

Title IX Sexual Harassment Regulations: Decision Makers & Appellate Decision Makers



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Training Agenda

- Title IX Sexual Harassment
- District's obligations to address alleged sexual harassment
- Title IX grievance process and the role of decision makers and appellate decision makers
- The ability of the parties to cross examine one another through written questions
- Understanding relevance of evidence and burden of proof
- How to prepare a determination of responsibility



Title IX Overview





What is Title IX?

“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.**”

-Title IX of the Education Amendments of 1972





“Sexual Harassment” Definition - § 106.30(a)

“**Sexual Harassment**” = conduct on the basis of sex that satisfies one or more of the following:

1. 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);
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 recipient’s education program or activity; or
3. “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

“**Education program or activity**” = any location, event, or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the context in which harassment occurred

SH definition does not turn on method of harassment; can be via e-mail, internet, or other technologies, as well as in-person, mail, handwritten, or other communications





General Response Standard - § 106.44(a)

- A recipient with **actual knowledge**
- of **sexual harassment** (as defined on previous slide)
 - in an **education program or activity** of the district
 - against a person **in the United States**,
- must **respond promptly**
- in a manner that is **not deliberately indifferent**.

“**Actual knowledge**” means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator, any ISD official who has authority to institute corrective measures on behalf of the ISD, or to any employee of an elementary and secondary school.

“**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

New regulations do not apply to sexual harassment alleged to have happened outside the U.S.

- Districts may still address this under the student code of conduct.
- Note that other Title IX prohibitions *do* apply outside the U.S.

“**Deliberately indifferent**” means clearly unreasonable in light of the known circumstances.

