypothetical for Decision-Makers

- Two students at a party after school dance
- Drive to campus, “making out” in car
- Sexual activity happens; Complainant reports that it was sexual assault
- **Are the following questions proper?**



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Hypothetical for Decision-Makers

- You typically have sex after drinking at parties, correct?
- You typically have sex with Respondent after drinking at parties, correct?
- You typically have sex after drinking at parties, correct?
- What date did you begin receiving treatment for anxiety?



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Hypothetical for Decision-Makers

- You told a friend that you reported Respondent because your mom found out that you had sex and was mad at you? What did you say?
- You told your attorney that you reported Respondent because your mom found out that you had sex and was mad at you? What did you say?



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Hypothetical for Decision-Makers

- To witness: You heard from a friend of the Complainant that Complainant reported Respondent because Complainant's mom found out that Complainant and Respondent had sex and was mad at Complainant, correct?
- To Complainant: You were so drunk that you do not know who sexually assaulted you, correct?



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Hypothetical for Decision-Makers

- To Complainant: You and the Respondent had sex again the week after the alleged incident, correct?
- To Complainant: You had sex with your significant other (not Respondent) the next day, correct?




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Appropriate Questions

- Ensure questions are not harassing
- Might include profane, obscene, repetitious questions
- Tread carefully!




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The Written Q&A Process

If the decisionmaker decides that a written question is not relevant and excludes the written question, the decisionmaker must explain to the party proposing the questions the basis for the decision.

34 C.F.R. § 106.45(b)(6)(ii)





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The Written Q&A Process

- A party may submit written questions for the other party or a witness to answer
- Answering party or witness must respond in writing
 - Remember: no duty to cooperate by party or witness and no retaliation for not cooperating**
- Decisionmaker may exclude a party's question if determined it is not relevant
- If question is excluded, the Decisionmaker must explain to the proponent of the question the basis for the decision (i.e., relevance)

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Notice of Right to Submit Written Questions

October 21, 2020

[Name]
[Address]

Re: Notice to Complainant and Respondent of Right to Submit Written Questions Regarding Title IX Formal Complaint

Dear _____,

On (insert date), the _____ Independent School District received a **Written Title IX Complaint Form** (the "Formal Complaint") filed by _____ ("Complainant") against _____ ("Respondent") alleging discrimination on the basis of sex. [Insert Name] was appointed to serve as the Investigator in this matter.

I have been appointed to serve as the Decisionmaker regarding the Formal Complaint.

Please be advised that under 34 C.F.R. § 106.45(b)(6)(iii), you have the right to submit written, relevant questions to me that you want asked of any party or witness. Questions are relevant if they seek information that would have any tendency to make a fact more or less probable than it would be without the information, and the fact is of consequence in determining the Respondent's responsibility or non-responsibility with respect to the allegations in the Formal Complaint. You may have an advisor of your choice, who may be, but is not required to be, an attorney, to assist you in drafting and/or answering the questions.

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

The Written Question and Answer Process

Each party is allowed to submit _____ initial questions to each party and/or witness. The questions must be submitted to me in writing by (insert date) by (insert preferred method of receiving questions). I will determine whether each question is relevant, and will explain to the party proposing the questions my decision to exclude a question as not relevant. Then, I will submit the relevant, written questions to the party or witness from whom an answer is sought. When I receive written answers to the questions, I will provide them to each party.

Each party will, then, be allowed to ask _____ follow-up questions of the party or witness in the same manner. I will submit the relevant, follow-up questions to each party or

- ✓ Advise of the right to submit written questions, and notes the questions must be relevant
- ✓ Define relevance
- ✓ Notify party that an advisor may assist in drafting and answering questions
- ✓ Set forth the standard regarding evidence of prior sexual behavior
- ✓ Explain the Written Q&A Process

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Notice of Right to Submit Written Questions

witness from whom an answer is sought. When I receive the answers to the follow-up questions, I will provide them to each party as well.

I will then consider the answers received, along with the Title IX Investigation Report and any written responses to the Title IX Investigation Report submitted by the parties, in making my determination of responsibility.

For additional questions or concerns, you or your advisor may contact the Title IX Coordinator: _____


Sincerely,

- ✓ Determine if district is going to limit the number of written questions a party may submit
- ✓ Explain that decisionmaker will consider the answers in making the Determination of Responsibility

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The Written Q&A Process



- The Decisionmaker receives the parties' written questions for the other party or any witness
- The Decisionmaker should review the proposed written questions to ensure they seek relevant evidence or information
- The Decisionmaker provides the written questions to the other party or witness for answer


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The Written Q&A Process Relevance Determinations


If the Decisionmaker determines that a question is not relevant:

- The Decisionmaker can exclude that question from the written questions submitted to the other party or witness for answer
- The Decisionmaker should provide written notification to the party submitting the written question that the Decisionmaker deemed the question not relevant, and explain the basis for this determination



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The Written Q&A Process Answers & Non-Answers



- A party's or witness's answer to questions should be in writing and submitted to the Decisionmaker
- The party and witness do not have to cooperate and cannot be compelled to provide a written answer
- The Decisionmaker should not draw any inference from a party's or witness's decision not to answer the questions
- If a party or witness refuses to answer a question, the Decisionmaker may disregard the party's or witness's testimony related to the question

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Notice of Answers & Right to Submit Follow-Up Questions

October 23, 2020

[Name Address]

Re: Notice to Complainant and Respondent of Answers to Written Questions and Right to Submit Limited Follow-Up Questions Regarding Title IX Formal Complaint

Dear _____,

On [insert date], I advised both Complainant and Respondent that they could submit relevant, written questions to me that either of them wanted asked of any party or witness regarding the Title IX Formal Complaint. Enclosed are the written answers I received to the written questions submitted to me.

