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# **TITLE IX TRAINING FOR INVESTIGATORS**



**OLENTANGY SCHOOLS**

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<b>2260 – Nondiscrimination</b> <b>5517 – Anti-Harassment</b>	Prohibits discrimination based on race, color, national origin, sex (including sexual orientation or gender identity), disability age, religion, military status, ancestry, or genetic information.
<b>AG 2260 – Nondiscrimination and Access to Equal Educational Opportunity</b>	Complaint process for discrimination and harassment.
<b>2266 – Nondiscrimination on the Basis of Sex</b>	Prohibits discrimination on the basis of sex and sexual harassment.
<b>AG 2266 – Nondiscrimination on the Basis of Sex in Education Programs or Activities</b>	Complaint process for claims of sexual harassment.
<b>5516 – Student Hazing</b>	Prohibits hazing and defines complaint process.
<b>5517.01 – Bullying and Other Forms of Aggressive Behavior</b>	Prohibits bullying and defines complaint process.

# OLENTANGY BOARD OF EDUCATION POLICIES



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# **YOUR TRAINING OBLIGATIONS UNDER THE NEW TITLE IX REGULATIONS**



# TITLE IX TEAM MEMBERS



## **Title IX Coordinator**

Initially contacts and offers supportive measures. Assesses and sometimes files complaints. Documents and manages the process.



## **Investigator**

Person designated to investigate, gather evidence and compile an investigation report.  
(May be Title IX Coordinator).



## **Decisionmaker**

Person who issues a written determination regarding responsibility.  
Cannot be the same person as the Title IX Coordinator or the Investigator.



## **Appeals Designee**

Must offer both respondent and complainant an opportunity to appeal.  
Cannot be the same person as the Title IX Coordinator, Investigator, or the Decisionmaker.

# TRAINING REQUIREMENTS



- Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an informal resolution process must receive training on:
  - the definition of sexual harassment in the regulations,
  - the scope of the recipient's education program or activity,
  - how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, **as applicable**, and
  - how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

# INVESTIGATOR-SPECIFIC TRAINING REQUIREMENTS



- Districts must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in the regulations.

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# TITLE IX BACKGROUND



## TITLE IX BACKGROUND



No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).



# WHOM DOES TITLE IX PROTECT?



Any person participating in an educational program in the United States that receives federal financial assistance.

- Students
- Staff
- Applicants for admission
- Visitors and community members

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# TITLE IX TERMS AND DEFINITIONS



## NEW TITLE IX LINGO (TERMS)



**Recipients:** School districts are now referred to as “recipients.”

**Complainant:** A person alleged to be the victim of conduct that could constitute sexual harassment.

**Respondent:** A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

**Supportive Measures:** These are your “interim measures.”

**Determination of Responsibility.** Finding whether a person is responsible for sexual harassment.

**Advisors:** Parties may have an advisor, who may be an attorney, participate in the process.

## NEW TITLE IX LINGO (DEFINITIONS)



Sexual Harassment: Conduct on the basis of sex that satisfies one or more of the following:

- An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (i.e., *quid pro quo* sexual harassment);
- 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 recipient's education program or activity;  
OR
- "Sexual assault," "dating violence," "domestic violence," or "stalking," as defined by the Clery Act.

## MORE DEFINITIONS



- **Sexual assault:** Sex offenses to include any sexual act, including rape, sexual assault with an object, or fondling directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.
- **Dating violence:** Violence committed by a person who has been in a social relationship of a romantic or intimate nature with the complainant; the existence of such a relationship shall be determined based on consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- **Domestic violence:** Felony or misdemeanor crimes of violence committed by: a current or former spouse or intimate partner of the complainant, a person with whom the complainant shares a child, a person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner, a person similarly situated to a spouse of the complainant under the jurisdiction's domestic or family violence laws, or any other person against a complainant who is protected under the domestic or family violence laws of the jurisdiction.
- **Stalking:** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their own safety or the safety of others or to suffer substantial emotional distress.

# EXAMPLES OF EFFECTIVE DENIAL OF EQUAL ACCESS



- Schools must evaluate whether a reasonable person in the complainant's position would be effectively denied equal access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.
- Skipping class to avoid a harasser, decline in a student's grade point average, or having difficulty concentrating in class.
- A third grader who starts bed-wetting or crying at night due to sexual harassment.
- A high school wrestler who quits the team but carries on with other school activities following sexual harassment.
- A student need not have already suffered loss of education before being able to report sexual harassment.
- Effective denial of equal access to education does not require that a person's total or entire educational access has been denied.
- Complainants do not need to have dropped out of school, failed a class, had a panic attack, or otherwise reached a "breaking point" or exhibited specific trauma symptoms to be effectively denied equal access.

