

The New Era of Title IX : What Every K-12 School Should Know

Training for Fort Worth ISD Title IX Personnel
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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 subject to discrimination under any education program or activity receiving federal financial assistance”

20 U.S.C. § 1681(a)



How Title IX is Enforced

Two avenues for enforcement:

- Administrative
 - ❖ The U.S. Department of Education Office for Civil Rights has jurisdiction over public school districts to investigate and review complaints under Title IX
 - ❖ Failure to comply may result in loss of federal funding
- Litigation
 - ❖ Individuals may hold schools liable by suing for damages in court

Three Key Inquiries

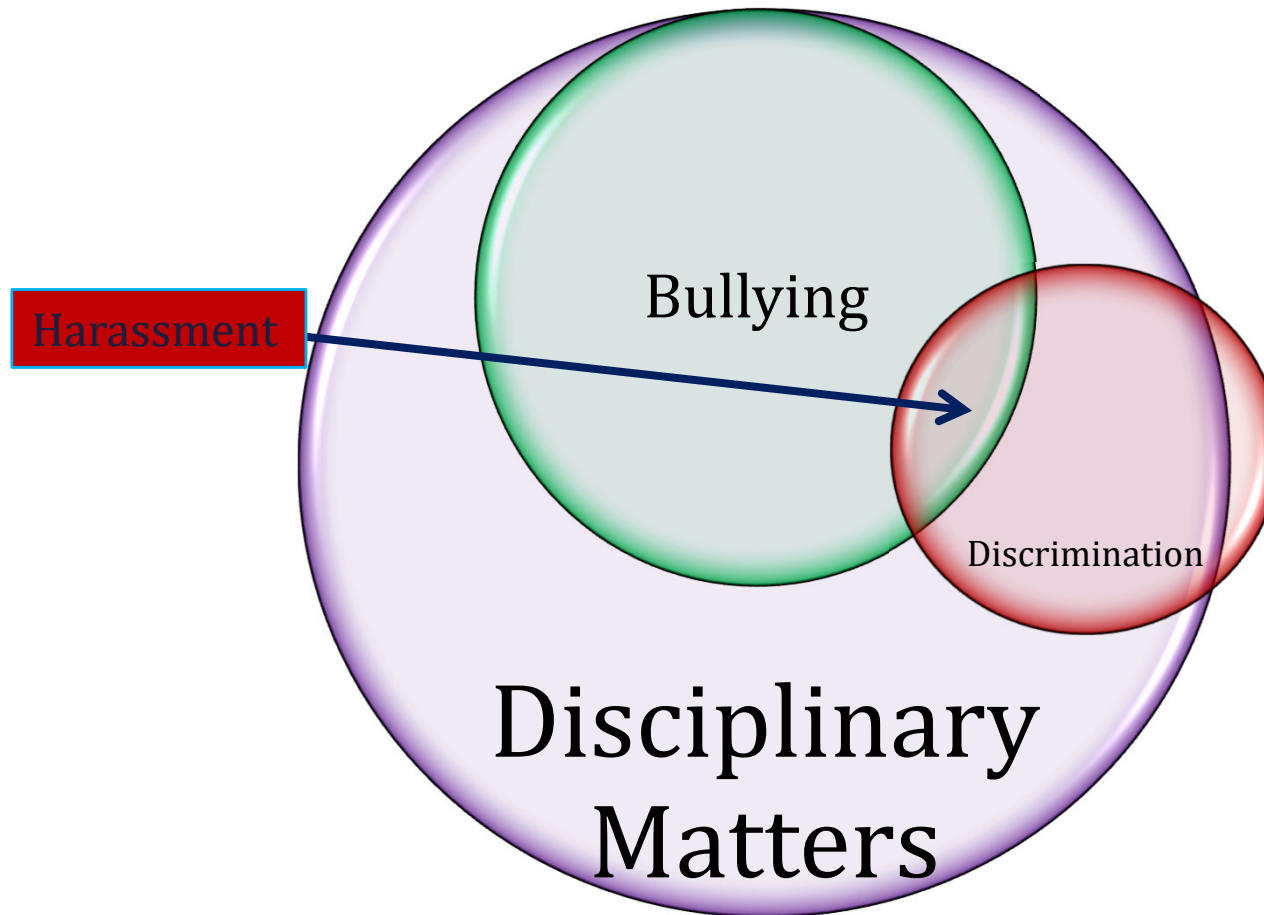
- What conduct is covered by Title IX?
- What triggers a school district's obligation to respond to an allegation of sexual harassment?
- What must that response entail?

What Issues Fall Under Title IX

“ . . . on the basis of sex . . . ”

- Sex discrimination
- Gender-based discrimination
- Gender-based harassment
- Gender-based bullying
- Gender-based assault
- Sexual harassment
- Sexual assault
- Domestic violence
- Dating violence
- Stalking
- Retaliation

Harassment v. Discrimination v. Bullying v. Discipline



The Deliberate Indifference to Actual Knowledge Standard for Liability

- School district can be liable for damages in a Title IX lawsuit for employee-on-student sexual harassment
- School must have “actual knowledge” of sexual harassment and respond with “deliberate indifference”
- An appropriate school district official must have actual knowledge
 - Generally, a campus principal, Title IX Coordinator, superintendent, or other high-level official
 - The knowledge of the wrongdoer is not enough



Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998)

School District Liability for Peer Sexual Harassment

- When can a school district be liable for peer-to-peer harassment?
- A school may be liable for its “**deliberate indifference** to **known** acts of **peer sexual harassment**”
- The harassment must be “so **severe, pervasive, and objectively offensive** that it effectively bars the victim’s access to an educational opportunity or benefit”
- Liability is permitted only if the institution exercised “**substantial control over both the harasser and the context** in which the known harassment occurs”

Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999)

Deliberate Indifference

- The school's response must be **"clearly unreasonable"**
- In the peer sexual harassment context, if the school does not engage in harassment directly, it may not be liable for damages unless the school's deliberate indifference causes students to undergo harassment or makes them vulnerable to harassment
- Courts should not second-guess the disciplinary decisions made by school administrators

Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students

New regulation defines sexual harassment, requires supportive measures for survivors, restores due process on campus

New Campus Sexual-Harassment Rule Aims to Boost Rights for Accused

Trump administration's regulation allows for cross-examination and live hearings, and provides some new support for accusers

ACLU sues Betsy DeVos over new campus sexual assault rules

The suit says Title IX changes will make it "more difficult for victims of sexual harassment or sexual assault to continue their educations."

Georgetown Students, Administration Raise Concerns About Title IX Changes

May 12, 2020 by [Jaime Moore-Carrillo](#) and [Moira Ritter](#) — [Leave a Comment](#)

Published on Friday, May 15, 2020 by Common Dreams

DeVos Sued Over New Title IX Rules That Make It 'Easier for Schools to Sweep Sexual Violence Under the Rug'

THE HILL

Biden says he'll reverse DeVos rule bolstering protections for those accused of campus sexual assault

BY JONATHAN EASLEY - 05/06/20 09:07 PM EDT

2,101 COMMENTS



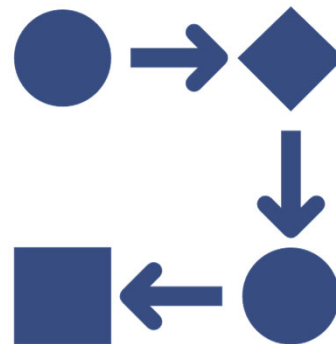
Overview of New Regulations

- This is the administrative enforcement standard
- Effective August 14, 2020
- Defines sexual harassment and scope of Title IX protections
- Adopts deliberate indifference to actual knowledge of sexual harassment standard
- Adds that **knowledge of any school district employee** can trigger a duty to respond
- Discusses formal/informal complaints



Overview of New Regulations

- Discusses the procedures schools must have to respond to reports
 - ❖ Supportive measures
 - ❖ Process for emergency removal, if applicable
- Discusses procedures schools must have for due process
 - ❖ Investigation
 - ❖ Grievance process
 - ❖ Appeals process



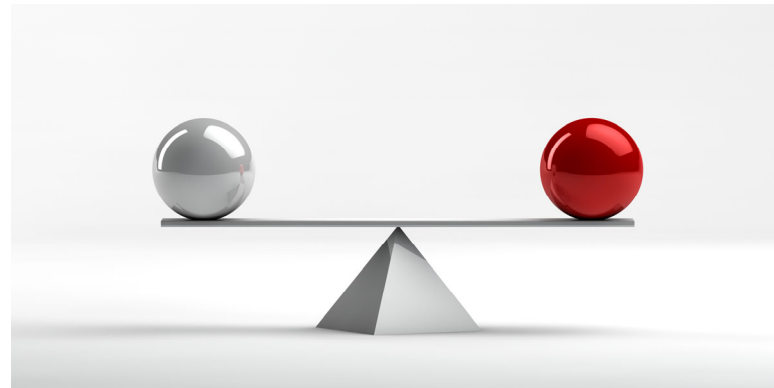
Overview of New Regulations

- Further defines role of Title IX Coordinator
- Provides role for investigator, decisionmaker, facilitator, and person reviewing any appeal
- Identifies policies school districts must implement
- Discusses written notices schools must provide
- Provides training schools must provide to personnel involved in the Title IX formal complaint process
- Includes specific anti-retaliation provisions with a complaint process for any retaliation

Overview of New Regulations

Parties must be treated **equitably**

- Must provide a range of supportive measures to complainants and respondents
- Must proceed with a presumption that respondent is not responsible
- Each party must be provided equal opportunity to present evidence, identify witnesses, and inspect and review evidence
- All Title IX personnel must serve impartially, without conflict of interest, and without bias



The Rationale for the Title IX Formal Complaint Process

- Schools must investigate and adjudicate formal complaints of sexual harassment using a process that incorporates **due process principles**, treats all parties fairly, and reaches reliable responsibility determinations
- Schools must follow the Title IX Formal Complaint Process **before** the imposition of any **disciplinary sanctions** or other actions that are not supportive measures, against a respondent

Actual Knowledge Under the New Title IX Regulations



“[N]otice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to **any employee of an elementary and secondary school**. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.”

