

New Title IX Requirements

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Summary of changes

- ▶ The regulations defines “sexual harassment” more narrowly than prior case law had done
- ▶ The District must select a burden of proof: either “preponderance of the evidence” or “clear and convincing evidence”
- ▶ The burden of proof is on the District, not the complainant or respondent
- ▶ The District must identify: a Title IX Coordinator; a Title IX investigator; a Title IX decision maker; and a Title IX appeals decision maker
- ▶ Standard for liability for the District is changed to “actual knowledge” of harassment and “deliberate indifference” to that harassment

Summary of changes (cont.)

- ▶ Action may not be taken against a respondent unless a formal complaint is filed
- ▶ Supportive services must be offered to a complainant even if no formal complaint is filed
- ▶ A Title IX complaint may be filed by the Title IX coordinator who receives multiple informal complaints about the same respondent
- ▶ The respondent is entitled to all information secured in the complaint and investigation
- ▶ No confidentiality requirements can be imposed

Summary of changes (cont.)

- ▶ Informal resolution may be offered under certain conditions
- ▶ The District must post on its website: the identity and contact information for the Title IX coordinator; its non-discrimination policy; and its training materials for Title IX
- ▶ New due process requirements for disposition of a complaint, whether by hearing or through written questions

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Sexual harassment defined

- ▶ “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity”
- ▶ This is a more narrow definition than had previously applied
- ▶ Sexual assault, dating violence, domestic violence and stalking are *per se* harassment under the regulations

Sexual harassment defined (cont.)

- ▶ Sexual harassment is defined as “conduct on the basis of sex that satisfies one or more of the following: (1) An employee of the District conditioning the provision of an aid, benefit, or service of the District on an individual’s participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District’s education program or activity; or (3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30)”

