



TITLE IX 2020 REGULATIONS

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Line Up

- Brief History of TITLE IX
- Compliance with Mandatory Training Provisions

... “receive training on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.”

What is Title IX?

- Title IX of the Educational Amendments of 1972
- Prohibits discrimination on the basis of sex in education programs and activities that receive federal funds
 - *School Districts!*
- Began as enforcement mechanism for gender equity in athletics, then broadened to sexual discrimination
- Until recently, neither Title IX nor its implementing regulations referred to sexual harassment
- Updates become effective August 14, 2020

Sexual Harassment Defined

- Conduct on the basis of sex that is one or more of the following:
 - *Quid pro quo harassment by a district employee*
 - *Hostile environment (newly defined)*
 - *A type of sexual violence defined by federal law*

Quid Pro Quo Sexual Harassment

- Definition: An employee making an aid, service, or benefit of the district conditional on an individual's participation in unwelcome sexual conduct
- NEW: ONLY APPLIES TO EMPLOYEE CONDUCT (not volunteer, another student, etc.)
- Unwelcomeness and severity of conduct is presumed

Hostile Environment Sexual Harassment

■ OLD DEFINITION

- Unwelcome conduct
- Determined by a reasonable person
- To be severe, pervasive, or persistent, and to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities

■ NEW DEFINITION

- Unwelcome conduct
- Determined by a reasonable person
- To be so severe, pervasive, AND objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity

Violence Against Women Act (VAWA) Big 4

- Sexual Assault (20 U.S.C. § 1092(f)(6)(A)(v))
- Domestic Violence (34 U.S.C. § 12291(a)(8))
- Dating Violence (34 U.S.C. § 12291(a)(10))
- Stalking (34 U.S.C. § 12291(a)(3))

- *There is no severe and pervasive requirement for these!*

Required Response

- A recipient (the District)
 - *With actual knowledge of sexual harassment*
 - *In an education program or activity of the recipient*
 - *Against a person in the United States*
 - *Must respond promptly in a manner that is not deliberately indifferent*

❖ 34 C.F.R. § 106.44(a)

Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment to:
 - *Title IX Coordinator*
 - *An official with authority to institute corrective measures*
 - **ANY EMPLOYEE** *of an elementary or secondary school*
 - ❖ This could be a custodian, teacher, bus driver, etc.

What's considered "education program or activity?"

- Location, events, or circumstance where the district exhibits substantial control over both the alleged harasser and the "context" in which the harassment occurred
 - Must be in the United States
- Might include cyberharassment
- This is going to be fact intensive for each case
- Doesn't negate David's Law requirements

Deliberate Indifference

- OLD DEFINITION (OCR Guidance)
 - *The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects*
- NEW DEFINITION (Final Rule)
 - *Failure to respond reasonably in light of known circumstances*



RESPONDING TO A REPORT/COMPLAINT

2 PART RESPONSE

Response after actual knowledge (“report”)

- Even if no formal, written complaint, MUST document response

Response after
“Formal Complaint”

New Terminology

■ Complainant

- Person alleged to be the victim of sexual harassment
- Not necessarily the person reporting
- Parent may act on behalf of minor student