Under 34 C.F.R. § 106.45(b)(6)(ii), you are also allowed to submit limited, relevant, follow-up questions. Each party is allowed to submit _____ follow-up questions to the party and/or witness from whom an answer is sought. The questions must be submitted to me in writing no later than [insert date] by [insert preferred method of receiving questions]. I will determine whether each question is relevant, and will explain to the party proposing the questions any decisions to exclude a question as not relevant.

Then, I will submit the relevant, written follow-up questions to the party or witness from whom an answer is sought. When I receive written answers to the questions, I will provide the written answers to each party.

As with the initial questions, follow-up questions are relevant if they seek information that would have any tendency to make a fact more or less probable than it would be without the information, and the fact is of consequence in determining the Respondent's responsibility or non-responsibility. You may have an advisor of your choice, who may be, but is not required to be, an attorney, to assist you in drafting and/or answering the questions.

Please remember that questions about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

For additional questions or concerns, you or your advisor may contact the Title IX Coordinator [redacted].

Sincerely,

Enclosure: Answers to Written Questions

- ✓ Provide written answers to questions to all parties
- ✓ Notify parties of right to submit limited follow-up questions
- ✓ District can determine the appropriate number of follow-up questions
- ✓ Remind the parties that the questions must be relevant and the limitations on questions regarding Complainant's prior sexual behavior

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INNOCENT

Determination

GUILTY

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Making a Determination

- Train decision makers to:
 - Remain unbiased and impartial
 - Render a reasoned decision based on evidence
 - Base decisions on relevant evidence
 - Evaluate witness credibility
 - Consider weight of evidence (remember the standard for burden of proof)



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Determination Process


- Decisionmaker must make a conclusion about whether the respondent is responsible for alleged sexual harassment
- May (and often, *must*) make credibility determinations
- Credibility determinations cannot be based on the status as a Complainant, Respondent, or witness
- Decisionmaker cannot rely on stereotypes or preconceived notions regarding complainants or respondents

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Determination Process

- Must apply the district’s established standard of evidence (usually preponderance of the evidence)
- Decisionmaker must issue a written determination of responsibility



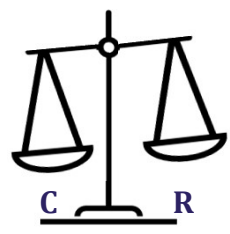
8/25/2020

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Preponderance of the Evidence

- Most districts have elected to use the “preponderance of the evidence” standard
- It is the **school district’s** burden of proof
- **Preponderance of the Evidence:**
 - ☐ A fact is more likely than not to be true; a proposition is more probably true than false
 - ☐ At least 51% of the evidence favors the Complainant



Probability of Truth > 50%

- ☐ Where the evidence is equipoise (i.e., “50/50”) the result is a determination that the Respondent is not responsible


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Written Decision:
The Determination of Responsibility

- Identify the allegations that potentially constitute sexual harassment, as defined
- Describe the procedural steps to date taken by the district in the Title IX Formal Complaint Process, from receipt of the Formal Complaint, through the written determination
- Include findings of fact supporting the determination
- Include conclusions regarding application of District policies, the school’s code of conduct, or other applicable rules to the facts

34 C.F.R. § 106.45(b)(7)(ii)




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Written Decision:
The Determination of Responsibility

- Include a statement of, and rationale for, the result as to each allegation
 - ❖ Determination regarding responsibility
 - ❖ Any disciplinary sanctions imposed on the respondent
 - ❖ Whether remedies designed to restore or preserve equal access to educational program will be provided by the school to the Complainant
- State district’s procedures and permissible bases for a party to appeal the Determination

34 C.F.R. § 106.45(b)(7)(ii)



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Writing the Determination of Responsibility



Get ready – Prepare an Outline

- ❖ Organizes thoughts
- ❖ Assists with logical flow
- ❖ Evaluates where the evidence applies

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Writing the Determination of Responsibility

The Determination must be objective and impartial

- ❖ Concisely state the factual findings– focus on what happened
- ❖ Identify the evidentiary basis for the factual findings
- ❖ If you made reasonable inferences, state the evidentiary basis for those inferences
- ❖ Do not make assumptions
- ❖ Do not state opinions; there should be no editorialization
- ❖ Watch use of adjectives and adverbs

*"The facts, Ma'am.
Just the facts."*



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Writing the Determination of Responsibility



- Stay focused on the subject and purpose of the Determination
- The written Determination should be specific and direct
- Use short, direct, and declarative sentences
- Watch your pronoun usage
- Do not make vague, open-ended, or unsubstantiated findings

