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Title IX Targeted Training

Presented by Peacock Keller, LLP
to Trinity Area School District
Administrators In-Service Training
August 18, 2022



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Compliance

- This training is in compliance with the requirements of 34 C.F.R. Section 106.45(b)(1)(iii) and (b)(8)(iii)(C)
 - “Title IX Coordinators, investigators, decision makers [including for appeals], and any person who facilitates an informal resolution process [must] receive training on:
 - the definition of sexual harassment
 - 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
 - how to serve impartially, including through avoiding prejudgment of the facts at issue, conflicts of interest, and bias
 - 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
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence”

“Any materials used to train [the above parties] must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.”



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Compliance

- This training is also in compliance with District Policies 103 and 104, which also require training regarding “how to address complaints when the alleged conduct does not qualify as Title IX sexual harassment but could be addressed under another complaint process or Board policy.”
- In accordance with law and District policy, all training materials must be posted on the District’s website.



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Overall Statement

- Numerous slides herein recommend that consultation with the solicitor is particularly important. However, this should not be taken to mean that the solicitor should not be involved from the inception; we recommend that the solicitor be contacted as soon as a potential Title IX violation is reported. Consult with the Superintendent or his designee about the process to follow for consulting with solicitor.



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District's Obligation

- District must not act with deliberate indifference.
- Failure to appropriately handle a Title IX sexual harassment complaint (or any complaint of unlawful harassment, discrimination or retaliation) can result in liability under other causes of action, including but not limited to **discrimination**.
- “Deliberate indifference” –clearly unreasonable response to alleged conduct, in light of the **known** circumstances
 - Ex: Fail to follow procedures, including investigation and notices
 - Fail to identify conduct as sexual harassment or other violation
 - Fail to pursue complaint when appropriate, even if complainant does not wish to
 - Dismissal of complaint other than for reasons permitted or required by Title IX
 - Fail to offer and document supportive measures**

Avoiding deliberate indifference is the floor, not the ceiling.



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District's Obligation

- Title IX: Actual knowledge of sexual harassment → must respond in a way that is not deliberately indifferent
 - **Actual knowledge** means **notice** of sexual harassment or allegations of sexual harassment to a recipient's (district's) Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, **or to any employee of an elementary and secondary school.**
- 34 C.F.R. § 106.30
- **All employees (and volunteers) must report to the Title IX Coordinator, as soon as possible, potential sexual harassment that they witness, hear about (including from a third party), or of which they receive a complaint.**



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District's Obligation

- The District is deemed to have actual notice when:
 - the Title IX Coordinator receives a report of possible Title IX violation
 - any employee witnesses a possible Title IX violation
 - any employee receives notice of a possible Title IX violation through any other means, including a report of a complainant or witness, a report of a third party, or any other means.



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District's Obligation

- District Policy No. 103 (“Discrimination/Title IX Sexual Harassment Affecting Students”) **requires** employees who suspect or have notice that **a student** has been subject to Title IX sexual harassment or other discrimination or retaliation to report the same to the building principal.
- District Policy No. 104 (“Discrimination/Title IX Sexual Harassment Affecting Staff”) **encourages** employees who suspect or have notice that **“they or others”** have been subject to Title IX sexual harassment or other discrimination or retaliation to report the same to the building principal.



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District's Obligation

- Attachment 3: “District staff who become aware of bullying, hazing, harassment or other discrimination affecting a student or staff member **shall** promptly report it to the building principal.”
- [In any case, if building principal is subject of complaint, the complaint is to be made directly to the Title IX Coordinator.]



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District's Obligation

- Best practice: **All** District employees should be **required** to report when they suspect that any individual protected by law/District policy from Title IX sexual harassment or other harassment, discrimination or retaliation, may have been subjected to the same.



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District's Obligation

- Title IX and other unlawful harassment/discrimination/retaliation issues:
 - Encourage reporting by those not required to report
 - Ensure that all those who can and must report and anyone who could be a complainant have notice of policies prohibiting conduct, understanding of what may be a violation and ways to report
 - Relevant policies and procedures (including Title IX) must be made available to all who could be complainants and all who could/must report
 - Website and personal distribution (student and staff handbooks); *notice to third parties*.



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District's Obligation

- Ensure students, volunteers and employees receive training re: Title IX and other key policies
- Create culture that supports reporting, discourages violations
- Ensure appropriate supervision to avoid violations



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Key Personnel – Must Receive This Training

- **Title IX Coordinator:** Superintendent. If assignment changes, Policy and notifying materials must change
(must assign otherwise if bias or conflict of interest)
- **Investigator:** As designated by District case by case. (“The Title IX Coordinator shall assess whether the investigation should be conducted by the building principal, another district employee, the Title IX Coordinator or an attorney and shall promptly assign the investigation to that individual. The designated investigator, if other than the Title IX Coordinator, shall work with the Title IX Coordinator to assess the scope of the investigation, who needs to be interviewed and what records or evidence may be relevant to the investigation. The investigation stage shall be concluded within 20 school days.”)
- **Facilitator of Informal Resolution Process:** As designated by District case by case.
- **Decision Maker:** Assistant Superintendent (must assign otherwise if bias or conflict of interest)
- **Designated Appeal Authority:** District Solicitor or Outside Counsel



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Key Personnel – Must Receive This Training

- Compliance Officer: Extraneous position listed in policies. Significant re-working of assignment of roles in Attachment 2 recommended in this regard.



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Key Personnel – Must Receive This Training

- Note: The personnel who fill the aforementioned positions have been designated by District Policy to do so. The District may change these assignments by policy, as long as the Title IX Coordinator/investigator, decision maker and appeal authority are all separate roles.
- Different personnel must also be assigned case-by-case in event of bias or conflict of interest, including if one of the individuals filling one of the roles is the subject of the complaint.



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Bias and Conflict of Interest

- None of the aforementioned parties may have a conflict of interest or bias for or against:
 - complainants or respondents generally
 - an individual complainant or respondent in a particular matter

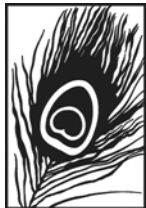


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Bias and Conflict of Interest

- Question of whether bias exists is based on a common sense evaluation of whether a reasonable person would believe bias is present.
- 85 FR 30248



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Bias and Conflict of Interest

- Cannot treat a party differently based on his or her sex or stereotypes about how men or women behave with respect to sexual violence.

85 FR 30238-40

Cannot ignore, blame or punish an individual based upon stereotypes about him or her

85 FR 30496

“The Department’s conception of bias is broad and includes bias against an individual’s sex, race, ethnicity, gender identity, disability or immigration status, financial ability, socioeconomic status or other characteristic.” 85 FR 30084 (***Prohibited bias in the Title IX process.***)



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Bias and Conflict of Interest

- In other words:
 - decide the matter **only on its merits**, not on any extraneous characteristics or biases
 - treat parties at all stages of the proceedings in accordance with **law and policy/procedures**, not based on any extraneous characteristics or biases



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Bias and Conflict of Interest

- The prior professional experience of an individual that a District would like to have in a Title IX role need not disqualify the individual from obtaining the requisite training to serve impartially.
- 85 FR 30252
- However...



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Bias and Conflict of Interest

- Whether a Title IX personnel has a bias and/or conflict of interest is determined on a **case-by-case basis**, and any combination of the experiences or affiliations **may** constitute bias and/or conflict of interest, depending on the circumstances



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Bias and Conflict of Interest

- **The District's grievance process must require an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence, and provide that credibility determinations may not be based on a person's status as a complainant, respondent or witness.**
- **It must not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding the privilege has waived the privilege.**



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Bias and Conflict of Interest

- The Department leaves the determination of conflict of interest in the discretion of the District.
- Bias and conflict of interest are decided on a case-by-case basis.
- Conflict of interest examples:
 - Decision maker/appeal decision maker's family member was witness
 - Investigator/decision maker/appeal decision maker accepted concert tickets from complainant or respondent
 - ***Financial/power dynamics unrelated to facts of case***



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Bias and Conflict of Interest

- **KEY: All decisions must be made on basis of the *facts/relevant evidence, no extraneous factors (bias, conflicts, etc.)***
- ***Procedures could be prepared to include:***
 - a way for the parties and Title IX Team members to report bias and COI
 - a way for Title IX Team members to disclose potential bias and COIs
 - written guidelines for assessing bias and COI stating that a determination will be based on **objective** facts, and not on generalizations, stereotypes, suspicions, or conclusions
 - an objective standard for determinations like whether “based on objective facts, a reasonable person would believe that a COI exists”
 - statement that disagreement with an outcome is generally insufficient to demonstrate bias or a COI
 - analysis should be case-specific and should not be unreasonably assumed, such as based solely on the person’s research or advocacy background
- Source: Strassberger McKenna



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Bias and Conflict of Interest

- The Title IX Coordinator can serve as the investigator and/or informal resolution facilitator, but not the decision maker or appeal decision maker.
- The decision maker cannot serve in another role.
- The appeal decision maker cannot serve in another role.



