

Title IX Sexual Harassment: Complaint Process and Recent Changes to Title IX Regulations

Training for Coordinator, Investigators, and Decision-Makers
October 19, 2021
USD 470 Arkansas City

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Introductory & Background Information

On Demand Training: Section 1

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Title IX of the Education Amendments Act of 1972

"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."



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Summary of 2020 Changes

- No changes to existing regulations related to athletic participation, employment, or single-sex education
- Defines sexual harassment
- Provides new terminology for use in Title IX complaints
 - Created specific roles of Title IX Coordinator, Investigator, Decision-Maker
- Requires response when district has “actual knowledge” of sexual harassment
- Provides due process rights to accusers and accused persons in sexual harassment investigation and decision-making, as well as outlining the procedure for response:
 - Mandates provision of supportive measures during investigation process
 - Prohibits retaliation
 - Requirements of Determination of Responsibility

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Definition: Sexual harassment shall include conduct on the basis of sex involving one or more of the following:

(1) a district employee conditioning the provision of an aid, benefit, or service of the district on an individual's participation in unwelcomed sexual conduct;

Quid pro
Quo

(2) unwelcomed conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district's educational program or activity; or

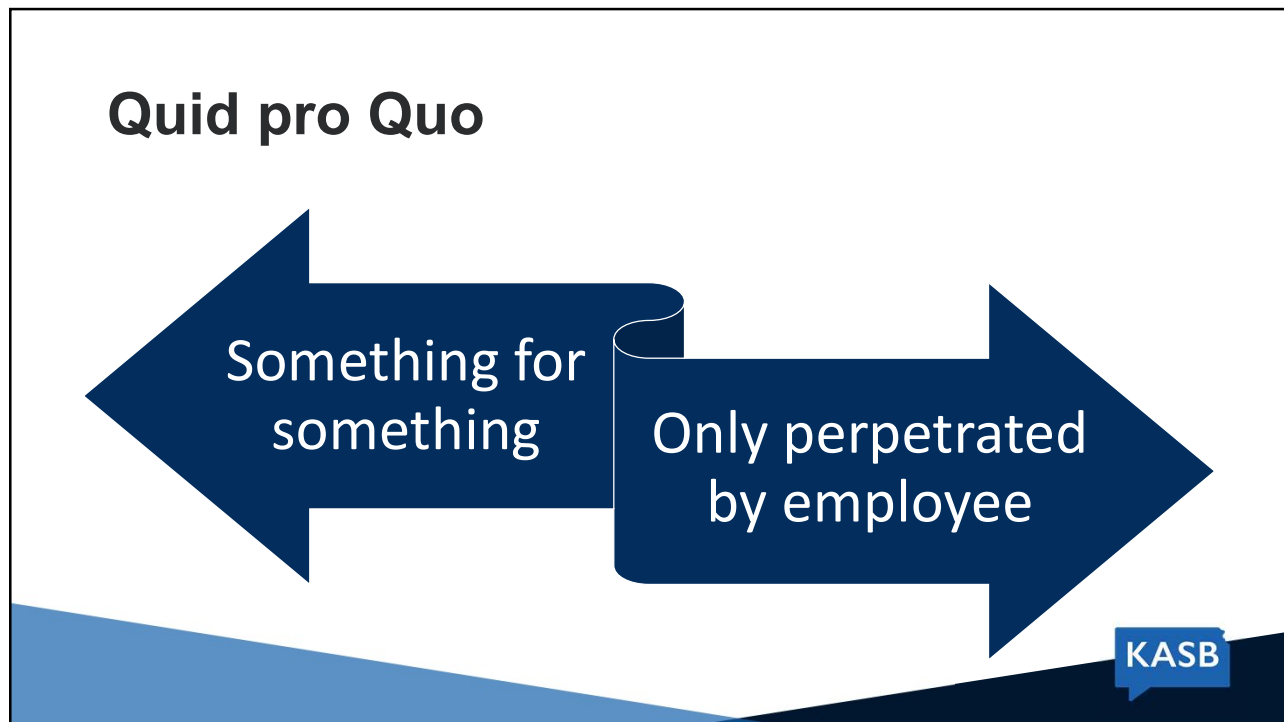
Hostile
Environment

(3) sexual assault, dating violence, domestic violence, or stalking.

