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Title IX Training

Investigators & Decision-makers

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Some Statistics on Sexual Harassment in Schools

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According to the National Women's Law Center:

About 1 in 2 students in grades 7-12 are sexually harassed in any given school year.

More than 1 in 5 girls ages 14-18 have been kissed or touched without their consent.

More than 60% of college students experience sexual harassment, and 1 in 4 women, 1 in 4 transgender or gender-nonconforming students, and 1 in 15 men are sexually assaulted during college.

https://nwlc.org/resources/let-her-learn-toolkit-sexual-harassment/

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How Did We Get Here?

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- A formal complaint has been filed by a Complainant (or their parent).
- The Title IX Coordinator has:
  - Provided the Complainant and Respondent (and parents) with notice of the allegations;
  - Determined the complaint falls within Title IX;
  - Engaged in a risk assessment;
    - Regarding whether there is an immediate threat to the physical health or safety of a student or other individual arising from the allegations that would justify removal of respondent from school; determined if report should be made to DCF and/or police;
  - Offered supportive measures and determined if any would be put in place;
  - Discussed with Complainant (and parents) the grievance process and the option of informal resolution.
- If the investigator is not the Title IX Coordinator, the Title IX Coordinator has provided all information in his/her possession regarding the complaint to the assigned investigator.

- Now what?

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Outline of Today's Discussion

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- Grievance Process Basics
- Investigation
- Decision-making

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Grievance Process Basics

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Grievance Process Basics

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- Underlying principles for grievance process:
  - Equitable:
    - Complainants and Respondents must be treated **equitably.**
  - Impartial:
    - The Title IX Coordinator, investigator, decision-maker, and informal resolution facilitator (where applicable) cannot have a **conflict of interest** or **bias** for or against complainants or respondents generally, or an individual complainant or respondent.
  - Thorough:
    - Must **objectively** evaluate all **relevant evidence** (both inculpatory and exculpatory).
  - Prompt:
    - Grievance process must include **reasonably prompt time frame** for conclusion.

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Grievance Process Basics

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- Presumption of non-responsibility:
  - Must have a **presumption that Respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

- Standard of evidence:
  - Must state the **standard of evidence**, either "preponderance of the evidence" or "clear and convincing evidence" standard.

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Avoiding Bias, Conflict of Interest, and Prejudgment of Facts

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- Investigators and decision-makers (as well as Title IX Coordinators, informal resolution facilitators, and appeals officers) must:
  - Be free from **conflict of interest,**
  - Be free from **bias**, and
  - Be trained to serve impartially and **without prejudging facts**.

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Potential Bias

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- The regulations make clear that at each stage, the school employee must not be biased.
  - Bias may be as to categories
    - e.g. a belief that because evidence shows that female students are often subjected to sexual harassment that it is more likely that the female student is telling the truth
  - Bias as to the specific individual
    - The more you know about the Complainant and/or Respondent the more you are likely to believe that they behaved in keeping with how you perceive them
      - e.g. – the Respondent is an honor student so he could not have engaged in the alleged acts
      - The Complainant has a reputation for going out with a lot of different boys at school so she is not believable
  - Pressure from outside
    - Is the Respondent the star of the school play that is about to open
    - Is the Respondent the star of the school's football team

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Potential Bias

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- Bias can be
  - Conscious or unconscious
  - Positive or negative
  - Based on societal norms or your own cultural perspective

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Conflicts of Interest

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- Things that are not automatic conflicts of interest
  - Just because you know the student/employee does not mean there is a conflict of interest
  - Just because you have disciplined the student/employee in the past does not equate to a conflict of interest

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Conflicts of Interest

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- Conflicts of interest
  - Wearing too many hats in the process
    - Title IX Coordinators who are also acting as Investigators must take care not to let the roles bleed into one another
  - A relationship with one of the parties that goes beyond the school setting
    - Friendship with students' parents
    - Coaching a student on a sports team

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Avoiding Prejudgment of Facts

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- Keep an open mind.
- Each case is unique and different.