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Bias and Conflict of Interest

- Cannot **pass judgment** on the allegations presented by either party or witnesses.
- Cannot **jump to any conclusions** without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties involved.
- Necessitates a broad prohibition on **sex stereotypes** -- decisions **must** be based on individualized facts, and not on stereotypical notions of what “men” and “women” do or not do



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Bias and Conflict of Interest

- **Title IX Coordinators and other personnel should not apply a “start by believing” approach** *Doing so would violate the requirement to “serve impartially.” 85 FR 30254. “The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment must not be prejudged and must be based on objective evaluation of the relevant evidence.” 85 FR 30254.*



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Bias and Conflict of Interest

- The Department **permits** institutions to apply **trauma-informed practices**, so long as doing so does not violate the requirement to serve impartiality and without bias
- It is possible, “albeit challenging,” to apply trauma-informed practices in an impartial, non-biased manner
- Any trauma-informed techniques must be applied equally to all genders 85 FR 30256, 30323



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Bias and Conflict of Interest

- Any and all stereotypes must be checked at the Title IX door.
- Leave behind any prior experiences, whether that be from past Title IX proceedings or personal experiences.
- Approach the allegations (of both parties) with neutrality at the outset.
- Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of the story.

Document *how* conclusions were reached. (Including written determination and appeal, **as well as** decisions on what evidence is relevant or directly related to allegations, what attempts to investigate were made and why any attempts failed, why certain allegations may not be found to be violations, why certain individuals' information provided was deemed not credible. Some will be documented in investigative report/written determination/appeal decision. Others should be documented at least in internal notes.)



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Definition of Title IX Sexual Harassment

- "Sexual harassment" is defined as **conduct on the basis of sex** that satisfies **one or more** of the following:
 - (1) An employee of the School District conditioning the provision of an aid, benefit or service of the School District on an individual's participation in unwelcome sexual conduct; OR
 - (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 School District's education program or activity; OR
 - (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v) of the Clery Act, "dating violence" as defined in 34 U.S.C. 12291(a)(10) of the Violence Against Women Act (VAWA), or stalking as defined in 34 U.S.C. 12991(a)(30) of the VAWA.



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Definition of Title IX Sexual Harassment

- Review policies for statutory definitions of conduct falling within Title IX sexual harassment
- Any question on definition of Title IX sexual harassment, or on any other step of the procedures: consult solicitor



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Definition of Title IX Sexual Harassment

- Must have occurred:
 - against a person in the United States
 - in/during an education program or activity of the District
 - Includes actions against non-students/non-employees



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Scope of the District's Education Program or Activity

- “Education program or activity” includes locations, events, or circumstances over which the District exercised **substantial control** over **both** the respondent and the context in which the sexual harassment occurs.

Possibilities:

- programs and activities operated by or controlled by the School District
- during the work or school day
- field trips
- athletic/extracurricular events
- *Fact specific analysis; consult with solicitor*

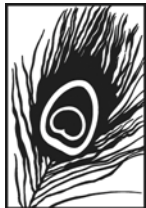


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Scope of the District's Education Program or Activity

- **OCR guidance has deemed the following to be within the scope of a district's program or activity:**
 - (1) buildings or locations that are part of the school's operations, including remote learning platforms (behaviors over computer and internet networks, digital platforms, or computer hardware or software owned or used in the school's operations);
 - (2) off-campus settings where the school exercised substantial control over the respondent and context in which the alleged harassment occurred;



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Consent

- **Not defined by Title IX; District can choose a definition** that “best serves the unique needs, values, and environment of the [school’s] own educational community.”
- Suggestion: Definition could be included in policy.

How To Conduct An Investigation

- Procedures under District Policies and Title IX/Best Practices
- See District Policies 103 and 104, **and all Attachments to those Policies**



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How to Conduct An Investigation

- **First steps:**
- **Any employee other than Title IX Coordinator witnesses or receives notice in any form of** conduct that could constitute Title IX sexual harassment → report to building principal immediately (Title IX Coordinator if building principal is subject of the complaint)
- **Any other mandatory reports must also be made!**
- **An individual other than an employee may also make the report to the building principal or Title IX Coordinator, or by any other means that results in Title IX Coordinator receiving a report**
- **Reports may be made during non-business hours**



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How to Conduct An Investigation

- **First steps:**
- An individual uses the same form (Attachment 1 to Policies 103 and 104) to report alleged harassment (Title IX and non-Title IX), retaliation, bullying, dating violence, or discrimination. (Dating violence is, by definition, Title IX sexual harassment.)
- Reporting and investigation policies/procedures re: bullying and dating violence should also be reviewed to ensure they appropriately work together with Title IX policies/procedures/requirements.



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How to Conduct An Investigation

- **First steps:**
- Verbal reports must also be accepted and documented (use Attachment 1.)



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How to Conduct An Investigation

- First steps:
- The building principal or building administrator shall promptly notify the Title IX Coordinator of **all reports** (*potential cases*) **of discrimination, harassment, Title IX sexual harassment or retaliation.**
- **The Title IX Coordinator shall promptly contact the complainant regarding the report to gather additional information as necessary, and to discuss the availability of supportive measures.** The Title IX Coordinator shall consider the complainant's wishes with respect to supportive measures.



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How to Conduct An Investigation

- **First steps:**
- **Building principal:** If you have any sense that the report *could* constitute Title IX sexual harassment or other unlawful harassment, discrimination or retaliation, promptly forward the same to the Title IX Coordinator.



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How to Conduct An Investigation

- Title IX Coordinator Receives Report:
 - Promptly contact complainant to obtain additional information ***and offer supportive measures*** (consider complainant's wishes re: supportive measures)
 - Conduct initial assessment
 - Review Report ("Report" is used here to mean either verbal, or the Report Form.) Use Report Form to gather/document information from an oral report if necessary.
 - Promptly contact the complainant (alleged victim)
 - Use the "For Official Use Only" section to gather additional information from the complainant and/or other individuals as necessary to conduct an initial investigation.



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How to Conduct An Investigation

- Title IX Coordinator Receives Report:

If Title IX implicated (even a possibility of a Title IX violation), when receive report or at any point thereafter in initial assessment, offer supportive measures to the complainant.



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How to Conduct An Investigation

- Title IX Coordinator Receives Report:
 - Conduct initial assessment
 - *Practice pointer:* Policy language and Attachment 1, as written, are a bit circular. How do you know when Title IX is implicated? Need to obtain initial information to determine if implicated...at several places on the form/several steps in initial assessment building principal and Title IX Coordinator is asked to make determination if Title IX implicated....this information may need to be further developed throughout initial assessment...determining that it is a Title IX issue triggers offering supportive measures and offering formal complaint...but determination of whether the allegation(s), **if found to be credible**, constitute a Title IX cause of action, may not be fully developed until the formal complaint/investigation process is followed.



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How to Conduct An Investigation

- The key is not missing *implication* of Title IX/*possible* Title IX violation, because this triggers offering supporting measures to complainant. Implication = easy standard to meet.
- When in doubt (unless very clear from outset that Title IX is *not* at issue):
 - Building principal must refer to Title IX Coordinator (Superintendent)
 - Title IX Coordinator must offer supportive measures (most likely this would constitute basic good educational/personnel practices regardless of Title IX **and supportive measures are one of the most important pieces of Title IX compliance!**)
 - Title IX Coordinator must offer complainant the opportunity to file a formal complaint



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How to Conduct An Investigation

- Title IX's initial investigation requirements:
 - Title IX Coordinator must offer complainant the opportunity to file formal Title IX complaint if appropriate
 - **Explain continued availability of supportive measures regardless of whether file formal complaint**
 - Explain procedure for filing formal complaint/provide copy of policy and procedures



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How to Conduct An Investigation

- **Document** all supportive measures offered, complainant's response to offer, what is actually implemented, what is adjusted over time.
- **Include** parents/guardians in all correspondence, unless there are reasons not to, as discussed in these slides.)