Burden of proof

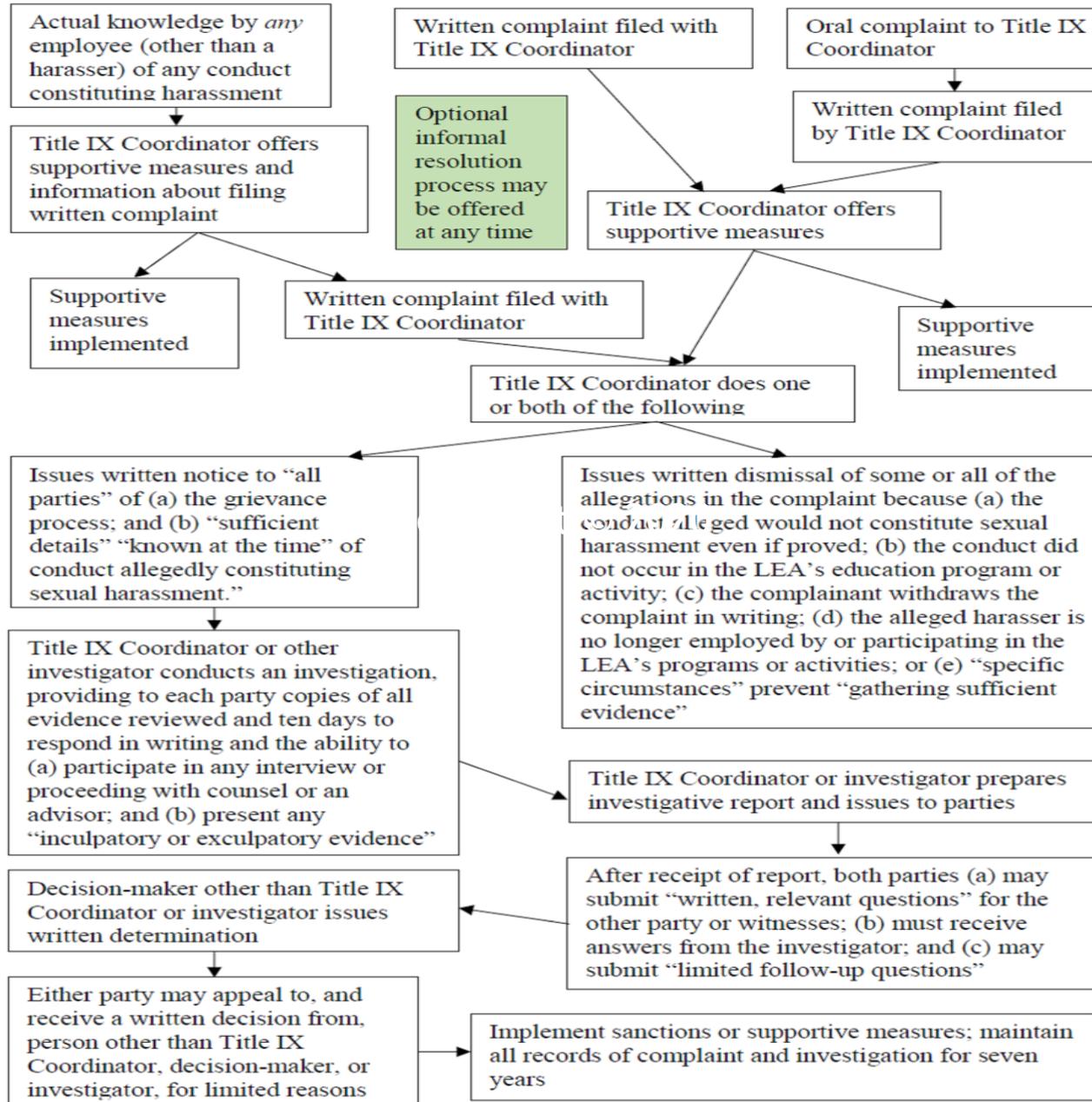
- ▶ District must choose either “preponderance of the evidence” or “clear and convincing” as the standard
- ▶ “Preponderance of the evidence” essentially means that the scales tip one direction or the other
- ▶ “Clear and convincing” essentially means that the allegations are highly likely to be true (it is not “beyond a reasonable doubt”)
- ▶ Whatever standard the District chooses must be utilized for all complaints
- ▶ “Preponderance of the evidence” may not be used as the standard if “clear and convincing” is used as the standard for any other conduct violation

Formal complaint

- ▶ No particular format is required, and any signed, written assertion of harassment may constitute a formal complaint.
- ▶ The Title IX Coordinator may conclude that they should file a formal complaint even if the complainant has not elected to.
- ▶ Even in the absence of a formal complaint, the District must offer supportive services to the complainant, such as a change in class schedule to avoid

Flowchart

The New Title IX Sexual Harassment Investigative Process: Simplified



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Title IX Coordinator

- ▶ Each District must designate at least one employee to be the Title IX Coordinator. The District must provide the Coordinator's or Coordinators' name or title, office address, email address, and phone number to “applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the District”. This information must also be made available, along with the District's anti-discrimination policy, on the District's website and in any handbooks or catalogues provided to any person entitled to receive notification of the Title IX Coordinator's contact information. Additionally, each person entitled to the above notifications must be provided with the grievance process procedures and how the District will respond

Title IX Coordinator (cont.)

- ▶ Must receive Title IX training as to the definition of sexual harassment, the scope of the school's education programs and activities, how to conduct an investigation and grievance process, remaining impartial and free of bias, and the issue of relevance
- ▶ Title IX Coordinators cannot have a conflict of interest or bias for or against Complainants or Respondents generally or individually
- ▶ Must accept complaints by email, mail, or phone. These reports can be made at any time, including during non-business hours, and may be made by anyone, whether or not they are the alleged victim of discrimination

Title IX Coordinator (cont.)