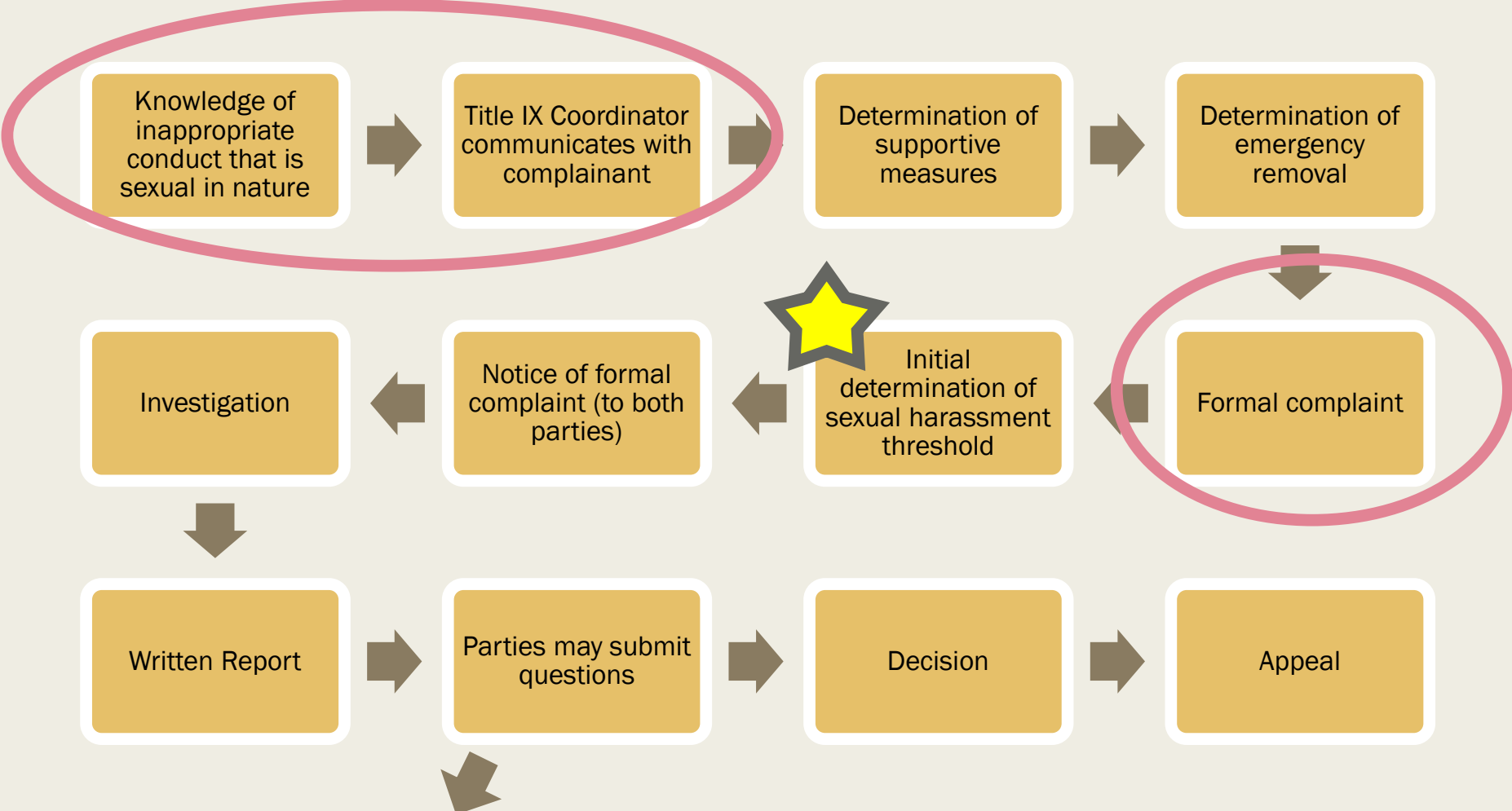
■ Respondent

- Person alleged to be the perpetrator of sexual harassment



New Basic Title IX Process

Much Lengthier Process!



10 days between report and decision to submit questions

Who's involved?



Title IX Coordinator



Investigator



Decision-Maker




Appeal
Decision-Maker



Informal Resolution Facilitator



TITLE IX COORDINATOR



Title IX Coordinator

- Main point of contact regarding Title IX
- Must designate on website and handbooks with name, number, email
- Can have more than one
- Can have deputy Title IX Coordinators
- Supervises the process
 - Assigns investigators
 - Assigns decision-makers, appeal decisions makers
 - Assigns facilitators
 - Ensures compliance with final sanctions

Title IX Coordinator

When a report comes in...

