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Title IX:

New Regulations, New Complaint Processing Requirements

August 2021 Training & Guidance for Hope-Page Public Schools Title IX Personnel

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What's New with Title IX and Why is it Important?

Title IX of the Education Amendments of 1972 is a federal law that provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Big picture: Title IX prohibits discrimination based on sex in education programs or activities that receive federal funding, i.e., in public school districts like yours, among other entities.

New regulations implementing the Title IX law were issued by the U.S. Department of Education in May 2020 and became effective August 14, 2020. These new regulations have the force and effect of law.

The new regulations:

- Make clear that *sexual harassment* is covered under Title IX and define it
- Impose new procedural requirements for processing *sexual harassment* reports
- Require a team of Title IX Personnel be involved with *sexual harassment* reports:
    - Title IX Coordinator,
    - Investigator,
    - Decision-Maker,
    - Appeal Decision-Maker, and
    - Informal Resolution Process Facilitator
- Require that District's Title IX Personnel be trained on the following topics:
    - Definition of sexual harassment
    - Scope/jurisdiction of District's education programs/activities
    - How to conduct investigations and grievance processes
    - Serving impartially
    - Avoiding conflicts of interest and bias
    - Creating an investigative report that fairly summarizes relevant evidence (investigators)
    - Relevance of questions and evidence (decision-makers)

The result is a drastically different approach to *sexual harassment* allegations than you are used to. Previously, all complaints under the District's Nondiscrimination and Anti-Harassment policy (AAC) could be processed under the Discrimination and Harassment

Grievance Procedure (AAC-BR, 4 pages long). Now, reports of *sexual harassment* must be processed under the new Title IX Sexual Harassment Grievance Procedure (AAC-BR2, 14 pages long) with some exceptions addressed below.

Title IX Coordinator and Dissemination of Information: Hope-Page has designated Business Manager, Alli Roller, as the Title IX Coordinator. The Title IX Coordinator must be immediately informed of all reports or complaints of sexual harassment and sex discrimination. Complaints may be made in person, by mail, by telephone, by e-mail, or by any additional method provided by the District. The Title IX Coordinator's identity and contact information must be prominently displayed on the District's website. This contact information must be made available to applicants for admission and employment, students, parents or legal guardians, employees, and all unions and professional organizations that have collective bargaining or professional agreements with the school or district.

The District's policy stating 1) it does not discriminate on the basis of sex in its education program or activities, including in employment, 2) that it is required by Title IX not to discriminate in such a manner, and 3) that questions regarding Title IX may be referred to the Title IX Coordinator, must be on the District's website and in each handbook made available to students, parents, employees, applicants for employment or admission, and unions.

All Other Staff: All Hope-Page staff, including administrators, are "responsible employees" under the Nondiscrimination and Anti-Harassment policy, meaning all staff must report any knowledge of sex discrimination and sexual harassment to the Title IX Coordinator.

Those Hope-Page employees receiving this training now have additional "Title IX Personnel" duties. Each of you may need to conduct an investigation, serve as a decision-maker, or facilitate an informal resolution process moving forward. **This training is intended to provide you information and guidance to prepare you for these roles.**

The information provided is current as of today's date, but the regulations could be amended at a future date and courts of law may issue decisions impacting the interpretation or legalities of the regulations. President Biden's administration has expressed a desire to quickly change the requirements, but when that might happen is currently unknown. Keeping the Title IX Coordinator informed of all reports and complaints is important for this reason, as the Title IX Coordinator will stay informed as to any changes impacting the processing of these complaints.

Definitions

Sexual harassment is conduct on the basis of sex that:

a. Constitutes *quid pro quo* harassment, meaning submission to such conduct or communication is made a term or condition, either explicitly or implicitly, of the basis for employment decisions or educational decisions or benefits for students (e.g., receiving a grade);

b. Is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District's education program or activity; or

c. Constitutes sexual assault, dating violence, domestic violence, or stalking as those offenses are defined in the Clery Act, 20 U.S.C. § 1092(f) and the Violence Against Women Act, 34 U.S.C. § 12291(a).

   i. "Sexual Assault" means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. See 20 U.S.C. 1092(f)(6)(A)(v).

   ii. "Dating Violence" means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. Whether such a relationship exists depends on the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. See 34 U.S.C. § 12291(a)(10).

   iii. "Domestic Violence" means felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction. See 34 U.S.C. § 12291(a)(8).

   iv. "Stalking" means 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. See 34 U.S.C. § 12291(a)(30).