(From OCR's July 2021 Q&A)

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# **DUTY TO AVOID BIAS AND CONFLICT OF INTEREST**



## DUTY TO AVOID BIAS AND CONFLICTS OF INTEREST



- Regulations require that any individual designated as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.



# DUTY TO AVOID BIAS AND CONFLICTS OF INTEREST



- Your focus is the integrity of the process. Never an outcome.
- Recognize and understand what your biases are so that you can put them aside.
- Cultural competency – understand your microaggressions or unconscious biases.

## DEFINING BIAS



- The Title IX Team must not be **biased**.
  - Black's Law Dictionary: Bias is a mental inclination or tendency; prejudice; predilection.
  - May not be biased for or against complainants or respondents generally.
  - May not be biased for or against the individual complainants or respondents involved in the formal complaint.

## DEFINING CONFLICT



- The Title IX Team must not have a conflict of interest.
  - Black's Law Dictionary: "Conflict of interest" means a real or seeming incompatibility between one's private interests and one's public duties.
  - May not have a conflict of interest in favor of or against complainants or respondents generally.
  - May not have a conflict of interest in favor of or against the individual complainants or respondents involved in the formal complaint.

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# **NEW TITLE IX SEXUAL HARASSMENT GRIEVANCE PROCESS**



# NEW PROCESS WHEN A FORMAL COMPLAINT OF SEXUAL HARASSMENT IS MADE



- Investigation
- Evidence Review
- Hearings (optional) or Question Exchange
- Decision/Determination of Responsibility
- Remedies/Discipline
- Appeal

- ✓ Notice of the grievance process, including any informal resolution process;
- ✓ Notice of the allegations, including sufficient detail (i.e., names of known parties, the conduct alleged to be sexual harassment, and the date and location of the conduct, if known) to allow the respondent to prepare a response before an initial interview;
- ✓ A statement that the respondent is presumed not responsible for the conduct and that responsibility will be determined at the conclusion of the grievance process;
- ✓ Notice of the parties' right to have an advisor (who may be, but is not required to be, an attorney) and to inspect and review evidence; and
- ✓ Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process.

## **Written Notice Upon Receipt of Formal Complaint**

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# THE ROLE OF THE INVESTIGATOR



# SIGNIFICANT CHANGES TO INVESTIGATIONS



- Mandatory separation between the investigation function and decision-making.
- Respondent is not just “innocent until proven guilty,” but must be presumed not responsible for the conduct throughout the entire investigation process.
- Parties are entitled to view all of the evidence in the case.
- Confidentiality of party and witness names is over.



# HOW MANY HATS CAN AN INVESTIGATOR WEAR?



## Investigator

Person designated to investigate, gather evidence and compile an investigation report.

Investigator may also be the Title IX Coordinator.



## Decisionmaker

Person who issues a written determination regarding responsibility.

Cannot be the same person as the Title IX Coordinator or the Investigator.



## Appeals Designee

Must offer both respondent and complainant an opportunity to appeal.

Cannot be the same person as the Title IX Coordinator, Investigator, or the Decisionmaker.

# CONFIDENTIALITY



Recipients cannot restrict either party's ability to discuss the allegations or gather and present evidence.

Recipients must keep confidential the identity of a person who complains or reports sexual harassment, including parties and witnesses, except as permitted by law or to carry out the purpose of these regulations.

Will these responsibilities be frustrated in practice?

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# **ROLE OF THE INVESTIGATOR: STEP ONE – PREPARING TO INVESTIGATE**



- ✓ Notice of the grievance process, including any informal resolution process;
- ✓ Notice of the allegations, including sufficient detail (i.e., names of known parties, the conduct alleged to be sexual harassment, and the date and location of the conduct, if known) to allow the respondent to prepare a response before an initial interview;
- ✓ A statement that the respondent is presumed not responsible for the conduct and that responsibility will be determined at the conclusion of the grievance process;
- ✓ Notice of the parties' right to have an advisor (who may be, but is not required to be, an attorney) and to inspect and review evidence; and
- ✓ Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process.

