

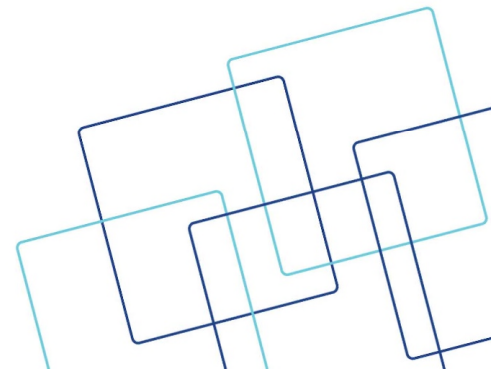


Best Practices for Identifying, Responding to, and Investigating Sexual Harassment Complaints Under Title IX

Presented by: Sarah E. Fama

SAN MATEO UNION HIGH SCHOOL DISTRICT

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Presenter

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AT LOZANO SMITH

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What We Will Cover

Title IX and the 2020 Regulations

The Roles and Responsibilities of District Administrators and Employees

12 Steps for an Effective Title IX Investigation

Poll Time:
Who has conducted an
investigation before?

Poll Time:
Who has participated in
a Title IX investigation?



Title IX and the 2020 Regulations



The Plain Language

“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 *et seq.*

What Does Title IX Cover?

1. Education Programs or Activities
2. Sports
3. Employment
4. Equal Access to Facilities
5. Admissions and Recruitment
6. Sexual Harassment*

(34 C.F.R. Part 106)

*New regulations that have the full force and effect of law



Why Title IX is Important - Potential Impact of Sexual Misconduct on Students and Employees



Shame, humiliation, stress, anxiety, depression, loss of sleep

Impaired learning/poor work performance

Absenteeism/turnover

Culture of discrimination

Civil liability (monetary damages, attorney fees)

Negative media attention and public outcry

OCR Resolution Agreement

Loss of federal funds



2020 Changes to Title IX Regulations

1. The definition of “sexual harassment”
2. “Actual knowledge” for notice
3. Procedural requirements for due process
 - a. Roles
 - b. Procedure
4. “Deliberate indifference” standard

2020 Title IX Definitions

Actual Knowledge (K-12)

- When ***any employee*** has notice of sexual harassment or allegations of sexual harassment

Formal Complaint

- A document filed by a ***complainant*** or signed by the ***Title IX Coordinator*** alleging sexual harassment against a respondent, and requesting that the recipient (District) investigate the allegation

Complainant

- An individual who is alleged to be the ***victim of the conduct*** that could constitute sexual harassment

Respondent

- An individual who has been reported to be the ***perpetrator of conduct*** that could constitute sexual harassment

2020 Title IX Definitions – Sexual Harassment

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

An **employee** conditioning the provision of an aid, benefit, or service of the district on the complainant's participation in unwelcome sexual conduct;

Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the district's education program or activity; or

"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)(11), **"domestic violence"** as defined in 34 U.S.C. 12291(a)(12), or **"stalking"** as defined in 34 U.S.C. 12291(a)(36).

2020 Title IX Definitions – Sexual Harassment

Sexual assault:

- Sex Offenses, Forcible—Any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.
 1. Forcible Rape—(Except Statutory Rape)
 2. Forcible Sodomy
 3. Sexual Assault With An Object
 4. Forcible Fondling
- Sex Offenses, Nonforcible—(Except Prostitution Offenses) Unlawful, nonforcible sexual intercourse.
 1. Incest
 2. Statutory Rape

2020 Title IX Definitions – Sexual Harassment

Sexual assault – Forcible Fondling:

The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

2020 Title IX Definitions – Sexual Harassment

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.
- (34 U.S.C. 12291(a)(11).)

2020 Title IX Definitions – Sexual Harassment

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 in common,
 - 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 domestic or family violence laws of the jurisdiction receiving grant monies, or
 - Any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws.
- (34 U.S.C. 12291(a)(12).)

2020 Title IX Definitions – Sexual Harassment

Stalking:

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for their safety or the safety of others; or
 - Suffer substantial emotional distress.