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Writing the Determination of Responsibility




- Be thorough, but concise
- Include all relevant, probative facts
- Do not omit relevant information
- Do not include extraneous facts that are unrelated to the allegations in the complaint or any defense
- Ensure that every factual finding you make is accurate and tied to the relevant evidence
- Ensure your conclusions are supported by the factual findings and evidence

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Writing the Determination of Responsibility



- Provide facts/evidence to reconcile conflicting evidence
- Explain any decision not to consider or include certain evidence in the Determination

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Determination of Responsibility



- Provides for responsibility determination—Responsible, Not Responsible, or Responsible, in Part
- There may be multiple allegations or incidents that require discrete responsibility determinations instead of a single determination
- Identify the allegations in the Formal Complaint
- Identify the Complainant’s and Respondent’s current status with the district

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Determination of Responsibility

Respondent:

THE TITLE IX FORMAL COMPLAINT AND FORMAL COMPLAINT PROCESS

[Describe the procedural steps taken from the District's receipt of the initial report/informal complaint through this determination of responsibility, including:]

On *[insert date]*, the Title IX Coordinator received a *[written/oral complaint report]* from *[name of complainant, student, parent or guardian]* (the *Respondent* *[insert name]*) had sexually harassed Complainant *[insert name]* by *[summarize allegations]*.

On *[insert date]*, the Title IX Coordinator reached out to Complainant, discussed supportive measures with Complainant, considered Complainant's wishes regarding supportive measures, and Complainant accepted the supportive measures offered by the District. *[Describe in general terms what supportive measures were offered and accepted. If supportive measures have been accepted, if requests to change supportive measures have been made, and Title IX Coordinator's efforts to implement supportive measures, but do not specify what supportive measures were provided because this is Confidential.]* (OPTIONAL - REMEMBER CONFIDENTIALITY)

On *[insert date]*, the Title IX Coordinator explained the District's Title IX Formal Complaint Process, provided Complainant a copy of Fort Worth ISD's written Title IX Formal Complaint Process document, the District Board policy FTH (LOCAL) (LOCAL), advised Complainant of *[his/her]* right to file a Formal Complaint, and provided the Student Title IX Complaint Form to Complainant.

Complainant submitted *[he/her/his]* Formal Complaint to the Title IX Coordinator on *[insert date]*.

On *[insert date]*, the Title IX Coordinator contacted Respondent and notified *[he/her]* of the allegations in the Formal Complaint. The Title IX Coordinator also explained the Title IX Formal Complaint Process to Respondent, provided Respondent a copy of *[his/her]* written Title IX Formal Complaint Process document, the District Board policy FTH (LOCAL) (LOCAL), and advised Respondent of *[his/her]* rights under the Title IX Formal Complaint Process, including the presumption that *[he/she]* was not responsible.

On *[insert date]*, the Title IX Coordinator also reached out to Respondent and offered Respondent supportive measures and Respondent accepted the supportive measures. *[Describe in general terms what supportive measures were offered and accepted. If supportive measures have been accepted, if requests to change supportive measures have been made, and Title IX Coordinator's efforts to implement supportive measures, but do not specify what supportive measures were provided because this is Confidential.]* (OPTIONAL - REMEMBER CONFIDENTIALITY)

Determination of Responsibility
Page 1 of 1

- Outlines the procedural steps taken from the informal report, through the Formal Complaint Process
- Not required to discuss the offering and provision of supportive measures to Complainant and Respondent
 - But the written Determination is a good way to document the measures district has taken in response to the Formal Complaint
- Discuss the measures in a manner that does not breach confidentiality

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Determination of Responsibility

[Insert name of investigator] was appointed to serve as the investigator in this matter on *[insert date]*.

[Insert name of investigator] conducted *[his or her]* investigation between *[insert dates]*, by interviewing the Complainant, the Respondent, and witnesses and reviewing disciplinary and non-disciplinary evidence presented by the parties or otherwise gathered by the investigator. The procedural details of the investigation are set out in the Title IX Investigation Report, which is attached to this Determination of Responsibility as "Exhibit A."

Prior to completion of the investigation, on *[insert date]* the Investigator met with Complainant, Respondent, and each of their respective advisors, if any, the evidence subject to inspection and review in an electronic format or a hard copy. A copy of the Notice to Complainant and Respondent of Right to Review the Evidence Directly Related to the Allegations in the Title IX Formal Complaint are attached to this Determination of Responsibility as "Exhibit B." Both Complainant and Respondent were provided at least ten (10) business days, until *[insert date]*, to submit a written response to the evidence. The Complainant *[did/did not]* submit a written response regarding the evidence. The Respondent *[did/did not]* submit a written response regarding the evidence. A copy of any written response submitted by the Complainant and/or the Respondent is attached to this Determination of Responsibility as "Exhibit C." The Investigator considered the written responses submitted by the Complainant and/or Respondent prior to completion of the Title IX Investigation Report.