VAWA
definitions

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Hostile Environment

Unwelcome conduct that a reasonable person would determine to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to work/education.

- “denial of access”:
 - Might include skipping a class, decline in grades, bed-wetting incidents or crying at home in younger children, an older child dropping out of sports/activities.
 - Does not require “that a person’s total or entire educational access has been denied.”
 - Do not have to suffer a loss of education before reporting
 - Drop out, fail a class, exhibit signs of trauma
 - No “concrete injury” required.

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VAWA “Big Four”

Sexual Assault

- an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

Dating Violence

- violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim where the existence of such a relationship shall be determined based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved.

Domestic Violence

- includes crimes of violence committed by a person who is a current or former spouse, partner, person with whom the victim shares a child, or who is or has cohabited with the victim as a spouse or partner, by a person similarly situated to a spouse of the victim under Kansas or applicable federal law, or by any other person against an adult or youth victim having protection from such person’s acts by Kansas or applicable federal law.

Stalking

- engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or to suffer substantial emotional distress.

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“Education Program and Activities”

- “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution”
 - Think similar to “nexus to school” consideration in student discipline.
 - “In the United States”

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New Roles

- Complainant**
 - Alleged victim
- Respondent**
 - Alleged perpetrator
- Title IX Coordinator**
 - Oversees process
- Investigator**
 - Investigates claims
- Decision-Maker (and Appeal Decision-Maker)**
 - Uses information collected by Investigator
- Informal Resolution Facilitator**
 - Neutral 3rd party that helps parties in informal resolution process



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Title IX Coordinator, Investigator, Decision-Makers, or Facilitator of an Informal Resolution Process



Shall not have a conflict of interest or bias for or against the complainant or respondent (personally or generally).

Will exercise objective evaluation of all available evidence, both inculpatory and exculpatory, and prohibit credibility determinations based on a party's status as complainant, respondent, or witness.



Will receive training to perform their roles



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Training Requirements



- the definition of sexual harassment;
- the scope of the education program and activities;
- how to serve impartially, including
 - by avoiding prejudgment of the facts,
 - conflicts of interest, and
 - bias; and
- how to conduct a formal complaint investigation process, including appeals and informal resolution processes.
- Investigators shall receive training on issues of relevance of questions and evidence in order for them to create investigative reports that fairly summarize relevant evidence, and how to prepare an investigation report.
- Decision-makers shall receive training on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.

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Impartiality

Avoid
Prejudgment
of the Facts
at Issue

Conflicts of Interest

Bias

Cannot Rely
on Sex-
Stereotypes

Title IX Coordinator's
initial determination
to dismiss/not
dismiss is not
prejudgment

Family member, close
family friend, etc.

Past Dealings

Personal bias or bias
for certain parties, by
virtue of their status
as
complainant/respond
ent/witness.

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Retaliation Prohibited

Retaliation:

Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.

Complaints alleging retaliation may be filed according to the formal complaint investigation procedures for sex discrimination.

No district or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.

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Retaliation Prohibited



- The exercise of rights protected under the First Amendment does not constitute retaliation prohibited by Title IX.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a formal complaint investigation proceeding does not constitute retaliation, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.
- The district must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA, as required by law, or to conduct any investigation, hearing, or judicial proceeding arising thereunder.

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Informal Resolution

At any time during the formal complaint process and prior to reaching a determination regarding responsibility, the district may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and determination of responsibility.

The informal resolution process cannot be used to resolve allegations that an employee sexually harassed a student.



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Informal Resolution Process

Title IX Coordinator Appoints Facilitator

- The informal resolution process may be facilitated by a trained educational professional, consultant, or other individual selected by the Title IX Coordinator.

Facilitator Meets with Parties

- If the matter is resolved to the satisfaction of the parties, the facilitator shall document the nature of the complaint and the proposed resolution, have both parties sign the documentation and receive a copy, and forward it to the Title IX Coordinator.

Agreement Reached

- Within 20 days after the complaint is resolved in this manner, the Title IX Coordinator shall contact the complainant to determine if the resolution of the matter remains acceptable.