34 C.F.R. § 106.30(a)

Actual Knowledge Under the New Title IX Regulations

In elementary and secondary schools telling any school employee always puts the school on notice

- OCR Webinar on New Title IX Regulations



Important Terms

- **Report of Sexual Harassment:** the initial report or complaint of sexual harassment that the school district receives; can be reported by the person harassed, a student, a parent, a teacher, or other school district employee
 - Must be reported to the Title IX Coordinator who must contact the person allegedly harassed
- **Formal Complaint:** Written and signed document containing the allegations of sexual harassment; signed by person harassed, a parent/legal guardian, or the Title IX Coordinator



Important Terms

- **Complainant:** The alleged victim of the conduct that could constitute sexual harassment
 - The Complainant is always the victim, even if the report was made by a parent/guardian, third party, or signed by the Title IX Coordinator
- **Respondent:** The individual reported to be the perpetrator of the conduct that could constitute sexual harassment
 - Required to call the accused the “Respondent” in the Title IX Formal Complaint Process



Important Terms

- **Title IX Formal Complaint Process:** The process required by the new Title IX regulations effective August 14, 2020 that is triggered by the Formal Complaint
 - Requires an investigation, a determination of responsibility, and a right to appeal for both the Complainant and Respondent
 - Differs from current grievance and discipline processes
- **Determination of Responsibility:** The written decision prepared by the decisionmaker that includes findings of fact and conclusions based on a review of the investigative report; determines whether the Respondent is responsible or not responsible for sexual harassment as alleged in the Formal Complaint



Many Fort Worth ISD Personnel Will Be Involved



Title IX Coordinator
Kevin Greene



Investigator
Campus Administrator



Decisionmaker
Chief of HCM/Legal Cynthia Rincon



Informal Resolution Facilitator
Executive Director



Appeal Officer
Deputy Superintendent Karen Molinar

Sexual Harassment Defined

1) Quid Pro Quo

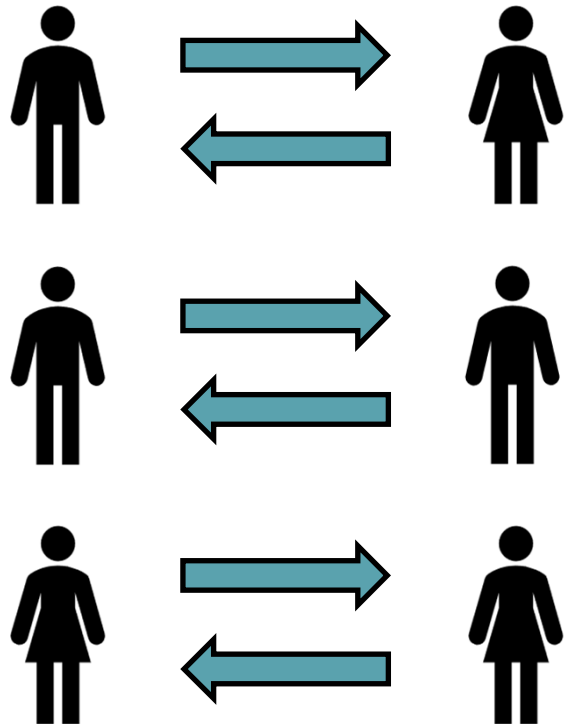
- ❖ A **school employee** conditioning an educational benefit or service on an individual's participation in unwelcome sexual conduct

2) Hostile environment

- ❖ Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's educational program or activity

3) Sexual assault, dating violence, domestic violence, or stalking as defined under the Clery Act and the Violence Against Women Act

Quid Pro Quo Sexual Harassment



“Quid pro quo”

- A favor or advantage granted or expected in return for something
- Literally, “this for that” or “something for something”

Quid Pro Quo Sexual Harassment

- Only school district employees can be the perpetrators of quid pro quo harassment
- It is presumed that the sexual conduct is unwelcome
- It is presumed to be sufficiently severe, pervasive, and objectively offensive to deprive a student of educational opportunity
- The employee does not have to explicitly state the “this for that”
 - ❖ The condition may be implied from the circumstances
 - ❖ The age and situation/position of the complainant is relevant to the determination of whether a condition is implied

Hostile Environment Sexual Harassment

- Must be based on sex
- Must be severe and pervasive and objectively offensive
 - ❖ Severe – nature of the harassment
 - ❖ Pervasive – frequency or duration of harassment
 - ❖ Objectively offensive – reasonable person standard; not subjective
- Must deprive complainant of educational opportunities
- An isolated incident, if sufficiently severe, can likely meet the standard

Hostile Environment Sexual Harassment

Is It Conduct On the Basis of Sex?

- The fact that the complainant and the respondent are of the opposite sex is not enough
- The complainant and the respondent can be the same sex—same-sex sexual harassment is actionable under Title IX
- Conduct based on personal animus rather than sex is not hostile environment sexual harassment
- Conduct motivated by reasons other than sex/gender is not sexual harassment

Hostile Environment Sexual Harassment

Several factors are considered:

- the degree to which the conduct affected the student's education
- the type, frequency, and duration of the conduct
- the relationship between the Complainant and the Respondent
- the number of individuals involved
- the age and sex of the participants
- size of school, location of incidents, and context
- other incidents of sex-based harassment

Is the Conduct Based on Sex and Severe, Pervasive, and Objectively Offensive?

SCENARIO 1: Female high school student alleges another female student started harassing her because she was dating the other female student's former boyfriend

- The alleged harasser called the female student a “ho” and said she “would beat her” up “if it weren’t for cheerleading”
- The alleged harasser also started a rumor that the female student “had a hickey on her boob”
- The harasser “cornered” the female student in the hallway during a passing period, told her she was having sex with the female student’s boyfriend, and physically touched her by wiping the tears from her eyes
- The harasser slapped the female student’s boyfriend’s buttock as she walked by and stated “your butt is so cute” and “you and your girlfriend are so cute”

Is the Conduct Based on Sex and Severe, Pervasive, and Objectively Offensive?

“Reduced to its essentials, this is nothing more than a dispute fueled by a disgruntled cheerleader mom, over whether her daughter should have made the squad. It’s a **petty squabble, masquerading as a civil rights matter**”

Sanchez v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156 (5th Cir. 2011)



Is the Conduct Based on Sex and Severe, Pervasive, and Objectively Offensive?

SCENARIO 2:

- 13-year-old male student was repeatedly accosted by a group of boys in the locker room—oftentimes having his underwear removed
- Members of the football team allegedly “stripped [him] nude and tied him up” and “placed him into a trash can” while calling him pejorative names and slurs asserting he was homosexual
- One student “videotaped the attack and uploaded it to YouTube”

Is the Conduct Based on Sex and Severe, Pervasive, and Objectively Offensive?

SCENARIO 2: YES

“[R]emoval of a person’s underwear without their consent on numerous occasions plausibly constitutes pervasive harassment of a sexual character”

Carmichael v. Galbraith, 574 F. App’x 286 (5th Cir. 2014)

Hostile Environment Sexual Harassment

Conduct that does not meet all the criteria for hostile environment sexual harassment under Title IX may still be prohibited conduct or misconduct that is addressed under Fort Worth ISD policy FFH (Local), FFI (Local), DH (Local), or the Student Code of Conduct



Sexual Violence Defined Under Federal Law

- Sexual assault
 - Defined in Clery Act
- Dating violence
- Domestic violence
- Stalking
 - Defined in Violence Against Women Act (VAWA)



“Sexual Assault” Under the Clery Act

“An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation” 20 U.S.C. § 1092(f)(6)(A)(v)

Includes:

- Rape
- Fondling
- Statutory Rape



Does not require an element of physical force, but turns on lack of consent of the Complainant

“Dating Violence” Under VAWA

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant
- The existence of a relationship is determined based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship



34 U.S.C. § 12291(10)

“Domestic Violence” Under VAWA

A felony or misdemeanor crime 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 person against a complainant who is protected from that other person’s acts under the domestic or family violence laws of the jurisdiction

34 U.S.C. § 12291(8)



“Stalking” Under VAWA

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;
- Suffer substantial emotional distress

34 U.S.C. § 12291(30)



“... on the basis of sex”



- Sex is not defined
- Department of Education stated “sexual harassment ... does not depend on whether the definition of ‘sex’ involves solely the person’s biological characteristics ... or whether a person’s ‘sex’ is defined to include a person’s gender identity... Anyone may experience sexual harassment, irrespective of gender identity or sexual orientation”

Educational Programs and Activities

“...under any education program or activity...”

- School must have **substantial control** over the **respondent and context** of the harassment
- Context:
 - ❖ Off-campus conduct not categorically excluded; fact specific and case-by-case basis

Educational Programs and Activities

“...under any education program or activity...”

- Did the school promote or sponsor the event?
- Examples
 - ❖ Instructional programs
 - ❖ Athletic programs
 - ❖ Student organizations



Educational Programs and Activities

“...under any education program or activity...”

- Basic instruction
- Guidance, counseling, and evaluation services
- Cocurricular and extracurricular activities
- Health services
- Student transportation
- Food services
- Social work services

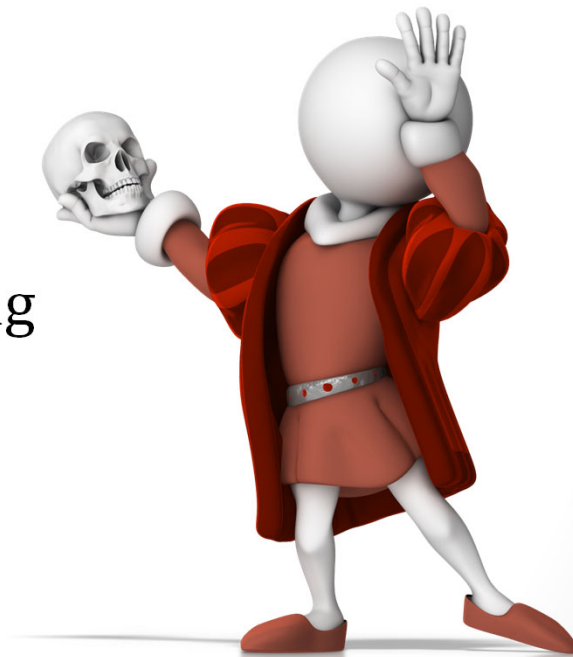


Educational Programs and Activities

“...under any education program or activity...”