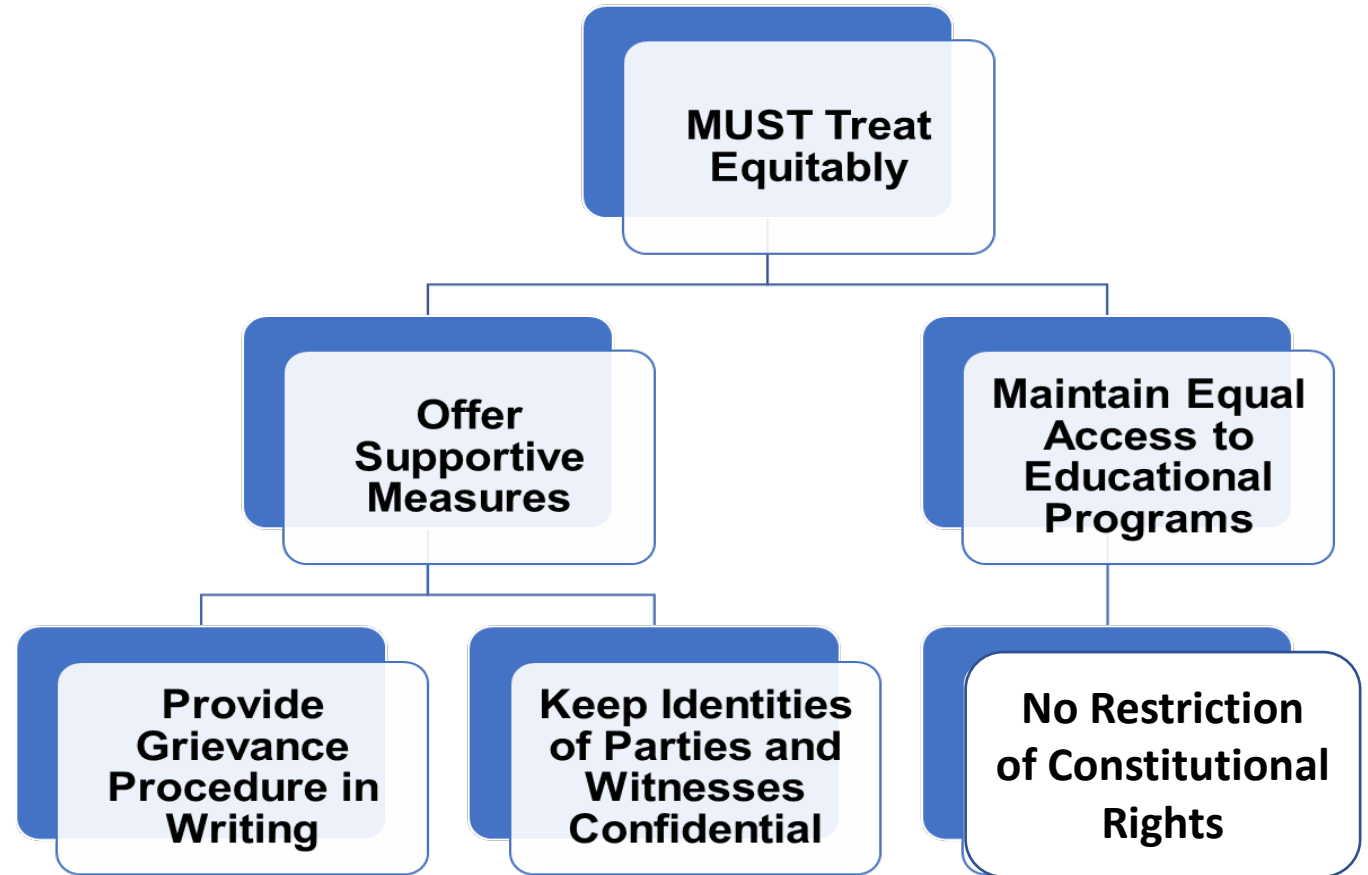




Rights of the Parties in Connection with District's Response to Sexual Harassment

“A district's response must treat complainants and respondents equitably by:

- **offering supportive measures** to a complainant, and
- **following a grievance process** that complies with § 106.45 **before the imposition of any disciplinary sanctions** or other actions that are not supportive measures against a respondent.”