On *[insert date]*, the Title IX Investigation Report with any Exhibits was simultaneously sent to Complainant, Respondent, and each of their respective advisors, if any, in an electronic format or a hard copy for their review and written response. *[Insert name of investigator]* notified both Complainant and Respondent and their respective advisors, if any, that any written response they wished to submit to the Title IX Investigation Report was due no later than ten (10) business days after service of the Title IX Investigation Report, which was *[insert date]*. Complainant and Respondent were notified that failure to send a written response to the Title IX Investigation Report by the deadline might result in the written response not being considered by the Determinator for purposes of the Determination of Responsibility. Copies of the Notice to Complainant and Respondent of the Title IX Investigation Report and Right to Submit Written Response are attached to this Determination of Responsibility as "Exhibit D."

The Complainant *[did/did not]* submit a written response to the Title IX Investigation Report. The written response was submitted on *[insert date]*.

The Respondent *[did/did not]* submit a written response to the Title IX Investigation Report. The written response was submitted on *[insert date]*.

Copies of Complainant's and Respondent's written responses to the Title IX Investigation Report are attached to this Determination of Responsibility as "Exhibit E."

Determination of Responsibility
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- Discusses the investigative process
- Outlines the notice to the parties of the write to submit a response to the Investigation Report and whether the parties did so
- Contains the potential to include exhibits; this is not required, but is a good way to create a single complete record of the process

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Outlines the written Q&A process

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Determination of Responsibility

NOTICE OF RIGHT TO APPEAL AND THE
TITLE IX FORM: COMPLAINT PROCESS APPEAL PROCEDURES

Either Complainant or Respondent may appeal this Determination of Responsibility. The appealing party must submit an appeal by submitting their Appeal of a Determination of Responsibility form electronically to the Title IX Coordinator of the District within ten (10) business days of service of this Determination of Responsibility.

Appeals are permitted only on one or more of the following grounds:

1. A procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time the Determination of Responsibility or dismissal of the Formal Complaint was made, that could have affected the outcome of the matter; and
3. An allegation that the Title IX Coordinator, investigator(s), or decisionmaker(s) had a conflict of interest or bias for or against complainants or respondents generally, or the individual Complainant or Respondent in this matter, that affected the outcome of the matter.

The Appeal must set forth:

- the determination being appealed,
- the specific ground(s) for the appeal, and
- the facts supporting the ground(s) for appeal.

Parties who choose to file an Appeal of a Determination of Responsibility must use the form provided by the District and submit it to the Title IX Coordinator **electronically** at the email address of the Title IX Coordinator.

Date _____

Decisionmaker
[Insert Name]
[Insert Job Position/Title]

Determination of Responsibility
Page 1 of 2

- Provides notice of right to appeal
- Timeline for appeal
- How to submit an appeal
- Permissible bases for appeal
- States the appealing party must use the District's Form

CONSIDER: a link to the appropriate appeal form on District's website

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Disciplinary Sanctions Employee Respondent

- The Decisionmaker can recommend the disciplinary sanction for an employee Respondent
- Ensure the disciplinary sanction recommended is handled appropriately under the District's employment decision process

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Disciplinary Sanctions Student Respondent

- The Decisionmaker can recommend the disciplinary sanction for a student
- Ensure the disciplinary sanction recommended is handled appropriately under Oregon law and the District's general student discipline processes
- Consider developing a process for the Decisionmaker to work with Campus Behavior Coordinators with respect to student disciplinary issues

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Remedies

- The Decisionmaker can recommend any remedies, as necessary, to restore Complainant's equal access to education
- Ensure the recommended remedies are tailored to the situation and can serve to stop any harassment, prevent future harassment, and are tied to ensuring access to education programs and activities
- The Title IX Coordinator implements the remedies

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Notice of Written Decision

- District must provide the Determination of Responsibility to the parties **simultaneously**
- When notifying the parties of the Determination of Responsibility, District must explain the appeal process and permissible grounds for each party to appeal

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Notice of
Determination of Responsibility

October 25, 2020

[Name
Address]

Re: Title IX Determination of Responsibility

Dear _____,

Enclosed please find the written Determination of Responsibility relating to the Title IX Formal Complaint filed on (insert date) that proceeded through the Fort Worth Independent School District's Title IX Formal Complaint Process.

If you are not satisfied with the Determination of Responsibility, you may file a request for an appeal. The Request for Appeal of a Title IX Determination of Responsibility form must be filed no later than (insert date) from your receipt of this letter with the Title IX Coordinator. **You must** If an appeal is not received within ten (10) business days, the Title IX Determination of Responsibility will be final and the Title IX Formal Complaint Process regarding this matter will be closed.

Please be advised that an appeal of the Determination of Responsibility may be sought only upon one or more of the following grounds:

- A procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the written Determination of Responsibility was made, that could affect the outcome of the matter; and/or
- The Title IX Coordinator, investigator(s), or decisionmaker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent in this Title IX Grievance Process that affected the outcome of the matter.

A copy of the **Request for Appeal of a Title IX Determination of Responsibility form** can be found **here**. Title IX website. **EDU's Title IX appeal process is addressed in District Board policy** **here**.

For additional questions or concerns, you or your advisor may contact the Title IX Coordinator **here**.