More Examples

- Field trips and off-campus, school-sponsored activities
- Dual credit programs
- Career and technical programs
- Early (pre-kindergarten) learning
- Athletics
- Special education
- Visual and performing arts



Reporting Sexual Harassment

- All employees who have knowledge or reason to believe sexual harassment has occurred must immediately report it to their supervisor or the Title IX Coordinator
- When campus administrators or supervisory-level employees receive reports of known or suspected sexual harassment, they should contact the Title IX Coordinator immediately
- The Title IX Coordinator should document information regarding all notifications/reports received and **must** reach out to the Complainant

School District's Response



- The report triggers the need to respond
- The response must be prompt, even if the student delayed in bringing forth his or her complaint

Overview of Fort Worth ISD's Title IX Formal Complaint Process

- The Initiation Stage—Title IX Coordinator
- The Investigation Stage—Title IX Investigator
- The Determination Stage—The Decisionmaker
- The Appeal—The Appeal Officer

Implement corrective measures based on outcome

Overview of Fort Worth ISD's Title IX Formal Complaint Process

The Initiation Stage

- Title IX Coordinator receives a report of sexual harassment and reaches out to Complainant
- Title IX Coordinator advises Complainant of right to supportive measures and works with Complainant to implement supportive measures
- Title IX Coordinator advises Complainant of Fort Worth ISD's Title IX Formal Complaint Process and right to file a Formal Complaint
- If Complainant files a Formal Complaint
 - ❖ Title IX Coordinator notifies Respondent of the allegations and offers Respondent student supportive measures, where appropriate
 - ❖ Title IX Coordinator determines if mandatory or permissive dismissal is appropriate
 - ❖ Title IX Coordinator evaluates potential emergency removal of Respondent student or administrative leave for Respondent employee

Overview of Fort Worth ISD's Title IX Formal Complaint Process

The Investigation Stage

- Investigator reviews the Formal Complaint and plans for the Investigation
- Investigator identifies and gathers evidence
- Investigator schedules interviews—providing written notice to Respondent and Complainant of dates, times, and purpose of interview with time to prepare
- Investigator conducts interviews—the parties and any witnesses
- Investigator prepares the evidence, including any witness statements/memoranda of interview
- Investigator provides all evidence directly related to the allegations in the Formal Complaint to the parties
- Parties have 10 days to submit a written response to the evidence
- Investigator prepares the investigative report, taking into account each party's written response to the evidence

The investigative report is simultaneously sent to the Complainant and Respondent and they are notified of their right to submit a response

Overview of Fort Worth ISD's Title IX Formal Complaint Process

The Determination Stage

- Decisionmaker receives and reviews the investigative report and the evidence
- Decisionmaker receives and reviews the parties' response to the investigative report, if any
- Decisionmaker provides the parties notice of the right to submit questions
- Decisionmaker oversees the written question and answer process, including any follow-up questions and answers
- Decisionmaker issues a written decision that complies with the Title IX regulations, which includes a determination of responsible or not responsible
- Decisionmaker notifies the parties of the determination of responsibility and their right to appeal

Overview of Fort Worth ISD's Title IX Formal Complaint Process

The Appeal Stage

- Either the Complainant or the Respondent may appeal either a Decisionmaker's determination regarding responsibility **or** the school's dismissal of a Formal Complaint
- Both parties are provided notice of the appeal and given the opportunity to submit written statements
- The Appeal Officer issues a written decision including the result/decision on appeal and the rationale

How to Serve Impartially

The new Title IX regulations require that any individual involved in the Title IX process—Title IX Coordinator, investigator, decisionmaker, appellate decisionmaker, or informal resolution facilitator—not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent



Impartiality

- All Title IX personnel must avoid:
 - Prejudgment of the facts
 - Conflict of interest
 - Bias



Avoiding Prejudgment

Definition of prejudgment

- “To judge before hearing or before full and sufficient examination”
- “[A]n opinion about a situation of a person that is formed before knowing or considering all of the facts.” – Cambridge Dictionary

Synonyms – Merriam-Webster

- Preconception
- Assumption
- Presumption/presupposition
- Speculation



Avoiding Prejudgment

- **Examples:**
- An investigator, after interviewing only the complainant, concludes that the respondent must have engaged in the alleged misconduct
- A juror in a criminal trial, after hearing only opening statements, makes up his mind that the defendant is guilty



Avoiding Prejudgment

Ways to Avoid Prejudgment:

- Remember: anyone can be a Complainant, and anyone can be a Respondent (don't pre-judge)
- Full and fair consideration of the allegations
- Full and fair investigation of the allegations and the evidence
- Full and fair consideration of the facts and the evidence
- Maintain the presumption that the Respondent is not responsible



Avoiding Prejudgment

Things Not To Do:

- Assume or infer the existence of facts or the outcome
- “Connect the dots”
- Speculate
- Rely on personal experience or beliefs
- Weigh credibility
(Title IX Coordinator and investigators)



Conflicts of Interest

Definition of conflict of interest

- “A situation in which the concerns or aims of two different parties are **incompatible**.”
- A conflict of interest arises when what is in a person’s best interest is not in the best interest of another person or organization to which that individual owes loyalty.”

<https://ethicsunwrapped.utexas.edu/glossary/conflict-of-interest>



Conflicts of Interest

Examples of conflict of interest

- A male manager dates or is in a relationship with a female employee who reports to the manager
- An attorney enters into a business venture with a current client
- When a person must answer to two different individuals or groups at odds with one another



Conflicts of Interest

Identifying relationships that raise a conflict of interest

- Family
 - Within the first degree of consanguinity or affinity
 - Parent, child, and spouse
- Workplace
 - Manager-employee
- Personal
 - Significant other
 - Friend



Conflicts of Interest

Criteria for assessing and detecting conflicts of interest

- What is the scope of the relationship?
- What are the competing interests?
- Can I act with total objectivity with regard to the interests?

****Also applies to the appearance of potential conflicts of interest****



Conflicts of Interest

How to remedy conflicts of interest

- Disclosure
 - ❖ To supervisor
- Recusal
 - ❖ Evaluate necessity
 - ❖ Err on side of caution to avoid even the appearance of impropriety
- Mitigation



Bias

Definition of bias

- “[A]n inclination of temperament or outlook, especially: a personal and sometimes unreasonable judgment.”
- “[T]o give a settled and often prejudiced outlook to...his background biases him against foreigners.”

Merrian-Webster

Synonyms – nonobjectivity, one-sidedness, partiality, partisanship, prejudice



Bias

- Under the commentary regarding the Title IX regulations, this includes bias against an individual's:
 - Sex
 - Race
 - Ethnicity
 - Sexual orientation
 - Gender identity
 - Disability
 - Immigration status
 - Financial ability
 - Other characteristic



Bias v. Prejudgment

- **Bias**

- Favoring one side over another – picking a side based on a reason that is not supported by evidence or logic
- Occurs when an individual displays **partiality** or prejudice against someone, something, or some idea

- **Prejudgment**

- When an individual **assumes** a fact or takes for granted a fact without supporting evidence



Bias

- Recognize bias
- Ensure bias does not affect review or consideration of facts or evidence
 - For or against Complainants, generally
 - For or against Respondents, generally
 - For or against a particular Complainant
 - For or against a particular Respondent
- Leave any of your own biases out of the investigation before you begin
- The Investigator must remain neutral



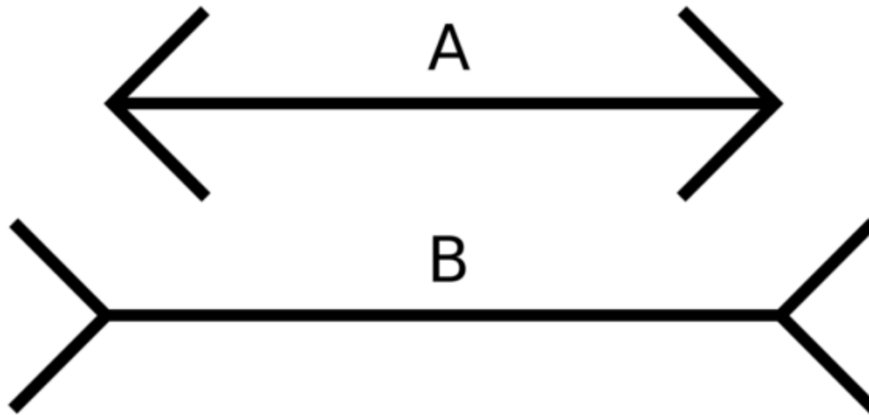
Bias

A Thought Experiment

- The symphony wants to hire musicians
- Listen to musician applicants behind a screen—a “blind audition”
- Judges went as far as to ask applicants to take off shoes so the judges can’t get hints about whether they are listening to a man or woman
- Goldin, Claudia and Cecilia Rouse. "Orchestrating Impartiality: The Impact of " Blind" Auditions on Female Musicians." *The American Economic Review* 90.4 (2000): 715-741.



Bias



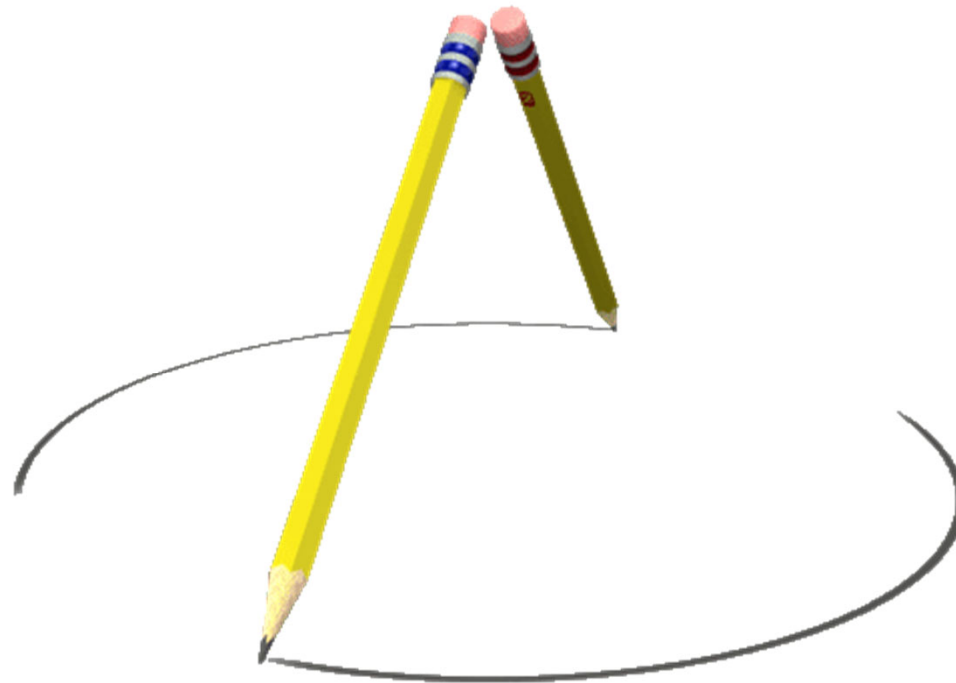
Ensuring the Title IX Process is Impartial