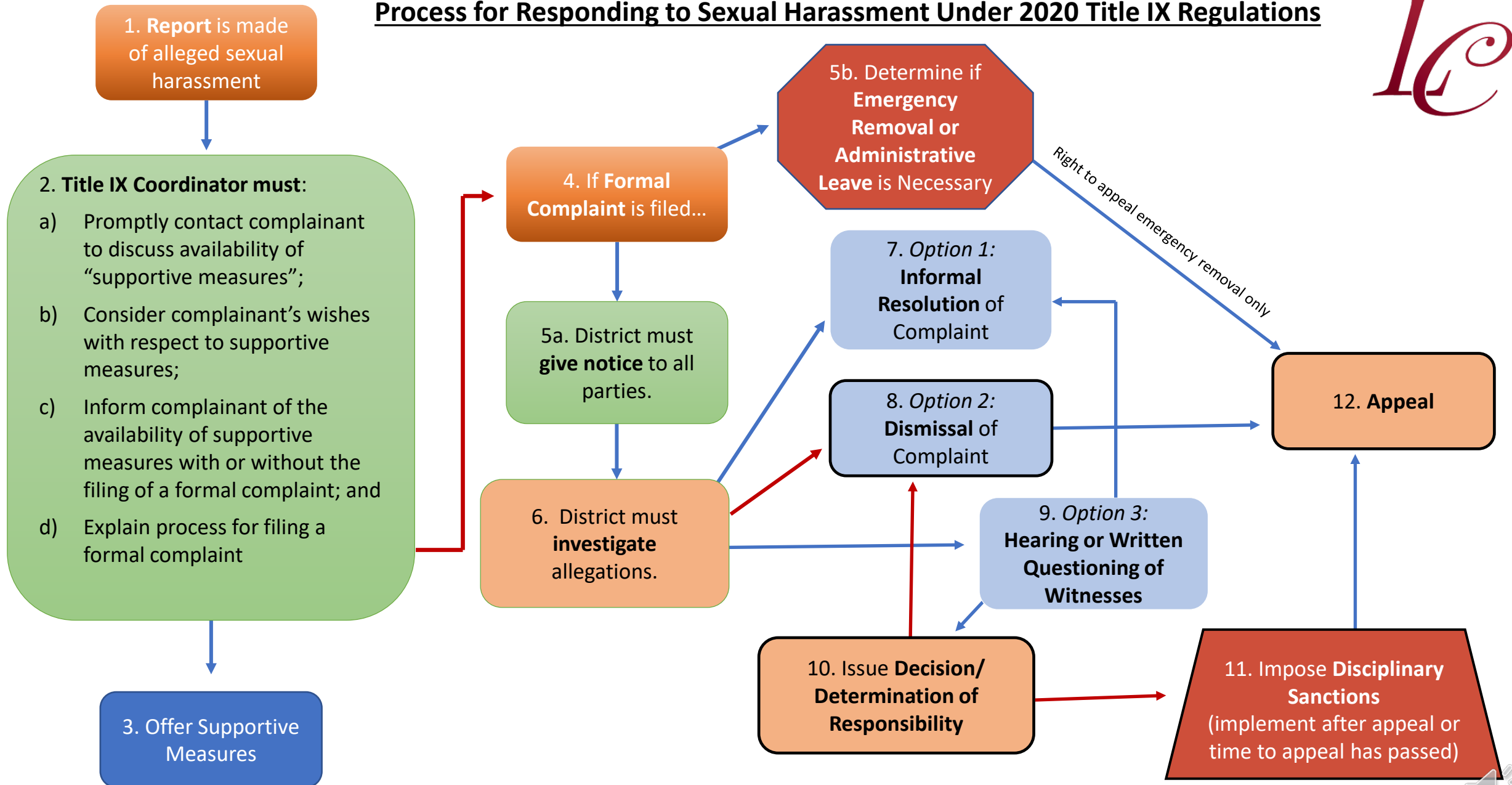


Response to a Formal Complaint § 106.44(b)

In response to a formal complaint, districts must follow a **grievance process** that complies with § 106.45 before imposing disciplinary sanctions against a Respondent.



Process for Responding to Sexual Harassment Under 2020 Title IX Regulations





Required Title IX Personnel



Title IX Coordinator

Investigator

Decision Maker

**Appellate
Decision Maker**

**Informal Resolution
Facilitator**



Overarching Considerations for All Title IX Personnel



Avoidance of Bias & Conflicts of Interest

All Title IX personnel must serve impartially and free from conflicts of interest or bias against the individual complainant and respondent involved in a formal complaint or against complainants and respondents generally.

- Bias includes but is not limited to bias against an individual's sex, race, ethnicity, sexual orientation, gender identity, disability, immigration status, or financial ability.





Prompt Timelines

Absent good cause for the District to delay an investigation, the Title IX formal-complaint process, beginning with filing or signing of the formal complaint and ending with the determination of responsibility, should be completed within a **reasonable time frame**.

- Your district's Title IX grievance process will establish that time frame.
- Days used for any voluntary informal resolution process do not count towards the time frame for concluding the formal complaint process.
- The day a document is filed is "day zero." The next District business day is "day one."





Modifying Timelines

- **All time limits shall be strictly followed** unless modified by the parties' mutual written consent or extended by the District for good cause. If the District grants an extension of time for one party, the same time extension must also be granted to the other party.
- If the District temporarily delays or extends timelines associated with the formal complaint process, the Title IX Coordinator shall provide a written explanation to the parties of the good cause basis for the delay or extension.
 - Permissible modifications to timelines include the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; the need for language assistance or accommodation of disabilities; or other good cause as determined by the Title IX Coordinator.
- The District shall make reasonable attempts to schedule meetings at a time mutually agreeable to all parties. However, extensions should not unnecessarily extend the timeline established in District policy for concluding the formal complaint process.





Confidentiality

The District must keep information confidential as required by law *except as necessary to*:

- provide supportive measures,
- conduct proceedings under the formal complaint process, when disclosure is required by law, or when permitted by the District in compliance with FERPA and state law, or
- otherwise carry out the purposes of the Title IX Regulations

- District may not restrict the ability of the parties to discuss the allegations under investigation or to gather and present relevant evidence.
- **A complainant's identity, if known, must be disclosed to the respondent once a formal complaint is filed** by a complainant or signed by the Title IX Coordinator.





Confidentiality of Parties' Identities

Other than the limited exceptions to confidentiality discussed on the previous slide, **Districts must keep confidential the identities** of anyone who has reported sexual harassment or who is alleged to be a perpetrator of sexual harassment.

OCR Warning

If a District discloses the identity of a party in circumstances other than the three limited confidentiality exceptions, OCR may deem the disclosure to be an act of improper **retaliation** against a party.





Role of Parents/Guardians and Advisors

Parents/guardians may act on their child's behalf at any time during Title IX Grievance Process.

Each party may be accompanied by an **advisor** of the party's choice during the interview with the investigator or other meetings during the formal complaint process.