Actual Knowledge means notice of sexual harassment is given to the Title IX Coordinator, an official with authority to institute corrective measures, or any elementary or secondary school employee. When the District has actual knowledge of alleged sexual harassment in

a District education program or activity, Title IX requires the District to respond in a manner that is not deliberately indifferent, or in other words, in a manner that is not clearly unreasonable in light of the known circumstances. This standard is not met when the only official of the recipient with actual knowledge is the respondent.

Complainant is an individual who is alleged to be the victim of conduct that could constitute sex harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in a Hope-Page education program or activity.

Respondent is an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment. Respondents need not be enrolled or employed by the District of have any other affiliation or connection with the District, but, the District may in its discretion dismiss a formal complaint if the respondent is no longer enrolled or employed by the District.

Supportive Measures are individualized services reasonably available that are non-punitive or non-disciplinary in nature, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment. Examples of possible supportive measures include, but are not necessarily limited to, counseling, extensions of deadlines or course-related adjustments, modifications of work or class schedules, a safety plan, school escort services, mutual contact restrictions, changes in work locations, leaves of absence, increased security and monitoring of certain areas on school property, and other similar measures.

Exculpatory evidence means evidence tending to exonerate a respondent or helps establish their innocence of the conduct alleged.

Inculpatory evidence means evidence that shows, or tends to show, a person's involvement in an act, or evidence that can establish guilt of the conduct alleged.

Definitions Regarding Scope of District's Programs and Activities

Education program or activity includes locations, events, or circumstances over which the District exercises control over both the respondent and the context over which the sexual harassment occurred. This includes locations or events that occur on or off school property, and may include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the District.

School property is defined in N.D.C.C. 15.1-19-10(6)(b) as all land within the perimeter of the school site and all school buildings, structures, facilities, and school vehicles, whether owned or leased by a school district, and the site of any school-sponsored event or activity.

Reports or Complaints, or Having Actual Knowledge, of Sexual Harassment

- Any person may report sexual harassment, whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual harassment.

- Having "actual knowledge" of alleged sexual harassment may not only come by way of a report. "Actual knowledge" means "notice of sexual harassment" given to any school employee, meaning any school employee has received information regarding conduct that could constitute sexual harassment.

- A report of sexual harassment may be filed with the Title IX Coordinator or with any district employee. A report may be filed in person, by mail, by telephone, by e-mail, or by any additional method provided by the District using the contact information for the Title IX Coordinator as set forth in policy AAC.

- A report may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

- District employees are required to report any discrimination or harassment to the Title IX Coordinator when they knew (e.g., received a report, directly observed it) or should have known it was occurring (e.g., overheard students talking about an incident, witnessed discriminatory or harassing conduct on school property or at a school activity). Failure by a district employee to report under this regulation may result in disciplinary action.

- Anonymous reports are permitted; however, the District's ability to offer supportive measures to a complainant, or to consider whether to initiate a grievance process against the respondent, will be affected by whether the report of sexual harassment disclosed the identity of the complainant or respondent.

No matter how the actual knowledge is obtained, the District must respond in a manner that is not deliberately indifferent.

Don't Forget:

1. Duty to report suspected crimes to law enforcement, and
2. Duty to report suspected child abuse or neglect using a Form 960.

Role of Title IX Coordinator

The Title IX Coordinator:

- Must be notified immediately of all sex discrimination and sexual harassment/violence allegations
- Conducts initial intake process
- Addresses supportive measures with the Complainant and Respondent
- Oversees, but does not necessarily participate in, the rest of the process

Prompt Contact with the Parties and Discussion of Supportive Measures

Prompt Contact with Complainant: After receiving a sexual harassment report or having actual knowledge of potentially harassing conduct, the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures *with or without the filing of a formal complaint*, and explain to the complainant the process for filing a formal complaint.

Assessing and Documenting Supportive Measures for the Complainant: If supportive measures are not provided to a complainant, the Title IX Coordinator must document why supportive measures were not provided and why the lack of supportive measures is not clearly unreasonable in light of the known circumstances. Similarly, if a particular supportive measure requested by the complainant is deemed inappropriate, the Title IX Coordinator must document why the denial of the particular supportive measure was not clearly unreasonable in light of the known circumstances.