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How To Conduct An Investigation

Initial Assessment: Other Practical Steps/Policy and Procedure Requirements

- The Title IX Coordinator shall **initially assess** whether the reported conduct:
 1. Meets the definition of Title IX sexual harassment. *(Again, indicate Title IX is implicated unless certain from the outset it is not. Initial investigation may develop facts as to whether this definition is met; may make sense to try to develop now, but do not need to answer this question definitively, and in some cases, may be better left to formal investigation. **If additional, formal investigation needed to make that determination, offer formal complaint.**)*
 2. Occurred in a District program or activity under the control of the District and against a person in the United States. (Whether under the control of the District will be fact specific. *(Again, indicate Title IX is implicated unless certain from the outset it is not. Initial investigation may develop facts as to whether this definition is met; may make sense to try to develop now, but do not need to answer this question definitively, and in some cases, may be better left to formal investigation **If additional, formal investigation needed to make that determination, offer formal complaint.**)*
 3. Involves other Board policies, the Code of Student Conduct, or similar Code of Conduct for employees.
 4. Indicates, based on an individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of an individual. (This analysis will be documented – Report Form – For Official Use Only.)
 5. Involves a student identified as a student with a disability under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act. **(If yes, Title IX Coordinator must contact Director of Special Education...potential FBA/evaluation/other support issues...no manifestation determination yet for potential Title IX violations)**



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How to Conduct An Investigation

- The “For Official Use Only” form calls for a Recommended Course of Action. This can include proceeding with a formal Title IX Complaint, deciding not to do so, and/or proceeding under another policy.
- This is point at which Title IX Coordinator decides whether to offer formal complaint.
- **Determination of whether a Title IX violation actually occurred *must not* be made at this point.**



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How to Conduct an Investigation

- Offer complainant (and family if complainant is a student) continued supportive measures *and opportunity to file formal complaint.*
- *Explain process for filing formal complaint. (Provide copy of Policy and Attachments.)*
- **Decide whether to pursue formal complaint even if complainant elects not to (see later slides)**
- The Title IX Coordinator shall also determine what supportive measures **may** be offered to the respondent
- **Advise complainant that supportive measures will be available regardless of whether or not he/she files a formal complaint.**
- Must not restrict rights protected under the U.S. Constitution, including the First, Fifth and Fourteenth Amendments (consult with solicitor if necessary)



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How to Conduct An Investigation

- **Recommended Course of Action:**
 - **If initial investigation indicates that another policy *may have* been violated *in addition to Title IX* and *related to same course of conduct*:**
 - **Check off that policy as well under Recommended Course of Action. Investigate same along with Title IX investigation and include same in Investigative Report/Written Determination/discipline AND take any other steps required under relevant other policy(ies), including investigation, documentation and/or discipline. Title IX formal complaint investigation may satisfy investigation requirements.**



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How to Conduct An Investigation

- **Recommended Course of Action:**
 - **If initial investigation indicates that another policy *has* been violated in addition to Title IX *related to same course of conduct*:**
 - **Check off that policy as well under Recommended Course of Action. Include same in Investigative Report/Written Determination/Discipline AND take any other steps required under relevant other policy(ies), including documentation and/or discipline. *No discipline until Title IX formal grievance process complete (or unless resolved through informal grievance process) if same course of conduct/tied up in Title IX violation.***



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How to Conduct An Investigation

- If initial investigation determines that **not Title IX, but another policy, has been or may have been violated**, indicate that policy under Recommended Course of action. Initial investigation conducted up to this point may be sufficient to satisfy some of all investigation requirements of that policy and make determination. Follow any additional investigatory, documentation and/or discipline steps of the other policy(ies).



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How To Conduct An Investigation

- Written Determination re: Title IX violation can and should cite violations found of other policies, as well, even if just to reference that they are being disciplined or further investigated under another policy(ies).
- Any documents eventually issued regarding discipline/expulsion adjudication/statement of charges to employee must reference all policies violated.
- At conclusion of Title IX investigation, if any additional steps need to be followed for investigation or discipline under other policies for other violations, follow same.



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How To Conduct An Investigation

- As you can see, issues can be intertwined. If any allegations related to a certain course of conduct during the Title IX formal investigation implicate Title IX, best to investigate all as part of Title IX investigation and not discipline **unless/until it is complete, or unless otherwise allowed under the Title IX Informal Resolution Process.**
- Conduct completely separate from Title IX can be disciplined under other policies even if did not go through formal grievance process, but, see caution above...
- **Parsing these out can be complicated with potential pitfalls...consultation with solicitor is recommended when in doubt.**



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How to Conduct An Investigation

- **Note:** Appropriate supports (ex., SAP team referral) should be provided even when Title IX supportive measures are not implicated, when it is the right course under other policies/procedures.



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How to Conduct An Investigation

- After determination is made to *offer* formal complaint (enough initial evidence of possible Title IX violation):
- Complainant may not want to proceed with a formal complaint.
- District *may* decide to move forward with formal complaint (and in some cases, should do so; see below and later slides)
- In some cases, a school may be in violation of Title IX if the Title IX Coordinator does not file a formal Title IX complaint. For example, the preamble explains that if a school “has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority,” OCR may find the school to be deliberately indifferent (i.e., to have acted in a clearly unreasonable way) if the school’s Title IX Coordinator does not sign a formal complaint, “even if the complainant . . . does not wish to file a formal complaint or participate in a grievance process.” Put simply, there are circumstances when a Title IX Coordinator may need to sign a formal complaint that obligates the school to initiate an investigation regardless of the complainant’s relationship with the school or interest in participating in the Title IX grievance process. **This is because the school has a Title IX obligation to provide all students (and others), not just the complainant, with an educational environment that does not discriminate based on sex.**



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How to Conduct An Investigation

- **Question 24: If a complainant has not filed a formal complaint and is not participating in or attempting to participate in the school's education program or activity, *may* the school's Title IX Coordinator file a formal complaint?**
- **Answer 24: Yes.** A Title IX Coordinator may file a formal complaint even if the complainant is not associated with the school in any way.
- **In some cases, a school may be in violation of Title IX if the Title IX Coordinator does not file a formal Title IX complaint.** For example, the preamble explains that if a school “has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority,” OCR may find the school to be deliberately indifferent (i.e., to have acted in a clearly unreasonable way) if the school's Title IX Coordinator does not sign a formal complaint, “even if the complainant . . . does not wish to file a formal complaint or participate in a grievance process.” Put simply, there are circumstances when a Title IX Coordinator may need to sign a formal complaint that obligates the school to initiate an investigation regardless of the complainant's relationship with the school or interest in participating in the Title IX grievance process. **This is because the school has a Title IX obligation to provide all students, not just the complainant, with an educational environment that does not discriminate based on sex.**



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How to Conduct An Investigation

- **Question 29: May a school stop offering its Title IX grievance process due to the COVID-19 pandemic?**
- Answer 29: No. A school must follow its policies for receiving and responding to reports of sexual harassment and may not adopt a policy of putting investigations or proceedings on hold due to COVID-19. For additional discussion of schools' ongoing Title IX obligations during the COVID-19 pandemic, please see OCR's [Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment](#).



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How to Conduct An Investigation

- **Question 30: How should a school proceed in the Title IX sexual harassment grievance process when a party or a witness is temporarily unable to participate due to a disability?** Answer 30: A school has “discretion to apply limited extensions of time frames during the grievance process for good cause, which may include, for example, a temporary postponement of a hearing to accommodate a disability.”
- However, when deciding whether to grant a delay or extension, a school must balance the interests of promptness, fairness to the parties, and accuracy of adjudications.
- The school also must promptly notify all parties of the reason for the delay and the estimated length of the delay, in addition to important updates about the investigation.
- Additionally, a school must not delay investigations or hearings solely because in-person interviews or hearings are not feasible. Instead, a school must use technology, as appropriate, to conduct activities remotely, in a timely and equitable manner, and consistent with the applicable law. For additional information, please see [34 C.F.R. § 106.45\(b\)\(1\)\(v\)](#).



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How to Conduct An Investigation

- **Important:** All reporting and documentation as required under Educator Misconduct Act, Act 168 ("Pass the Trash"), Child Protective Services Law, etc., must also be completed.
- Employee passing a potential Title IX violation on to Title IX Coordinator does not alleviate employee from responsibility of making any other required reports!



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How to Conduct An Investigation

- **A particular word about discrimination and other unlawful harassment/other sexual harassment:**
- If conduct is identified prior to the formal complaint process as potential unlawful discrimination or other unlawful harassment/sexual harassment or retaliation (but clearly not Title IX sexual harassment): follow discrimination procedures (Attachment 2 to policies 103 and 104) (similar to Title IX but generally less complex.)
- If conduct is identified by investigation **during** the formal complaint process as not meeting the definition of Title IX sexual harassment:
 - dismiss the complaint
 - procedures related to other unlawful harassment/discrimination/retaliation/other violations must be followed, to the extent not already subsumed by Title IX procedures followed to date.



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- District Policy No. 103 (“Discrimination/Title IX Sexual Harassment Affecting Students”) **requires** employees who suspect or have notice that **a student** has been subject to Title IX sexual harassment **or other discrimination or retaliation** to report the same to the building principal.
 - Attachment 2: Scope is broader **in terms of who is protected/who can report**: “A student **or individual** who believes they have been subject to discrimination by any student, employee or third party is encouraged to immediately report the incident to the building principal using the Discrimination/Sexual Harassment/Bullying/Hazing/Dating Violence/Retaliation Report Form or by making a general report verbally or in writing to the building principal.”
- District Policy No. 104 (“Discrimination/Title IX Sexual Harassment Affecting Staff”) **encourages** employees who suspect or have notice that **“they or others”** have been subject to Title IX sexual harassment **or other discrimination or retaliation** to report the same to the building principal.
 - Attachment 2: An employee **or individual** who believes they have been subject to discrimination by any district student, employee or third party is encouraged to immediately report the incident to the building principal using the Discrimination/Sexual Harassment/Retaliation Report Form or by making a general report verbally or in writing to the building principal or building administrator. A person who is not an intended victim or target of discrimination but is adversely affected by the offensive conduct may file a report of discrimination.