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"Dangerous Words" to Avoid

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- Just ignore it.
- It's just a joke.
- This is just part of growing up.
- If we disciplined every student that said a bad word, we would never be able to get any teaching done.
- It's just a prank.
- Nobody else has ever complained about it.
- Boys will be boys OR Girls will be girls.

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Bias/Conflict of Interest Hypothetical

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- Mr. Johnson is the assistant principal at Top High School. He has been in that position for the past three years. As part of his job, he is responsible issuing student discipline that can be issued within the school such as detentions and suspensions. He also acts as the investigator for Title IX complaints at the school.
- John Jones and Susie Smith are two students at Top High School. John Jones is a senior and has a long disciplinary record. He served a short expulsion for bringing marijuana into school when he was a sophomore and has served various detentions and suspensions for things such as insubordination, using profanity at school and has served one ten days suspension for fighting.

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Bias/Conflict of Interest Hypothetical

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- Susie Smith is an honor roll student. She has never served a detention or a suspension.
- John Jones has filed a sexual harassment complaint alleging that Susie Smith has been spreading rumors about him at school. He claims that Susie asked him out and when he turned her down she was very upset. He believes that she is spreading the rumors because he refused to go to the school dance with her.

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Bias/Conflict of Interest Hypothetical

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- James Bucks is a local business man who has provided a lot of money to the school including providing the funding for the lights for the school's sports field. His name is displayed prominently on the fence around the school's football field. His son is currently the quarterback of the football team. Sally files a Title IX complaint against Jeff Bucks (Mr. Bucks' son) claiming that he attempted to sexually assault her under the stairwell at school.
- The school' social worker is the Title IX Coordinator and the Assistant Principal is the investigator. The Principal serves as the decision-maker.

Are there any conflicts of interest and/or biases to be concerned about?

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Relevance

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- District must **objectively** evaluate all **relevant evidence** (both inculpatory and exculpatory).
  - Recipient must ensure that "all relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decisionmaker)."
- What is relevant?
  - Includes evidence that is "probative of any material fact concerning the allegations."
  - Includes "evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant)".
- The Rules of Evidence do NOT apply.

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Relevance Exceptions

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- Medical treatment records:
  - Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other professional, and which are made/maintained in connection with the provision of treatment of the party, unless obtain voluntary written consent.
- Legally privileged information:
  - A recipient's grievance process cannot require, allow, rely upon, or otherwise use evidence or questions that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- Complainant's sexual behavior (Rape Shield Protections):
  - Evidence about Complainant's prior sexual history must be excluded unless such evidence/questions:
    - Are offered to prove that someone other than the Respondent committed the conduct, or
    - If the evidence/questions concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to provide consent.
  - Note: Rape shield protections do not apply to Respondents.
    - "[E]vidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be."

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Relevance Hypothetical

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You are assigned to investigate a complaint filed by Mr. and Mrs. Jones that their daughter's sixth grade teacher, Mrs. Smith, showed an inappropriate movie in class that had a scene where two of the characters were engaged in kissing and starting to undress before the scene cuts away. Mr. and Mrs. Jones filed a formal complaint alleging that their daughter was highly embarrassed and she does not want to go back to the class because during the movie and because afterward she heard many of the other students make inappropriate sexual statements.

What evidence might be relevant?

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Relevance Hypothetical

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- The student is a special education student. Is her IEP relevant?
- Is her discipline record relevant?
- Is the teacher's discipline record relevant?
- Is the teacher's last end-of-year evaluation relevant?

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The Investigation

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Investigator

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- Who is the investigator?
  - The investigator may be internal or external, may also be the Title IX Coordinator (although not recommended).
- Role of Investigator:
  - Gather and organize relevant evidence directly related to the allegations (both inculpatory and exculpatory).
    - District must ensure that "all relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker)."

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Investigation Basics

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- The investigation is the process of actively gathering information to determine if a violation of Title IX has occurred.
- The investigation must be:
  - Equitable/Fair
  - Impartial
  - Thorough
  - Prompt
  - Reliable
- All of the grievance process basics described previously apply.