Title IX Jurisdiction

The conduct occurs against a person *in the United States*;

The conduct occurs in an education program or activity over which the District exercised *substantial control* over both:

The complainant was *participating/attempting to participate in* the education program or activity at the time the complaint was filed.

1) the *respondent* and

2) the *context* in which the sexual harassment occurs; and

Group Activity

Kylie, a 10th grade student, tells you that Mark, another student, has been following her around before and after school, telling people that she is his girlfriend, and recently threatened to beat her little brother up if she didn't hang out with him and "be his girlfriend." Kylie hasn't been to school all week and does not want to come back if Mark is there.

Is this Title IX?
What do you do?

The Regulations Are NOT Retroactive



- The 2020 regulations do NOT apply to any alleged sexual harassment that occurred prior to August 14, 2020
- The Federal Rule governs how schools must respond to sexual harassment that allegedly occurs ON or AFTER August 14, 2020

GROUP ACTIVITY

Which of the following is considered “Sexual Harassment” under Title IX?

1

A student conditioning the provision of an aid or benefit on the complainant’s participation in unwelcome sexual conduct.

2

An employee conditioning the provision of an aid, benefit, or service of the district on the complainant’s participation in unwelcome sexual conduct.

3

Unwelcome conduct determined by a reasonable person to be severe and pervasive.



GROUP ACTIVITY

True or False

1. Under the Title IX Regulations...

The District must conduct a formal investigation into an incident that occurred between two students over the weekend, at a student's home.

2. Under the Title IX Regulations...

The District must conduct a formal investigation into an incident in which a coach communicated with a current student athlete via text message, multiple times over the course of three months, using personal cell phones, about subjects of a personal and sexual nature.

3. Under the Title IX Regulations...

The District must conduct a formal investigation into a complaint submitted by a former student against a teacher regarding an incident that took place three years ago.



The Roles and Responsibilities of District Administrators and Employees



What are the Roles?



Responsibilities of the Title IX Coordinator:

- Provides or coordinates Title IX trainings and preventative measures
- Offers supportive measures to complainant and respondent
- Explains the complaint/grievance process to the complainant
- Receives all complaints and oversees the complaint/grievance or informal resolution process
- Determines mandatory and discretionary dismissals
- Evaluates corrective actions
- Addresses patterns or problems



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Responsibilities of the Investigator:

- Administers a fair investigation of formal complaints
 - Interviews parties and witnesses
 - Reviews evidence
 - Provides parties the opportunity to inspect, review, and respond to all evidence gathered, and considers their responses
 - Creates an investigative report that summarizes relevant evidence
- Does not make a determination of responsibility
 - May make recommended findings

Responsibilities of the Decision-Maker:

- Reviews the investigation report, but does not investigate
- Facilitates the exchange of written relevant questions and determines whether the questions are relevant
- Makes a determination about responsibility
- Prepares the written determination that is issued to each party
- May recommend sanctions and/or corrective actions

Responsibilities of the Informal Resolution Officer:

- Facilitates the informal resolution process
- Verifies a complaint meets the criteria for informal resolution, and that the parties have given voluntary, written consent
- Ensures the parties know their rights, including their right to withdraw at any time prior to a resolution being reached

Responsibilities of the Appeals Officer:

- Evaluates any appeal request made by the complainant or respondent
- Makes a decision on the appeal and issues a written decision to each party that states the decision and rationale

Responsibilities of All Employees:



Identify

Report

Does not relieve an employee of their mandated reporter duties!

Group Activity: Police Investigation

Katie comes into your office and tells you she was sexually assaulted by Mason in the bathroom last week. She explains that she has been avoiding Mason, but that his friends are taunting her; asking her when she is “meeting him in the bathroom again.”

Katie tells you she went to the police, and they are doing an investigation. You contact the police to coordinate, and they tell you they have not yet spoken to Respondent, and they ask that you NOT contact Respondent until they do.

What do you do?

Contacting Law Enforcement

Was a crime potentially committed?

Title IX does not relieve employees of their mandated reporting obligations.

Police investigation does not relieve the District of its duties.