Supportive Measures for the Respondent: The Title IX Coordinator must also promptly contact the respondent, who must also be offered supportive measures regardless of whether a formal complaint is filed.

Supportive Measures Generally: Supportive measures must be designed to preserve equal access to the education program or activity without unreasonably burdening the other party. Supportive measures must be coordinated by the Title IX Coordinator and kept confidential to the extent reasonably possible. Supportive measures should be equitably offered to both the complainant and the respondent and should be reasonably available before or after the filing of a formal complaint or where no formal complaint has been filed.

Disciplinary sanctions or other actions that are not supportive measures must not be taken against the respondent unless a formal complaint is filed and an investigation is conducted in accordance with AAC-BR2.

Receipt of a Formal Complaint

Complainants may request supportive measures but not wish to initiate an investigation. The regulations encourage students to report sexual harassment while allowing them to exercise some control over their report.

Complainants may request supportive measures and also request that the District initiate an investigation. If this is the case, a "formal complaint" regarding sexual harassment is filed by the complainant (or the complainant's parent) with the Title IX Coordinator.

- At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in an education program or activity of the District.
- A formal complaint may not be filed anonymously by a complainant.
- The formal complaint must be in writing.
- The formal complaint must allege sexual harassment against a respondent and request that the District investigate the allegation of sexual harassment.

Initiation of Complaint by the Title IX Coordinator

A formal complaint may also be initiated and signed by the Title IX Coordinator. The District must respect the complainant's wishes with respect to whether the Title IX Coordinator initiates a formal complaint and investigation unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances. The rules warn that a Title IX Coordinator's decision to sign a complaint despite a complainant's wishes that an investigation not proceed will be scrutinized by OCR for "deliberate indifference." In other words, the Title IX Coordinator must not decide unreasonably in light of the known circumstances to sign a complaint—or to not sign a complaint—when a complainant is unknown or does not want to proceed.

Such a decision will require a delicate balance of the varying considerations, analyzed on a case-by-case basis. Specific examples cited in the preamble to the regulations are few, and including situations in which:

- The District has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority;
- The institution wishes to investigate allegations in order to determine whether it has probable cause of employee sexual misconduct that affect the recipient's ESSA obligations; and
- A Title IX Coordinator receives multiple reports of sexual harassment against the same respondent.

The preamble also states that a Title IX Coordinator may consider a variety of factors, including a pattern of alleged conduct and the involvement of violence, weapons, and similar factors in a complainant's allegations, in deciding whether to sign a formal complaint.

If the Title IX Coordinator does commence a formal complaint and a complainant is known, the Coordinator must provide the complainant all notices and opportunities to respond to evidence required by the rules, even if the complainant is not actively involved.

The rules require the Title IX Coordinator to document the reasons why a decision to sign or not sign a formal complaint was not deliberately indifferent.

Consolidation of Complaints

The Title IX Coordinator is authorized to exercise discretion to consolidate formal complaints when allegations of sexual harassment arise out of the same facts or circumstances.

Mandatory and Permissive Dismissals of Formal Complaints

A formal complaint must be dismissed if:

a. The conduct alleged in the formal complaint, even if proven, does not meet the definition of sexual harassment;

b. The conduct alleged in the formal complaint did not occur in the District's education program or activity; or

c. The conduct alleged did not occur against a person in the United States.

A formal complaint may be dismissed if:

a. The complainant notifies the Title IX Coordinator, in writing, that he or she would like to withdraw the complaint;

b. The respondent is no longer enrolled at or employed by the school; or

c. Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the complaint.

If a formal complaint is dismissed, the complainant and respondent must be simultaneously notified in writing of the dismissal and the reason(s) for the dismissal and their right to appeal the decision.

Dismissal of a formal complaint under AAC-BR2 does not prevent the District from addressing the alleged conduct under a different District policy or code of conduct.