- Conduct self-reflection and be honest with yourself
- In instances where you do not believe you can remain impartial, disclose this and allow someone else to conduct the investigation or engage in the role you serve in the Title IX Formal Complaint Process, in the particular case



The Initiation Stage

Primary Actor: *The Title IX Coordinator*



The Title IX Coordinator

- Fort Worth ISD must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under Title IX, and this employee must be referred to as the “Title IX Coordinator”
- Fort Worth ISD must list the contact information for the Title IX Coordinator on its website and in any handbooks or catalogs provided to students and employees
- The Title IX Coordinator must be fair and impartial with no **conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent specifically

The Title IX Coordinator



Fort Worth ISD must provide the name or title, office address, electronic-mail address, and telephone number of the Title IX Coordinator to the following:

- applicants for admission and employment
- students, parents or legal guardians of elementary and secondary school students
- employees, and
- all unions or professional organizations holding collective bargaining or professional agreements with the recipient

(“Persons entitled to notification”)

The Title IX Coordinator

- Any person may report sex discrimination, including sexual harassment (even if the person reporting is not the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report
- Such a report may be made at **any time** (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator

Title IX Coordinator's Role in the Response

- Once the school knows about the sexual harassment, the Title IX Coordinator must promptly contact the complainant to provide information regarding:
 - ❖ Supportive measures
 - ❖ Right to file a complaint
 - ❖ How to file a formal complaint
- A Title IX Coordinator must engage in such outreach even if no formal complaint has been filed by anyone

Supportive Measures

Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed



Supportive Measures

Supportive measures should be designed to:

- Restore or preserve equal access to Fort Worth ISD's education programs or activities without unreasonably burdening the other party
- Protect the safety of all parties
- Protect the safety of Fort Worth ISD's educational environment
- Deter sexual harassment



Supportive Measures

- Supportive measures must be offered to both the Complainant **and** the Respondent
- Supportive measures should be provided during the Title IX Formal Complaint Process
- The measures should be kept confidential
- The Title IX Coordinator is responsible for implementing the supportive measures
- **Remember:** supportive measures cannot be punitive or disciplinary

Supportive Measures

- Examples:
 - ❖ Counseling
 - ❖ Extensions of deadlines or other course-related adjustments
 - ❖ Modifications of work or class schedules
 - ❖ Campus escort services
 - ❖ Mutual restrictions on contact between the parties
 - ❖ Leaves of absence
 - ❖ Increased security and monitoring of certain areas of the campus



Supportive Measures

The courts have held that schools have a duty to evaluate whether their efforts to stop ongoing harassment are ineffective, and potentially increase the severity of the measures they have put in place or take new measures to avoid liability

Patterson v. Hudson Area Schs., 551 F.3d 438, 444 (6th Cir. 2009)

Vance v. Spencer Cty. Pub. Sch. Dist., 231 F.3d 253, 262 (6th Cir. 2000)



Supportive Measures

Students with Disabilities

- Districts have a duty to ensure that students who are harassed on any basis continue to receive a Free Appropriate Public Education (“FAPE”)
- Because harassment may impede a student’s ability to benefit from his or her educational services, a district may need to reevaluate the student’s needs and amend his or her Individualized Education Program (“IEP”) or Section 504 plan to address the harassment and ensure the student continues to derive an educational benefit

Supportive Measures

Students with Disabilities

- Coordination required between Title IX Coordinator and the ARD or Section 504 Committee
- Special educators should keep in mind that the provision of supportive measures in some cases may constitute a change in placement, trigger disciplinary removal analysis, require manifestation determinations, and/or require changes to schedule of services and related services
- Determine which supportive measures require ARD/504 involvement and ARD documentation and which do not

Emergency Removal

- The school may not impose disciplinary sanctions on a respondent or take other action, other than providing supportive measures, without following the Title IX Formal Complaint Process
 - Emergency removal, where appropriate, is a limited exception to the inability to take “other action”
 - Emergency removal can occur regardless of whether the Title IX Formal Complaint Process is initiated
- Emergency removal is not intended as a disciplinary sanction and is not designed to impose interim suspension or expulsion or to penalize a respondent student
- Emergency removal is meant to protect the physical health or safety of any student or individual to whom the respondent poses an immediate threat

Emergency Removal

- Emergency removal of student
 - ❖ Fort Worth ISD must conduct an individualized safety and risk assessment
 - ❖ The assessment must find that the student is an imminent threat to the physical health or safety of another student or individual arising from the allegations of sexual harassment
 - ❖ Fort Worth ISD must provide notice and immediate opportunity to challenge the decision

IDEA & Section 504 Implications

- Removal of a student would be a change of placement
- MDR requirements and procedural safeguards will be triggered
- **Bottom line**: ARD/Section 504 Committees will need to be involved from the beginning and the Title IX staff will need to be trained on identifying and address SPED/504 implications

Administrative Leave for Employee

- Administrative leave *with pay* for employees during the Title IX Formal Complaint Process and investigation is permitted
 - Follow state law, Board policy, and normal Fort Worth ISD procedures
- Administrative leave is not authorized by the Title IX regulations unless the Title IX Formal Complaint Process has been initiated
- Regardless, this could trigger other Fort Worth ISD policies, procedures, or bases for administrative leave

Formal Complaint

- A Formal Complaint triggers the Title IX Formal Complaint Process and investigation
- The Formal Complaint is a written and signed document containing the allegations of sexual harassment
- Fort Worth ISD must investigate all Formal Complaints unless the Formal Complaint is dismissed
- The Title IX Coordinator oversees the Formal Complaint process



Formal Complaints

- May be made by a complainant (or parent, or legal guardian) or signed by the Title IX Coordinator
 - ❖ Complainant's wishes as to whether to file a formal complaint should be respected unless the Title IX Coordinator determines that initiating an investigation against the complainant's wishes is not clearly unreasonable
- School must have policy regarding how to file a formal complaint and must publish how to file the formal complaint on the district's website

Fort Worth ISD's Formal Complaint Form



Student Title IX Complaint Form

The Title IX Coordinator and/or designee investigate complaints by faculty, staff, and students who believe themselves to be harmed by sexual harassment or discrimination and harassment related to gender.

Sexual Harassment Definition: The Fort Worth Independent School District prohibits sexual harassment, including sexual assault, dating violence, domestic violence or stalking (as defined by the Clery Act or Violence Against Women Act). Sexual harassment conduct includes:

1) A District employee using educational benefits, aids, or services to obtain participation in unwelcome sexual conduct (quid pro quo), or 2) Unwelcome conduct that a reasonable person would determine to be severe, pervasive and objectively offensive that would effectively deny a person access to the District's educational program.

Name _____

Home Phone _____

Cell Phone _____

Email _____

Home Address _____

School _____

Type of Complaint:

Check all that apply (v)

- ☐ Bullying
- ☐ Cyber bullying
- ☐ Gender Discrimination ☐ Gender Inequity
- ☐ Sexual Harassment
- ☐ Sexual Assault
- ☐ Sexual Misconduct
- ☐ Stalking
- ☐ Rape
- ☐ Retaliation
- ☐ Relationship Violence

Fort Worth ISD's Formal Complaint Form



My complaint is against (check one): ☐ Student ☐ Employee

Please describe your complaint and include date, location and names of any witnesses. Attach additional pages, if necessary.

Name of the person or persons you believe committed the offense against you and how do you came in contact with them (For example, the contact information requested is asking for: teacher, administrator, faculty, classmates/friends/teammates etc.)

Describe the corrective action you are seeking. Attach additional pages if necessary.

For retaliation complaints, please explain why you believe someone retaliated against you:

Continue to Next Page

Fort Worth ISD's Formal Complaint Form



Witnesses (The relationship information requested means teachers, administrators, faculty, classmates/friends/teammates etc.)

- 1.
- 2.
- 3.

I certify the aforementioned is true and correct. ☐

Complainant or Parent/Guardian Name _____ Date ____/____/____

Submit the completed form to Kevin Greene, Director of Title IX and UIL Compliance. The Title IX Coordinator will review the document. A final determination will come within 2 days notifying you if the complaint is accepted under Title IX., You will be contacted regarding supportive measures and any future proceedings.

Kevin Greene, Director of Title IX and UIL Compliance,

100 N. University Dr., Fort Worth, TX 76107

Phone: 817.814.1830

Email: Kevin.Greene@fwisd.org

For the Title IX Coordinator:

Received on: Date ____/____/____ Time: _____

Signature _____ Print Name _____ Date _____

Response to Formal Complaints

- Upon receipt of a formal complaint and prior to any interviews, Fort Worth ISD must provide the parties written notice of:
 - ❖ The school's Title IX Formal Complaint Process
 - ❖ The allegations of sexual harassment
 - ❖ Respondent's presumption of not responsible
 - ❖ The right to inspect and review evidence
 - ❖ The right to have an advisor during the process
 - ❖ Any provision in Fort Worth ISD's student policies or Student Code of Conduct or employee policies/handbook that prohibits knowingly making false statements or submitting false information during the Title IX Formal Complaint Process



Dismissal of Formal Complaints

- The regulations set out **mandatory** and **discretionary** reasons for dismissal of formal complaints
- Goal: complainants must be empowered with the authority to start an investigation, but OCR cannot require schools to adjudicate misconduct not covered by Title IX or control how such non-Title IX misconduct is handled
- Under the appropriate circumstances, Fort Worth ISD can dismiss the entire Formal Complaint or dismiss certain allegations in the Formal Complaint
- Generally, the Title IX Coordinator will make the dismissal decision, but may need to involve legal counsel

Dismissal of Formal Complaints

- **Mandatory Dismissal**
 - ❖ Complaint does not describe conduct that would constitute sexual harassment, as defined, even if proven
 - ❖ The sexual harassment did not occur in the school's education program or activity
 - ❖ The sexual harassment did not occur against a person in the United States