- Contact complainant and respondent to discuss supportive measures
 - To both parties
 - Available with or without a formal complaint
- Use to be called “interim measures”
- Non-punitive
- Individualized services to preserve and restore equal access to education programs/activities

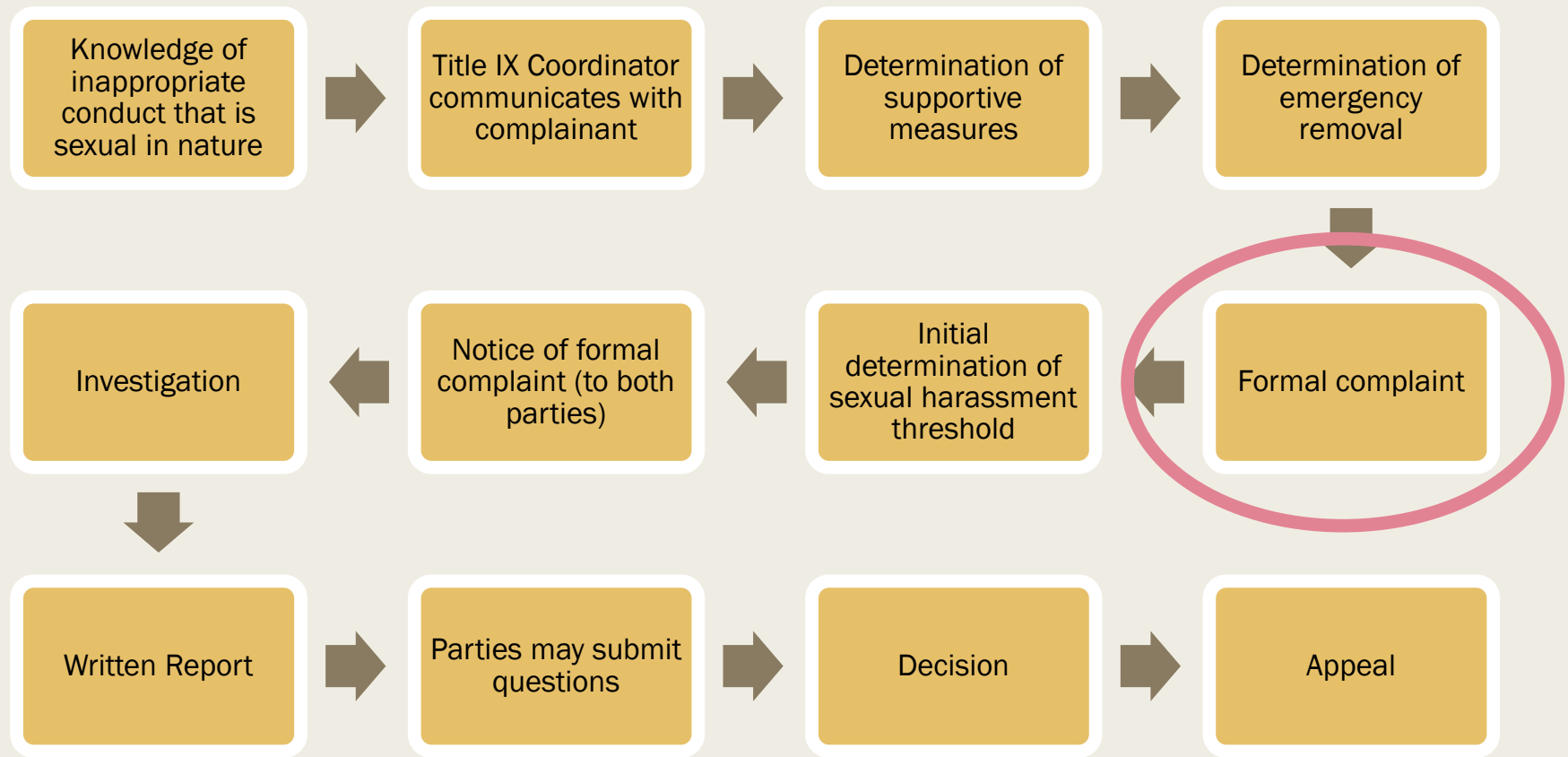
Title IX Coordinator

- Responding to report, cont'd

- Examples (include)
 - Stay away agreements; mutual restrictions
 - Increased monitoring; escort
 - Counseling
 - Extensions of deadlines/course changes
 - Schedule changes
- Explain the complaint process
- Ensure no disciplinary sanctions are put in place against respondent until grievance process is complete
 - However, can take emergency measures
 - Can recommend placing an employee on administrative leave with pay (only the Superintendent can make that placement)

Discipline

- A district's response must treat complainants and respondents equitably by offering supportive measures to a complainant and by following a grievance process that complies with Title IX regulations BEFORE the imposition of any disciplinary sanctions that are not supportive measures against a respondent
- ❖ 34 CFR § 106.44(a)



What is a Formal Complaint?

- A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient (District) investigate the allegation of sexual harassment
 - Can only be submitted by the alleged victim (complainant), the minor victim's parent, or the Title IX coordinator

Formal Complaint Process

12 Basic Requirements

1. Equitable treatment of Complainants and Respondents
2. Objective evaluation of all relevant evidence
3. Requirement that Title IX Coordinator, investigator, decision-maker, or informal resolution facilitator not have a conflict of interest or bias
4. Presumption that the Respondent is not responsible for the alleged sexual harassment until a determination is made at the conclusion of the Title IX formal complaint process

5. Timeframes that provide a reasonably prompt conclusion of the Title IX formal complaint process, including time frames for appeals and any informal resolution process, and that allow for temporary delays or the limited extension of time frames with good cause and written notice as required by law.