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How to Conduct An Investigation

- Also, a person who is not an intended victim or target of discrimination but is adversely affected by the offensive conduct may file a report of discrimination.



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How to Conduct An Investigation

- **Best practices**
 - **Require** employee and volunteer reporting of unlawful harassment, discrimination or retaliation in addition to Title IX sexual harassment.
 - Treat discrimination procedures as also encompassing harassment/sexual harassment other than Title IX sexual harassment. *Consult solicitor...some allegations of sexual harassment may not meet Title IX definition but may constitute sexual harassment under other laws/District policy.*



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How to Conduct An Investigation

- Recommended scope of Policy and procedures for who is protected:



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- The Board prohibits, on District property and in other settings under the jurisdiction of the District including but not necessarily limited to school-sponsored activities, all forms of unlawful harassment of employees, independent contractors, volunteers, applicants for employment, volunteer service or service as an independent contractor, students and third parties, by all District students and employees, contracted individuals and volunteers, and business invitees, and anyone else who is prohibited by law from engaging in such activities in the District's education program or activities. Prohibited conduct that occurs outside of the District's jurisdiction may also be subject to this Policy depending upon the effect upon or link to the school environment. **(Essentially as broad as District Policy/procedure.)**
- With respect specifically to Title IX sexual harassment, the District's jurisdiction is limited to its education programs or activities, meaning, all locations, events or circumstances over which the District exercises substantial control over both the respondent and the context in which the harassment occurs.



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How to Conduct An Investigation

- Unlawful discrimination against any District employee, independent contractor, volunteer, or applicant for any such position, or any student or third party, by a District employee, independent contractor, or volunteer, the District's Board of Directors, or a student, and by anyone else who is prohibited by law from engaging in unlawful discrimination as related to the District's educational programming and in the course of District-sponsored programs or activities, is prohibited in all hiring, termination and employment related decisions and during the District's educational programming and in the course of District-sponsored programs or activities, including transportation to or from school or school-sponsored activities or in the provision of access to District-sponsored programs or activities. **(District Policy/procedure is broader in terms of who is protected.)**



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How to Conduct An Investigation

- **Retaliation**, including as related to Title IX sexual harassment, is to be addressed under Attachment 2 procedures.



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How to Conduct An Investigation

- Other types of unlawful harassment, discrimination and retaliation, **to be addressed under unlawful discrimination/harassment/retaliation policy and procedures (Attachment 2):**
 - **Legal definitions:**
 - Title VII: Discrimination and harassment **because of** race, religion, national origin, and sex (including gender identity and sexual orientation) in the workplace (against employees)(however, if it is Title IX sexual harassment, still falls under Title IX procedures)
 - ADA/Section 504 of the Rehabilitation Act: Disability-based discrimination and harassment (students, employees, third parties in some circumstances)
 - Pennsylvania Human Relations Act: Race, color, religion, ancestry, age (40 and above), sex, national origin, non-job related disability, known association with a disabled individual, GED instead of high school diploma (against employees) (however, if it is Title IX sexual harassment, still falls under Title IX procedures)
 - Title IX discrimination based on sex, including gender identity and sexual orientation (harassment on this basis is covered by Title IX procedures)
 - Age Discrimination in Employment Act: (against employees 40 and over)
 - ***Sexual harassment that does not meet Title IX definition may still meet Title VII! Severe OR pervasive standard. Allegations cannot be dismissed simply because don't meet Title IX definition. Consult with solicitor.***



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How to Conduct An Investigation

- Other types of unlawful harassment, discrimination and retaliation, **to be addressed under unlawful discrimination/harassment/retaliation policy and procedures (Attachment 2):**
- Policy 103 and 104 definitions:
- **Discrimination** shall mean to treat individuals differently, or to harass or victimize based on a protected classification including race, color, age, creed, religion, sex, sexual orientation, ancestry, national origin, marital status, pregnancy, or handicap/disability.
- Students:
- **Harassment** is a form of discrimination based on the protected classifications listed in this policy consisting of unwelcome conduct such as graphic, written, electronic, verbal or nonverbal acts including offensive jokes, slurs, epithets and name-calling, ridicule or mockery, insults or put-downs, offensive objects or pictures, physical assaults or threats, intimidation, or other conduct that may be harmful or humiliating or interfere with a person's school or school-related performance when such conduct is:
 1. Sufficiently severe, persistent **or** pervasive; and
 2. A reasonable person in the complainant's position would find that it creates an intimidating, threatening or abusive educational environment such that it deprives or adversely interferes with or limits an individual or group of the ability to participate in or benefit from the services, activities or opportunities offered by a school.



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How to Conduct An Investigation

- Employees:
- **Harassment** is a form of discrimination based on the protected classifications listed in this policy consisting of unwelcome conduct such as graphic, written, electronic, verbal or nonverbal acts including offensive jokes, slurs, epithets and name-calling, ridicule or mockery, insults or put-downs, offensive objects or pictures, physical assaults or threats, intimidation, or other conduct that may be harmful or humiliating or interfere with a person's school or school-related work performance, including when: [\[9\]](#)
 1. Submission to such conduct is made explicitly or implicitly a term or condition of an employee's status; **or**
 2. Submission to or rejection of such conduct is used as the basis for employment-related decisions affecting an employee; **or**
 3. Such conduct is sufficiently severe, persistent **or** pervasive that a reasonable person in the complainant's position would find that it unreasonably interferes with the complainant's performance at work or otherwise creates an intimidating, hostile, or offensive working environment such that it alters the complainant's working conditions.



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Gender Identity and Sexual Orientation

- [Executive Order 13988](#), dated January 20, 2021, on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.
- Thus, **gender identity and sexual orientation** are now protected characteristics. Discrimination or sexual harassment and related retaliation on either or both of these bases is prohibited. Applies to students, employees and third parties, under Title IX and other antidiscrimination analyses.



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How to Conduct An Investigation

- **As part of initial assessment (prior to deciding whether to offer formal complaint):**

If respondent is a special education student/student with a 504 plan, *or "thought to be"*:

- Contact Special Education Director
- Be mindful of any adverse effect of supportive measures on complainant's or respondent's right to FAPE, consult with Director of Special Education, consider all interests and decide best course of action.



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How to Conduct An Investigation

- **As part of initial assessment (prior to deciding whether to offer formal complaint):**
- **All students and employees:** The District **may** remove a respondent from its education program or activity on an emergency basis, provided that the District undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision **immediately following the removal.**
- **BUT**
- This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.**SO**



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How to Conduct An Investigation

- **Still need IEP team permission for removal constituting a change of placement for an identified or thought to be special education student:**
 - More than 10 consecutive or 15 cumulative school days for same underlying/continued behavior/pattern
 - More than 1 school day for a student identified as/thought to be intellectually disabled
 - **Emergency removal of student or employee: consult with solicitor**



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How to Conduct An Investigation

- Remember 45 day unilateral interim placement for special education students, for specific offenses is also a potential option
- ***Special circumstances.*** School personnel **may** remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child -
 - (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA (the District);
 - (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or
 - (3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA (the District).
- 34 C.F.R. Section 530



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How to Conduct An Investigation

- *For purposes of unilateral changes in placement, a knife with a blade of less than 2 and ½ inches is not considered to be a weapon. "Weapon" for this purpose is defined as a device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury*
- **18 U.S.C. Sec. 930(g)(2)**
- *For purposes of unilateral changes in placement, "serious bodily injury" means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ or mental faculty. **18 U.S.C. Sec. 1365(h)(3)***



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How to Conduct An Investigation

- ***Notification.*** On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in [§ 300.504](#).
- 34 C.F.R. Section 930(h)



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How to Conduct An Investigation

- **As part of initial assessment (prior to deciding whether to move to formal complaint), or if a threat becomes apparent at any time thereafter:**
- If the district has determined, based on an individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of any student or other individual due to the allegations of Title IX sexual harassment, the respondent (student) **may** be removed from the district's education program or activity or moved to an alternative setting, consistent with all rights under federal and state laws and regulations, and Board policy, including but not limited to the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.
- If the respondent is an identified student with a disability, or thought to be disabled, the Title IX Coordinator shall contact the Director of Special Education to coordinate the required actions in accordance with Board policy.
- The respondent (**special or regular education**) shall be provided with notice and provided an opportunity for due process (notice and opportunity to challenge the decision after removal, and prior consent needed for special education students/thought to be special education students), in accordance with law, regulations and Board policy. **Consult with solicitor.**



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How to Conduct an Investigation

- Relevant personnel with knowledge of respondent (student or employee) and situation should be involved in emergency removal analysis (ex., special education teacher, school counselor, social worker, classroom teacher, etc.)
- Policies indicate that manifestation determination/expulsion may be imposed at this time if continuation of education not feasible. **We are very cautious about imposing any discipline, including but not limited to changes of placement for special education students, until the Title IX process is complete, due to the requirements of Title IX Regulations. Consult with solicitor if this becomes an issue.**
- Emergency removal of **employees** may consist of administrative leave/administrative leave may otherwise be imposed for the duration of the formal grievance process. Consult with solicitor re: due process requirements.