Sincerely,

Enclosure: Determination of Responsibility

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If No Appeal is Filed

- The provision of the Determination of Responsibility concludes the Decisionmaker's role
- Determination of Responsibility is final and District can implement any recommended sanctions or remedies
- Title IX Formal Complaint Process regarding the Formal Complaint is concluded and should be closed
- Title IX Coordinator works to implement the Determination of Responsibility

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The Appeal Process

**Thompson
& Horton** LLP
ATTORNEYS | COUNSELORS

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Decision-Maker's Role in Appeal

- Review decision-maker on complaint's written determination
- Review appeal document(s)
- Grant parties an opportunity to respond
- Review party responses
- Make independent judgment on appeal questions



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Title IX Appeal Officer Forms

Forms and Documentation

- ☐ Request for Appeal of Dismissal of Title IX Formal Complaint
- ☐ Request for Appeal of Determination of Responsibility
- ☐ Determination of Appeal of Dismissal of Formal Complaint
- ☐ Letter providing Determination of Appeal of Dismissal of Formal Complaint
- ☐ Determination of Appeal of Determination of Responsibility
- ☐ Letter providing Determination of Appeal of Determination of Responsibility



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Appeal Officer

- Decisionmaker on appeal **cannot** be the same decisionmaker from the initial Determination of Responsibility, the investigator, or the Title IX Coordinator
- The Appeal Officer must be free from conflict of interest or bias and must be able to serve impartially
- The Appeal Officer must also receive Title IX training under the regulations
- Appeal Officer must treat the parties equitably
- Appeal Officer must conduct an objective evaluation of the appeal
- Appeal Officer cannot rely on stereotypes or preconceived notions regarding complainants or respondents

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The Title IX Appeal Process

District must offer both parties an appeal regarding:

- (1) a Determination of Responsibility
- (2) the dismissal of a Formal Complaint or any allegations in the Formal Complaint

34 C.F.R. § 106.45(b)(8)(i)



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Appeal Process

- **Three bases for appeal:**
 - (1) Procedural issue affecting the outcome
 - (2) New evidence that wasn't reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome
 - (3) Title IX Coordinator, investigator, or decision-maker had 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



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Procedural Issue

- Failure to follow the rules in policy/procedure
- Can be intentional or inadvertent
- Resulted in inappropriate decision; not always the case



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Procedural Issue

- Would the Title IX Coordinator failing to meet with the Complainant to offer supportive measures affect the outcome? **Yes or no?**
- Would the Investigator failing to provide both parties all directly related evidence before issuing the report affect the outcome? **Yes or no?**

☐ Yes

☐ No






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New Information

- New information
- Not known at the time
- Would change the opinion of the decisionmaker if known
- Not a review of information known at the time



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New Information

- The Respondent was not aware at the time of the investigation that the Complainant previously made a false report by another student the year before. Is this new information sufficient to require an appeal? **Yes or no?**

☐ Yes

☐ No





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Bias/Conflict of Interest

- Bias toward one party or one type of party – personal or institutional
- Conflict of interest – personal or institutional
- Prejudgment of facts (avoid by “showing your work”)




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Bias/Conflict of Interest

- After the investigation, Respondent learns that Complainant’s father works with the investigator’s wife. Their offices are right down the hall from one another, and they sometimes each lunch together. Is this enough to demonstrate a bias or conflict of interest? **Yes or no?**

☐ Yes

☐ No






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The Title IX Appeal Process

- Districts may offer an appeal on additional bases; the ability to appeal on the additional bases must apply to both parties equally

34 C.F.R. § 106.45(b)(8)(ii)



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Appeal of Dismissal of Formal Complaint

Request for Appeal of the Dismissal of a Title IX Formal Complaint

Name of Party Completing Form _____

Date Submitted _____

Either a Complainant or Respondent may appeal the mandatory or permissive dismissal of a Title IX Formal Complaint filed with _____ Independent School District. The appealing party commences an appeal by submitting this Request for Appeal of the Dismissal of a Title IX Formal Complaint form to the Title IX Coordinator within ten (10) business days of service of the Notice of Dismissal of Title IX Formal Complaint.

A Complainant or Respondent may only request an appeal of the dismissal of a Title IX Formal Complaint on one or more of the following grounds:

1. A procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time the dismissal decision was made, that would affect the outcome of the matter; and/or
3. The Title IX Coordinator, investigator(s), or decisionmaker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent in this particular Title IX Formal Process that affected the outcome of the matter.

The Request for Appeal must set forth:

- the determination being appealed;
- the specific ground(s) for the appeal; and
- the facts supporting the ground(s).