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Investigation Basics

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- Must provide equal opportunities to parties throughout investigation:
  - Must provide an equal opportunity for the parties to present witnesses (including fact and expert witnesses) and other inculpatory and exculpatory evidence.
- Discussing Allegations:
  - Cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- Burden of proof and burden of gathering evidence is not on Complainant or Respondent.

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Investigation First Steps

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1. Review all relevant school policies and procedures as well as any relevant state and federal statutes. Ensure that you follow all policies and procedures throughout the investigation.
    a. Make sure you review the district's sexual harassment policies and procedures before starting the investigation.
2. Review the written complaint
3. Make an investigation plan

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Typical Order of Investigation

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4. Review any relevant portions of the student/staff files of the Complainant and Respondent
5. Interview the Complainant and any other alleged victims
    a. Things to ask include, but are not limited to:
        i. What occurred?
        ii. How did the alleged harassment affect you or your school experience?
        iii. Are there any other students, teachers or staff who may have relevant information?
        iv. Do you have any notes, emails, text messages, WhatsApp messages, SnapChats, or any other relevant physical evidence?

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Typical Order of Investigation

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6. Interview witnesses identified by the Complainant, as necessary
    a. Some suggested questions to ask
        a. What did you observe/see/hear?
        b. Relationship with the parties?
        c. What, if anything, did the Complainant tell you about the incident?
        d. Describe the Respondent's behavior toward the Complainant?
        e. Are you aware of the Respondent doing anything similar in the past?
        f. Do you know of anyone else who may have relevant information?

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Typical Order of Investigation

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7. Interview of any other witnesses identified
8. Interview the Respondent
9. Interview any witnesses identified by Respondent
9. Review notes
10. Follow up on any inconsistencies

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Role of Advisors

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- Must provide Complainant and Respondent with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any interview or related meeting or proceeding by the advisor or their choice.
- Who can be an advisor?
  - Advisor may be an attorney but need not be.
- Cannot limit the choice or presence of advisor for either party in any meeting or grievance proceeding.
- May establish restrictions regarding extent to which advisor may participate in the proceedings, as long as applies *equally* to both parties.

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Notice of Interviews

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- Provide written notice to individuals who you intend to interview (including Complainant, Respondent, and witnesses) which must contain the following information:
  - Date,
  - Time,
  - Location,
  - Participants, and
  - Purpose of interview.
- Must provide sufficient time for the individual to prepare to participate.

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Interview Preparation

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- Carefully prepare a list of questions in advance for each interview.
- Be prepared to revise questions as you learn more from the party or witness during the interview.
- Select a neutral, comfortable setting for the interview(s).

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Interview Basics - Introductions

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- Introduce yourself and explain your role.
- Develop a rapport.
- Explain why they are being interviewed.
- Explain retaliation policy.
- Ask if they have any questions.

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Interview Basics - Questioning

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- In general, ask **open-ended** (vs close-ended) questions**.**
  - i.e. who, what, how, etc.
- Ask questions **one at a time**.
- Avoid multiple choice questions.
- Avoid jumping from one line of questioning to another.
- Avoid suggesting the answer in your question.
- Avoid questions that are not relevant.

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Interview Basics – Active Listening

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- Remain attentive and carefully listen to everything being said.
- Watch for non-verbal behaviors.
- Avoid unnecessary writing.
- Avoid whispering between investigators unless absolutely necessary.
- Never accuse an interviewee or participate in heated arguments.

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Interview Basics - Complainant

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- Don’t guide the interview unless necessary, allow Complainant to narrate without interruption.
- Use trauma-informed interview techniques.
- Speak carefully and accurately.
  - Avoid words that imply consent.
  - Do not victim blame.

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Interview Basics - Conclusion

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- Ask if the party or witness has any questions.
- Request copies of evidence potentially available.
- Discuss confidentiality:
  - Note: Cannot prohibit a party from discussing allegations.
- Explain next steps.

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Post-Interview

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- Document interview.
- Update witness list and evidence list.
- Write down follow up questions for others.
- Consider whether additional allegations were raised that must be brought to Title IX Coordinator.