- ▶ The Title IX Coordinator is the only employee who can sign a formal complaint alleging sexual harassment. When signing a formal complaint, the Title IX Coordinator does not become a Complainant or otherwise a party
- ▶ Once a District has actual knowledge, the Title IX Coordinator must respond promptly and in a manner that is not deliberately indifferent. A District is deliberately indifferent if the response is clearly unreasonable given the known circumstances. The Title IX Coordinator must reach out to the Complainant to discuss the availability of supportive measures at no cost, and the process for filing a formal complaint
- ▶ Actual knowledge means notice given to the Title IX Coordinator or to any elementary or secondary school employee

Complaint process

- ▶ Upon receipt of a formal complaint, written notice must be provided to all parties. Such notice shall include:
 - ▶ Notice of grievance process
 - ▶ Notice of the allegations providing sufficient details known at the time, including the names of the parties and dates and locations of the alleged incident(s) if known, as well as sufficient time to prepare a response before any initial interviews
 - ▶ Statement that Respondent is presumed not responsible and that a determination of responsibility will be made at the end of the grievance process

Complaint process (cont.)

- ▶ Notice must also include:
 - ▶ Notice that the parties are entitled to an advisor who may be, but is not required to be, an attorney, and that the parties and their advisors will be entitled to review any evidence obtained as part of the investigation into the allegations
 - ▶ Notice of any provision of school code of conduct that prohibits knowingly submitting false information during the grievance process
- ▶ If in the course of an investigation the District decides to investigate allegations concerning the Complainant or Respondent that are not part of the original notice to the parties, the District must provide notice of the new allegations to the parties who are known

Complaint process (cont.)

- ▶ Complainants and Respondents must be treated equitably, and it is the responsibility of the Title IX Coordinator to coordinate and implement supportive measures for both parties. Supportive measures are non-disciplinary services offered to the parties free of charge, either before or after the filing of a formal complaint, or where no formal complaint has been filed. Supportive measures could include counseling, course-related adjustments, modification of schedules, restrictions of contact between the parties, etc. Parties should be made aware of the range of supportive measure that may be available to them

Complaint process (cont.)

- ▶ A formal complaint must be dismissed for purposes of sexual harassment under Title IX if any of the following is true:
 - ▶ The alleged misconduct would not constitute sexual harassment even if proved
 - ▶ The alleged misconduct did not occur in a school education program or activity
 - ▶ The alleged misconduct did not occur against a person in the United States

Complaint process (cont.)

- ▶ A formal complaint may be dismissed if at any time during the investigation or hearing any of the following is true:
 - ▶ A Complainant notifies the District in writing that they wish to withdraw the complaint
 - ▶ The Respondent is no longer enrolled or employed by the District
 - ▶ Specific circumstances prevent the District from gathering sufficient evidence to reach a determination as to the formal complaint or allegations
- ▶ Any dismissal of complaint requires written notice and the reasons for dismissal simultaneously to the parties

Complaint process side bar

- ▶ Although conduct may not satisfy the definition of “sexual harassment” under Title IX, that does not mean that the conduct is immune from discipline
- ▶ District’s have other Board policies or codes of conduct that may govern the behavior at issue, and under which corrective action may be taken

Complaint process (cont.)

- ▶ Formal complaints may be consolidated as to allegations of sexual harassment against more than one Respondent, or by more than one Complainant against one or more Respondents, or by one party against the other where the allegations of sexual harassment arise out of the same facts or circumstances

Complaint process (cont.)

- ▶ Respondents are considered non-responsible until a determination has been made. Therefore, Districts may not punish or impose sanctions upon a Respondent unless they are determined to be responsible
- ▶ Districts may remove a Respondent from an education program or activity on an emergency basis if, after applying an individualized safety and risk analysis, it is determined that there is an immediate threat to the physical health or safety of another person arising from the allegations of sexual harassment. The Respondent must be given notice and the opportunity to challenge the decision immediately following removal
- ▶ Districts may place non-student employees on administrative leave during the pendency of a grievance process

Title IX Investigator

Responsibilities of an investigator include the following:

- ▶ Receive Title IX training as to the definition of sexual harassment, the scope of the school's education programs and activities, how to conduct an investigation and grievance process, remaining impartial and free of bias, and the issue of relevance
- ▶ Investigators cannot have a conflict of interest or bias for or against Complainants or Respondents generally or individually
- ▶ Do not seek or use evidence or information protected under a legally recognized privilege, unless the person holding the privilege has waived it
- ▶ If during the course of the investigation, it is decided to also investigate allegations concerning either party which were not included in the notice sent to the parties informing them of the original allegations, additional notice must be provided to the parties informing them of the additional allegations
- ▶ The burden of proof and of gathering evidence rests on the school, not on the parties. The standard of evidence is [a preponderance of the evidence]

Title IX Investigator

- ▶ Hold investigative hearings and interviews. Provide equal opportunities for the parties to present witnesses and evidence, both inculpatory and exculpatory
- ▶ Do not restrict either party from discussing the allegations or from gathering and presenting relevant evidence
- ▶ Ensure that the parties have equal opportunity to have others present at any grievance proceeding, including an advisor. Do not restrict the parties' choice of advisor or their presence at any proceeding, although it is permissible to limit the extent to which the advisors may participate in proceedings, so long as restrictions apply equally to both parties
- ▶ Provide written notice of date, time, location, participants and purpose for any hearing, interview, or other meeting, with sufficient time for the parties to prepare
- ▶ Provide the parties with equal opportunity to inspect and review evidence gathered during the investigation that is directly related to the accusations in the formal complaint. This evidence must be sent to the parties and their advisors in electronic format or hard copy prior to completion of the investigative report. The parties must be given at least 10 days to submit a written response, which you will need to take into consideration prior to finalizing the report

Title IX Investigator (cont.)

- ▶ With or without a formal hearing, questions and evidence about a Complainant's sexual predisposition or prior sexual behavior are not relevant unless 1) offered to prove that someone other than the Respondent committed the act alleged in the complaint, or 2) 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
- ▶ Finalize an investigative report that summarizes the relevant evidence. Send a copy of this report, either electronically or hard copy, to the parties and their advisors at least ten days before any hearing or time of determination

Title IX Investigator (cont.)

Gathering Evidence

Suggested questioning

- ▶ Names of all alleged to have committed the discriminatory conduct
- ▶ Complainant's relationship to the Respondent(s)
- ▶ Names and contact information of any witnesses
- ▶ Times and locations of alleged misconduct
- ▶ Is the misconduct ongoing
- ▶ Who has the Complainant told about the alleged misconduct? When and what where they told

Grievance Process

- ▶ Provide reasonably prompt time frames for conclusion of the grievance process including appeals and any informal resolution process. A temporary delay in the grievance process may be instituted with good cause and written notice to the Complainant and Respondent
- ▶ Describe or list the range of possible disciplinary sanction and remedies that may be implemented after a determination of responsibility
- ▶ Indicate the standard of evidence that will be used to determine responsibility, whether it be a preponderance of evidence or clear and convincing evidence. The standard must be the same in all formal complaints of sexual harassment, whether the Respondent is a student or an employee
- ▶ Provide the process and bases for the parties to appeal
- ▶ If also designated as the Investigator, conduct an investigation that adheres to the requirements of §106.45 (see Guidance for Title IX Investigators)

Grievance Process (cont.)

- ▶ Ensure that no information is required to be given that is protected by a legally recognized privilege, unless the person holding the privilege has waived it
- ▶ Ensure that the Decision Maker is not the same person as Title IX Coordinator, Investigator, or Decision Maker on appeal
- ▶ The grievance process for elementary and secondary schools does not need to include a formal hearing. Regardless of whether or not there will be a formal hearing, and upon receipt of the investigative report, the parties must have the opportunity to submit written questions to be asked of any party or witness. Such questions should be answered, with opportunity for limited follow-up questions, before a final determination is made

Grievance Process (cont.)