Dismissal of Formal Complaints

- **Permissive/Discretionary Dismissal**
 - ❖ Complainant notifies Title IX Coordinator in writing that he/she wishes to withdraw the formal complaint or some allegations in the complaint
 - ❖ The respondent is no longer enrolled or employed
 - ❖ Circumstances exist that prevent the school from gathering sufficient evidence to reach a determination about the allegations

Dismissal of Formal Complaints

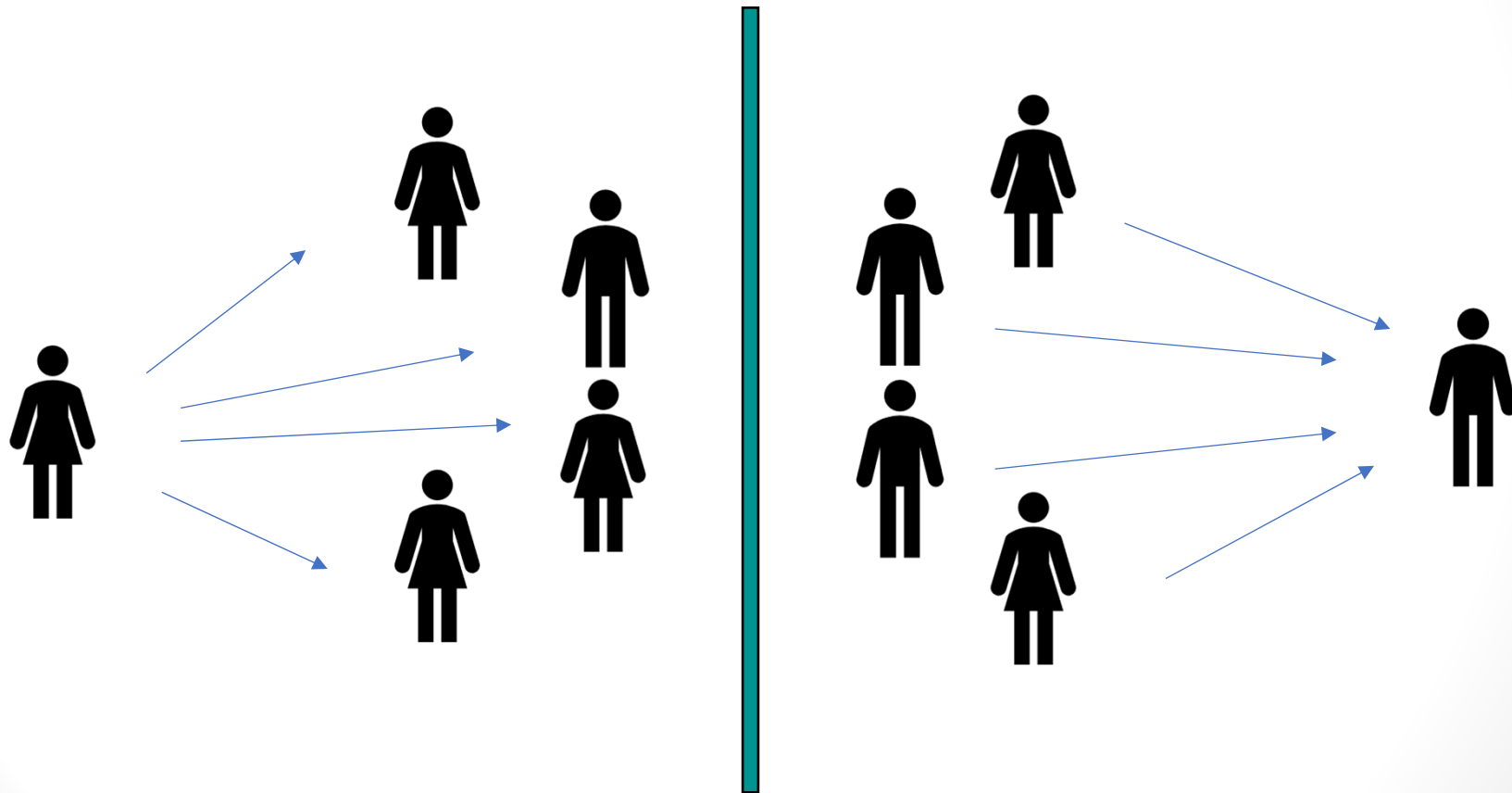
- If Fort Worth ISD dismisses the Formal Complaint or allegations in the Formal Complaint, it must promptly send written notice of the dismissal **and** the reason for the dismissal to all parties
- Any party can appeal the dismissal decision



Consolidation of Formal Complaints

Fort Worth ISD may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise **out of the same facts or circumstances**

Consolidation of Formal Complaints



Informal Resolution

- An alternative to the formal Title IX Formal Complaint Process that schools *may* offer, but not are not required to offer
- Schools may not offer the parties informal resolution options, such as mediation or restorative justice, unless a Formal Complaint is filed
- Informal resolution is never permitted in employee-student sexual harassment cases
- Schools cannot require parties to attempt informal resolution and cannot require waiver of a formal adjudication

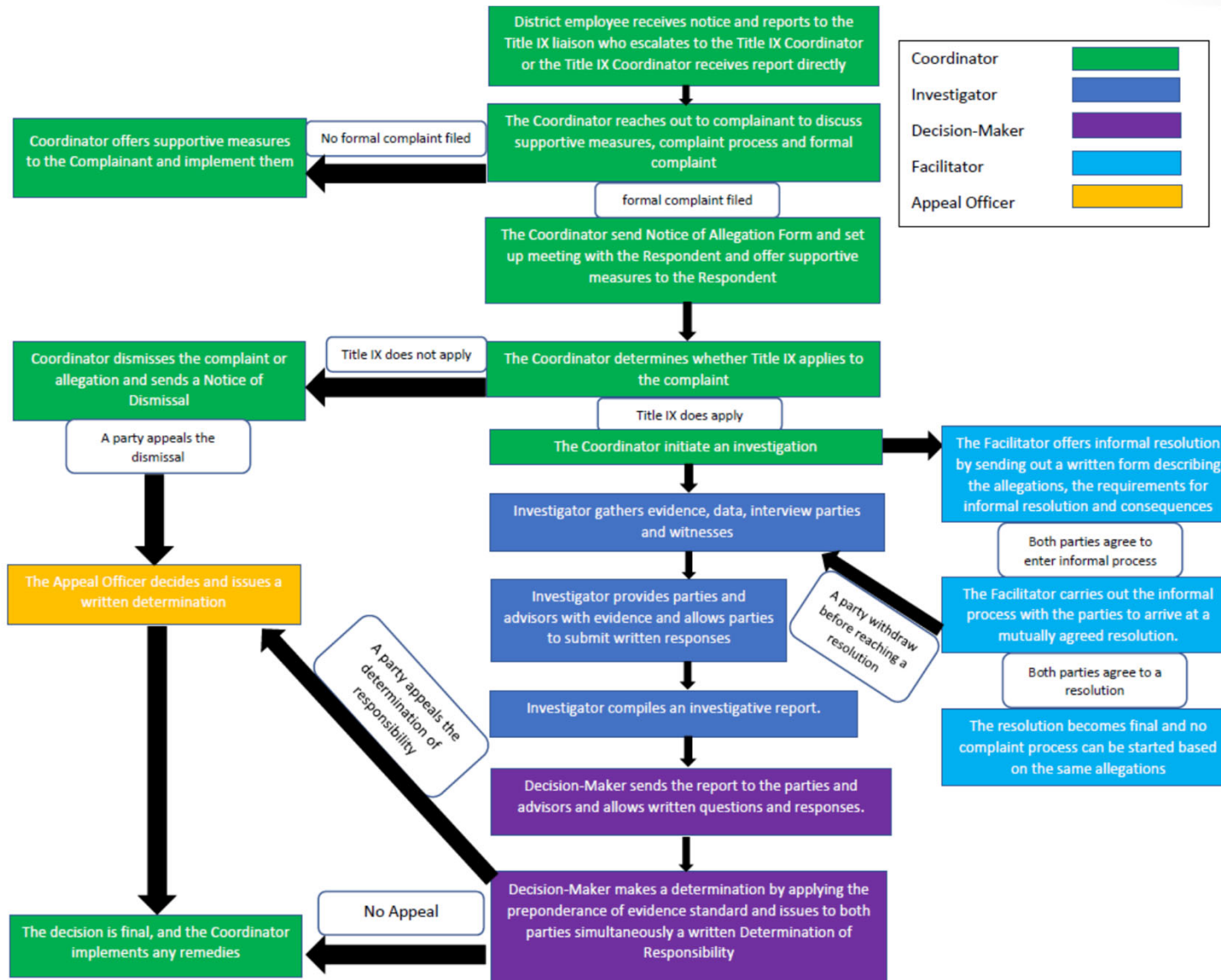
Informal Resolution

- Informal resolution is allowed at any time during the Title IX Formal Complaint Process if:
 - ❖ The school provides the parties written notice of the allegations and their rights
 - ❖ Both parties give voluntary, informed, written consent
 - ❖ Parties have the right to withdraw from the informal resolution process at any time and proceed with the formal Title IX Formal Complaint Process

Informal Resolution Facilitator

- Schools that choose to use an informal resolution process should identify an informal resolution facilitator to oversee the process
- Need not be a school district employee; can be an outside mediator or arbitrator
- Facilitator must serve impartially, without conflict of interest, or bias
- Facilitator must receive Title IX training

Flow Chart of Fort Worth ISD's Process



The Investigation Stage

Primary Actor: *The Investigator(s)*



Title IX Investigation Process

1. Title IX Formal Complaint Process is triggered by the Formal Complaint
2. Investigator receives Formal Complaint
3. Investigator ensures evidence is preserved and gathers all **relevant** evidence
4. Investigator determines what interviews to conduct and outlines potential schedule
5. Investigator provides written notice to Complainant and Respondent of interviews and meetings with sufficient time to prepare



Title IX Investigation Process

6. Investigator conducts interviews—the Complainant, Respondent, and other witnesses
7. Investigator seeks any further relevant evidence and interviews, including witnesses identified by Complainant and Respondent
8. Once evidence is gathered, Investigator provides all evidence **directly related to the allegations in the Formal Complaint** to the parties for review
9. Investigator affords parties 10 days to submit a written response regarding the evidence