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Additional Evidence

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- Investigator may need to gather evidence other than statements from parties and witnesses.
- Some evidence may be identified by the parties or witnesses, and the investigator may identify other evidence.
  - Follow up with individuals regarding evidence mentioned in interviews.
- Examples of possible evidence:
  - Copies of text messages and voicemail messages
  - Copies of phone bills
  - Posts on social media
  - Medical records (only allowed with signed permission)
  - Police reports
  - Photographs, video recordings, video surveillance
  - Diaries/journals

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Parties' Opportunity to Review Evidence and Respond

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- Prior to completion of investigative report, must provide Complainant and Respondent (and advisors) equal opportunity to inspect and review any evidence that is directly related to the allegations.
  - Electronic or paper copy.
  - Includes evidence upon which District does not intend to rely in reaching a determination regarding responsibility.
  - Includes inculpatory and exculpatory evidence, from all sources.
- Parties must have at least 10 days to submit a written response.
- The investigator must consider the written responses prior to completion of investigative report.

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Investigative Report

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- Prior to writing report, consider:
  - Has all evidence been examined?
  - Have all leads been exhausted?

- Investigative report must fairly summarize all relevant evidence.
  - Summarize the facts.
    - Both undisputed and disputed.
  - Do not make any determinations.

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Investigative Report Content

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- Information to include in investigative report:
  - Introductory information:
    - Identify those involved (Complainant, Respondent, witnesses, investigator)
    - Date filed
    - Name of person and office that received allegations
  - Background:
    - History of relationship between parties
    - Other details surrounding allegations
  - List specific allegations.
  - Description of alleged policy violations.
    - Include definition of prohibited conduct from policy.
  - Witnesses interviewed (and those not interviewed).
  - Procedures followed (and any abnormalities).
  - Explanation of how report is organized (chronologically, by allegation, etc.).
  - Statement regarding relevant evidence:
    - Ex: “All relevant information gather during the course of the investigation has been included in this report.”

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Investigative Report Content

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- Appendices to report may include:
  - Summaries/transcripts of interviews
  - Documents/physical evidence
  - Timeline of incident
  - Timeline of investigation
  - Witness list/flowchart
  - Diagrams

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Opportunity to Review/Respond to Investigative Report

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- Must send Complainant and Respondent (and any advisors) the investigative report, at least 10 days prior to hearing or other time of determination regarding responsibility.
  - Electronic or hard copy.
- Complainant and Respondent must have opportunity to review and respond.

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Refusal to Participate

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- Parties (including Complainant, Respondent, and witnesses) have the right to elect not to participate in the investigation, a recipient cannot retaliate against them.

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Hypothetical 1

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- Susie Smith is a sixth grade student at Noname Middle School. She informs the assistant principal at her school that on the school bus home yesterday, John Jones, an eighth grade student, sat in the seat next to her. John Jones is much bigger than her. She said that he kept trying to put his hands on her leg and down her shirt. She was too afraid of him to tell him to stop. They were sitting in the back of the bus and she is not sure if the bus driver saw anything. She was crying by the time she got to her stop. The bus driver did not say anything to her. She is the third stop on the bus and she knows there were some other kids on the bus, but she is not sure who they are.

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Hypothetical 2

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Jerry Johnson is a freshman boy. He is small for his age. His favorite color is pink and he tends to wear pink shirts a lot to school. Due to a medical condition, his voice is very high pitched. Jerry decides to try out for the boys' soccer team but does not make it. After that, boys on the soccer team make fun of him. They call him "girlie boy" and tell him that he should try out for the girls' soccer team next year. Although Jerry was an A student in middle school, in high school most of his grades are C's and D's. Jerry also has a number of unexcused absences.

Jerry's parents file a Title IX Complaint and request an investigation.

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Decision-makers

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Decision-maker

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- Who can be the decision-maker?
  - Someone able to use independent judgment and be free from conflicts of interest and bias.
  - Can be an individual or a panel.
  - Can be internal or external.
  - Cannot be the Title IX Coordinator or investigator.