Parties who choose to file a Request for Appeal of the Dismissal of a Title IX Formal Complaint must use this form, and submit it to: **the Title IX Coordinator, Kanes, Campus of _____**

Please state the grounds for your appeal below (you may attach additional pages, if necessary):

Appealing Party's Signature _____

- The Form notifies the parties of the permissible grounds for appeal
- The Form states these are the only bases for appeal
- The Form requires the party to identify:
 - ❖ The determination being appealed
 - ❖ The ground(s) for the appeal
 - ❖ The facts supporting the grounds for appeal

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Response to Appeal of Dismissal of Formal Complaint

- Notify both parties that an appeal has been filed
- Notify the parties of the right to submit a written response in support of the dismissal decision, or challenging the dismissal decision
- The Appeal Officer considers the grounds for dismissal, the grounds for appeal, and any written response submitted by the parties
- The Appeal Officer issues a written Determination of Appeal

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Determination of Appeal of Dismissal of Formal Complaint

- Ensure the appeal was timely filed
- Consider the parties' written responses, if any
- Evaluate the permissible grounds for appeal:
 - ❖ Were there procedural irregularities?
 - ❖ Did the procedural irregularities impact the dismissal decision?
 - ❖ Is there new evidence that was not reasonably available at the time of the dismissal decision?
 - ❖ Would the new evidence affect the dismissal decision?
 - ❖ Did the Title IX Coordinator, investigator, or decisionmaker have a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent?
 - ❖ Did the conflict of interest or bias affect the dismissal decision?

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Determination of Appeal of Dismissal of Formal Complaint

**DETERMINATION OF APPEAL OF
DISMISSAL OF TITLE IX FORMAL COMPLAINT**

Case Number: 012345
Complainant: Jane/John Doe
Respondent: John/Jane Doe
Appeal Officer: (First and Last Name)
Date: (Date)

On (insert date), Complainant (insert name) submitted a **Notice Title IX Complaint** (the "Formal Complaint") against Respondent (insert name) alleging discrimination on the basis of sex. Specifically, the Formal Complaint alleges (summarize allegations of sexual harassment, including sufficient details such as the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known).

On (insert date), (insert name) Independent School District dismissed the Formal Complaint under the (mandatory/permissive) dismissal provision of Title IX's implementing regulations because (list the grounds for dismissal set forth in the Notice of Dismissal). The Notice provided both Complainant and Respondent Notice of (Mandatory/Permissive) Dismissal of the Title IX Formal Complaint on (insert date).

On (insert date), the (Complainant/Respondent) filed an appeal of the (mandatory/permissive) dismissal of the Formal Complaint. **The appeal (was/was not) timely filed.** The grounds for the appeal were:

(Summarize the ground(s) for appeal alleged in the Request for Appeal, and then provide some factual detail to flesh out the allegations)

Both Complainant and Respondent were given a reasonable, equal opportunity to submit a written statement in support of, or challenging, the dismissal of the Formal Complaint.

The Complainant (did/did not) submit a written statement regarding the dismissal of the Formal Complaint. The Complainant rebutted (his/her) written statement on (insert date).

The Respondent (did/did not) submit a written statement regarding the dismissal of the Formal Complaint. The Respondent rebutted (his/her) written statement on (insert date).

Determination of Appeal
Page 1 of 2

- Discuss the allegations in the Formal Complaint
- Discuss the dismissal decision and the reasons for dismissal
- Discuss the filing of the appeal and grounds for the appeal
- Confirm the opportunity afforded to the parties to submit a written statement, and whether the parties did so

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Determination of Appeal of Dismissal of Formal Complaint

APPEAL OFFICER'S DECISION:

The implementing regulations for Title IX give both the Complainant and the Respondent the right to appeal the mandatory or permissive dismissal of a Title IX Formal Complaint, but only on the following grounds:

1. A procedural irregularity existed that affected the outcome of the matter;
2. New evidence exists that was not reasonably available at the time the written Determination of Responsibility was made, that could affect the outcome of the matter; and/or
3. The Title IX Coordinator, investigator(s), or decisionmaker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent in this particular Title IX Formal Complaint Process that affected the outcome of the matter.

After consideration of the Formal Complaint, the grounds for (mandatory/permissive) dismissal under Title IX's implementing regulations, Fort Worth ISD's decision to dismiss the Formal Complaint under the (mandatory/permissive) dismissal provision, and any written statements submitted by Complainant and/or Respondent in support of, or challenging, the dismissal of the Formal Complaint, I am (affirming/reversing) the dismissal of the Formal Complaint.

(Explain the result of the appeal and the rationale for the result. Tie the findings to the permissible grounds for appeal listed above.):

(If reversed: The Formal Complaint will now proceed through Fort Worth ISD's Title IX Formal Complaint Process discussed in Board policy _____.)

(If affirmed: This concludes _____ in ISD's Title IX Formal Complaint Process regarding the Formal Complaint.)

Date _____

Appeal Officer
(Insert Name)
(Insert Job Position/Title)

Determination of Appeal
Page 2 of 2

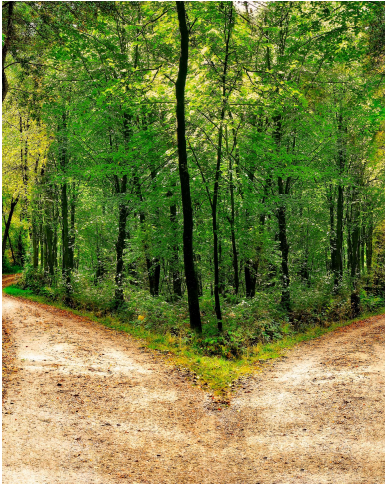
- Reiterates the permissible grounds for appeal
- Affirm or reverse the dismissal of the Formal Complaint
- Explain the reason/rationale for the decision to affirm or reverse the dismissal decision
- Notify the parties of the next steps in the Formal Complaint process based on affirming or reversing the dismissal decision