Title IX Investigation Process

10. Investigator considers any response submitted by the Complainant and Respondent *before* finalizing the Investigative Report
11. Investigator prepares and finalizes Investigative Report

CONCLUSION OF INVESTIGATION

Fort Worth ISD provides the final Investigative Report to the Complainant and Respondent and they are notified of their right to submit a response



Title IX Investigation Principles

- Consistent investigation process for student-on-student and employee-on-student sexual harassment
- Treat the Complainant and Respondent **equitably**
- Provide **equal opportunity** to the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence
- **Objectively evaluate** all evidence
- Ensure Investigator has **no conflict of interest or bias**
- Investigator must remain impartial
- Investigator must receive training regarding the Title IX Formal Complaint Process and requirements

Title IX Investigation Principles

- The investigation must be conducted within a **reasonably prompt** timeframe with delays only for good cause
- Respondent is **presumed not responsible**
- The evidentiary standard is the “**preponderance of evidence**”
- Investigators should only rely on **relevant** evidence
- Do not use privileged information unless the party holding the privilege waives it in writing

Title IX Investigation Principles

- Investigation itself cannot discriminate against the Complainant or Respondent on the basis of sex
- The Investigator and investigation cannot rely on sex-based or other stereotypes or preconceived notions regarding complainants and respondents
- The Investigator does not make a finding of responsibility
- Credibility determinations are not made by the Investigator—the decisionmaker will decide credibility based on the information in the investigation and investigative report

The Investigators

- Fort Worth ISD must investigate all Formal Complaints, with the exception of those that are dismissed on mandatory or discretionary grounds
- Campus administrators—the Principal or Principal's Designee (Assistant Principal)—will serve as Title IX Investigators
 - ❖ Decisionmaker cannot serve as the investigator
 - ❖ Appeal officer cannot serve as the investigator
 - ❖ The new regulations do not *prohibit* the Title IX coordinator serving in this role, but it is not ideal
- All investigators must be trained in accordance with the new Title IX regulations

Confidentiality

- Fort Worth ISD cannot restrict the parties' ability to discuss the allegations or gather evidence (i.e. no “gag orders”)
- But confidentiality should be maintained to the greatest extent possible



The Right to an Advisor

- The Complainant and Respondent must be given the opportunity to select an advisor of their choice
- The advisor may be present for any meeting or interview involving their advisee during the investigative process
- Fort Worth ISD may establish restrictions regarding the extent to which the advisor may participate in the proceedings if the restrictions are equally applied to both parties
- Advisor may inspect and review the evidence

Investigation Time Frames

- Investigation is conducted within reasonably prompt time frames
 - ☐ Some exceptions due to law enforcement investigations, party or witness absence, or providing language or disability accommodations
- Considerations in developing time frames
 - ☐ Written notice required for any interviews or meetings
 - ☐ Provide party with sufficient time to prepare for interviews
 - ☐ Scope of investigations
 - ☐ Required time for parties to submit written responses to the evidence

The Evidentiary Standard

- Fort Worth ISD has elected to use the “preponderance of the evidence” standard
 - **Preponderance of the Evidence:**
 - ☐ A fact is more likely than not to be true; a proposition is more probably true than false
 - ☐ At least 51% of the evidence favors the Complainant
- Probability of Truth > 50%**
- ☐ Where the evidence is equipoise (i.e., “50/50”) the result is a determination that the Respondent is not responsible



Must use the same standard of evidence for **all** complaints against students and employees

Gathering Evidence

- After receipt of the Formal Complaint, an investigator should:
 - ☐ Immediately identify and preserve likely sources of evidence
 - ☐ Preserve evidence—locate and take control of the evidence
- The burden to gather evidence is on the school—not the parties
- **Equal opportunity** for the parties to present inculpatory and exculpatory evidence



Relevant evidence

Evidence is relevant if

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

FED. R. EVID. 401



Gathering Evidence

- **“Inculpatory evidence”**
 - ❖ Favorable to the Complainant
 - ❖ Evidence that shows or tends to show an individual’s involvement in the alleged sexual harassment that can establish responsibility
- **“Exculpatory evidence”**
 - ❖ Favorable to the Respondent
 - ❖ Evidence that exonerates or tends to show the Respondent is not responsible for the alleged sexual harassment incident

Gathering Evidence



- No information protected by legal privilege may be used during an investigation unless waived in writing by the person holding the privilege
 - Attorney-Client, Physician/ Psychotherapist-Patient, etc.
 - No questions may be asked about these matters unless privilege is waived

Attorney-Client Privilege

- A *confidential* communication
- To a lawyer or her subordinate
- For the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding
- The individual asserting the privilege has the burden to prove these elements

United States v. Robinson, 121 F.3d 971, 974 (5th Cir. 1997)

Physician/Psychotherapist-Patient

Under federal law, a person has a limited privilege to refuse to disclose, and to prevent another from disclosing, confidential communications made to a psychotherapist for the purposes of diagnosis or treatment of a mental or emotional condition, including drug addiction.

Jaffee v. Redmond, 518 US 1, 15 (1996)

- A psychotherapist is a person authorized to engage in the diagnosis or treatment of a mental or emotional condition, including drug addiction
- The privilege may extend to unlicensed counselors
- The privilege is limited to confidential communications made in the course of diagnosis or treatment

Physician/Psychotherapist-Patient

Under state law, a person has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between a physician and the patient that relates to or was made in connection with any professional services that physician rendered the patient, and a record of the patient's identity, diagnosis, evaluation, or treatment created or maintain by the physician.

TEX. R. EVID. 509(c).



Interviews

- School must provide parties **written notice** of the date, time, location, participants, and purpose of all investigative interviews or other meetings **with sufficient time to prepare**

No more surprise interviews!

- Must provide parties with equal opportunity to present evidence and identify fact and expert witnesses



Interviews – Rape Shield Protections

- Questions and evidence related to a Complainant's prior sexual history or sexual behavior are **not relevant** and may not be asked/sought
- Exceptions in two narrow circumstances:
 1. The evidence is offered to prove someone other than the respondent committed the alleged sexual harassment
 2. The evidence relates to the sexual behavior between the complainant and respondent and is offered to prove consent
- Except in these two narrow circumstances, do not seek evidence or ask a complainant questions about their prior sexual history or sexual behavior

Interviews

DO	DON'T
Take all allegations and statements seriously	Make credibility determinations based on sex-stereotyping or status in the investigation
Make the employee feel at ease	Create a hostile or unwelcoming environment
Be neutral, objective, and open-minded	Have an agenda
Let the interviewee tell his or her story	Conduct an interrogation
Listen <u>actively</u>	Be a passive interviewer
Be thorough – make sure to elicit all relevant facts	Shy away from asking tough questions
Test the credibility of the statements made during the interview	Conduct the interview without reference to any documentation
Seek information regarding potential justifications/excuses	Rush to judgment
Ask probing questions	Be argumentative or accusatory
Ask all necessary follow-up questions	Do all the talking
Ask for any supporting documentation and/or corroborating witnesses	Be unprepared

Investigation Practical Tips

- Develop an investigation plan.
 - What needs to be investigated? What is the scope?
- Interview the Complainant and the Respondent
 - Develop outlines in advance based on available information
 - Identify relevant documents (e.g., club or class roster)
 - Conduct follow-up interviews as may be appropriate during the investigation

Investigation Practical Tips

- Interviews
 - Take excellent notes
 - Use quotation marks to indicate direct quotes
 - Obtain a written statement from witnesses when possible
- Avoid developing an email/texting relationship with witnesses; emails should be ministerial (*e.g.*, to schedule a meeting)
- Evidence
 - Promptly pull and save surveillance video if relevant
 - Obtain and save copies of electronic evidence as promptly as possible (*e.g.*, text messages, Facebook postings)
 - Take photographs when needed; do not photograph a Complainant's injuries without consent

Investigation Practical Tips

- The Complainant and the Respondent are entitled to fairness, respect, sensitivity
- Both may experience stress throughout the process
- Conduct the interviews in a comfortable environment
- Allow the witness to bring an advisor
- Demonstrate empathy and patience

Investigation Practical Tips

- Interview individuals who are likely to have material information
- Document efforts to contact witnesses
- Interview witnesses one at a time
- Inform each person interviewed about the policy against retaliation
- Ask open-ended questions, followed by appropriate clarifying questions
- Ask at the end of the interview: “Is there anything else about this situation that I should know?”
- Invite the individual to contact you with additional information

Investigation Practical Tips

- Ask questions to understand relationships and bias (e.g., “How do you know the reporting party?”)
- Don’t ask the Complainant and the Respondent to contact witnesses themselves, but do obtain contact information
- When interviewing third-party witnesses, share the least amount of information possible, and ask non-leading questions.
 - Ex.: “We have a complaint about the lab environment. What can you tell me about the environment in the lab?”
- Withhold judgment until the facts are in
- Don’t offer opinions about facts that are shared

Evaluating the Evidence

Remember:

- Investigators must objectively evaluate all the evidence
- Investigation cannot itself discriminate against the Complainant or Respondent on the basis of sex or rely on sex stereotypes
- Credibility determinations are not made by the investigator—the decisionmaker will decide credibility
 - Investigator can include a summary of contradicting evidence and statements for the decision maker
- Respondent maintains the **presumption of not responsible** during the investigation
 - Only at the conclusion of the entire Title IX Formal Complaint Process can a finding of responsibility be made

Types of Evidence

- Investigators and decisionmakers should understand the types of evidence they are evaluating:
 - ☐ Direct Evidence
 - ☐ Circumstantial Evidence
 - ☐ Statistical Evidence
 - ☐ Hearsay
 - ☐ Rumor or Innuendo (not evidence)

Direct Evidence

Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

BLACK'S LAW DICTIONARY 675 (10th ed. 2014)

- What a witness directly experienced
- Eyewitness testimony
- Admissions—written or oral
- Surveillance tape or cell phone video captures the incident

Circumstantial Evidence

Evidence based on inference and not on personal knowledge or observation...all evidence that is not given by eyewitness testimony.

BLACK'S LAW DICTIONARY 674 (10th ed. 2014)

Hearsay Evidence

Hearsay means a statement (oral or written) that the declarant does not make while testifying at the current trial or hearing, and that a party offers in evidence to prove the truth of the matter asserted in the statement.