Retaliation Prohibitions

- Retaliation is prohibited against anyone who has attempted to participate in the Title IX process
- The District cannot use the student conduct process as a way to avoid the Title IX complaint/grievance process
- Retaliation complaints must be filed under the same complaint/grievance process
- The District must keep the identities of all involved parties confidential, unless disclosure is required by law or necessary to carry out Title IX proceedings
- Exercising a First Amendment right is not retaliation
- Charging an individual with making a false statement in bad faith during a Title IX process is not retaliation

12 Steps for Effective Title IX Investigations

12 Steps for Effective Title IX Investigations

Step 1 Receiving and Assessing Complaints



Receiving Complaints (In General)

WHERE COMPLAINTS COME FROM

Student

Parent

Employee

Member of Public

Anonymous Person

FORM OF COMPLAINTS

Verbal

Written

No Complaint (Rumor or Observation)

Group Activity

You receive an anonymous note on your desk. It appears to be a student's handwriting and it says that B. Collins, in 9th grade is sexually harassing the other boys in Band. There is no name on the note, and no one saw who left it.

What do you do?

Is this a complaint?

GROUP ACTIVITY

A high school senior threatens to sabotage a sophomore's reputation unless she sends him nude photographs of herself.

She also tells you he forcibly kissed her, reached up her skirt and tried to pull down her panties.

Is this Title IX?

Receiving a Complaint



- Notify the Title IX Coordinator
- Assess whether a CPS report should be filed (continue to reassess)
- Assess whether to contact law enforcement
- Advise complainant of their rights

Contact the Victim/Complainant

Conduct initial discussion with complainant/victim to better understand the complaint and if it fits the definition of sexual harassment under Title IX

- Discuss options for supportive measures
- Explain options for filing a formal complaint with the District
- Discuss the District's policy that prohibits retaliation

Initial Discussion With Victim/Complainant

- Ask open-ended questions
- Get complaint in writing or confirm allegations in writing if not already received
- Review policy against retaliation
- Do not promise confidentiality
- Determine whether matter can be resolved informally
- Listen and “hear” the concern



12 Steps for Effective Title IX Investigations

Step 2

Supportive/Urgent Measures



Urgent Considerations



- Is there a threat of imminent harm to others?
 - Admin Leave
 - Emergency Removal
- Supportive Measures

Supportive Measures

“Non-disciplinary, non-punitive individualized services offered [...] to the complainant or respondent before and after the filing of a formal complaint or where no formal complaint has been filed.”

- Designed to restore or preserve equal access to the educational program without unreasonably burdening either party
- Should be determined on a case-by-case basis
- Cannot be retaliatory

Group Activity

Megan is a senior and the team manager for the wrestling team at your high school. One day, late after practice, Megan is in the equipment shed, organizing and cleaning the mats. Drew, a sophomore wrestler, comes into the shed, startling Megan. When Megan tries to leave, Drew grabs her, pushes her down, and has sexual intercourse with her.

Megan comes to you a week later, upset and nervous.

Is this Title IX?
What supportive measures do you offer?

Supportive Measures

Examples: Counseling

Medical services

Academic support

No-contact orders

Increased security

Changed schedules

Document the implemented supportive measures, but don't stop there!

Emergency Removals (Students)

Title IX Regulations contemplate that the full Title IX grievance procedure be completed prior to discipline being imposed.

EXCEPTION:
Emergency Removal

Respondent must be an immediate threat to the physical health or safety of any student or individual;

The immediate threat must arise from the allegations of sexual harassment; and

Respondent is provided with notice and an opportunity to challenge the decision immediately after removal.

Administrative Leave

Placing an
employee on
Administrative
Leave is not
disciplinary

12 Steps for Effective Title IX Investigations

Step 3 Assessing the Nature of the Complaint



Do You Have a “Formal” Title IX Complaint?

Filed by a
complainant

Signed by Title
IX Coordinator

Test 1: If the Alleged Conduct is True, Does it Rise to the Level of Sexual Harassment Under Title IX?

Any **employee** conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct;

Any unwelcome conduct that a reasonable person would find so **severe, pervasive, and objectively offensive** that it denies a person equal education access; OR

Any instance of sexual assault, dating violence, domestic violence or stalking.