- ▶ With or without a formal hearing, questions and evidence about a Complainant's sexual predisposition or prior sexual behavior are not relevant unless 1) offered to prove that someone other than the Respondent committed the act alleged in the complaint, or 2) 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
- ▶ Title IX Coordinator is responsible for effectively implementing any remedies after a final determination of responsibility by the Decision Maker

Appeals

- ▶ Both Complainants and the District are entitled to an appeal from the final determination of responsibility and from the District's dismissal of a formal complaint on the following bases: procedural irregularity that affected the outcome; new evidence that could affect the outcome; or bias or conflict of interest on the part of a Title IX Coordinator, Investigator, or Decision Maker that affected the outcome. Appeals may also be offered equally to both parties on other grounds
- ▶ When a party appeals, the District must notify the other party in writing. The Decision Maker in the appeal cannot be the same person as those who serve as Title IX Coordinator, Investigator, or the original Decision Maker
- ▶ Each party shall have the opportunity to submit a written statement supporting or challenging the determination of responsibility
- ▶ A written decision should be issued to the parties simultaneously and include the rationale for reaching the decision

Informal Resolution

- ▶ An informal resolution process can be offered to the parties only after a formal complaint has been filed, and can be entered into with the written consent of all parties at any time prior to reaching a final determination of responsibility. The parties cannot be required to participate in an informal resolution process
- ▶ The District must provide the parties with the allegations, the requirements of the process, including any circumstances under which the parties would then be precluded from resuming the formal complaint, and any consequences resulting from participating in the informal resolution process such as records being maintained or shared
- ▶ Either party may withdraw from the informal resolution process at any time prior to reaching an agreed upon resolution
- ▶ The informal resolution process is not available where there are allegations of an employee sexually harassing a student

Informal Resolution (cont.)

- ▶ The District must keep records of sexually harassment investigations for a period of seven years. This includes:
 - Any determination of responsibility
 - Any audio or audiovisual recordings or transcripts
 - Any sanctions imposed on the Respondent
 - Any remedies provided to the Complainant
 - Any appeal and results thereof
 - Any informal resolution and results thereof
 - All materials used to train Title IX Coordinators, Investigators, Decision Makers, and anyone who facilitates information resolution. These materials must also be made available on the District's website
 - Any actions taken in response to a report of formal complaint of sexual harassment, including supportive measures. In each instance, the District must document the basis for its conclusion that its response was not deliberately indifferent, and document all measures taken to restore or preserve equal access to the District's education program or activity. If supportive measures are not provided to a Complainant, the District must document the reasons why such a response was not clearly unreasonable in light of known circumstances

Informal Resolution (cont.)

- ▶ No District or other person may intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX because that person made a report or complaint, testified or refused to testify or refused to participate in any manner in an investigation, proceeding, or hearing
- ▶ Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation
- ▶ The District must keep confidential the identity of any persons who make a report or complaint of sex discrimination, including a report or formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by statute or required by law to carry out an investigation, hearing, or judicial proceeding

Decision Makers

- ▶ Receive Title IX training as to the definition of sexual harassment, the scope of the school's education programs and activities, how to conduct a grievance process including hearings and appeals, remaining impartial and free of bias, and the issue of relevance
- ▶ Decision Makers cannot serve in any other capacity, i.e. Title IX Coordinator, Investigator, or Decision Maker on appeal
- ▶ Decision Makers cannot have a conflict of interest or bias for or against Complainants or Respondents generally or individually
- ▶ Provide reasonably prompt time frames for the conclusion of the grievance process
- ▶ Describe the range of possible sanctions and remedies that may be implemented following a determination of responsibility
- ▶ State the standard of evidence: [preponderance of the evidence]. This standard must be the same for all formal complaints of sexual harassment

Decision Makers (cont.)