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How to Conduct An Investigation

- As part of initial assessment (prior to deciding whether to move to formal complaint), or if a threat becomes apparent at any time thereafter:
- When an employee, based on an individualized safety and risk analysis, poses an immediate threat to the health or safety of any student or other individual, the employee **may** be removed on an emergency basis.
- An accused nonstudent district employee must be placed on ***paid*** administrative leave during the pendency of the grievance process for formal complaints, consistent with all rights under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, and in accordance with state law and regulations, Board policy and an applicable collective bargaining agreement or individual contract. **Consult with solicitor.**



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How to Conduct An Investigation

- Attachment 3: “If the investigation reveals that the conduct being investigated may involve a violation of criminal law, the investigator shall promptly notify the Title IX Coordinator, who shall promptly inform law enforcement authorities about the allegations and make any additional required reports.”



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How to Conduct An Investigation

- Law enforcement may need to be contacted, based on Safe Schools reporting requirements or other reasons of safety/due diligence. Investigator shall inform the Title IX Coordinator, who shall contact law enforcement, unless the matter is so urgent that the investigator should make the contact first.
- Need not wait until/unless formal complaint investigation has been concluded to contact law enforcement
- Possibly wait until law enforcement has concluded its investigation to make written determination by decision maker
- Will law enforcement's investigation replace the need for District to investigate?
 - No. District is still required to give certain notices and substantive rights to parties, such as right to review and respond to evidence. District must still issue investigative report and written determination.
 - May combine efforts with law enforcement. Stay in contact with law enforcement and solicitor.



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How to Conduct An Investigation

- Obligation to conduct the investigation under the **formal grievance process and follow all steps thereof, including issuance of the written report**, will not be negated by the fact that a criminal or child protective services investigation of the allegations is pending or has been concluded. The investigator should coordinate with any other ongoing investigations of the allegations, **including [potentially] agreeing to request for a delay in fulfilling the district's investigative responsibilities** during the fact-finding portion of a criminal or child protective services investigation. Such delays shall not extend beyond the time necessary to prevent interference with or disruption of the criminal or child protective services investigation and the reason for such delay shall be documented by the investigator.
- **Continue to provide supportive measures throughout any such delays.**



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How to Conduct An Investigation

- **Upon conclusion of initial assessment and offering of formal complaint:**
- If complainant/family wants to file formal complaint:
 - He/she/they sign report; report is filed; formal grievance process proceeds.
 - District is obligated to proceed with formal complaint if complainant wishes to do so.
 - Disagreements between complainant student and family re: how to proceed?
Consult with solicitor.

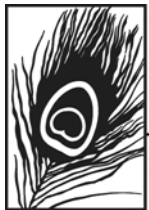


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How to Conduct An Investigation

- If complainant/family does not want to file formal complaint:
 - Attachment 3: “The Title IX Coordinator is also authorized to initiate [the formal grievance] process despite a complainant’s wishes when actions limited to supportive measures are not a sufficient response to alleged behavior, or when a formal complaint process is necessary to investigate and address the situation adequately.”
 - **“For example, if disciplinary action would be warranted if allegations are true, if the respondent is an employee, or if further investigation is needed to assess the extent of the behavior and impact on others, it may be clearly unreasonable not to initiate the formal complaint process.”**
 - **If the District “has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority” it should initiate the formal grievance process.**
 - **Only the Title IX Coordinator is authorized to initiate the formal complaint process despite a complainant’s wishes, but the Title IX Coordinator may consult with the solicitor and other District officials in making this decision.**



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How to Conduct An Investigation

- In addition to implementing the Title IX sexual harassment procedures, **the Title IX Coordinator shall ensure** that reported conduct which meets the definition of other laws, regulations or Board policies, is also appropriately addressed in accordance with the applicable laws, regulations or Board policies, including but not limited to, incidents under the Safe Schools Act, reports of educator misconduct, threats, or reports of suspected child abuse.



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How to Conduct An Investigation

- Throughout the Title IX sexual harassment procedures, the District shall make reasonable accommodations for identified physical and intellectual impairments that constitute disabilities for any party, and address barriers being experienced by disadvantaged students such as English learners and homeless students, consistent with the requirements of federal and state laws and regulations and Board policy.
- See prior slide re: disabilities and delays.



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How to Conduct An Investigation

- Confidentiality regarding the supportive measures offered, the investigation, and the identity of the following individuals shall be handled in accordance with applicable law, regulations, Policies 103/104 and their attachments, and the District's legal and investigative obligations:
 - person making the report
 - complainant
 - respondent
 - witnesses
- All supportive measures provided by the District shall remain confidential, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the supportive measures.



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How to Conduct An Investigation

- See Attachment 4 to Policy No. 103



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Investigation: Formal Complaint

Reasonably prompt timeframes shall be established for the conclusion of the grievance process for formal complaints, including timeframes for the informal resolution process and timeframes for filing and resolving appeals.

The established timeframes included in these procedures may be adjusted to allow for a temporary delay or a limited extension of time frames for good cause. Written notice of the delay or extension and the reason for such action shall be provided to the complainant and the respondent, and documented with the records of the complaint. Good cause may include, but is not limited to, considerations such as:

1. The absence of a party, a party's advisor or a witness.
2. Concurrent law enforcement activity.
3. Need for language assistance or accommodation of disabilities.



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Investigation: Formal Complaint

- *If delayed, ensure that supportive measures continue to be provided and documented.*



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Investigation: Formal Complaint

- Formal complaint ***must*** be dismissed at any time during the investigation or written determination if it is determined that none of the allegations, if true, would meet the definition and parameters of Title IX sexual harassment within the District's jurisdiction. (the alleged conduct does not constitute sexual harassment; the alleged conduct did not occur in the District's educational program or activity; the alleged conduct did not occur in the United States.)
- If the matter merits review and possible action under the Code of Student Conduct and other Board policies or procedures/policies related to discrimination complaints or other issues, the Title IX Coordinator shall redirect the report to the appropriate administrator.

Written notice shall be promptly and simultaneously issued to the parties (and their advisors) of any allegations that are dismissed in compliance with Title IX and of the right to appeal the dismissal. Written notification shall state whether the allegations will continue to be addressed pursuant to the Code of Student/Employee Conduct, or other Board policies and/or procedures.



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Investigation: Formal Complaint

- Formal complaint ***may*** be dismissed at any time during the investigation or written determination if:
 1. A complainant provides written notification of withdrawal of any allegations or of the formal complaint. *But see rules on when District **should** proceed, even against complainant's wishes.*
 2. The respondent is no longer enrolled or employed by the District in a District program or activity.
 3. Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint or allegations. *If there is any reasonably possible way to gather evidence, pursue it.*



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Investigation: Formal Complaint

- Written notification is required if complaint or any allegations thereof dismissed, regardless of whether for mandatory or permissive reasons.
- A dismissal may be appealed via the appeal procedures set forth in Attachment 3.



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Investigation: Formal Complaint

- The District may consolidate formal complaints against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.



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Investigation: Formal Complaint

- Respondent must be presumed not responsible until conclusion of formal complaint investigation/issuance of written determination of responsibility.
- ***No discipline can be applied*** for allegations implicating a Title IX violation unless and until the formal complaint investigation is concluded and appeal period ended or appeal found without merit/resolution is reached through informal resolution process.
- Respondent can be disciplined for non-Title IX violations prior to or without formal complaint process being followed/concluded, but if conduct is closely tied to/arises from same set of facts as potential Title IX violation, better not to discipline unless/until formal complaint investigation/informal resolution process concluded. ***Consult with solicitor.***



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Investigation: Formal Complaint

- After a formal complaint is filed (by complainant or District), the Title IX Coordinator must provide a notice to the complainant and respondent, and their families (if students), advising of:
 1. Notice of the District's grievance process for formal complaints and any informal resolution process that may be available.
Include a copy of Policy and Procedures.
 2. Notice of the allegations potentially constituting Title IX sexual harassment, including sufficient details known at the time and **with sufficient time to prepare a response before any initial interview.** Sufficient details include:
 - a. The identity of the parties involved, if known.
 - b. The conduct allegedly constituting sexual harassment.
 - c. The date and location of the alleged incident(s), if known.

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Investigation: Formal Complaint

3. A statement that a written determination regarding responsibility shall be made at the conclusion of the grievance process for formal complaints and, until that time, the respondent is presumed not responsible for the alleged conduct.
4. Notice that parties may have an advisor of their choice, who may be, but is not required to be, an attorney. The advisor and/or the parties/their families may inspect and review evidence.
5. Notice that Board policy and the District's Code of Student Conduct/Employee Conduct prohibits knowingly making false statements or knowingly submitting false information to school officials during the grievance process.
6. **Notice to all known parties of any additional allegations that the District decides to investigate during the course of the investigation. (Must provide updated written notice as needed.)**



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Informal Resolution Process

- **The informal resolution process cannot be offered or used to facilitate a resolution for any formal complaint where the allegations state that an employee sexually harassed a student.**
- At any time after a formal complaint has been filed, but prior to reaching a determination of responsibility, **if the Title IX Coordinator believes the circumstances are appropriate, the Title IX Coordinator may offer** the parties the opportunity to participate in an informal resolution process, which does not involve a full investigation and adjudication of the Title IX sexual harassment complaint.
- The District may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal Title IX sexual harassment complaints. Similarly, the District may not require the parties to participate in an informal resolution process.
- Informal resolutions can take many forms, depending on the particular case. Examples include, but are not limited to, mediation, facilitated discussions between the parties, restorative practices, acknowledgment of responsibility by a respondent, apologies, a requirement to engage in specific services, or supportive measures.