No Agreement

- If the matter is not resolved, or if the individual does not believe the resolution remains acceptable within 20 days after the informal resolution document is executed, the individual or the Title IX Coordinator may proceed with the formal complaint process.

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Rights in the Informal Resolution Process

The parties are provided a written notice disclosing the allegations, the requirements of the informal resolution process, information on when it may preclude the parties from resuming a formal complaint arising from the same allegations

At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the investigation of the formal complaint and be informed of any consequences resulting from participating in the informal resolution process

The parties voluntarily and in writing consent to the informal resolution process

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Recordkeeping Requirements



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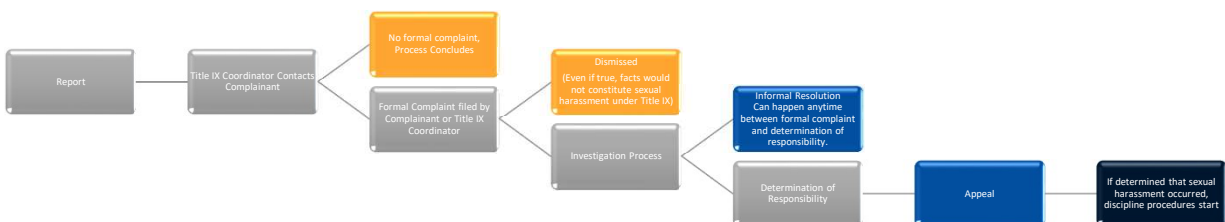
Overview of the Title IX Formal Complaint and Investigation Process

On Demand Training: Section 2

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Formal Complaint Investigation Process



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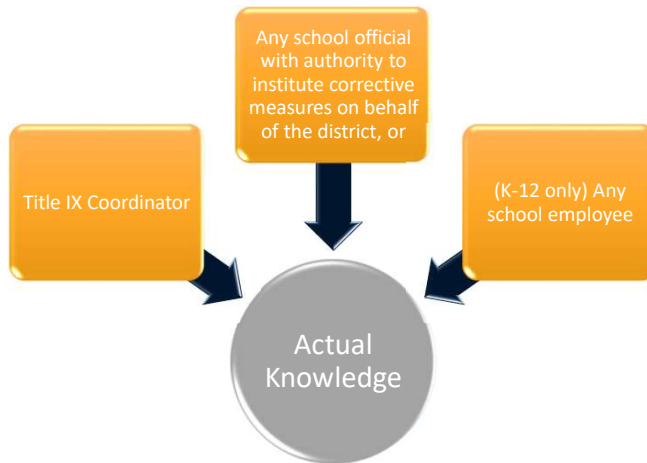
Report of Sexual Harassment

District must respond when it has “actual knowledge” of sexual harassment.

Actual knowledge:

Notice of sexual harassment, including claims of sexual harassment

Other school employees report claims to Title IX Coordinator.



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Title IX Coordinator Contacts Complainant

- Response must not be “deliberately indifferent”
 - Clearly unreasonable in light of known circumstances
- Promptly contact complainant, and meet confidentially:
 1. To discuss availability of supportive measures,
 2. Consider the complainant’s wishes with respect to supportive measures,
 3. Inform the complainant of the availability of supportive measures with or without a formal complaint, and
 4. Explain the process for filing a formal complaint.
 - KASB Policy : 10 days, unless good cause for delay.
- Should respect complainant’s wishes regarding whether or not a school investigates, unless the Title IX Coordinator determines that signing a formal complaint over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.

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Offer Supportive Measures

- The district will treat the complainant and respondent equitably by offering supportive measures.
- These non-disciplinary and non-punitive measures will be offered as appropriate, as reasonably available, and without cost to the complainant or the respondent.
- Supportive measures are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party.
- “Supportive Measures” shall include, but not be limited to, measures designed to protect the safety of all parties, to protect the district’s educational environment, or to deter sexual harassment.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

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Examples of Supportive Measures

Supportive measures do not require a formal complaint. In some instances, where a formal complaint is not available, supportive measures can still be used to address alleged harassment

Remember, District response to alleged harassment cannot be deliberately indifferent. Supportive measures allow an avenue to respond without formal complaint.

counseling

extensions of deadlines or course related adjustments

modifications of work or class schedules

escort services or increased security and monitoring

mutual restrictions on contact between the parties

changes in work locations

leaves of absence

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Emergency Removal

A school may remove a respondent from the program or activity on an emergency basis if:

- Undertake an individualized safety and risk analysis
- Determine that an immediate threat to the physical health or safety of any student or other individual justifies removal, and
 - Threat must arise from the allegations
- Respondent given notice and an opportunity to challenge the decision immediately following the removal.