Advisor may be, but is not required to be, an attorney.





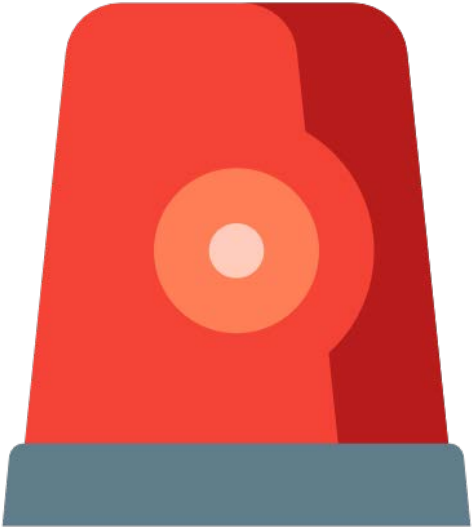
Advisors & Confidentiality

1. In order to preserve the confidentiality of student information protected by FERPA, the **District may require the parent of a minor student to sign a release form** indicating consent to allow the District to release information related to the allegations to the designated advisor.
2. District must inform any designated advisors that **confidential information** received during the Title IX formal complaint process, including the evidence received for inspection and review as well as the investigation report, **may be used only for purposes of the Title IX formal complaint process** and may not be further disclosed or disseminated.
3. Note: Any restriction or requirement regarding an advisor must apply equally to all parties.





Required Reporting



- At any point during a District's investigation that evidence is uncovered that requires reporting to law enforcement, CPS, SBEC, or another entity, District employees must take the necessary actions to do so in compliance with law or board policy.





Equitable Treatment

- A District's treatment of complainants, respondents, witnesses, and any other person involved in a formal complaint process must not discriminate on the basis of sex.
- All parties involved must be treated fairly, with dignity, respect, and sensitivity and without bias, prejudice, or reliance on stereotypes.





Presumption of Nonresponsibility

All District actions must presume that the respondent is **not responsible** for the alleged conduct until after a final determination in a formal complaint process.

In a formal complaint process, a respondent may face Title IX disciplinary sanctions for sexual harassment only after a fair process determines responsibility.

However, even if a Title IX formal complaint is not filed or signed, the District may investigate and respond to prohibited conduct in accordance with board policies and the Student Code of Conduct.





Standard of Evidence: Preponderance of the Evidence

TASB Model Grievance Process: “The District uses the preponderance of evidence standard of evidence to determine responsibility unless stated otherwise in FFH(LOCAL).”

➤ Same standard must apply to all formal complaints (employees and students)

51%

“Preponderance of the Evidence” means that a proposition is more likely than not to be true.





Privileged Information

Districts cannot use information protected under a legally recognized privilege unless the person holding the privilege has waived it.

If a party seeks or uses information protected under a legally recognized privilege, the party must provide written documentation indicating that the individual holding the privilege has waived the privilege and consents to use of the information for purposes of the formal complaint process.



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District Bears the Burden of Proof

The **burden of proof** and **burden of gathering evidence** sufficient to reach a determination regarding responsibility **rests with the District** and not with the parties.



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- **Parties have right to participate fully and robustly** in investigation process if they choose by gathering evidence, presenting fact and expert witnesses, reviewing the evidence gathered, responding to investigative report, and asking questions of other parties and witnesses before the determination of responsibility.





Understanding “Relevance”

Evidence is considered relevant if:

- (1) it has **any tendency to make a fact more probable or less probable** than it would be without the evidence; and
- (2) the **fact is of consequence** in determining the complaint.