***If the answer is no, the Title IX Coordinator must dismiss the complaint or allegations therein. If yes, move to Test 2.**

Test 2: Is there Title IX Jurisdiction Over the Conduct?

Education Program or Activity

- If the school exercises substantial control over the respondent; and
- The school exercises substantial control over the context in which the sexual harassment occurred.

Must be within the United States.

At the time of filing a formal complaint, complainant must be participating/attempting to participate in the educational program.

***If the answer is no, the Title IX Coordinator must dismiss the complaint or allegations therein.**

GROUP ACTIVITY

Eli, a senior in high school, comes to you to tell you that when he was a freshman, his classmate Drew raped him in the bathroom of the park across the street from the school.

Is this Title IX?

GROUP ACTIVITY

A teacher communicated with one of their current students via text message, multiple times over the course of three months, using personal cell phones, about subjects of a personal and sexual nature.

Is there Title IX
Jurisdiction?

If it is determined there is no
Title IX Jurisdiction, do you
still investigate?

Discretionary Dismissals

Districts *MAY* dismiss a formal complaint, or any allegations in the complaint, if:

- A complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegations therein;
- The respondent is no longer enrolled or employed by the district; or
- Specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Dismissals (Mandatory and Discretionary)

The decision to dismiss a complaint should be made in consultation with the Title IX Coordinator.

Notice of dismissal must be issued to both parties in writing.

Parties must be informed of their right to appeal the dismissal on the basis of:

- Procedural irregularity;
- New evidence that was not reasonably available earlier; or
- Involved personnel had a conflict of interest or bias.

Group Activity

Gianna, a 10th grader, has not been to class in two weeks. Gianna says she was being bullied every day over a rumor that she slept with two seniors. Gianna said she was being bullied in person and on social media. She has deleted all her social media accounts. She feels embarrassed and humiliated and does not want to come back to school.

What do you do?
Is this Title IX?

Even if You Determine Title IX Is NOT Triggered or the Complaint Should Be Dismissed, Do NOT Stop There!

- *Consider whether the alleged conduct may otherwise violate District policy or employee/student conduct standards*



What if the Complainant says, “Do Nothing”?

The Title IX Coordinator must inform them of their options

- This includes supportive measures without filing a formal complaint

The Title IX Coordinator can sign a formal complaint on the complainant’s behalf

- Assess the conduct!
- If NOT filing a formal complaint would be deliberately indifferent, the Title IX Coordinator has the discretion to sign a formal complaint on the complainant’s behalf

Policies and Procedures for Investigating Title IX Complaints

BP/AR 1312.3 – Uniform Complaint Procedures

BP/AR 4030 – Nondiscrimination in Employment

BP/AR 4119.11 – Sexual Harassment (Employee)

AR 4119.12 – Title IX Sexual Harassment Complaint Procedures (Employee)

BP/AR 5145.7 – Sexual Harassment (Students)

AR 5145.71 – Title IX Sexual Harassment Complaint Procedures (Student)

Group Activity

A 10th grade student, Erica, comes and tells you that a 9th grade student, Natalie, has been making her feel uncomfortable at school. Erica tells you that Natalie has been staring at her in the locker room, and that one of her friends overheard Natalie call her “sexy” when she was changing in the locker room.

- Is this Title IX?
- What supportive measures do you offer?
- What do you do next?

12 Steps for Effective Title IX Investigations

Step 4

Send Notice of the Investigation



Notice of Investigation

Identify complaint/investigation process, including informal resolution process;

Identify allegations with sufficient details;

Include a statement that respondent is presumed not responsible and that a determination is made at the conclusion of the process;

Explain that they may have an advisor of their choice inspect and review the evidence; and

Identify the District's code of conduct that prohibits knowingly making false statements or submitting false information.

Do not restrict either party's ability to discuss the allegations under investigation.

Investigation Timelines



- Title IX - “reasonably prompt time frame”
- District policies

Informal Resolution

Formal complaint

Notice sent to both parties

Both parties provide voluntary written consent

Conduct informal resolution

12 Steps for Effective Title IX Investigations

Step 5 Frame the Scope



Understand the Scope - Frame the Allegations

- Prepare clear and concise “yes or no” questions or statements that the investigation will answer or address.
- Do not include legal terms such as “discriminated,” “harassed,” or “retaliated.”
 - Poor example: Did Suzie discriminate against Joe?
 - Good example: Did Suzie issue Joe a letter of reprimand because of Joe’s race?