Notice of the Allegations

Once the Title IX Coordinator has a formal complaint, s/he must provide the parties with a written notice containing:

1. Notice of the grievance process (AAC-BR2), including any informal resolution process;
2. Notice of the allegations, including sufficient details to the extent they are known at the time, including but not limited to the identities of the parties involved in the incident; the conduct allegedly constituting sexual harassment; and the date and location of the alleged incident;
3. A statement that the respondent is presumed not responsible and that a determination regarding responsibility will be made at the conclusion of the grievance process;
4. Notice that the parties may have an adult advisor of their choice;
5. Notice informing the parties of any provision of the school or school district's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process;
6. Notice of the District's obligation to conduct a formal investigation;
7. Notice of the parties' right to advance written notice of the date, time, location, participants, and purpose of each investigative interview;
8. Notice of the parties' right to review all evidence obtained in the investigation that is directly related to the allegations and their right to submit a written response to the evidence prior to conclusion of the investigation;
9. Notice of the parties' right to submit written, relevant questions that a party wants asked of any party or witness, be provided the answers, and have opportunity for additional, limited follow-up questions;
10. Notice of the range of remedies and disciplinary actions the District may impose following a determination of responsibility;
11. Notice of the standard of evidence that will be applied;
12. Notice of the range of supportive measures available to the parties;
13. Notice of appeal procedures; and
14. Notice that the parties are prohibited from retaliating against others.

The District has a form at descriptor code AAC-E5 that may be utilized for purposes of providing this notice. AAC-E5 contains the required components of the notice.

Timing of Notice: Written notice of allegations must be provided with sufficient time for the parties to prepare for an initial interview and so that both parties understand the scope of the investigation and can prepare to meaningfully participate.

Advisors: The advisor that each party may have can be, but does not have to be, an attorney. The advisor must be permitted to attend any meeting or grievance proceeding that the party attends. However, the District may limit the extent to which the advisor may participate in such meetings, so long as the restrictions are imposed equally on the parties' respective advisors.

Emergency Removals of Respondents

Removal of a respondent during the pendency of an investigation under AAC-BR2 may occur under limited circumstances.

Generally, consistent with the District's requirement to presume non-responsibility until the investigation has been completed and a determination of responsibility has been made, a respondent will not be suspended, expelled, excluded, or otherwise removed while an investigation is pending under the grievance process.

However, in the event the respondent poses an *immediate threat* to the *physical health or safety* of any student or other individual *and this emergency situation arises from the allegations of sexual harassment,* the Title IX Coordinator may remove the respondent from the District's education program or activity, or place the respondent on administrative leave on an emergency basis, with or without a grievance process pending.

Safety and Risk Analysis Required: The decision whether to remove the respondent on an emergency basis may be made at any time during the grievance process, but must only be made after an individualized, fact-based safety and risk analysis.

Emergency removal decisions regarding student respondents must comply with:

- Applicable state law regarding suspensions/expulsions (in ND a suspension of longer than 10 days is technically an expulsion requiring an expulsion hearing), and
- Applicable state and federal law and board policies regarding removal of students with disabilities (e.g., when removal will constitute a change in placement requiring a Manifestation Determination Review).

Notice and Challenge: The Title IX Coordinator must promptly provide notice of the emergency removal decision to the respondent explaining the reasons for the removal decision. The respondent must have the opportunity to challenge the removal decision of the Title IX Coordinator to the designated decision-maker, whose decision regarding removal will be final.

Administrative Leave of Respondent Employees

Separate from emergency removals outlined above, when the respondent is an employee of the District the Superintendent is authorized to place the respondent on administrative leave pending the outcome of the investigation in accordance with District policy when the Superintendent identifies a need to temporarily remove the employee from his/her duties and/or job placement to protect District property, school operations, students and/or other employees. If the respondent is the Superintendent or business manager, the Board President has this authority.

The Superintendent may instead consider if a transfer or reassignment of the employee would be an appropriate alternative to administrative leave. A decision to transfer or reassign an employee cannot violate the terms of the employee's contract with the District or negotiated agreement, if applicable.

For certified or contract employees, administrative leave must be with pay. For ancillary staff, administrative leave may be without pay if District policy does not say otherwise and the employee may be permitted to take paid leave if available under the applicable leave policies.

Upon a Determination of Responsibility

Later in the grievance process, if the decision-maker determines responsibility on the part of the respondent and determines disciplinary sanctions will be issued to the respondent, and remedies offered to the complainant, the Title IX Coordinator must communicate these remedies separately to the complainant to discuss what remedies are appropriately designed to preserve or restore the complainant's equal access to the education program or activity. The Title IX Coordinator must create a monitoring plan to evaluate the effectiveness of the disciplinary sanctions, remedies and/or supportive measures identified in the determination of responsibility to help prevent recurrence.