Rape-Shield Protections for Complainants

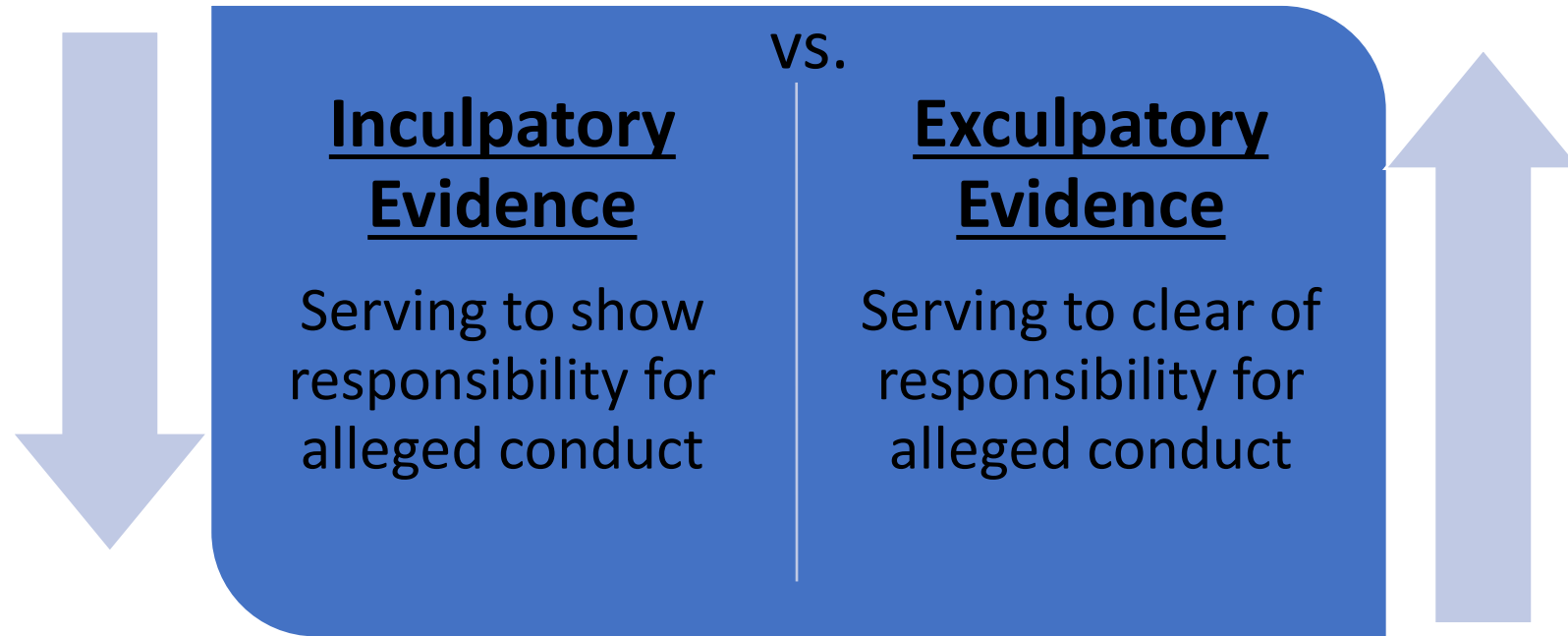
Evidence about a **complainant’s prior sexual behavior or sexual predisposition is not relevant** unless the evidence:

- is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- concerns specific incidents of the complainant’s prior sexual behavior with respect to the respondent and is offered to prove consent.





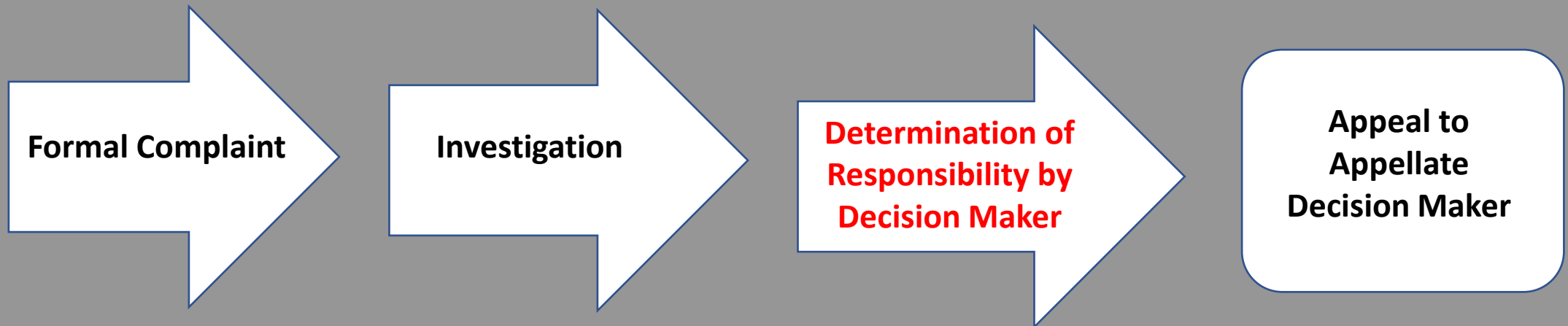
Exculpatory vs. Inculpatory Evidence



Districts must consider both exculpatory and inculpatory evidence and must provide the parties an equal opportunity to present and review such types of evidence.