FED. R. EVID. 801(c)

Reviewing the Evidence

- The Investigator must provide the parties and advisors an opportunity to inspect and review the evidence
 - Evidence that is **directly related to the allegations** raised in the Formal Complaint
 - Statements, notes of interviews, and other types of evidence the school plans to use before reaching a determination *and* evidence the school doesn't think it will use
 - Provide the evidence in electronic or hard copy format
- The parties must be given at least **10 days** to review all the evidence and submit written responses about the evidence to the investigator

Considering the Parties' Response

- The Investigator must consider the parties' response(s) to the evidence:
 - Did either party identify new witnesses who may need to be interviewed, or new evidence that will need to be collected and considered?
 - Did either party raise relevancy concerns about the current evidence?
 - Did either party point out inconsistencies in the evidence?

Drafting the Investigation Report

- Investigator does not make a finding of responsible/ not responsible
- The report must fairly summarize the evidence the school gathered about the alleged sexual harassment incident
- The report should show that the investigator considered the parties' written response regarding the evidence, and address whether it comports with or contradicts other evidence

The Investigation Report

Potential Contents:

- Summary of the Formal Complaint
- Summary of the Title IX Formal Complaint Process to date (from initial report → Formal Complaint → investigation)
- Summary of the investigation you conducted (witnesses interviewed, documents reviewed, follow-up conducted)
- Factual/evidentiary summary
 - Facts regarding each allegation in the Formal Complaint
 - Discuss key evidence
 - Consider discussing information you chose not to summarize and why (not relevant, uncorroborated, etc.)

Finalizing the Investigation Report

- Fort Worth ISD must share the final Investigative Report with both parties and their advisors
- Both parties must be given at least **10 days** to review and submit a written response regarding the investigation report to the decisionmaker before any determination of responsibility



Investigation Timeframe Example

Week	Su	M	Tu	W	Th	F	Sa
1		Formal Complaint Submitted		Notice to Parties	Determine Scope of Investigation		
2		Gathering Evidence and Interviews					
3		Gathering Evidence and Interviews					
4		Provide Evidence to Parties					
5						Written Response Deadline	
6		Receive and consider written responses to the evidence.		Issue Investigative Report			

Investigative Process Checklist

- ☐ Identify investigators
- ☐ Determine appropriate investigation time frames in accordance
- ☐ Draft templates to parties and witnesses to maintain consistency
 - Interview/meeting notices
 - Introductory statement to witnesses
 - Notice of evidence
 - Examining evidence and details on how to provide written responses to the evidence
 - Investigative Report and time to respond
 - Other notices/report templates deemed necessary
- ☐ Revise school district policies and regulations

Remember the Potential Differences

- Must disclose allegations to all parties
- The duty to cooperate may differ—disciplinary action for refusal to participate can constitute retaliation under Title IX
 - ❖ Complainant or Respondent cannot be required to consent to an interview and/or submit a written statement
 - ❖ You can encourage the Complainant and Respondent to cooperate and provide all relevant and factual information
 - ❖ Fort Worth ISD can require Complainant and Respondent to provide truthful statements and can discipline for making false statements or providing false information

Remember the Potential Differences

- Confidentiality—the Complainant and Respondent must be able to gather their own evidence
 - ❖ You cannot ask the Complainant or Respondent to refrain from discussing the case with anyone other than the investigator and his or her advisor/legal representative
 - ❖ You cannot ask the Complainant or Respondent to refrain from contacting witnesses
 - ❖ You can encourage the Complainant and Respondent to protect confidentiality to the extent it does not impair their ability to gather evidence
- Confidentiality—other witnesses
 - ❖ You cannot tell witnesses they cannot discuss the case with Complainant or Respondent
 - ❖ You can tell the witnesses they do not have to discuss the case with anyone, including the Complainant or Respondent

The Determination Stage

Primary Actor: *The Decisionmaker*



The Determination of Responsibility Process

- Decisionmaker receives and reviews the investigative report, the evidence, and the parties' response to the investigative report
- Decisionmaker provides the parties notice of the right to submit questions
- Decisionmaker oversees the written question and answer process, including any follow-up questions and answers
- Decisionmaker issues a written decision that complies with the Title IX regulations, which includes a determination of responsible or not responsible
- Decisionmaker notifies the parties of the determination and their right to appeal

The Decisionmaker



- Cannot be the investigator or Title IX Coordinator
- Must be objective and exercise independent judgment
- Must weigh relevant evidence and decide whether it meets the standard of proof (preponderance of the evidence)
- Must be free from conflicts of interest or bias:
 - Against complainants and respondents, generally
 - Against the individual Complainant and Respondent

The Written Q & A Process

- Live hearings, with cross-examination, *are not required* at the K-12 level
- Fort Worth ISD has opted not to have live hearings
- Instead, Fort Worth ISD must establish a written question/answer process



Hearing on Written Questions

- After completion of the investigation report, and after the report is provided to both parties
- Each party must have the opportunity to submit written, **relevant** questions for any other party or witness
- Process must provide opportunity for additional, **limited** follow-up questions from each party

Hearing on Written Questions

- Answering party must respond in writing
 - ❖ **Remember: no duty to cooperate**
- Decisionmaker may exclude a party's question if determined it is not relevant
- If question is excluded, the decisionmaker must explain to the proponent of the question the basis for the decision (i.e., relevance)

Revisiting Rape Shield

Protection for Complainants

- Limitation on questioning and evidence regarding the complainant's sexual predisposition or prior sexual behavior.
- Questions or evidence about complainant's prior sexual behavior are irrelevant, unless:
 - ❖ offered to prove someone else committed the alleged misconduct; or,
 - ❖ concern specific incidents in complainant's prior sexual history with the respondent and are offered to prove consent.

Determination Process

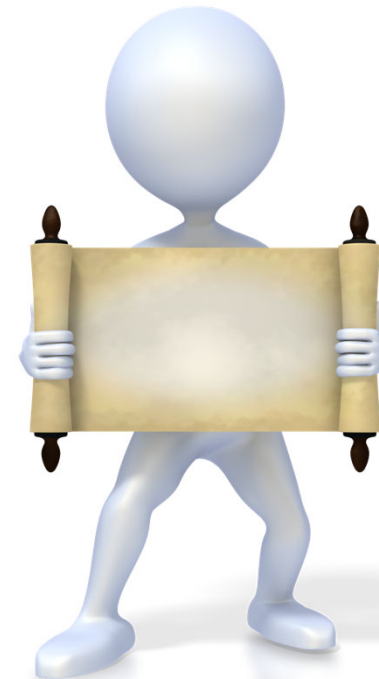
Many of the “Title IX Investigation Principles” apply

- Decisionmaker must approach the process with the presumption that Respondent is not responsible
- Decisionmaker must objectively evaluate the relevant evidence and make a conclusion about whether the respondent is responsible for alleged sexual harassment
- May (and often, *must*) make credibility determinations
- Credibility determinations cannot be based on the status as a Complainant, Respondent, or witness
- Decisionmaker cannot rely on stereotypes or preconceived notions regarding complainants or respondents



Determination of Responsibility

- Must apply the school's established standard of evidence (preponderance of the evidence)
- Decisionmaker must issue a written determination of responsibility



Reminder Regarding Dismissal

- Depending on what is revealed in the investigation and the Title IX Formal Complaint Process, it may be necessary to revisit dismissal of a Formal Complaint
- Decisionmaker should consider whether grounds for dismissal were revealed
 - ❖ Conduct was not sexual harassment
 - ❖ Conduct not during school program/activity
 - ❖ Request to withdraw

Written Decision Requirements

- Identify the allegations at issue that potentially constitute sexual harassment
- Include specific policy provision that the conduct allegedly violates
- Describe the procedural steps to date taken by Fort Worth ISD in the Title IX Formal Complaint Process, from receipt of informal report, to receipt of the Formal Complaint, to the written determination
- Include findings of fact supporting the determination
- Include conclusions regarding application of District policies, the school's code of conduct, or other applicable rules to the facts

Written Decision Requirements

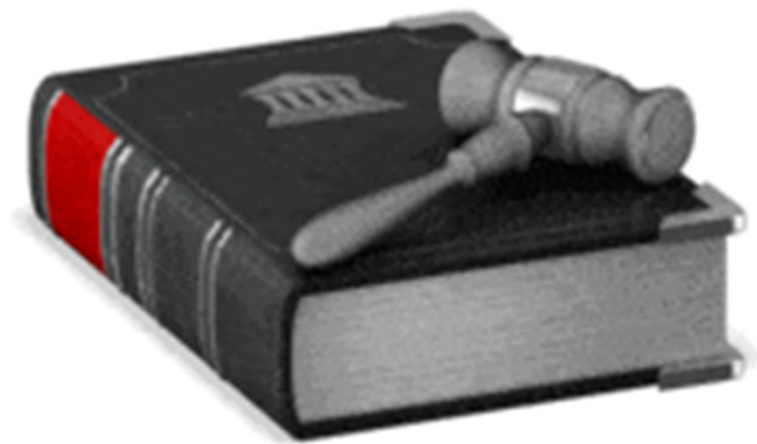
- Decision must include a statement of, and rationale for, the result as to each allegation
 - ❖ Determination regarding responsibility
 - ❖ Any disciplinary sanctions imposed on the respondent
 - ❖ Whether remedies designed to restore or preserve equal access to educational program will be provided by the school to the Complainant

Notice of Written Decision

- Fort Worth ISD must provide the Determination of Responsibility to the parties simultaneously
- When notifying the parties of the Determination of Responsibility, Fort Worth ISD must explain the appeal process and permissible grounds for each party to appeal

The Appeal Stage

Primary Actor: *The Appeal Officer*



Appeals in the Title IX Formal Complaint Process

- Fort Worth ISD must create a process for appealing
 - (1) a determination regarding responsibility
 - (2) the dismissal of a Formal Complaint
- Each party must be provided notice of the appeal process and the opportunity to appeal
- The Appeal Officer issues a written decision including the result/decision on appeal and the rationale

Appeals in the Title IX Formal Complaint Process

- Grounds for appeal:
 - ❖ Mandatory
 - Procedural irregularities that affected the outcome
 - New evidence
 - Conflict of interest
 - ❖ School may choose to offer appeals on additional bases
 - ❖ Both parties must have equal appeal rights