- What is the role of the decision-maker?
  - Determine whether the Respondent has violated the district's Title IX policy.

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Live Hearing?

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- For primary and secondary schools, grievance process may, but need not, provide for a hearing.
- If district conducts live hearings:
  - Cross-examination is prohibited.
  - Based on the preamble, the district has discretion to set rules to maintain decorum throughout hearings and also to remove non-complying advisors, parties, or witnesses.

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Questions from Parties

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- With or without a hearing, after the recipient has sent the investigative report to the parties and before making a determination regarding responsibility, the decision-maker must:
  - Provide the Complainant and Respondent the opportunity to submit written, relevant questions that they want asked of any party or witness,
  - Provide each party with the answers, and
  - Allow for additional, limited follow-up questions from each party.
- Important note:
  - Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless:
    - Such questions and evidence are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
    - If the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.
  - Decision-maker must explain to the party proposing the question any decision to exclude it as not relevant.

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Evaluating the Evidence

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- The decision-maker must objectively evaluate all **relevant** evidence.
  - Inculpatory and exculpatory.
  - Note: Although investigator made initial determinations of relevance by including evidence in their investigative report, the decision-maker is not bound by their judgment and must make their own decisions.
- The decision-maker will also evaluate **credibility.**
  - Note: Although credibility determinations can be made by investigator and included in investigative report, must be careful that investigator is not in reality making determinations regarding responsibility.
- The decision-maker may consider and assign different weight to different pieces of (relevant and credible) evidence.

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Credibility Determinations

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- What is credibility?
  - The accuracy and reliability of information.
- In assessing credibility, consider:
  - Consistency/Corroboration
  - Plausibility
  - Credibility determinations may not be based on an individual's status as a Complainant, Respondent, or witness.

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Standard of Evidence

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- Standard of Evidence:
  - Preponderance of the evidence
  - Clear and convincing evidence
- Remember: Must use the same standard for all formal Title IX complaints, against both students and employees for all policies and procedures with adjudication for sexual harassment complaints.
- Must begin with a presumption of no violation by Respondent.

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Standard of Evidence

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- Preponderance of the evidence: It is “more likely than not “ that the district’s Title IX policy was violated.
  - More likely than not to be true
  - More probable than not
  - 51% or greater probability to be true

- Clear and convincing evidence: It is “highly probable” that the district’s Title IX policy was violated.
  - Highly probable to be true
  - Substantially more likely to be true than untrue
  - Higher than “preponderance of the evidence” standard

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The Written Decision

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- Written determination must include:
  - Identification of the **allegations** potentially constituting sexual harassment;
  - A description of the **procedural steps** taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.
  - **Findings of fact** supporting the determination.
  - **Conclusions** regarding the application of the recipient's code of conduct to the facts.
  - A, including **statement of, and rationale for, the result as to each allegation:**
    - A determination regarding responsibility,
    - Any disciplinary sanctions the recipient imposes on the Respondent, and
    - Whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided to the Complainant.
  - The recipient's procedures and permissible bases for the Complainant and Respondent to **appeal.**

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The Written Decision

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- The recipient must provide the written decision to the Complainant and Respondent.
- The decision becomes final either:
  - If an appeal is filed - on the date the recipient provides the parties with the written determination of the result of the appeal.
  - If an appeal is not filed – the date on which an appeal would no longer be considered timely.

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Disciplinary Sanctions and Remedies

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- Sanctions: Disciplinary measures imposed on the Respondent.
  - Examples for students: Detention, suspension, expulsion, etc.
  - Examples for employees: Recommendation for termination, suspension, demotion, non-renewal, etc.
- Remedies: Measures provided to the Complainant; designed to restore or preserve equal access to the district's education program or activity.
  - Ex: No-contact order, class changes, etc.
- Note: The grievance process must describe the range of (or list) possible disciplinary sanctions and remedies.