TITLE IX DECISION MAKERS





Your Role In Context

- A decision maker designated by the Title IX Coordinator will make an independent determination regarding a respondent's responsibility for alleged sexual harassment.
- The decision maker cannot be the District's Title IX Coordinator or the investigator who investigated the complaint at issue.





Timelines & Procedure Before Decision Maker

- Investigative report must be provided to each party and their advisors at least 10 days before the determination of responsibility by a decision maker.
 - Consult your District's specific Title IX grievance process to determine any additional timing requirements allotted to procedures before a decision maker.
- After both parties have received the investigative report and prior to a determination regarding responsibility, the decision maker will notify each party of the **opportunity to submit written, relevant questions** that a party wants asked of any party or witness noted in the investigation report.
 - As determined by the decision maker, the parties may reasonably exchange additional, limited follow-up questions.
- In order to maintain a reasonably prompt timeline, the decision maker may give addressed parties or witnesses a reasonable and equitable deadline to provide answers in response.
- In consultation with the Title IX Coordinator, the decision maker may also extend the timeline for good cause.





Timelines & Procedure Before Decision Maker

The decision maker shall ensure that questioning is relevant, respectful, and non-abusive.

A party or witness is not required to respond to any questions posed by the other party.

- 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.

- The decision maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.





Preparing the Determination of Responsibility

The decision maker must issue a determination regarding responsibility for the alleged conduct in a reasonably prompt manner after the date all questions, answers, and supporting documentation were requested to be submitted to the decision maker.

- To reach this determination, decision maker must apply the preponderance-of-the-evidence standard to weigh the relevant evidence applicable to the formal complaint.

The written determination must include:

- (A) Identification of the allegations potentially constituting sexual harassment under the Title IX regulations;
- (B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including
 - any notifications to the parties,
 - interviews with parties and witnesses,
 - site visits,
 - methods used to gather other evidence, and
 - hearings held;
- (C) Findings of fact supporting the determination;
- (D) Conclusions regarding the application of the district's code of conduct to the facts;
- (E) A statement of, and rationale for, the result as to each allegation, including
 - a determination regarding responsibility,
 - any disciplinary sanctions the district imposes on the respondent, and
 - whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the complainant; and
- (F) The district's procedures and permissible bases for the complainant and respondent to appeal.

Written determination must be provided to both parties simultaneously.

The determination regarding responsibility becomes final *either*

- on the date that the district provides the parties with the written determination of the result of the appeal, if an appeal is filed, or
- if an appeal is not filed, the date on which an appeal would no longer be considered timely.





Disciplinary Sanctions & Remedies

- ❑ If a respondent has been determined through the formal complaint process to be responsible for the alleged sexual harassment, the **District must provide remedies to the complainant** that are designed to restore or preserve the complainant's equal access to the District's educational programs and activities.
 - ❑ The Title IX Coordinator is responsible for effective implementation of remedies.
- ❑ Remedies may include individualized services offered as supportive measures or may be disciplinary sanctions imposed against a Respondent including suspension, expulsion, or any other disciplinary measure provided by the District's Student Code of Conduct.
 - ❑ Examples of other permissible sanctions include declaring the Respondent ineligible to play sports or serve in student government position, etc.
- ❑ Unlike supportive measures offered after a report of sexual harassment, **remedies need not be non-disciplinary, non-punitive, or avoid burdening the respondent.**





Choosing an Appropriate Disciplinary Response

- **Appropriate steps should be taken to end the harassment.**
 - For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser based on the severity of the harassment or any record of prior incidents or both.
- Disciplinary decisions must be made for the purpose of deciding how best to enforce the code of conduct while considering the impact of separating a student from her or his education.
- **Any disciplinary decision must be made as a proportionate response to the violation.**