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Informal Resolution Process

- When offering an informal resolution process, the Title IX Coordinator shall:
 1. Provide the parties a written notice disclosing the following:
 - a. The allegations.
 - b. The requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations; provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process for formal complaints.
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.



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Informal Resolution Process

2. Obtain the parties' voluntary, written consent to the informal resolution process. As part of the consent process, all parties shall be informed of the rights being waived by agreeing to the informal resolution process, and shall acknowledge such agreement in writing. (Additional waiver and notice must be part of resolution agreement.)

- The informal resolution process shall be conducted within ten (10) school days of the parties' signed agreement for the informal resolution process. **Policy deadline.**
- The parties must mutually agree to the resolution.
- If the matter is resolved to the satisfaction of the parties, the District employee facilitating the informal resolution process shall document the nature of the complaint and the proposed resolution of the matter, have both parties sign the documentation and receive a copy, and forward it to the Title IX Coordinator.



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Informal Resolution Process

- Within ten (10) school days after the complaint is resolved in this manner, the Title IX Coordinator shall contact the complainant to determine if the resolution was effective and to monitor the agreed upon remedies. **Policy requirement.**
- **The Title IX Coordinator shall document the informal resolution process, responses from all parties, and an explanation of why the District's response was not deliberately indifferent to the reported complaint of sexual harassment.**
- **If Step 2 Informal Resolution Process results in the final resolution of the complaint, an investigation/formal grievance process does not proceed.**



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Informal Resolution Process

- IR may result in discipline, if the parties had notice of this possibility and agree to the same
- An IR facilitator can be a witness in a subsequent investigation or hearing, if the parties had notice of this, and information discussed in the informal resolution process can be used in formal grievance process if resumed
- A carefully worded notice of rights being waived/parameters of the informal resolution process must be provided to the parties at the outset, as well as a carefully worded resolution agreement
- If suspension is the agreed upon punishment, then waiver of rights regarding an informal hearing must be signed
- If expulsion is the agreed upon punishment, then waiver of rights regarding a formal hearing must be signed, along with an expulsion agreement; Board approval is needed.
- *If the student is identified as eligible for special education and the behavior is found to be a manifestation, student is not to be expelled and other disciplinary consequences are not to be applied, even if all parties would agree to the same. Appropriate procedures must be followed to discuss provision of FAPE through appropriate means*
- Additional waivers in personnel matters may be needed
- Consult with solicitor as appropriate



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Investigation: Formal Complaint

- **Designation of Investigator:** The Title IX Coordinator shall assess whether the investigation should be conducted by the building principal, another district employee, the Title IX Coordinator or an attorney and shall promptly assign the investigation to that individual.



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Investigation: Formal Complaint

- The designated investigator, if other than the Title IX Coordinator, shall work with the Title IX Coordinator to assess the scope of the investigation, who needs to be interviewed and what records or evidence may be relevant to the investigation. The investigation stage shall be concluded within twenty (20) school days. ***Policy deadline.** Can be extended for certain reasons; see Procedures.
- When investigating a formal complaint ***and throughout the grievance process***, the investigator shall do all of the following:



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Investigation: Formal Complaint

- **Note:** Affording these procedural rights to the parties “throughout the grievance process” means that the District may have to apply flexibility (ex., if a party presents evidence or a witness after the deadline, which in some cases may even be on appeal)



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Investigation: Formal Complaint

- The Investigator must gather **all available evidence sufficient to reach a determination regarding responsibility.**
- The investigator should:
 - undertake a thorough search,
 - for relevant facts and evidence,
 - while operating under the constraints of completing the investigation under designated, reasonably prompt timeframes,
 - and without powers of subpoena.
- 85 FR 30292



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Investigation: Formal Complaint

- The investigator shall bear the burden of proof and gather evidence and conduct interviews sufficient to reach a written determination.
- During the process of gathering evidence, unless the District obtains the voluntary, written consent of the party, or the party's parent/guardian when legally required, the District cannot access, consider, disclose or otherwise use a party's records which are protected by legal privilege, such as those records made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with providing treatment to the party.



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Investigation: Formal Complaint

- The investigator must:
- Objectively evaluate all available evidence, including inculpatory and exculpatory evidence.
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.



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Investigation: Formal Complaint

- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
 - **Note: Attachment 3 says that “the district may request a nondisclosure agreement be signed by the parties and their advisor(s), if any, stating that they will not disseminate or disclose evidence and documents exchanged in the investigation.” However, as a best practice, this should be applied very carefully; if any non-disclosure agreement is to be requested, it should be prepared with the solicitor’s assistance.**



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Investigation: Formal Complaint

- Provide the parties with the same opportunities to have others present during any interview or other meeting or grievance proceeding, including an advisor of the party's choice. The District may establish restrictions, **applicable to both parties**, regarding the extent to which the advisor may participate.



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Investigation: Formal Complaint

Provide written notice to any party or witness whose participation is invited or expected during the investigation process (interviews or other meetings) with the following information, in sufficient time for the party to prepare to participate:

- a. Date.
- b. Time.
- c. Location.
- d. Participants.
- e. Purpose of all hearings, investigative interviews or other meetings.



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Investigation: Formal Complaint

- If at any point the investigation expands to include additional allegations that were not included in the initial notice provided upon initiation of the grievance process for formal complaints, the investigator shall alert the Title IX Coordinator.
- The Title IX Coordinator shall provide written notice of the new allegations to the known parties.



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Investigative Report

- The investigator shall draft an investigative report that fairly summarizes relevant evidence and shall provide the investigative report to all parties and to the designated decision-maker.



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Investigative Report

- Prior to the completion of the investigative report, **the investigator shall:**
 1. Send to each party and the party's advisor, if any, the below-described (directly related) evidence subject to inspection and review in electronic or hard copy format. Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is **directly related** to the allegations, including evidence the district does not intend to rely on to reach a determination regarding responsibility and any inculpatory and exculpatory evidence, whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. **Note: Not everything that is *directly related* is relevant. Only relevant evidence is to be included in the investigative report. Directly related is a broader standard. If in doubt, consult with solicitor.**
 2. Provide the parties at least ten (10) days **(Title IX requirement)** following the date on which the evidence was provided to them to submit a written response to the investigator. (In all steps, provide same amount of time, including any extensions, to both parties, and notify of timeframe or extensions in writing.)
 3. Consider the written responses prior to completion of the investigative report.



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Investigative Report

- The investigator must:
 - draft an investigative report that fairly summarizes relevant evidence
 - provide the investigative report to the parties and their advisors in an electronic format or hard copy
 - **Title IX requirement not explicitly stated in Attachment 3: The investigator must send the investigative report to the parties *for their written responses*. Best practice: Direct parties to send their written responses to the decision maker.**
 - **Also Title IX requirement: The decision maker cannot reach a decision sooner than ten (10) days after investigative report was sent to decision maker and parties (“at least ten days prior to the time of determination regarding responsibility, the investigator must send to each party and the parties’ advisors, if any, the investigative report in an electronic format or hard copy, for their review and written response.”)**
 - ***Allow sufficient time for decision maker to receive and review written responses; due date for written responses and issuance of written determination should not be on same day.***
 - Communicate all timeframes in writing to parties.



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Investigative Report

- Sufficient time must also be afforded for the parties to exchange written questions and answers, as discussed in later slides.



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Investigative Report

- “[T]hese final regulations do not prescribe the contents of the investigative report **other than specifying its core purpose of summarizing relevant evidence.**” 85 FR 30310
- **✓ Good practice to include:**
 - Summary of allegations
 - Policy provisions implicated
 - Timeline of investigative process
 - Description of the procedural steps taken
 - **Summary of relevant evidence (required)**
 - Summary of documents and other evidence collected/reviewed, including that which was not deemed directly related or relevant, and why not so deemed
 - Any unsuccessful efforts to interview
 - Any unsuccessful efforts to obtain documents or other evidence
 - Parties’ responses to evidence



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Investigation: Formal Complaint

- If at any point the investigation reveals that the conduct being investigated may involve a violation of criminal law, the investigator shall promptly notify the Title IX Coordinator, who shall promptly inform law enforcement authorities about the allegations and make any additional required reports, in accordance with law, regulations and Board policy.
- **Best practice:** Investigator may need to contact law enforcement directly if it is urgent.