## Written Notice Start of Formal Complaint

## MANAGING AN ADVISOR'S INVOLVEMENT



- Both parties have an equal opportunity to have others present during any grievance proceeding, including the opportunity to be accompanied by an advisor who may be, but is not required to be, an attorney.
- Employees will typically have a union representative and/or an attorney represent them.
- Students may bring a parent or advisor.
- Make sure to have a pre-interview discussion with representatives/advisors about the limitations of what they can do/say in the interview.
- You may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

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# **ROLE OF THE INVESTIGATOR: STEP TWO – GATHERING EVIDENCE**



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# INVESTIGATION #1: STUDENT COMPLAINANT AND RESPONDENT

Katie is a Junior on the school's dance team and has dated two different football players this year. She had sex with both of them and now that she has broken up with them, they've told the entire team about the details of everything they've done. The boys have shared intimate texts and sexting between the two of them and now the whole school knows. Katie has been called a "slut" and a "whore" by various classmates, but especially by Nick, her most recent boyfriend. Twice she has been in the hallway at school at her locker and had her butt grabbed by someone, and she doesn't know who it was. She files a formal complaint naming Nick as the Respondent and delivers it to the Title IX Coordinator.



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## INVESTIGATION #2: STUDENT COMPLAINANT/STAFF RESPONDENT

Sam is a Sophomore student who has struggled academically. His math teacher suggested he start meeting with her after school for private tutoring/review, at no cost. His parents are aware. Sam meets with his teacher for two months in her classroom with the door shut, and then during a tutoring meeting the teacher leans in towards him, puts her hand on his stomach, and kisses him. He was stunned, didn't say anything, and went home and told his parents. The following day the parents call the school counselor and tell her what happened. They do not want to see the teacher ever again and they do not want to participate in an investigation because it will be too traumatic and embarrassing for Sam.





# GATHERING EVIDENCE – COMPLYING WITH THE REGULATIONS



- Burden of proof rests on the Recipient at all times.
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Cannot restrict the parties from discussing the allegations under investigation or from gathering and presenting relevant evidence.
- Must provide to any party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

# GATHERING EVIDENCE – BEGIN WITH AN ORGANIZED FILE



- Binders are great. Set up an automatic protocol for each investigation. A binder with pre-determined tabs and a Table of Contents that you can fill in as you go.
- Tabs: Notice of Allegations, Advisor Forms, Complainant Interview, Respondent Interview, Witness Interviews, Text Messages and Social Media, Evidence from Complainant, Evidence from Respondent, Draft Report, Final Report, Correspondence with Complainant and/or Advisor, Correspondence with Respondent and/or Advisor, Notes, etc.
- Start a Timeline and a Witness List to use throughout your investigation.
- Remember that all of your evidence must be provided to the parties eventually, and so keep original copies of things clean.

## GATHERING EVIDENCE – HOW TO BEGIN



- What records should you be looking at and/or asking for?
- Who do you interview first?
- What witnesses have the Complainant and Respondent asked you to interview?

## WHAT IS RELEVANT EVIDENCE?



- *Black's Law Dictionary*: Relevant means logically connected and tending to provide or disprove a matter at issue; rationally tending to persuade people of the probability or possibility of some alleged fact.
- Does the fact, evidence or statement tend to prove or disprove any element of the type of sexual harassment you are investigating?

## OFF LIMITS QUESTIONS



- Throughout the grievance process, the investigator(s) and decision-maker(s) may 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 such privilege has waived the privilege in writing.

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# TAKING STATEMENTS

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- Begin interview process as soon as possible.
  - Never promise confidentiality, but explain the safety precautions the District will take (e.g., no disclosure of personally identifiable information in public records).
  - Consider the role of the parents: Notification? Representation?
  - Get their story in their own words, first in general, then more specifically.
  - Follow up to get specific facts, not generalities.
  - Don't forget "anything else?"

# INTERVIEWING CHILDREN



- Interview Structure:
  - Introductory--set general ground rules regarding discussion.
    - Agreement to tell the truth.
    - Reminder they should not guess.
    - Correct you if you are wrong.
  - Rapport-Building--talk about things other than the target incident.
  - Free-Recall—ask open-ended questions.
- Open-ended questions provide higher quality information.
  - Ex: “Where were the other students?” v. “Were the other students in the hallway?”
- Young students – look for the core of the story to be true; minor inconsistencies are common and do not speak to the larger credibility of the narrative.