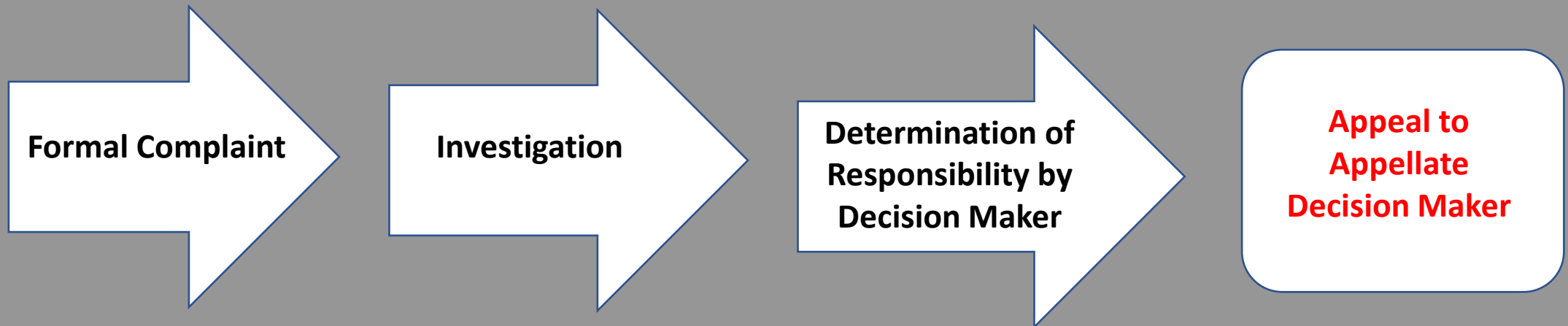


Employee Discipline

- ☐ Consult Board Policy (CJ, DC, DH, and DHB), District Administrative Regulations, and Employee Handbook protocols.
- ☐ Must complete Title IX grievance process before disciplining an employee for sexual harassment.
- ☐ Possible disciplinary sanctions: directives, reassignment, nonrenewal, termination



TITLE IX APPELLATE DECISION MAKERS





Bases for Appeals

Either party has the right to **appeal a determination regarding responsibility**, and **a district's dismissal of a formal complaint or any allegations therein**, on any of the following bases:

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





Appellate Procedures

- ❑ To initiate an appeal, a party must file a written request for appeal with the Title IX Coordinator within the time period specified under District policy following the party's receipt of the determination of responsibility.
- ❑ The Title IX Coordinator will review the request and assign an appropriate appellate decision maker. If the reason for appealing the dismissal or determination of responsibility is not mandatory, the District may dismiss the appeal. If the request for an appeal is not dismissed, the Coordinator will designate an appellate decision maker to proceed.
- ❑ The appellate decision maker may not be the same person as the decision maker that reached the determination regarding responsibility or dismissal, the investigator who investigated the complaint at issue, or the Title IX Coordinator.
- ❑ The Title IX Coordinator will notify the non-appealing party in writing when an appeal is filed and implement appeal procedures equally for both parties.
- ❑ Both parties will be provided a reasonable, equal opportunity to submit a written statement in support of, or challenging, the dismissal of a formal complaint or determination of responsibility.





Appeal of Complaint Dismissal

- ❑ The appellate decision maker will review the request for appeal and any other written statements provided by the parties and issue a written decision explaining why the appeal of the dismissal is granted or denied.
- ❑ The decision will either instruct the Title IX Coordinator to resume implementation of the Title IX formal complaint process or will inform the appealing party of additional options.
- ❑ Written decision must be provided simultaneously to both parties.





Effect of Appeal of Determination of Responsibility

- If an appeal regarding the determination of responsibility is filed, the determination does not become final, and the District may not proceed with administering Title IX disciplinary sanctions or remedies based on the determination, until the date that the District provides both parties with the written result of the appeal.
- If an appeal is not filed, the determination of responsibility becomes final on the date on which an appeal of the determination would no longer be considered timely.
- For an appeal by either party to be fully effective, the District must wait to act on the determination regarding responsibility while maintaining the status quo between the parties through supportive measures designed to ensure equal access to education.





Appeal of Determination of Responsibility

- ❑ The written decision of the appellate decision maker must describe the result of the appeal of the determination regarding responsibility and the rationale for the result.
- ❑ Written decision of appeal must be provided simultaneously to both parties.
- ❑ Once an appellate decision maker issues a written decision regarding the appeal of the determination of responsibility, the District will proceed with implementing Title IX disciplinary sanctions or remedies or take other appropriate action.



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