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Determination of Appeal of Dismissal of Formal Complaint

- If the Appeal Officer affirms the dismissal decision, the Title IX Formal Complaint process is concluded
- The only further action that needs to be taken is notice to the parties of the written Determination of Appeal
- If the Appeal Officer reverses the dismissal decision, the Formal Complaint proceeds through the Title IX Formal Complaint Process
- The matter should be provided to the Title IX Investigator to commence / complete the investigation of the Formal Complaint



8/26/2020

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Notice of Determination of Appeal of Dismissal of Formal Complaint

October 15, 2020

[Name Address]

Re: Title IX Determination of Appeal of Dismissal of Title IX Formal Complaint.

Dear _____,

Enclosed please find the written Determination of Appeal of Dismissal of Title IX Formal Complaint.

[If reversed, The Formal Complaint will now proceed through _____ SD's Title IX Formal Complaint Process addressed to Board policy _____ SD Title IX Investigator will commence the investigation of the Formal Complaint.]

[If affirmed, This concludes Fort Worth ISD's Title IX Formal Complaint Process regarding the Formal Complaint.]

For additional questions or comments, you may contact the Title IX Coordinator, _____.

Sincerely,

Enclosure: Determination of Appeal of Dismissal of Title IX Formal Complaint

Provide the written decision simultaneously to the parties

Notify the parties of the next steps in the Formal Complaint process based on affirming or reversing the dismissal decision

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Appeal of Determination of Responsibility

- Occurs at the conclusion of the Title IX Formal Complaint Process
 - The Formal Complaint has not been dismissed
 - An investigation has been conducted and concluded, and an Investigation Report has been completed
 - The Decisionmaker has conducted the written hearing process (written Q&A) and rendered a decision in the written Determination of Responsibility
- Either party may appeal the Determination of Responsibility
- The appeal must be filed within ten District business days after the Determination of Responsibility

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Appeal of Determination of Responsibility

Request for Appeal of a Title IX Determination of Responsibility

Name of Party Completing Form: _____

Date Submitted: _____

Either a Complainant or Respondent may appeal the Determination of Responsibility rendered by the decisionmaker in the Title IX Formal Complaint Process. The appealing party resumes an appeal by submitting this Request for Appeal of a Title IX Determination of Responsibility form to the Title IX Coordinator within ten (10) business days of service of the written Determination of Responsibility.

A Complainant or Respondent may only request an appeal of the Determination of Responsibility on one or more of the following grounds:

- A procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the written Determination of Responsibility was made, that could affect the outcome of the matter; and/or
- The Title IX Coordinator, investigator(s), or decisionmaker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent in this particular Title IX Formal Complaint Process that affected the outcome of the matter.

The Request for Appeal must set forth:

- the determination being appealed;
- the specific ground(s) for the appeal; and
- the facts supporting the ground(s).

Parties who choose to file a Request for Appeal of a Title IX Determination of Responsibility must use this form and submit it to the Title IX Coordinator, [redacted], at [redacted].

Please state the grounds for your appeal below (you may attach additional pages, if necessary):

Appealing Party's Signature _____

- The Form notifies the parties of the permissible grounds for appeal
- The Form states these are the only bases for appeal
- The Form requires the party to identify:
 - ❖ The determination being appealed
 - ❖ The ground(s) for the appeal
 - ❖ The facts supporting the grounds for appeal

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Response to Appeal of Determination of Responsibility

- Notify both parties that an appeal has been filed
- Notify the parties of the right to submit a written response in support of, or challenging the Determination of Responsibility
- The Appeal Officer considers the Determination of Responsibility, the grounds for appeal, and any written response submitted by the parties
- The Appeal Officer issues a written Determination of Appeal
- The inquiry is not whether the Determination is correct, but whether there are grounds to support the appeal such that further action is warranted

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Response to Appeal of Determination of Responsibility

- Ensure the appeal was timely filed
- Consider the parties' written responses, if any
- Evaluate the permissible grounds for appeal:
 - ❖ Were there procedural irregularities?
 - ❖ Did the procedural irregularities impact the Determination of Responsibility?
 - ❖ Is there new evidence that was not reasonably available at the time of the Determination of Responsibility?
 - ❖ Would the new evidence affect the Determination of Responsibility?
 - ❖ Did the Title IX Coordinator, investigator, or decisionmaker have a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent?
 - ❖ Did the conflict of interest or bias affect the Determination of Responsibility?

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Response to Appeal of Determination of Responsibility

- The Appeal Officer should consider the parties' written statements regarding the appeal
- The Appeal Officer should compare the parties' submissions to the grounds for the appeal
- The Appeal Officer must issue a decision affirming or reversing the Determination of Responsibility
- The written decision must set forth the final decision reached by the Appeal Officer and explain the basis/rationale for the decision

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Determination of Title IX Appeal

DETERMINATION OF TITLE IX APPEAL

Case Number: 45345
Complainant: Jane/John Doe
Respondent: John/John Doe
Appel Officer: [First and Last Name]
Date: [Date]

On [insert date], [redacted] Independent School District issued a Determination of Responsibility in this matter, finding that the Respondent [insert name] [was/were not] responsible for the allegations of sexual harassment in the Title IX Formal Complaint submitted by Complainant [insert name] on [insert date].