Understand the Scope - Frame the Allegations

- Avoid ambiguous and subjective words such as “inappropriate” and “unfair.”
 - Poor example: Did Suzie act mean and unfairly toward Joe?
 - Good example: Did Suzie tell Joe “Go to Hell?”
- Make sure all relevant claims are included in the allegations. (Or, if you excluded something, be prepared to explain why.)

Legal Framework

Preponderance of
the Evidence



12 Steps for Effective Title IX Investigations

Step 6 Gather, Review, and Preserve Evidence



Title IX Evidence Requirements

- District has the burden of gathering evidence.
- District cannot access or use a party's medical, psychological, or other similar records unless they obtain the party's voluntary, written consent.
- District cannot restrict parties from discussing allegations or gathering and presenting relevant evidence.
- District must provide an opportunity for parties to present fact and expert witnesses and other exculpatory or inculpatory evidence.

Child Pornography

Call School Resource Officer, Police Department, or Safety & Security Department right away before touching anything

Third party witness

Track chain of custody

Warning: It is a state and federal crime to possess and/or distribute child pornography. There's no exception for school administrators or investigators.

Group Activity

A junior, Jordan, keeps private messaging another junior, Charlotte, over the Zoom chat function during independent study classes, saying things like, “Your breasts look really good in that top” and “You should send me pictures after class.” One Saturday, Jordan uses their cell phone to text Charlotte a link to pornography.

Charlotte used to like Jordan but has recently become uncomfortable with Jordan’s constant messaging and texting. Charlotte comes to you to report the conduct.

What do you do?

12 Steps for Effective Title IX Investigations

Step 7 Make a List of Witnesses



Preparing to Conduct Interviews

Consider potential conflicts of interest.

Consider location, timing, and order.

As you conduct interviews, be sure to ask each witness if there are other witnesses you should speak with.

12 Steps for Effective Title IX Investigations

Step 8

Draft Interview Questions and Apply a Trauma-Informed Approach



Trauma-Informed Approach

Schedule interview at convenient time and place

Listen attentively and actively without interrupting

Exhaust open-ended questions first and save technical ones for later

Display compassion and sincerity

Interview without judgment or skepticism

Use of trauma-informed techniques during the complainant's interview can facilitate rapport building, cooperation and complainant's emotional recovery.

Do NOT Victim-Blame

Permit student/employee to control information flow

Suggest breaks as needed

Explain the need/context when asking sensitive questions

Interviews

- Start with an outline of questions but be flexible!
- Use the outline as more of a roadmap for issues you need to touch on with each witness.
- If there are a series of incidents, consider a linear roadmap.
- Keep in mind big picture goals.
- At the end, ask: “Is there anything else?”



Questioning Techniques

Tell me what happened
Explain why you're upset
Describe how it made you feel

Who? What?
Where? When?
How? *Why?*

Were you ___?
Where was ___?
Did you ____?

Statements/Questions to Avoid

Questions to avoid:

- Why did you...?
- Why didn't you...?
- Didn't you consider...?

Questions that may be helpful:

- How did that make you feel?
- What was your thought process at that time?
- Do you remember smelling/hearing anything?

Don't insert your opinion into the victim's experience

Don't make assumptions about what the victim needs or wants

Avoid questions that can be answered with one-word or short responses

Avoid leading questions

"And then you did this..." v. "What happened next?"

Activity: Good or Bad Questions

- 1) “On April 2, you sent a text message to Angela Smith, right?”
- 2) “Did you send a text message to Angela Smith on April 2?” [If answer is yes] “Tell me about the conversation.”
- 3) “Tell me how it made you feel to be texting with your teacher.”
- 4) “That must have made you feel scared, didn’t it?”
- 5) “What was your thought process at that time?”
- 6) “What time did you arrive, and who else was there?”
- 7) “Why did you text her back?”
- 8) “Why didn’t you just tell your teacher to stop?”