6. Description of the possible disciplinary sanctions that may be implemented following a determination of sexual harassment
7. A statement of the standard of evidence to be used to determine responsibility for all Title IX formal complaints of sexual harassment
8. Procedures and permissible bases for the complainant and respondent to appeal a determination of responsibility or a dismissal of a Title IX formal complaint or any allegation therein

9. A description of the supportive measures available to the Complainant and Respondent
10. Prohibition on using or seeking information under a legally recognized privilege unless the individual holding the privilege has waived the privilege.
11. Additional formal complaint procedures required by law including written notice of a formal complaint, consolidation of formal complaints, recordkeeping, and investigation procedures
12. Other local procedures as determined by the Superintendent.

Complaint Form

- Require inclusion of the following elements in the written report
 - *Detailed description of allegations*
 - *Statement that victim believes he/she has experienced sexual harassment*
 - *Statement that victim wishes to institute formal Title IX grievance process*
 - *Signature/date of:*
 - Victim/parent
 - Title IX Coordinator (evidencing date of receipt of grievance)

Title IX Coordinator

Complainant does not wish to file

- Even if a formal complaint is not filed, the school district can investigate and respond to prohibited conduct in accordance with Policy and Student Code of Conduct
 - *Except when threat to community → must investigate*
 - *As long as we can respond to prevent future harassment of Complainant and others, do not have to investigate if Complainant does not want*
 - *And must explain the consequences to the Complainant of not filing a formal complaint*
 - *Document if Complainant does not follow through*

Title IX Coordinator

Complainant does not wish to file, cont.