On [insert date], the [Complainant/Respondent] filed an appeal of the Determination of Responsibility. The appeal [was/was not] timely filed. The grounds for the appeal were:

[Summarize the grounds for appeal alleged in the Request for Appeal, and then provide some factual detail to flesh out the allegations]

Both Complainant and Respondent were given a reasonable, equal opportunity to submit a written statement in support of, or challenging, the Determination of Responsibility.

The Complainant [did/did not] submit a written statement regarding the Determination of Responsibility. The Complainant submitted [his/her] written statement on [insert date].

The Respondent [did/did not] submit a written statement regarding the Determination of Responsibility. The Respondent submitted [his/her] written statement on [insert date].

APPEAL OFFICER'S DECISION:

The implementing regulations for Title IX give both the Complainant and the Respondent the right to appeal the Determination of Responsibility, but only on the following grounds:

1. A procedural irregularity existed that affected the outcome of the matter;
2. New evidence exists that was not reasonably available at the time the written Determination of Responsibility was made, that could affect the outcome of the matter; and/or
3. The Title IX Coordinator, investigator(s), or decisionmaker(s) had a conflict of interest or bias for or against complainants or respondents generally or

Determination of Title IX Appeal
Page 1 of 2

- Discuss the Determination of Responsibility
- Discuss the filing of the appeal and grounds for the appeal
- Confirm the opportunity afforded to the parties to submit a written statement, and whether the parties did so
- Reiterate permissible grounds for appeal

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Determination of Title IX Appeal

the individual Complainant or Respondent in this particular Title IX Formal Complaint Process that affected the outcome of the matter.

After consideration of the Determination of Responsibility, and any written statements submitted by Complainant and/or Respondent in support of, or challenging, the Determination of Responsibility, I am (affirming/reversing) the Determination of Responsibility.

[Explain the result of the appeal and the rationale for the result. Tie the findings to the permissible grounds for appeal listed above.]

This concludes [redacted] Independent School District's Title IX Formal Complaint Process.

Date: _____

Appel Officer
[Insert Name]
[Insert Job Position/Title]

- Affirm or reverse the Determination of Responsibility
- Explain the result and rationale for affirming or reversing the Determination of Responsibility

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- Provides the parties a written copy of the Appeal Determination
- Notifies the parties the Title IX Formal Complaint process is concluded

October 28, 2000

[Name
Address]

Re: Determination of Title IX Appeal.

Dear _____:

Enclosed please find the written Determination of Title IX Appeal.

The Appeal Office [affirmed/reversed] the Determination of Responsibility. This concludes Fort Worth Independent School District's Title IX Formal Complaint Process.

For additional questions or concerns, you may contact the Title IX Coordinator _____

Sincerely,

Enclosure: Determination of Title IX Appeal

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Recordkeeping/File Maintenance

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Title IX Recordkeeping



Must retain records for **seven** years.
Records must include:

- ❖ Final determination;
- ❖ Any audio/visual records or transcripts;
- ❖ Supportive measures taken or reason for no supportive measures;
- ❖ Sanctions imposed;

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Title IX Recordkeeping



Must retain records for **seven** years. Records must include:

- ❖ Remedies provided;
- ❖ Appeal and result;
- ❖ Informal resolution and result;
- ❖ All training materials; and
- ❖ The basis for the school's conclusion that any response to an allegation of sexual assault was not deliberately indifferent and that it took measures to restore/preserve equal access.

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A Few Additional Points to Remind Decision-Makers

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Treat Parties Equitably

- The Decisionmaker and Appeal Officer must always treat the Complainant and Respondent equitably
- This requires consistent application of principles and process to both Complainant and Respondent
- Each party must have an equal opportunities to present their allegations, responses, and evidence during the Title IX Complaint Process

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Confidentiality & FERPA

Remember:

- The parties must have the opportunity to present evidence and submit written responses
- Therefore, the identity of the parties and witnesses, that might typically be redacted or undisclosed, will need to be provided *to the parties*
- Supportive measures, however, should remain confidential



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Remedies


- The Title IX Coordinator is responsible for effective implementation of any remedies
- Remedies must be designed to **restore or preserve equal access** to the school's educational program or activity
- Need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent
- If a student respondent is found responsible for sexual assault, discipline could include suspension, alternative placement, or expulsion

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Retaliation

- Charges of code of conduct violations that arise out of the same facts or circumstances as a report of sex discrimination or sexual harassment for the purpose of interfering with any right under Title IX constitutes retaliation
- Charges for making a materially false statement is not retaliation if charge is not based solely on outcome of the Title IX Formal Complaint Process
- Notify all parties of the prohibition on retaliation
- Advise of the complaint process for retaliation



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Jackie Gharapour Wernz

Partner

469-421-6619

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jwernz@thompsonhorton.com



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