Informal Resolution Procedure

(Involves Title IX Coordinator & Other Designated Facilitator)

After a formal complaint has been filed, and before proceeding with the formal resolution process or at any time before a determination regarding responsibility has been made, the District may offer the informal resolution procedure to the complainant and the respondent when:

1. The Title IX Coordinator has deemed it appropriate, and
2. Both parties voluntarily agree, in writing, to attempt the informal resolution procedure.

The informal resolution procedure may never be used to resolve allegations that an employee sexually harassed a student.

Notice: Prior to commencing the informal resolution process, the Title IX Coordinator or other designated facilitator must inform the parties of:

1. The informal resolution parameters,
2. The potential consequences of participation in the process (e.g., no formal investigation undertaken, no admission of responsibility), and
3. Any confidentiality implications.

Proceeding with Informal Process: Upon commencement of the process, the Title IX Coordinator or other designated facilitator must gather information necessary to understand the allegations set forth in the formal complaint and to facilitate the informal resolution process. Based on this information-gathering process, the Title IX Coordinator or other designated facilitator shall propose to the parties an informal resolution process, which may include, but is not limited to:

1. Participation by the parties in mediation or other alternative dispute resolution procedure facilitated by the Title IX Coordinator, other designated facilitator, or third-party mutually agreed upon by the parties;
2. Holding a meeting (or series of meetings) with the parties and their advisors (provided all parties consent to participation) to discuss a potential resolution;
3. Development by Title IX Coordinator or other designated facilitator of written behavior expectations of the respondent to redirect conduct; or
4. Arranging a documented meeting with the respondent that involves a discussion of the sex discrimination and sexual harassment policies and requirements for compliance.

The informal resolution process may result in agreements made between the parties, facilitated by the Title IX Coordinator or other designated facilitator, that result in the provision or continuation of supportive measures, as well as disciplinary or punitive measures. These agreements may contain confidentiality requirements.

Monitoring: The Title IX Coordinator must monitor the implementation and effectiveness of the informal resolution and initiate the formal resolution procedure if the alleged harassment persists.

Both the complainant and the respondent have the right to terminate or withdraw from the informal resolution procedure and resume the formal resolution procedure at any time prior to agreeing to a resolution.

Formal Resolution Procedure

(Involves Title IX Coordinator, Investigator, & Decision-Maker(s))

The formal resolution procedure must be used whenever the informal resolution procedure is not used or is terminated before resolution.

The following information is a guide for the investigator and decision-maker roles.

Timelines of Both Resolution Procedures

The informal resolution procedure must be completed within 30 days of the receipt or signing of a formal complaint by the Title IX Coordinator, unless the Title IX Coordinator documents good cause for a temporary or limited delay and communicates the cause for the delay to the complainant and the respondent.

The formal resolution procedure, including any appeal process, must be completed within 60 days of the receipt or signing of a formal complaint by the Title IX Coordinator or a complainant or a respondent terminating the informal resolution procedure, unless the Title IX Coordinator documents good cause for a temporary or limited delay and communicates the cause for the delay to the complainant and the respondent

Concurrent Law Enforcement Investigations: Conduct that constitutes sexual harassment may also constitute child abuse, sexual abuse, or other crimes resulting in law enforcement investigations. In such situations and when good cause exists, the Title IX resolution procedures may be temporarily delayed in order to coordinate or cooperate with a concurrent law enforcement investigation.

Role of Title IX Investigator

Generally, the Title IX Investigator:

- Only serves as investigator if s/he is a neutral party with no conflicts of interest or bias for or against either the complainant or respondent (or complainants or respondents in general);
- Recognizes a presumption of non-responsibility on the part of the respondent until conclusion of the investigation;
- Conducts a fair and impartial investigation of the allegations as set forth in the formal complaint;
- Gathers facts by interviewing the complainant, respondent, any witnesses or others with knowledge, gathering and reviewing any evidence or other information relevant to the complaint;
- Keeps the burden of proof and burden of gathering evidence on the District while protecting every party's right to consent to the use of the party's own medical, psychological, and similar treatment records;
- Provides the parties equal opportunity to present facts and expert witnesses and other inculpatory and exculpatory evidence before any determination regarding responsibility is made;
- Does not restrict the parties from discussing the allegations or gathering evidence (e.g., gag orders) except when it may constitute prohibited retaliation or as required by applicable law;
- Gives the parties equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney);
- Prohibits the gathering of information protected by a legally recognized privilege (e.g., doctor-patient, attorney-client) without the appropriate party's voluntary, written waiver;
- Provides written notice when a party's participation is invited or expected for an interview or meeting, including the date, time, location, participants, and purpose of the interview or meeting, with sufficient time for the party to prepare to participate;
- Upon receipt of all evidence the parties would like the investigator to consider, provides both parties and their advisors (if any) an equal opportunity to review and respond to the evidence gathered during the investigation when such evidence is directly related to the allegations set forth in the formal complaint. The parties must be provided at least 10 days to review and respond to the evidence gathered, and