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Investigation: Formal Complaint

- **Remember, it is the District's responsibility to gather evidence and bear the burden of proof.**
- **Presumption of non-responsibility:**
 - OCR tells us that this presumption was included to establish impartiality, **not** to create a prejudgment:
 - "The presumption does not imply that the alleged harassment did not occur; the presumption ensures that recipients [schools] do not take action against a respondent *as though* the harassment occurred prior to the allegation being proved . . ." *Preamble page 851*
 - "The presumption does not imply that a respondent is truthful or that a complainant is lying . . ." *Preamble page 853*
 - *It may be worth explaining this to the parties in writing.*
 - *Source: Strassberger McKenna*



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Written Determination and District Action

- **Designation of Decision-Maker:**
- To avoid any conflict of interest or bias, the decision-maker cannot be the same person as the Title IX Coordinator or the investigator.
- If the Assistant Superintendent (decision maker) has a conflict of interest or is a party in the formal complaint process, he shall disclose the conflict and the Title IX Coordinator shall designate another individual to serve as the decision-maker.



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Written Determination and District Action

- A written determination of responsibility (written determination) must not be finalized less than (can be finalized no sooner than) ten (10) days from the day on which the investigator completed the investigative report and provided it to all parties and their advisors, and in no event shall it be finalized sooner than the date on which each party has the opportunity to submit questions and follow-up questions and the decision maker has the time to consider all such questions and responses as well as the parties' written responses to the investigative report.



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Written Determination and District Action

- A written determination of responsibility (written determination) must not be finalized less than (can be finalized no sooner than) ten (10) days from the day on which the investigator completed the investigative report and provided it to all parties and their advisors, and in no event shall it be finalized sooner than the date on which each party has the opportunity to submit questions and follow-up questions and the decision maker has the time to consider all such questions and responses as well as the parties' written responses to the investigative report.
- Before the decision-maker reaches a determination regarding responsibility, the decision-maker shall:
 - afford each party (respondent and complainant) the opportunity to submit written, relevant questions to the decision maker that a party wants to be asked of any party or witness (copy advisors on correspondence)
 - provide each party with the answers, and
 - allow for additional, limited follow-up questions from each party (respondent and complainant)



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Written Determination and District Action

- Relevant questions for a party or witness must be submitted [to the decision maker] by each party within five (5) school days following [the party's] receipt of the investigation report.
- [The decision maker shall determine which, if any, questions are relevant and shall submit relevant questions to the party(ies) and their advisors and/or witness(es) to which they are directed within a reasonable time to be set by the decision maker.]
- [The party(ies) and/or witness(es) who received the questions shall have a reasonable time to be set by the decision maker to submit responses to the decision maker.]
- [The decision maker shall submit all responses to each party within a reasonable time to be set by the decision maker.]



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Written Determination and District Action

- [Each party may submit limited follow-up questions regarding any of the answers received to the initial questions.]
- Follow-up questions must be submitted by each party [to the decision maker] within five (5) school days of the date on which the party was provided answers [by the decision maker] to the original questions.
- [Follow-up questions shall be sent by the decision maker to the parties and their advisors and/or witness(es) to whom they are directed within a reasonable time frame to be set by the decision maker.]
- [The party(ies) and/or witness(es) who received the follow-up questions shall have a reasonable time frame to submit responses to the decision maker.]
- [The decision maker shall submit all responses to each party and their advisors within a reasonable time frame to be set by the decision maker.]



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Written Determination and District Action

- Issues for consultation with the solicitor: Extent to which confidentiality may need to be protected when sending questions to witnesses.



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Written Determination and District Action

- **All materials sent by the decision maker to parties/advisors or witnesses at any of the above steps shall be sent to each party and witness simultaneously.**
- **The decision maker shall consider the responses to all questions and follow up questions in preparing the written determination.**



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Written Determination and District Action

- Questions and evidence in the question and answer process just discussed, 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, 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.
- **Note: In general,** evidence includes statements, photographs, clothes, etc.
- The decision-maker shall explain to the party **(in writing/document explanation)** proposing the questions [and their advisors] about any decision to exclude a question as not relevant.



Written Determination and District Action

- The decision-maker must issue a written determination for the conduct alleged in formal complaints. Attachment 3: “To reach this determination, the decision-maker shall apply the clear and convincing evidence standard, meaning that the party bearing the burden of proof must show that the truth of the allegations is highly probable.”
- Colorado v. New Mexico, 467 U.S. 310 (1984): ” ‘Clear and convincing’ means that **the evidence is highly and substantially more likely to be true than untrue**; the fact finder must be convinced that the contention is highly probable.”

Other standard which District could adopt by changing policy (Attachment 3):
Preponderance of the evidence standard, meaning that the party bearing the burden of proof must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not. (“50% + 1”)



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Written Determination and District Action

- In considering evidence, the decision-maker shall ensure credibility determinations are not based on an individual's status as a complainant, respondent or witness, or any other irrelevant factor.



Written Determination and District Action

- After considering all relevant evidence, the decision-maker shall issue a written determination [simultaneously to both parties and their advisors] that includes:
 1. Identification of the allegations potentially constituting Title IX sexual harassment.
 2. A description of the procedural steps taken from the receipt or signing of the formal complaint through the written determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence.
 3. Findings of fact supporting the determination.
 4. Conclusions regarding the application of the District's Code of Student/Employee Conduct or Board policies to the facts.



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Written Determination and District Action

5. A statement of, and rationale for, the result as to each allegation, including:
 - a. Determination regarding responsibility.
 - b. Any disciplinary sanctions. (Ordinary sanctions and procedures apply. Special education protections and procedures apply.)
6. Any remedies designed to restore or preserve equal access to the District's education program or activity that will be provided by the District to the complainant. Such remedies may be punitive or disciplinary and need not avoid burdening the respondent.



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Written Determination and District Action

7. The procedures, deadline and permissible bases for the complainant and respondent to appeal.



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Written Determination and District Action

- The written determination shall be provided to the parties [and their advisors] simultaneously. The determination becomes final either:
 1. On the date that the District provides the parties with the written decision of the result of the appeal, if an appeal is filed;
 2. Or, if an appeal is not filed, on the date on which an appeal would no longer be considered timely, in accordance with the timeframe established for appeals in Attachment 3.



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Written Determination and District Action

- **The Title IX Coordinator** shall be responsible to ensure that any remedies are implemented by the appropriate District officials and for following up as needed to assess the effectiveness of such remedies.
- Disciplinary actions shall be consistent with the Code of Student/Employee Conduct, Board policies and administrative regulations, district procedures, applicable collective bargaining agreements/Act 93 Plan, and state and federal laws and regulations, including specific requirements and provisions for individuals with disabilities.



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Appeals

- **The District must offer both parties an equal right to appeal:**
 - a determination of responsibility
 - the District's dismissal of a Title IX formal complaint or any allegation in the Title IX formal complaint.

The scope of appeals related to Title IX sexual harassment are limited to the following reasons for appeal as stated in the Title IX regulations:

1. A procedural irregularity that affected the outcome of the matter.
2. New evidence that could affect the outcome was not reasonably available at the time the decision to dismiss or determination of responsibility was made.
3. The Title IX Coordinator, investigator(s) or decision maker(s) had a conflict of interest or bias for or against the individual complainant or respondent or for or against complainants or respondents generally that affected the outcome of the matter.



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Appeals

District can add grounds for appeal. If done, should be by policy, after consultation with Solicitor.



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Appeals

- Policy procedures:
- Written notice of a party's appeal shall be submitted to the Title IX Coordinator within ten (10) school days after the date on which the written determination was issued to the parties.
- Notice of appeal shall include a brief statement describing the basis for the appeal.



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Appeals

- The Title IX Coordinator shall ensure that the designated appeal authority is not the same person as the decision-maker that reached the determination, the investigator, or the Title IX Coordinator. The designated appeal authority may be the District solicitor or outside counsel. (Must be outside counsel if solicitor has advised during the Title IX procedures.)



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Appeals

- For all appeals, the designated appeal authority shall:
 1. Provide written notice to the other party [and advisor] when an appeal is filed and implement appeal procedures equally for both parties.
 2. Provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the stated basis for the appeal. Supporting statements shall describe in detail as applicable the procedural irregularities asserted to have affected the outcome of the determination, the nature of any new evidence which could affect the outcome, or the nature of any bias or conflict of interest asserted to have affected the outcome, with an explanation of how the outcome was affected by such factors. If evidence exists supporting the basis for appeal, it shall accompany the supporting statement, or it shall identify where such evidence may be found.



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Appeals

- If the party filing the appeal wishes to submit a supporting statement, it must be submitted to the appeal authority and simultaneously provided to the other party [and his/her advisor] within ten (10) school days of the date of the written notice of appeal.

If the other party wishes to submit a statement in opposition to the appeal, it must be submitted[to the appeal authority and other party and his/her advisor] within five (5) school days of the submission of the supporting statement.

- If a statement in opposition to an appeal refers to any evidence beyond what is described in a supporting statement, it shall accompany the statement in opposition, or it shall identify where such evidence may be found.



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Appeals

- The appeal authority may accept and consider evidence in support of or in opposition to an appeal in making any conclusions necessary to deciding the appeal.
- Alternatively, when the appeal authority determines that factors exist making it necessary for the decision-maker to further develop the evidentiary record relevant to the basis for appeal, the appeal authority may return the matter to the decision-maker for that limited purpose.