- ▶ The burden of proof rests on the District, not on the parties
- ▶ Parties must receive procedures and bases on which to file an appeal
- ▶ Do not seek or use evidence or information protected under a legally recognized privilege, unless the person holding the privilege has waived it
- ▶ After receiving the Investigator's final report, oversee live hearing
 - Each party's advisor must be allowed to ask the other party and any witnesses relevant questions and follow-up questions, including those challenging credibility
 - Cross examination must be conducted directly, orally, and in real time by a party's advisor, not the party itself. At the request of either party, the live hearing must occur with parties located in separate rooms with technology enabling the Decision Maker and parties to simultaneously see and hear the party or witness answering the questions
 - Only relevant cross examination and other questions may be asked of a party or witness. Before any party or witness answers a question, the Decision Maker must first determine whether it is relevant and explain any decision to exclude a question as not relevant

Decision Makers (cont.)

- If a party does not have an advisor at the live hearing, one must be provided free of charge. This advisor may or may not be an attorney, and will conduct cross examination on the party's behalf
- Questions and evidence about a Complainant's sexual predisposition or prior sexual behavior are not relevant unless 1) offered to prove that someone other than the Respondent committed the act alleged in the complaint, or 2) 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
- If a party or witness does not submit to cross examination at the live hearing, the Decision Maker must not rely on any statement of that party or witness in reaching a determination of responsibility, but the Decision Maker cannot draw conclusions based solely on a party's or witness's absence from the live hearing or refusal to answer cross examination or other questions

Decision Makers (cont.)

- At the District's discretion, any or all parties, witnesses or participants may attend the live hearing virtually, with technology to enable participants simultaneously to see and hear each other
 - The District must create an audio or audiovisual recording or transcript of any live hearing and make it available to the parties for inspection and review
- ▶ Regardless of whether or not there will be a formal hearing, and upon receipt of the investigative report, the parties must have the opportunity to submit written questions to be asked of any party or witness. Such questions should be answered, with opportunity for limited follow-up questions, before a final determination is made

Decision Makers (cont.)

- ▶ With or without a formal hearing, questions and evidence about a Complainant's sexual predisposition or prior sexual behavior are not relevant unless 1) offered to prove that someone other than the Respondent committed the act alleged in the complaint, or 2) the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent. The Decision Maker must explain to the party proposing the questions any decision to exclude a question as not relevant
- ▶ The Decision Maker must issue a written determination regarding responsibility, applying the appropriate standard of evidence. The written determination must include the following:
 - ▶ Identification of allegations potentially constituting sexual harassment
 - ▶ A description of the procedural steps taken from receipt of formal complaint through determination, including any notifications to parties, interviews with parties and witnesses, site visits, methods used to gather evidence, hearings held

Decision Makers (cont.)

- ▶ Findings of fact supporting the determination
- ▶ Conclusions regarding the application of the District's code of conduct to the facts
- ▶ A statement of rationale for each allegation, including a determination of responsibility, any disciplinary sanctions to be imposed on the Respondent, and whether remedies designed to restore or preserve equal access to the District's education program or activity will be provided by the District to the Complainant
- ▶ Procedures and bases to appeal
- ▶ The written determination must be provided to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the District provides the parties with the determination of the result of the appeal, or if an appeal is not filed, it becomes final on the date on which an appeal would no longer be considered timely

Appeals Decision Makers

- ▶ Receive Title IX training as to the definition of sexual harassment, the scope of the school's education programs and activities, how to conduct a grievance process including appeals, remaining impartial and free of bias, and the issue of relevance
- ▶ Appeals Decision Makers cannot serve in any other capacity, i.e. Title IX Coordinator, Investigator, or initial Decision Maker
- ▶ Decision Makers cannot have a conflict of interest or bias for or against Complainants or Respondents generally or individually
- ▶ Both parties must be offered the chance to appeal the determination of responsibility
- ▶ Both parties must be given equal opportunity to submit a written statement in support of or challenging the outcome of the determination of responsibility

Appeals Decision Makers (cont.)

- ▶ Issue a written decision describing the result of the appeal and the rationale behind it
- ▶ The written decision must be provided simultaneously to both parties
- ▶ The determination regarding responsibility becomes final on the date that the District provides the parties with the determination of the result of the appeal

Miscellaneous Notes