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Formal Complaint Filed



- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the District where the formal complaint is filed.
- A formal complaint may be filed with the Title IX Coordinator in person, by mail, by email, or by any other means that results in the Title IX Coordinator receiving the report.
- A formal complaint contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint (unless signed by the Title IX Coordinator).
- A complaint should be filed as soon as possible after the conduct occurs, but not later than 180 calendar days after the complainant becomes aware of the alleged violation, unless the conduct forming the basis for the complaint is ongoing.

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Provide Notice of Complaint to Parties



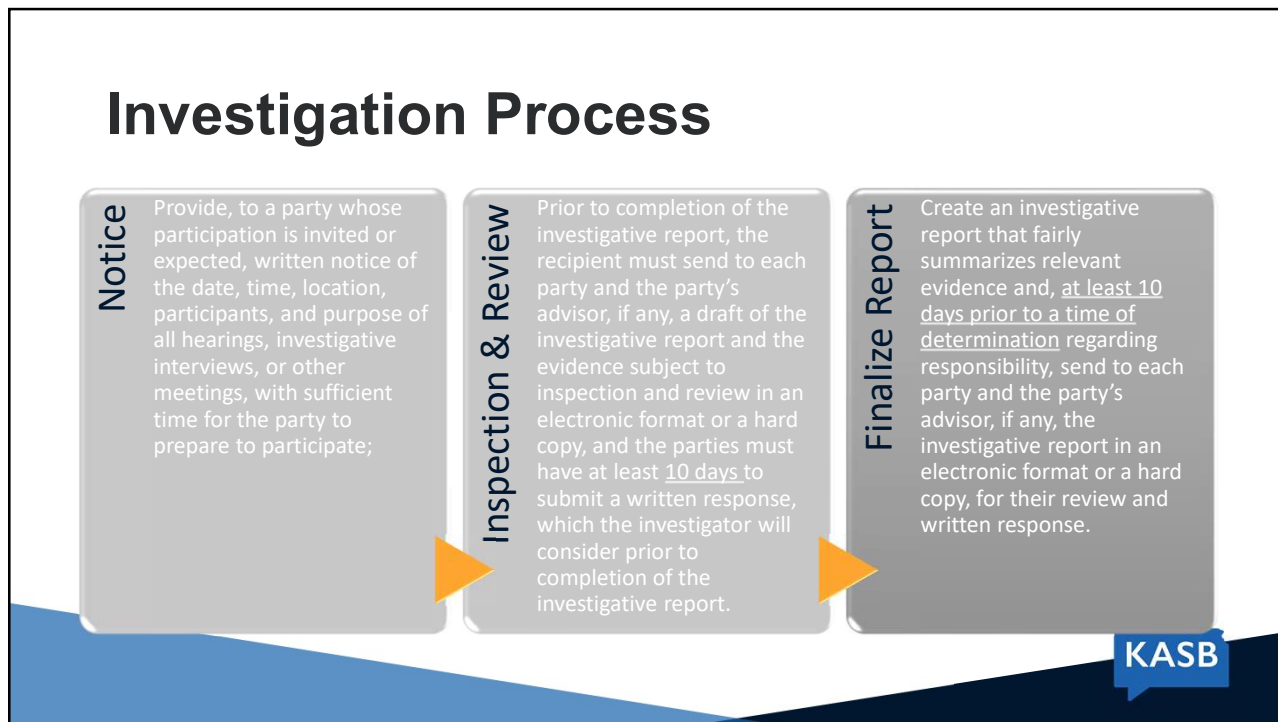
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Title IX Coordinator Responsibilities