any responses will be considered by the investigator prior to completion of the investigation report; and

- Compiles an investigative report that fairly summarizes relevant evidence and provides a copy of the report simultaneously to all parties and their advisors, providing each party with 10 additional days to respond to the investigative report in writing.

Conducting an Appropriate Investigation

Investigators must act promptly for at least these reasons:

- The formal grievance procedure must be completed within 60 days of receipt of the formal complaint and the investigative role is only a portion of the process. Much of the 60-day time period must be dedicated to other matters, such as:
    - Providing the parties with an opportunity to respond to evidence (10 days) and respond to the investigative report (an additional 10 days);
    - Allowing the decision-maker adequate time to review the report and evidence and issue a determination regarding responsibility; and
    - Possible appeal by the parties, which they have 7 days to consider filing, and then allowing the appeal decision-maker adequate time to consider the matter on appeal.
- Memories may fade, "stories" may be concocted, and evidence may be lost if there are any delays.
- *I suggest the investigation take no longer than 15 days, but fewer when possible.*

The investigator should prepare for their role:

1. Review AAC, AAC-BR2, this guidance document, and any other relevant information to refresh memory as to the required process.
2. Based on what you know at the outset from the allegations in the formal complaint, identify for yourself the parties and any fact witnesses who you will interview, realizing the parties will have an equal opportunity to identify additional fact witnesses and you must also independently determine whether other individuals should be interviewed as fact witnesses as you investigate.
3. **Consider *Garrity* Warnings when District employees are being interviewed.**

In *non-Title IX situations*, the following applies to interviews of employees:

a. Public employers must administer a *Garrity* Warning when requiring employees to provide information as a condition of maintaining employment. *Garrity v. New Jersey*, 385 U.S. 493 (1967). If a public employer directs an employee to answer interview questions upon penalty of discipline, the information obtained by that employer and any subsequent information obtained as a result of the compelled statement cannot be used in subsequent criminal proceedings against the employee. Therefore, if law enforcement officials are also investigating the conduct in question, it is a good idea to contact the investigating officer before administering a *Garrity* Warning.

b. The *Garrity* Warning should: (1) direct the employee to answer the interviewer's questions accurately and truthfully under penalty of discipline for insubordination; and (2) inform the employee that the information s/he provides and any information resulting from the interview may not be used against them in a criminal proceeding. The *Garrity* Warning should also explain that any information obtained independently by law enforcement or prosecuting authorities may be used in any criminal proceeding.

However, the Title IX rules make clear there is no duty to cooperate in a Title IX investigation. Parties are allowed to not participate and cannot be disciplined or drawn a negative inference for so choosing. With that said, if the party is only concerned about what may be used in a criminal proceeding against them, you may then explain the *Garrity* Warning and provide it if they are willing to proceed.

4. Be prepared to respond to the following types of scenarios:

a. An interviewee asks for your questions in advance or requests that they be allowed to answer questions only in writing instead of participating in an interview with you.

Suggested response: Explain that Title IX requires written notice in advance of the interview or meeting with certain information and allows them to bring an advisor of their choice, but Title IX does not require the District to provide questions in advance or forego a face-to-face interview. Explain you will be following AAC-BR2's procedure and expect their attendance at the interview. If COVID is a factor in their request, interviews can be conducted virtually.

b. The interviewee refuses to answer questions.

Suggested response: Explain that without their side of the story, the decision-maker will only have the other party's/witnesses' versions to consider when making a determination regarding responsibility. If they fear retaliation by another, explain the policy's prohibition on retaliation and that they should report to you if it occurs, which will

result in its own investigation. *Ultimately, the new rules do allow parties to decline to cooperate.*

c. The interviewee's advisor or representative interjects too much or attempts to frame the interviewee's answers for them.