12 Steps for Effective Title IX Investigations

Step 9 Conduct Interviews

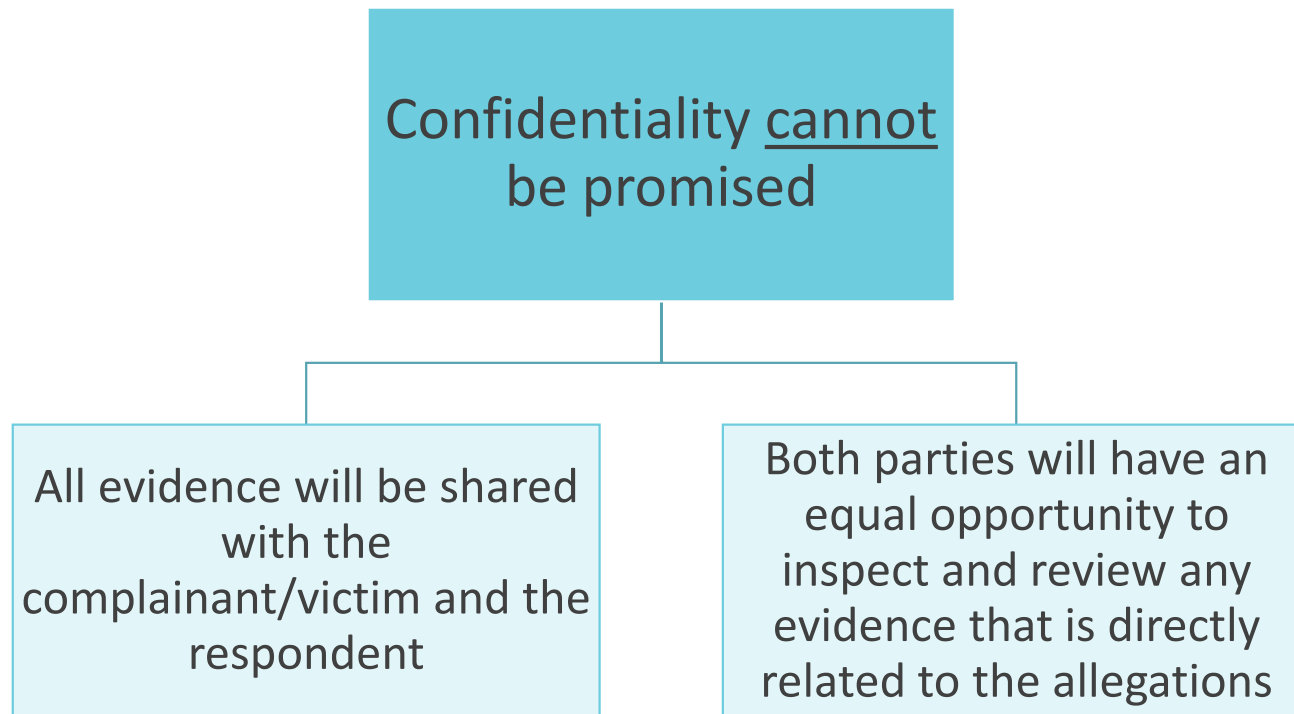




Common Questions and Issues

- What if the witness is underage?
- What if the witness is biased or lies?
- Do all witnesses get a union representative or support person?
- What if the witness refuses to be interviewed or wants their identity to remain confidential?

Confidentiality & Preserving the Integrity of the Investigation



12 Steps for Effective Title IX Investigations

Step 10

Conduct Additional Interviews If Needed



Conduct Additional Interviews



Review your witness summaries and evidence and ask yourself if there are any holes.



Do you have all the information you need to thoroughly address each allegation?



It is OK to conduct follow-up interviews of witnesses if needed.