- Can sign a formal complaint on behalf of complainant
 - *A Complainant's wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing the formal complaint is not clearly unreasonable in light of the known circumstances*
 - *Can also initiate grievance procedures where discipline is appropriate*

Title IX Coordinator

What to do when a complaint is made

- Complaint received
 - Unlike Board Policy FNG, there is no deadline to file
 - Can consolidate
- Must provide written notice to the parties



- ✓ Allegations of sexual harassment
- ✓ Statement that the respondent is presumed NOT responsible for the alleged conduct until a determination is made at the conclusion of the grievance process
- ✓ Inform parties that they may have an advisor of their choice
- ✓ Inform of policy/student code of conduct that prohibits knowingly making false statements/submitting false information during an investigation

Title IX Coordinator

Procedures to Dismiss the Complaint

■ Mandatory Dismissal

- Allegations do not constitute sexual harassment as defined, if true
- Did not occur in District program or activity
 - Consider in person effects of out of activity/program conduct
- Did not occur in the United States

■ Discretionary Dismissal

- Complainant no longer wants to pursue (wants to withdraw)
- Respondent is no longer in the District (enrolled or employed)
- The investigation cannot be completed (e.g., passage of time, lack of cooperation by complainant)

- ❖ Must provide written notice of dismissal and subject to appeal
- ❖ Dismissal does not prohibit addressing issues under non-Title IX policies

After determining viable complaint

Title IX Coordinator is the complaint process over-seer

From Formal Complaint to Completion - approximately 60 days

But things may slow it down

- Law enforcement investigation
- Complexity
- Availability of Evidence
- Global Pandemic
- Other temporary delays for good cause

Title IX Coordinator

Record Keeping

- District must maintain records of each response to report or complaint for 7 years and includes:
 - Investigation records
 - Disciplinary sanctions
 - Remedies
 - Appeals
 - Records of any action taken, including supportive measures
 - Records of informal resolution process

Title IX Coordinator

Record Keeping, cont.

- Must document for every instance:
 - How response was not deliberately indifferent
 - That measures were taken to restore or preserve equal access to the educational program or activity
 - If no supportive measures provided, how that was not deliberately indifferent
- Must also post documentation of training compliance on District's website.



**IMPARTIALITY, BIAS AND
CONFLICT OF INTEREST**

Roles

- Can use District employees in roles or can outsource
- Certain roles are exclusive and individuals in those roles cannot wear multiple hats

Title IX Coordinator



Title IX Coordinator



Investigator



Decision-Maker



Appeal
Decision-Maker



Informal Resolution Facilitator

Investigator



Title IX Coordinator



Investigator



Decision-Maker



Appeal
Decision-Maker



Informal Resolution Facilitator

Decision Maker



Title IX Coordinator



Investigator



Decision-Maker



Appeal
Decision-Maker



Informal Resolution Facilitator

Appeal Decision-Maker



Title IX Coordinator



Investigator



Decision-Maker



Appeal
Decision-Maker



Informal Resolution Facilitator

Informal Resolution Facilitator



Title IX Coordinator



Investigator



Decision-Maker



Appeal
Decision-Maker



Informal Resolution Facilitator

All Roles

- Investigators, Decision-Makers, Appeal Decision-Makers, and Informal Resolution Facilitators must be:
 - *Impartial*
 - *Free from Bias*
 - *Free from Conflict of Interest*

Impartial

- This means being free from bias
- “Treating all rivals and disputants equally; fair and just”
- Neutral
- Nondiscriminatory
 - *Example: Avoid sex stereotyping*
- Decisions based on objective criteria rather than bias, prejudice

Bias

- Concern about “cover-ups” or protection of one person or institution based on who the investigator/decision-maker is and their role
- “Prejudice in favor of or against one thing, person, or group compared with another, usually in a way that is considered to be unfair”
- Perceived does not mean actual

Conflict of Interest

- Aligned interests
- Conflicting interests
- Perceived does not mean actual

Bottom Line

- Go in with an open mind
- Go in with a clean slate
 - *Example: Avoid prejudgment of facts, witnesses, and parties*
- Be free from stereotypes based on anything, including sex stereotypes
- Do you have a conflict of interest? Perceived or real?
- Keep out all personal beliefs
- If you don't think you can do it or should do it... say something!
 - To Title IX Coordinator