## SPECIAL WITNESS CONSIDERATIONS: DIFFICULT WITNESSES



- What if a student witness refuses to cooperate?
- Do not allow witnesses or parties to provide ambiguous answers, or to not fully answer your question.



## SPECIAL WITNESS CONSIDERATIONS: DIFFICULT WITNESSES



- What if a Respondent-Employee refuses to testify?
- *Kalkines v. United States*, 473 F.2d 1391, 1393 (Fed. Cir. 1973).
- Failure to cooperate may result in disciplinary action, including dismissal.
- Note: testimony provided in the above scenario may not be used for a criminal prosecution.

# SPECIAL WITNESS CONSIDERATIONS: CONDUCTING A TRAUMA-INFORMED INTERVIEW



Trauma-informed investigating and interviewing include the following key components:

- 1) understanding the impact of trauma on a neurological, physical, and emotional level;
- 2) promoting safety and support;
- 3) knowing positive ways to respond that avoid re-traumatization; and
- 4) providing choice with a goal of empowerment.

# SPECIAL WITNESS CONSIDERATIONS: CONDUCTING A TRAUMA-INFORMED INVESTIGATION



- Making the interview more comfortable and build rapport— having a box of tissues in the room; letting them choose their drink; maybe a white noise machine if it is in a busy space; letting them choose their seat/side of the table.
- Never “rank” the trauma (e.g., “you’re lucky you don’t remember” or ranking based on whether you were drugged or not drugged, or whether it was someone you know or a stranger, etc.)
- Avoid Asking “why” questions. “Why did you...” It sounds too judgmental.
  - Why assumes that there was another option that they didn’t choose.
  - Instead, can ask “how did it happen that...?”

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**ROLE OF THE INVESTIGATOR:  
STEP THREE – PROVIDING THE PARTIES WITH  
EVIDENCE**



## OBLIGATION TO PROVIDE EVIDENCE



- The Title IX Coordinator will provide both parties an equal opportunity to inspect and review any evidence obtained as a part of the investigation that is **directly related to the allegations raised in a formal complaint**, including the evidence upon which the recipient does not intend to rely in reaching a determination.
- This is done so that each party can “meaningfully respond to the evidence prior to the conclusion of the investigation.”
- You must provide the evidence in an electronic format or hard copy and give the parties time to submit a written response. If a written response is provided, consider it in completing your final report.

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# **ROLE OF THE INVESTIGATOR: STEP FOUR – TURNING EVIDENCE INTO THE REPORT**



- ✓ **Fairly summarize relevant evidence.**
- ✓ **Evaluate all relevant evidence objectively, including both inculpatory and exculpatory evidence.**
- ✓ **Make credibility determinations that are not based on a person's status as a Complainant, Respondent, or Witness.**
- ✓ **"Show your work" for all of the above in order to have a complete report.**

## **Written** **Investigation** **Report**

# FAIRLY SUMMARIZING RELEVANT EVIDENCE



## Do...

- Be specific.
- Memorialize witnesses interviewed, records reviewed/created.
- Document the District's efforts. (e.g., if a witness would not cooperate/be interviewed).
- Come to a factual conclusion about what happened and make credibility determinations.

## Don't...

- Be too general.
- Use legal definitions or terms.
- Refer to conversations with legal counsel.
- Refer to conversations with insurers.
- Be afraid to take action if there is misconduct that just doesn't fall into the definitions investigated.



# EVALUATING INFORMATION: EVALUATING CONFLICTING EVIDENCE



- The investigator is the finder of fact.
- The report should answer the question of whether the conduct occurred as alleged. Did the person do what they are accused of doing?
- Apply common sense and consider credibility determinations.
  - Consider the witnesses' opportunity to observe what happened versus hearsay.
  - Consider whether testimony matches up with hard evidence such as texts, photographs, videos, social media, etc.
  - Demeanor of witnesses. What do they have to lose/gain?

# TURNING EVIDENCE INTO A REPORT

## AVOIDING BIAS



- Distinguish undisputed evidence from contested evidence.
- Let the evidence lead to a conclusion – do not interpret the evidence with a goal to reach a particular conclusion.
- Avoid having a “hunch” from the beginning or judging based upon appearance or the “type” of girl/boy.
- Avoid “first impression bias.”
- There will be gaps in evidence – if you cannot fill those gaps, do not use your assumptions or speculation.

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**THANK YOU!**