12 Steps for Effective Title IX Investigations

Step 11

Exchange of Evidence, Prepare the Investigation Report and Written Determination



Review of Evidence By the Parties

Send the parties all evidence directly related to the allegations

Must be done prior to the completion of the investigation report

Parties given at least 10 days to respond

Investigation Report



The final investigation report summarizes all relevant evidence

Sent to the parties at least 10 days before a written determination is issued

Parties respond to investigation report and exchange written questions

Investigation Report (Recommended Content)

Identify the date the investigation commenced

Identify the investigator

Identify supportive measures offered to and accepted by the parties

Summary of the investigation process

Identify the legal standard of review applied to the review of evidence/
applicable policies

Identify number of/identity of witnesses

Summary of evidence – documents and witness statements

Exchange of Written Questions

10 days for parties to submit written, relevant questions to the other party or witness

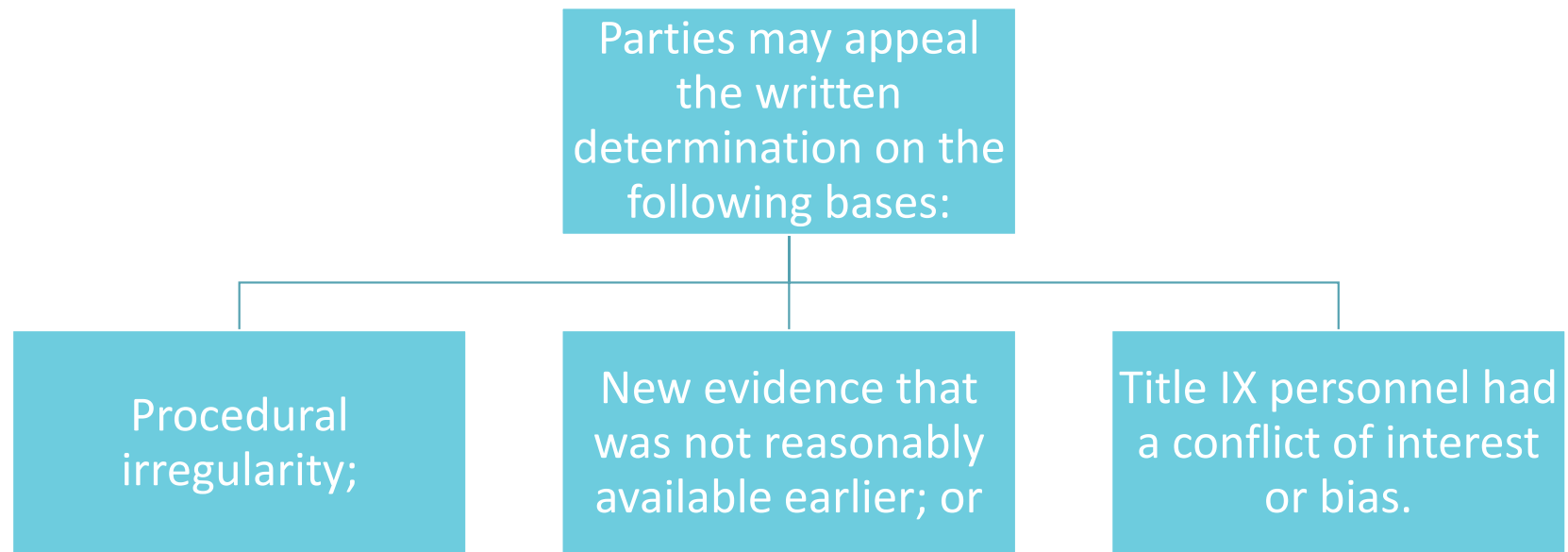
Limited follow-up questions

Decision-maker determines relevancy, and if a question is not allowed, they explain why

Written Determination Regarding Responsibility – Issued by the Decision-Maker

- Identification of the **allegations** potentially constituting sexual harassment.
- A description of the **procedural steps** taken from formal complaint through the determination of responsibility.
- **Findings of Fact** supporting the determination.
- **Conclusions** regarding the application of the recipient's code of conduct to the facts.
- **Rationale** for each finding and conclusion, including a **determination of responsibility** for each allegation.
- Statement of **potential disciplinary sanctions**.
- Appeal rights.

Appeal Rights for Both Parties at the District



Students/employees may also be afforded the right to file a complaint or an appeal with federal and/or state agencies (e.g., OCR, CDE, CRD, EEOC).