INVESTIGATORS

Investigator

- As the title suggests, your job is to investigate the complaint
- However, you are not the Decision-Maker!
- The District has the burden of proof and burden to gather evidence

Investigator: Prepare

- Review the evidence that has been provided
- What are you researching/What are the allegations
- Review allegations within the context of the definition of sexual harassment
- What do you need to know?
- Create a list of needed evidence (changes along the way)
- Create a list of anticipated witnesses (changes along the way)
- Create an outline of questions for witnesses (but listen and adjust as necessary)

**Notes may be discoverable*

- Make sure witnesses have space to share information you may not have asked about specifically

Investigator: Parameters of Investigation

- Procedure
 - Must provide both parties the opportunity to have an advisor
 - Require a party's written consent before using the party's medical, psychological, or similar treatment records
- Interviews
 - Both parties are guaranteed the right to advance notice, in writing, whenever they are invited or expected to participate in an interview, meeting, or hearing
 - Can't restrict the ability of either party to discuss allegations or to gather and present relevant evidence

Investigator: Parameters of Investigation, cont.

- Written Evidence
 - Must give both parties equal opportunities to inspect and review the evidence obtained in the investigation, if the information is directly related to the allegations
 - Must give both parties equal opportunity to present the relevant evidence that they gather
 - Parties must be allowed to submit written questions to be provided to other party
 - Must give both parties a meaningful opportunity to respond to evidence

Investigator: Interviews

- Best practices in questioning the Complainant, Respondent, and Witnesses:
 - Explain the groundwork for conducting the interview and hold all interviewees to the same standards of conduct and decorum
 - Maintain control of the interview, both in the substance of the questions and answers and in the conduct of those in the room (interviewees and their advisors)

Investigator: Interviews, cont.

- Begin with general, more open-ended questions and work your way to more specific questions
 - Generalized questions can go to the elements of the alleged offense
 - Specific questions should be built off documentary evidence evaluated before the interview, information obtained from prior interviews, and other known facts
- Keep in-mind that interviews are meant to determine disputed issues of fact, and questions should be directed at solving the disputed fact questions

Investigator: Findings

- Investigative Reports
 - After gathering evidence, prepare an investigative report on the allegations
 - DO NOT reach a conclusion
- Give both parties at least 10 days to respond to evidence in writing
 - *If response submitted, must consider that response before finalizing investigative report*
- Finalize the investigative report and provided to both parties
 - Still do not reach a conclusion
 - Must fairly summarize relevant evidence

Notes on Evidentiary Standards: Evidence

- What is “inculpatory” and “exculpatory” evidence?
 - Inculpatory evidence shows or tends to show Respondent’s responsibility
 - Exculpatory evidence shows or tends to show the Respondent is not responsible

Notes of Evidentiary Standards: Relevance

- OCR's Title IX Guidance provides, "The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied."
- Federal Rule of Civil Procedure 401 provides a commonly understood definition of relevance:
 - Evidence is relevant if:
 - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - (b) the fact is of consequence in determining the action.

Notes on Evidentiary Standards: Evidence

- Evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless:
 - *such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant;*
 - *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.*

Investigative Report Final Note

- The investigator MUST NOT reach any conclusions—REMEMBER, conclusions in a sexual harassment complaint are reserved for the Decision-Maker
- The purpose of the investigative report is to put the Decision-Maker in the best position to make a thorough, well-reasoned, and supported decision
- Organization and clarity are key in the investigative report
 - The most natural way for a neutral third-party to understand a story is to present it to them chronologically
 - Show your work! Cite to the sources of information gathered in your investigation
 - Proofread to ensure that the investigative report meets the District's standards of professionalism and propriety

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DECISION-MAKERS

Decision-Maker

- Can NOT be the person who received the formal complaint or investigated it, including the Title IX Coordinator
- May not issue written determination of responsibility until investigative report has been circulated to parties for 10 days
- Review evidence
- Assess credibility of evidence/witnesses
 - Be objective in the evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person's status as a Complainant, Respondent, or Witness