- Supervise the supportive measures
- Oversee formal complaint investigation process
- Title IX Coordinator may dismiss a formal complaint that is filed when the facts alleged in the complaint
 - do not meet the definition of sexual harassment under Title IX, or
 - did not occur in the school's education program or activity against a person in the United States.
- Ensure compliance with record retention

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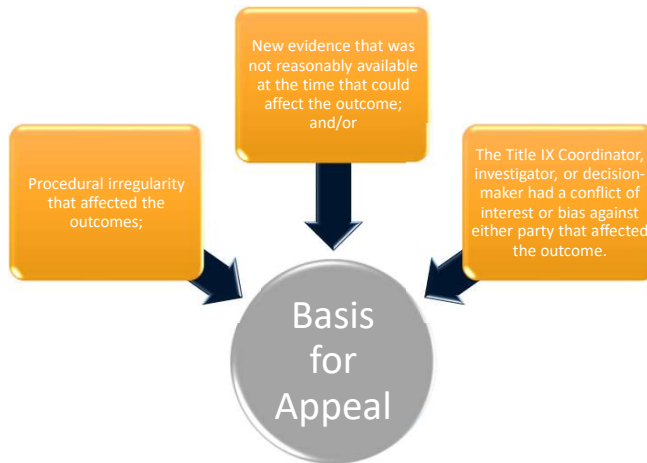
Appeals

The complainant or respondent may appeal the decision-maker's determination regarding responsibility or a dismissal of a formal complaint.

Request for appeal shall be made in writing within 10 days after the date of the written determination regarding responsibility.

Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome

Provide the written decision simultaneously to both parties



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Don't forget the rights granted in the investigation process

- Ensure that the preponderance of the evidence burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district and not the parties;
- Provide an equal opportunity for the parties to present witnesses and evidence;
- Not restrict either party's ability to discuss the allegations under investigation or to gather and present relevant evidence;
- Allow the parties to be accompanied with an advisor of the party's choice;
- Provide written notice of the date, time, location, participants, and purpose of any interview, meeting, or hearing at which a party is expected to participate;
- Provide the parties equal access to review all the evidence collected which is directly related to the allegations raised in a formal
- complaint, including the investigative report, and the opportunity to respond to that evidence before a determination is made;
- Be impartial and objectively evaluate all relevant evidence without relying on sex stereotypes;
- Not have conflicts of interest or bias for or against complainants or respondent;
- Not make credibility determinations based on the individual's status as complainant, respondent, or witness.
- Providing parties with reports/decisions at the same time.

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Investigator Training

On Demand Training: Section 3

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Parties' Rights in Investigation

Provide an equal opportunity for the parties to present witnesses and evidence;	Allow the parties to be accompanied with an advisor of the party's choice;	Provide written notice of the date, time, location, participants, and purpose of any interview, meeting, or hearing at which a party is expected to participate;	Provide the parties equal access to review all the evidence collected which is directly related to the allegations raised in a formal complaint, including the investigative report, and the opportunity to respond to that evidence before a determination is made;
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Investigation Steps

- Receive Notice of Formal Complaint
- Contact Parties, Witnesses, etc. to set up interviews.
- Send Pre-Meeting Notice
- Conduct Interviews and Collect Evidence
- Compile Investigative Report
- Distribute Report to Parties with Deadline for Response (10 days)
- Review Parties' Responses and Update Report, Send to Parties, Title IX Coordinator and Decision-Maker

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Interview Tips



Ask open ended questions.



Remain impartial, but build rapport and try to create comfortable environment for those you interview.



Remember all evidence, including notes, must be shared with both parties.

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Investigative Report

Relevance:

The tendency of a given item of evidence to prove or disprove one of the legal elements of the case, or to have probative value to make one of the elements of the case likelier or not.

- The investigator shall prepare an investigative report that fairly summarizes relevant evidence and share the report with the parties and their advisors for review and response.
 - Must include all inculpatory and exculpatory evidence.
 - Evidence is included with Investigative Report for parties' review.
- The report and evidence are provided to the parties at the same time, and they have 10 days to provided response.

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After Initial Report

- Response from Parties:
 - Examples:
 - Additional evidence or support of position
 - Support or rebuttal to information in the initial report
- Review the responses and update your report accordingly.
 - Can add information, rephrase or change report, etc.
- Provide the final report to the parties, Title IX Coordinator, and Decision-Maker.