12 Steps for Effective Title IX Investigations

Step 12 Corrective Action and Tying Up Loose Ends



Corrective Actions

Staff/student discipline

Ensuring no retaliation

Additional support for involved parties

Generalized training for staff/students in class, school, or district-wide

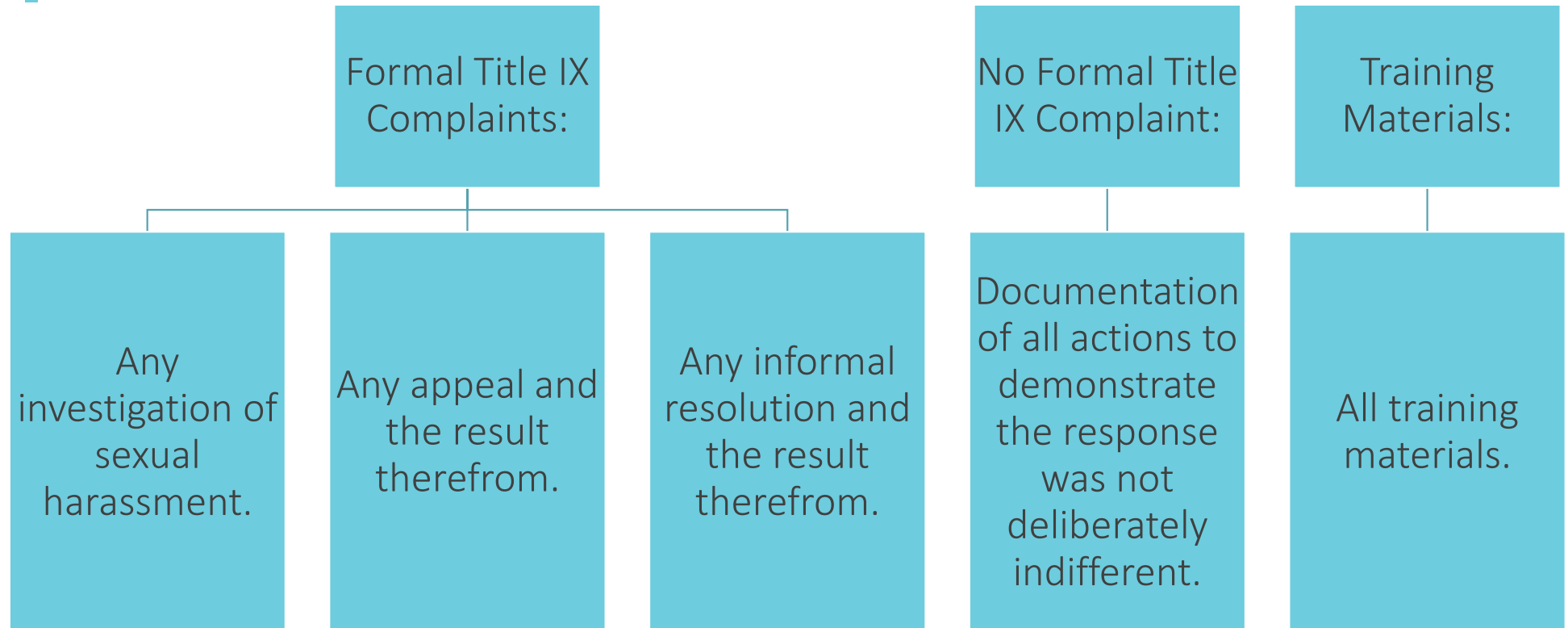
Generalized notification of policies/rules

Increased monitoring and check-ins

Changes to District practice



Recordkeeping – Records Must Be Maintained for 7 Years



Questions





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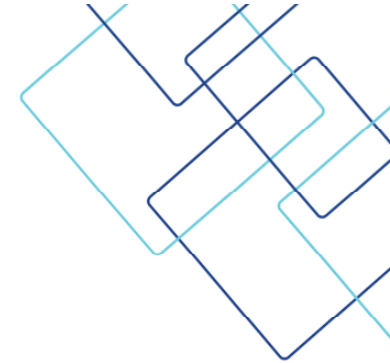
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