Appeal Officer

- Decisionmaker on appeal cannot be the same decisionmaker from the initial Determination of Responsibility, the investigator, or the Title IX Coordinator
- The Appeal Officer must be free from conflict of interest or bias and must be able to serve impartially
- The Appeal Officer must also receive Title IX training under the regulations

Appeal Decision

- The Appeal Officer should consider the parties' written statements regarding the appeal
- The Appeal Officer should compare the parties' submissions to the grounds for the appeal
- The Appeal Officer must issue a decision granting or denying the appeal
- The written decision must set forth the final decision reached by the Appeal Officer and explain the basis/rationale for the decision

Sample Timeline of Fort Worth ISD's Title IX Formal Complaint Process

Monday	Tuesday	Wednesday	Thursday	Friday
March 1 Formal Complaint Filed	2	3 District provides notice of the allegations of sexual harassment ... with five District business days to select advisor of their choice and time to prepare a response before any initial interview	4	5 Title IX Coordinator sets up meeting with respondent to discuss supportive measures
8 Investigator gives written notice of interviews	9	10	11 Interviews <i>Parties must obtain advisor by this date and prepare for interviews. Investigator must give written notice of interviews to complainant and respondent three District business days in advance</i>	12 Interviews
15 Interviews	16	17	18 Provide evidence subject inspection and review – give parties at least 10 days to submit a written response	19
22	23	24	25	26

Legend:

Purple days are statutory mandatory days

Blue days are “permissive” or “policy”/process days

Sample Timeline of Fort Worth ISD's Title IX Formal Complaint Process

Monday	Tuesday	Wednesday	Thursday	Friday
29	30	31	April 1 Receive and consider written comments from parties as to evidence	2
5 Issue Investigative Report to both parties – give 10 days for their review and written response	6	7	8	9
<i>Engage in the Written Q&A Process: Decisionmaker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up</i>				
12	13	14	15	16
<i>Continue Written Q&A Process: Decisionmaker receives answers to questions, provides the answers to the parties, and obtains follow-up questions.</i>				
19	20	21	22	23
<i>Continue Written Q&A Process: Decisionmaker submits any follow-up questions, receives written answers to follow-up questions, and provides the answers to the parties.</i>				
26 Receive and consider written response from parties	27	28 Issue Determination of Responsibility	29	30

Legend:

Purple days are statutory mandatory days

Blue days are “permissive” or “policy”/ process days

Sample Timeline of Fort Worth ISD's Title IX Formal Complaint Process

Monday	Tuesday	Wednesday	Thursday	Friday
May 3	4	5 Appeal Filed <i>Filed within five District business days of issuance of Determination of Responsibility</i>	6	7 Notice of Appeal to Non-Appealing Party <i>District provides within two District business days</i>
10	11	12	13	14 Written Response to Appeal <i>Submitted within five District business days of the Notice of Appeal</i>
17	18	19 Appeal Decision <i>Three District business days after receipt of written response</i>	20	21
22	23	24	25	26
29	30	31	June 1	2

Legend:

Purple days are statutory mandatory days

Blue days are "permissive" or "policy"/ process days

Remedies

- The Title IX Coordinator is responsible for effective implementation of any remedies
- Remedies must be designed to **restore or preserve equal access** to the school's educational program or activity
- Need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent
- If a student respondent is found responsible for sexual assault, discipline could include suspension, DAEP placement, or expulsion

Retaliation

- New regulations contain an anti-retaliation provision
- Charges of code of conduct violations that arise out of the same facts or circumstances as a report of sex discrimination or sexual harassment for the purpose of interfering with any right under Title IX constitutes retaliation
- Charges for making a materially false statement is not retaliation if charge is not based solely on outcome of the Title IX Formal Complaint Process
- Complaint process for retaliation



Training Materials

Schools must ensure that all training materials are accessible on their websites



Title IX

Recordkeeping



Must retain records for **seven** years.
Records must include:

- ❖ Final determination;
- ❖ Any audio/visual records or transcripts;
- ❖ Supportive measures taken or reason for no supportive measures;
- ❖ Sanctions imposed;
- ❖ Remedies provided;
- ❖ Appeal and result;
- ❖ Informal resolution and result;
- ❖ All training materials; and
- ❖ The basis for the school's conclusion that any response to an allegation of sexual assault was not deliberately indifferent and that it took measures to restore/preserve equal access.

Implementing the New Regulations

- ☑ Develop a plan to implement the new regulations
- ☑ Identify Title IX team: Coordinator, investigator(s), decision-maker(s), appeal officer(s), and facilitators
- ☑ Title IX Coordinator:
 - Must have the title “Title IX Coordinator”
 - Prepare documentation and processes to provide the Title IX Coordinator’s name or title, office address, email address, and telephone number to:
 - ☐ Applicants for admission and employment
 - ☐ Students, parents or legal guardians
 - ☐ Employees
 - ☐ All professional organizations holding professional agreements with the district
 - Prominently display the contact information for the Title IX Coordinator on the district’s website



Title IX Coordinator Compliance

- ☒ Title IX Coordinator will:
 - ☐ Receive reports
 - ☐ Advise complainant of availability of supportive measures
 - ☐ Explain to the complainant the process for filing a formal complaint
 - ☐ Potentially sign the formal complaint
 - ☐ Implement supportive measures
- ☒ Determine whether Title IX Coordinator will also be an investigator or if the school will keep the roles separate



Title IX Training Requirements

☒ Training

- ☐ Title IX Coordinator, investigator(s), decisionmaker(s), decisionmaker(s) for appeals, facilitators
- ☐ Training for all other employees regarding need to report sexual harassment
- ☐ Must post all training materials on website
- ☐ Ensure training meets all requirements of the new regulations and does not engage in sex stereotyping



Title IX Policy

☒ Policy Development

- ☐ TASB is developing model policies
- ☐ Develop timelines for your investigation/determination process and appeals
- ☐ Determine whether the school will opt to adopt the hearing process
- ☐ Determine the standard of proof the school will use for all complaints of sexual harassment (clear and convincing evidence vs. preponderance of the evidence)
- ☐ Determine if school will provide additional bases for appeal of decision regarding responsibility
- ☐ Determine if the school will have a more expansive definition of sexual harassment
- ☐ Determine what process (if any) will be used by the school to address harassment that does not fall within the definition of sexual harassment in the Title IX regulations
- ☐ Determine process for complaints of retaliation



What Can't and Can be in Policies?

- **Can't tell Complainant and Respondent:**
 - That they **must** consent to an interview and/or submit to a written statement
 - To refrain from discussing the case, facts, suspicions, or allegations with anyone other than the assigned investigator and his or her legal representative
 - To refrain from contacting witnesses
- **Can tell Complainant and Respondent**
 - That we encourage them to cooperate and provide all relevant and factual information
 - To provide truthful statements

What Can't and Can be in Policies?

- **Can't tell Witnesses:**

- That they can't discuss the case, facts, suspicions, or allegations with the complainant or respondent
- To refrain from contacting the complainant or respondent
- That they must direct inquiries from respondents or their representative regarding the allegations to the assigned investigator

- **Can tell Witnesses:**

- That they don't have to discuss the case, facts, suspicions, or allegations with the complainant or respondent
- To provide truthful statements

Title IX Forms & Notices



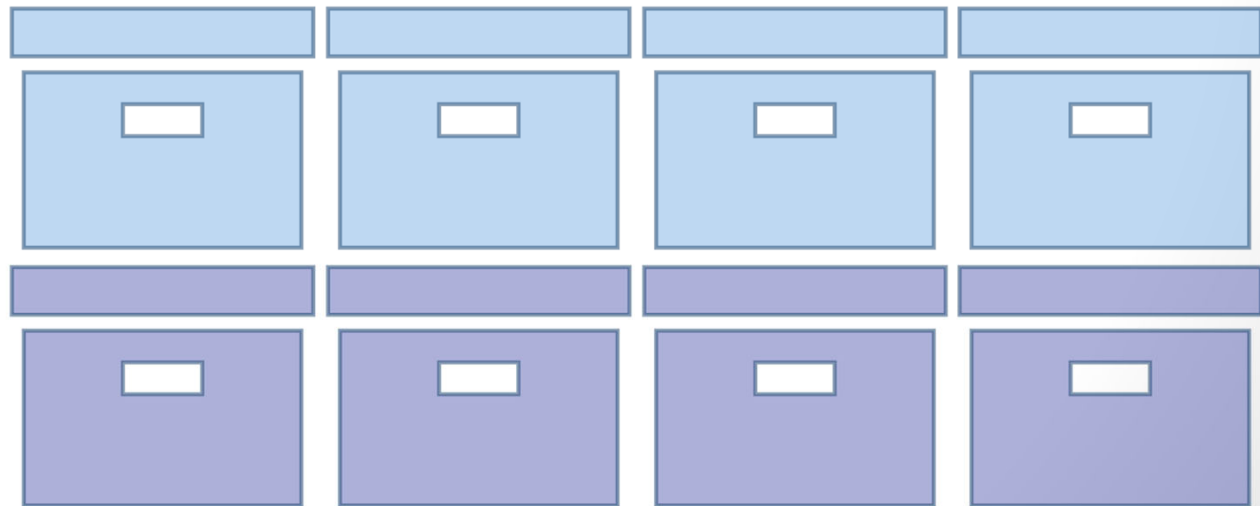
Forms and Documentation

- ☐ Documentation to show initial response to report of sexual harassment
- ☐ Formal complaint form
- ☐ Notice to complainant and respondent regarding mandatory or permissive dismissal of formal complaint (before Title IX Formal Complaint Process) and right to appeal dismissal
- ☐ Form to opt in or out of informal resolution process
- ☐ Notice to complainant and respondent at initiation of Title IX Formal Complaint Process
- ☐ Notice forms regarding interviews/meetings during Title IX Formal Complaint Process
- ☐ Potential checklist for investigator and decisionmaker to ensure the investigative report and decision contain all information required by the new regulations
- ☐ Appeal forms
- ☐ Checklist for recordkeeping



Title IX Recordkeeping

- ☒ Recordkeeping
 - ☐ Update document retention schedule
 - ☐ Make sure all relevant personnel know of new recordkeeping procedures (Title IX Coordinator, investigator(s), decisionmaker(s), etc.)



Fort Worth ISD

Title IX Coordinator

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Questions? Comments?



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