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Investigator's Responsibilities in the Process

- Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district and not the parties;
- Not restrict either party's ability to discuss the allegations under investigation or to gather and present relevant evidence;
- Be impartial and objectively evaluate all relevant evidence without relying on sex stereotypes;
- Not have conflicts of interest or bias for or against complainants or respondents;
- Not make credibility determinations based on the individual's status as complainant, respondent, or witness.

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Decision-Maker Training

On Demand Training: Section 4

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Decision-Making Process

- Receive Investigator's Report
- Exchange of Questions (K-12)
- Schedule Hearing (Post-Secondary)
- Write Determination Regarding Responsibility

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Exchange of Questions

In K-12 Schools, this exchange of questions takes the place of a live hearing on the sexual harassment complaint.

May exclude irrelevant questions, but must provide explanation to the party as to why question was not forwarded.

This does not replace the disciplinary hearing that would take place after a finding that sexual harassment has occurred, nor does it deprive the student of any rights granted in student discipline laws or policies.

Give each party the opportunity to submit written, relevant questions that the parties want asked of any party or witness.

Provide each party with the answers of the other party,

Allow for additional, limited follow-up questions.

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Note for Live Hearings: Technology Issues

- K-12 does not require live hearings, but all post-secondary must conduct live hearings.
- If performing a hearing, it must be recorded. Be sure to work with district technology staff ahead of hearings to be prepared.
- Ensure the hearing space can accommodate equipment: Access to outlets, sound quality, etc.

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Written Determination Regarding Responsibility



Identify the allegations potentially constituting sexual harassment



Describe the procedural steps taken, including any notifications to the parties, site visits, methods used to gather evidence, and interviews



Include the findings of fact supporting the determination



Address any district policies and/or conduct rules which apply to the facts



Address each allegation and a resolution of the complaint including a determination regarding responsibility and the rationale therefor



The procedures and permissible bases for the complainant and/or respondent to appeal the determination



Provided to parties at the same time

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Preponderance of the Evidence



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.

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Relevance and Evidence

Relevance:

The tendency of a given item of evidence to prove or disprove one of the legal elements of the case, or to have probative value to make one of the elements of the case likelier or not.

Evidence:

Any of the material items or assertions of fact that may be submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it

- Look to initial complaint, review investigation report.
- Consider all information that supports either parties' position, or in contradiction to them.
- Try to focus investigation on the complaint, but if additional issues arise, provide parties with the required notice.
- Be cautious of any evidence related to the sexual predisposition or sexual history of the complainant.
- In questions exchanged by parties in lieu of hearing, all questions must be relevant.

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Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, 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.

Sexual Predisposition of Complainant

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Appeal Decision-Maker Responsibilities



Review the evidence gathered by the investigator, the investigator's report, and the original decision-maker's determination;



Notify both parties in writing of the filing of an appeal and give them a period of time after the appeal is filed to submit further evidence in writing;



Not have a conflict of interest or bias for or against complainant or respondent and receive the required training;



Issue a written decision and the rationale for the decision within 30 days after the appeal is filed;



Describe the result of the appeal and the rationale for the result in the decision; and

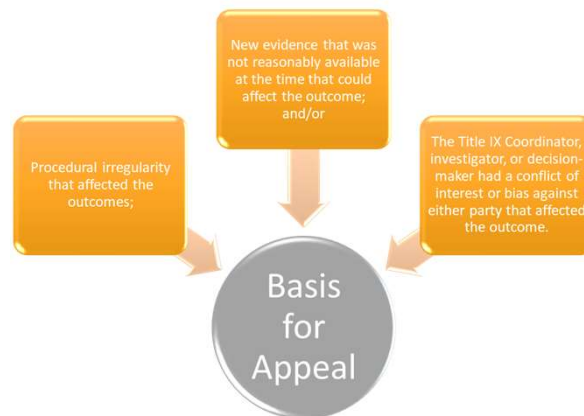


Provide the written decision simultaneously to both parties and to the Title IX Coordinator.

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Remember Limited Bases for Appeal



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