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Appeals

- The appeal authority shall:
 1. Determine whether the appeal meets the grounds for permitted reasons for appeal and justifies modifying the written determination.
 2. Issue a written decision setting forth the respects, if any, in which the written determination is modified and the rationale for the result within ten (10) school days [of receiving final supporting/opposing document from the parties.]
 3. Provide the written decision simultaneously to both parties [and their advisors]. A copy of the written decision shall also be provided to the Title IX Coordinator.



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Appeals

The appeal authority must undergo this training



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Appeals

According to Title IX, the District must do the following (likely will be done by appeal authority):

- Notify the other party in writing when an appeal has been filed and implement appeal procedures equally for both parties.**
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.**
- Issue a written decision describing the result of the appeal and the rationale for the result; and**
- Provide the written decision simultaneously to both parties [and their advisors.]**



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Recordkeeping

- The District shall maintain the following records for a minimum of seven (7) years after conclusion of procedures and implementation of disciplinary sanctions and/or remedies, or in the case of a complainant or respondent who is a minor, until the expiration of the longest statute of limitations for filing a civil suit applicable to any allegation:
 1. Each Title IX sexual harassment investigation, including any written determination regarding responsibility and any audio or audiovisual recording or transcript, and disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the District's education program or activity.
 2. Any appeal and the result.
 3. Any informal resolution and the result.



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Recordkeeping

3. All materials used to train the Title IX Coordinator, investigators, decision-makers, and any person who facilitates an informal resolution process [and appeal authority]. **The District shall make the same publicly available on its website.**
4. Records of any District actions, including any supportive measures, taken in response to a **report or formal complaint** of Title IX sexual harassment. **In each instance, the District shall document:**
 - **the basis for its conclusion that its response *was not deliberately indifferent***
 - **that it has taken measures designed to restore or preserve equal access to the District's education program or activity**
 - **If the District does not provide a complainant with supportive measures, *then the District must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.*** The documentation of certain bases or measures does not limit the District in the future from providing additional explanations or detailing additional measures taken (best to document everything).



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Recordkeeping

- **The District may wish to develop:**
- Uniform investigation report form
- Uniform written determination form
- Uniform appeal form
- Additional uniform forms for various notices to parties at these steps in process
- Consult with solicitor



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Additional Practices for Fostering An Inclusive Workplace Free of Unlawful Harassment and Discrimination

- Act with uniformity in decision making regarding who receives District resources, access to programs, etc.
 - This includes materials and equipment
- Reasons for treating anyone differently must be based on legitimate, program/business related reasons
- Even if motivation is not based on unlawful reasons, inconsistent treatment can lead to allegations of unlawful discrimination
- **Recommendation:** Have policies/procedures in place, including regarding allocation of District resources, and follow them.



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Additional Practices for Fostering An Inclusive Workplace Free of Unlawful Harassment and Discrimination

(1) Complainant may establish a *prima facie* case of unlawful discrimination by showing that he or she is a member of a protected class, was qualified to gain/retain a position or other term or condition of employment, that he or she was denied the position/term/condition by the employer, and that another individual not a member of the protected class was treated more favorably, **OR** "can provide facts which 'if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.' " Willis V. UPMC Children's Hospital of Pittsburgh, 808 F.3d 638, 644 (3d Cir. 2015).

- (2) If employee establishes the above, that is enough to "get the foot in the door." Employer then has the burden of showing a legitimate, non-discriminatory reason for the action.
- (3) If employer establishes (2), employee can still prevail if he or she establishes that employer's proffered reason was merely a pretext.



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Additional Practices for Fostering An Inclusive Workplace Free of Unlawful Harassment and Discrimination

- **A second analysis: Disparate impact**
- An unlawful employment practice based on disparate impact will be established if:
 - Complainant demonstrates that the employer used a particular employment practice that caused a disparate impact on the basis of any of the protected characteristics of the complainant (ex., race, age, religion, gender, etc.)
 - The complainant is able to demonstrate through specific factors that an alternative employment practice exists and the employer refused to adopt the same.
 - After either of the above are established, it is the employer's burden to demonstrate that a specific employment practice does not cause a disparate impact, or that if it does, that the practice is required by business necessity.
- **Remember, business necessity may not be used as a defense against a claim of intentional discrimination.**



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Additional Practices for Fostering An Inclusive Workplace Free of Unlawful Harassment and Discrimination

- “Locker room talk”
- “Just joking....lighten up!”
- “You can’t take a joke”
- “You can’t take a compliment”
- **Intent vs. Impact**



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Additional Practices for Fostering An Inclusive Workplace Free of Unlawful Harassment and Discrimination

- **“Second generation discrimination”**
 - often more subtle and pervasive
 - unconscious biases can affect decision making and actions in:
 - providing access to opportunities and benefits
 - assigning work/less favorable tasks
 - investigations and outcomes
 - daily interactions



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Additional Practices for Fostering An Inclusive Workplace Free of Unlawful Harassment and Discrimination

- Microaggressions (see handout)
- Why are such actions/statements a problem?
 - Contrary to a collegial workplace or supportive learning environment
 - Can constitute unlawful harassment/discrimination
 - Can be evidence of unlawfully discriminatory intent



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Relevance

- Relevance not defined by Title IX
- Relevance determinations need to be made:
 - **By investigator regarding:**
 - evidence to be fairly summarized in written investigative report
 - **By decision maker regarding:**
 - questions submitted by parties prior to issuance of written determination
 - all facts and evidence to be relied upon in making decision (Investigative report has already summarized relevant evidence but also included all directly related evidence. Decision maker must identify which findings of fact support determination, and the rationale for the result as to each allegation.)



Relevance

- Relevance determinations need to be made:
 - By appeal authority re: reasons given for appeal
 - Do the facts surrounding the investigation/decision support one of the bases for appeal?
 - Could the outcome change based on the reason asserted?
 - **Possibility exists of sending case back for further development of the record; consultation with counsel is strongly advised on appeal process; technical issues involving how to handle evidence that is new or allegedly not properly considered.**
- “A party who believes the investigator reached the wrong conclusion about the relevance of the evidence **may argue** again to the decision-maker (i.e., as part of the party’s response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant[.]”



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Relevance

- Definition of relevance: Proving, or tending to prove, an element of the definition of sexual harassment (or of any alleged violation).
- *evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true* (i.e., on what is relevant)."
- 85 FR 30294
- ***Consult with solicitor if in doubt***



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Relevance

- **May not:**
 - Adopt an “undue/unfair prejudice” rule. 85 FR 30294 (But, see next slide re: sexual history or predisposition.)
 - Adopt a rule prohibiting evidence of character or prior bad acts. 85 FR 30248
 - Exclude certain types of relevant evidence (*e.g.* lie detector test results, or rape kits).



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Relevance

- Questions and evidence about the **complainant's** (this rule protects complainants only) sexual predisposition or prior sexual behavior are not relevant, unless:
 - 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; 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
 - Ex: The parties are in a relationship and a certain act is something to which they have both consented in the course of their relationship.



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Relevance

- **Note:** The aforementioned questions (sexual predisposition/prior sexual behavior) may possibly be allowed in review and inspection of evidence even if the two criteria are not met as long as **directly related** to the allegations in the complaint, but cannot be considered in the summary of **relevant** evidence in investigative report, or in final decision or appeal, **unless** one of the two criteria are met.
- **Potentially complex area; consultation with solicitor is strongly advised.**



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Relevance

- **Other information considered *per se* not relevant:**
 - Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent; and
 - Any information protected by a legally recognized privilege unless waived (ex., attorney-client, medical records, spousal)



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Relevance

- To make relevance determinations:
- Review the allegations
- Compare evidence to the elements of the alleged policy violation to see if evidence impacts the elements
- Assess whether the evidence makes the allegations more or less likely



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Credibility

- If there are conflicting versions of **relevant** events, decision-maker (and possibly appeal authority) will have to weigh each party's **credibility**
- Credibility assessments can be critical in determining whether the alleged policy violation in fact occurred
- The duty is not to “believe one story over the other” but to assess each piece of evidence, independently, and as part of the bigger picture, to determine whether the evidence supports a finding of responsible or not responsible for a policy violation.
- **Investigator** can make credibility determination, but cannot be decision maker. Confused? Call solicitor.

- Source: Strassberger McKenna



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Credibility

- Credibility assessment factors to consider include:
- **Inherent plausibility:** Is the information believable on its face? Does it make sense?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation, video, entry logs) that corroborates the party's testimony?
- **Past record:** Did the Respondent have a history of past similar behavior?
- **Demeanor:** Did the person seem to be telling the truth or lying? Use caution here.
- **Per OCR, none of the above factors are determinative as to credibility.**
- **Document how you reached conclusion on credibility.**



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District May Elect for the Grievance Process to Include a Hearing

- Additional, precise steps must be followed.
- If desired, District should work with solicitor. Procedures/policies will need to be revised to include a hearing.



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Questions or concerns?



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