Decision-Maker

- Is there a policy violation?
- Cite reasons for conclusion
- Consider punishments/sanctioning
- Responsibilities
 - Must be free from conflicts of interest or bias for or against Complainants or Respondents
 - Must be impartial
 - Needs to use independent judgment
 - Weigh the relevant evidence, and decide whether it meets the school's standard of evidence for sexual harassment allegations

Decision-Maker

- How to determine relevant evidence
 - Does it help to answer the allegations?
 - Is it about the individuals involved?
 - Is it allowable?
 - NO: sexual behavior or predisposition
 - EXCEPT to determine someone other than respondent committed the behavior
 - EXCEPT specific incidents related to complainant and respondent offered to prove consent
 - NO: information protected by legal privilege
 - NO: party's treatment records (absent voluntary consent)

Decision-Maker

- Presumption of innocence
- Standard of evidence (school decides) (must be consistent)
 - Clear and convincing
 - Sufficient evidence has been presented to make it highly probably to be true that the Respondent engaged in the alleged sexual harassment
 - Preponderance of evidence, in TASB's Model Policy
 - More likely than not that the Respondent committed the alleged sexual harassment

■ Written Decision must include:

- Identification of the allegations potentially constituting sexual harassment
- Description of the procedural steps that were taken by the school on the way to getting to that point (notifications to parties, methods used to gather other evidence, etc.)
- Findings of fact supporting the determination
- Conclusions regarding the application of the Code of Conduct to the facts
- Statement of and rationale for the ultimate determination of responsibility for each allegation and any disciplinary sanctions imposed on the respondent
- Statement of and rationale for any remedies for the Complainant, addressing how those remedies will restore or preserve equal access
- Statement of the District's procedures and basis for appeal
 - Can set deadlines for appeal (put in decision)

***Must be sent to the parties simultaneously*

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APPEAL DECISION-MAKER

Appeal Decision-Maker

- Grounds for appeal
 - Dismissal
 - Procedural irregularity affected outcome of the matter
 - New evidence has been discovered that was not reasonably available at the time of the determination on responsibility or dismissal
 - Conflict of Interest of Title IX Coordinator, Investigator, or Decision-Maker, and the conflict of interest affected the outcome
 - Schools can offer additional grounds for appeal, so long as the grounds apply on an equal basis to the parties

Appeal Decision-Maker

- Can NOT be the Decision-Maker, Investigator, or Title IX Coordinator
- Notify parties in writing and implement appeal procedures equally
- Both parties have equal opportunity to submit written statement supporting or challenging the outcome
- After considering parties' written statements, the appeal decision-maker issues a written decision and sends it to the parties simultaneously
- Determination about whether the Respondent is responsible for the sexual harassment **becomes final** after the appeal decision

Retaliation Reminder

- District or any person may not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX because the individual has:
 - *Made a report or complaint*
 - *Testified*
 - *Assisted*
 - *Participated in or refused to participate in any manner in an investigation, proceeding, or appeals*

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INFORMAL RESOLUTION FACILITATORS

Informal Resolution Process

- Only applies after a formal complaint is filed
- Both parties must give voluntary, informed, written consent
- Cannot use if employee – student

- At any time prior to resolution agreement, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint

Facilitators

- If an agreement is reached
 - Put in writing
 - Be specific with the terms so there is not room for misinterpretation
 - Require confidentiality, as permitted by law
 - Insert consequences for breach of terms or breach of confidentiality
- Student Code of Conduct
 - Have check-in provisions?

Additional Title IX resources

- OCR's Title IX Blog will provide updates on an ongoing basis
 - <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>
- Summary of Major Provisions of the Department of Education's Title IX Final Rule
 - <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>
- TASB's Title IX Basics
 - <https://www.tasb.org/services/legal-services/tasb-school-law-resource/students/documents/title-ix-basics.pdf>
- TASB Policy Update 115

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