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Hypothetical

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- You receive a Title IX complaint from Jessica.
- She tells you that she dated Kevin last year but they broke up over the summer. She says that during the summer, Kevin physically attacked her in her bedroom but that nothing sexual happened. She complained that at school he always seemed to be around when she was in the hallways and that on at least two occasions he had physically pushed her. She said that on one occasion her friend Sarah was present when Kevin called her a bitch and pushed her. On another occasion, she said that Kevin's friend Jim was present when he grabbed her while she was walking down the hallway and pulled her toward him.
- Jessica says that recently Kevin's cousin, Rachel has been giving her menacing looks and often calls her names when she walks by. She does not know if anyone has ever heard this.
- Jessica and her parents have requested a formal Title IX investigation.

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Title IX Regulations and Conflicts - FERPA

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- 20 U.S.C. §1232g(b) prohibits the release of a student's education records, or personally identifiable information contained therein, other than directory information unless one of the exceptions applies or there is signed permission
  - There is no exception in the rule to allow the release confidential education records of a student who has filed a sexual harassment complaint against another student or school employee
  - There is no exception to the rule to allow release of confidential discipline records for a student who is found to be responsible for sexual harassment in a K-12 school
    - FERPA exception that allows release of the name of a perpetrator of a sexual offense and the discipline does NOT apply in the K-12 setting. *See* 20 U.S.C. sec. 1232g(b)(6)

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Title IX Regulations and Conflicts - FERPA

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- The US DOE in *New York et al v. DeVos* attempted to reconcile this by claiming:
  - "The Rule allows a recipient to redact personally identifiable information from education records if that information does not directly relate to a formal complaint's allegations and acknowledges that such redactions may even be required under FERPA."

- QUERY – what if the information is confidential student information protected by FERPA, but would also directly relate to a formal complaint allegation?

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Title IX Regulations and Conflicts – IDEA

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- Similar to FERPA, evidence that may be reviewed by the investigator and/or decision-maker could include special education records of either the Complainant or the Respondent
  - The mandate to release all evidence reviewed during the investigation to the parties would appear to violate the IDEA's confidentiality mandates
- The requirement that a single decision-maker decide discipline could result in violation of the IDEA's required procedures prior to making a disciplinary change in placement

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Informal Resolution

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- The district can always offer an informal resolution process for issues between students or between employees.
- If either Complainant or Respondent wants to pursue the informal resolution process, find out if the other party is willing to voluntarily engage in the informal resolution process as well.
- If so, identify an impartial, neutral trained individual to serve as the informal resolution facilitator.
  - Notify the parties of the name/information about the facilitator to see if either party has a basis as to why the person selected cannot be fair and impartial or is biased.
- Important note: Informal resolution process is NOT available for complaints that an employee harassed a student.

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Informal Resolution

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- Prior to initiating the informal resolution process, the district must provide the parties with a written notice disclosing:
  - The allegations,
  - The requirements of the informal process including circumstances under which it would preclude a party from resuming the formal complaint process from the same allegations,
  - Any party has the right to withdraw from the informal resolution process at any time, and
  - Any consequences from engaging in the informal resolution process including whether records from it will be maintained and/or shared in the formal complaint process.

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Appeal Grounds

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- Both Complainant and Recipient ***must*** be provided an opportunity to appeal from a determination regarding responsibility on the following bases:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent.
- Recipient ***may*** offer an appeal equally to both parties on additional bases.

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Appeal Decision-Maker

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- Who cannot be the appeal decision-marker:
  - Cannot be the same person as the decision-maker that reached the determination regarding responsibility or dismissal, the investigation, or the Title IX Coordinator.
  - Ensure no conflicts of interest, bias, etc.

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Appeal Process

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- Whenever there is an appeal, the recipient must:
  - Notify the other party in writing when appeal is filed; and
  - Implement appeal procedures equally for both parties; and
  - Give Complainant and Respondent a reasonable, equal opportunity to submit a written statement in support of, or challenging, the result; and
  - Issue a written decision describing the result of the appeal and rationale for the result; and
  - Provide the written decision simultaneously for both parties.
- While appeal is pending:
  - Supportive measures remain available to restore or preserve either party's equal access to education.
  - Respondent [should] enjoy the presumption of non-responsibility until final determination after appeal.

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