Suggested response: Explain that you need to hear from the interviewee as they are the ones with potentially relevant information. Explain that the Title IX regulations allow the District to limit the extent to which the advisor may participate, and any restrictions you're placing on the advisor will similarly be placed on the other party's advisor.

d. The interviewee asks or demands that the interview be recorded.

Suggested response: Explain any District policy that prohibits recording of students or staff and explain that Title IX and AAC-BR2 do not require they be allowed to record. However, consider allowing them to record. Explain to them that the recording itself will become evidence that will need to be shared with the other party. If they do record, make sure you record as well so you have your own version of the recording and notify them you will do so.

e. The respondent asks whether they will be disciplined.

Suggested response: Explain your role is to investigate, a different individual will be the decision-maker, and only after a determination of responsibility is made can they be disciplined. In other words, at this time you cannot say one way or the other.

5. Keep conflicts of interest and bias in mind.

a. Conflicts of Interest: The investigator's role is to investigate the complaint objectively. You therefore cannot have any personal interest in the outcome of the investigation, or you must disqualify yourself as someone who cannot serve impartially. For example, if you have a financial interest in the outcome of the investigation, a personal interest due to a personal relationship with a party to the investigation, or a professional interest, you are likely not in a position to investigate the particular matter. Additionally, if you hold an incompatible role within the District, you should not investigate (e.g., a principal should not be investigating the Superintendent, their supervisor).

b. Bias: You must not allow any personal bias to influence the outcome of the investigation. A biased investigation, such as one based on the predetermination that "all boys are violent" or "all girls are liars" will likely result in an appeal and possible liability under Title IX. Similarly, you cannot allow your past experience with a particular party or witness to influence the

outcome of the investigation. Instead, all investigations must be conducted neutrally.

Addressing Implicit Biases.

1. Impose the same ground rules, adopt the same demeanor and tone of voice, and otherwise treat all interviewees the same, regardless of your history with the individual and regardless of their race, sex, gender, sexual orientation, disability status, religion, or other protected class status.

2. Give equal consideration to complainants, respondents, and witnesses, regardless of your history with them or their race, sex, gender, sexual orientation, disability status, religion, or other protected class status.

3. Avoid characterizations or statements based on an individual's race, sex, gender, sexual orientation, disability status, religion, or other protected class status.

c. Any determination regarding an individual's conflict of interest or bias depends on an "objective" evaluation of the circumstances. An "objective" standard, according to the U.S. DOE, "is whether a reasonable person would believe bias exists." Note: On appeal, even where a conflict of interest or bias is alleged, the appeal will not be granted unless the party can demonstrate that the conflict or bias materially affected the outcome.

6. Be prepared to coordinate your investigation with a law enforcement investigation:

a. Explain to law enforcement the District's duty to investigate itself, regardless of what law enforcement does, and the time constraints placed on the District by Title IX. Law enforcement often doesn't realize your separate duty here.

b. Do not rely on law enforcement to provide you with their information or otherwise do any aspect of the investigation for you. They are oftentimes unable to provide you with their information, and you must be the one to assess reliability of information and credibility of witnesses.

c. Keep in mind that law enforcement and prosecutors are using a different standard than the District is, e.g., beyond a reasonable doubt vs. preponderance of the evidence. Just because law enforcement does not proceed with an investigation or charges does not mean the District will lack sufficient evidence to proceed with District-level discipline.

d. Work cooperatively with law enforcement so your investigation does not impair the criminal investigation, e.g., discuss with them the timing of interviews you plan to conduct.

e. Take care to conduct your investigation in a manner that does not spoil or disturb evidence that law enforcement may need to utilize. Safely preserve all evidence you collect.

7. Understand *relevancy* before you begin:

a. The Title IX regulations do not define "relevancy" but note that relevant evidence includes both inculpatory and exculpatory evidence. According to the Federal Rules of Evidence, evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and when "the fact is of consequence in determining the action." Fed. R. Evid. 401.

b. Rape Shield Provisions: The only type of evidence that is not relevant in a Title IX investigation is evidence relating to the complainant's sexual predisposition or prior sexual behavior. However, there are two exceptions to the "prior sexual behavior" rule:

i. When offered to prove someone other than the respondent committed the alleged conduct, or
ii. When 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.

c. The investigator must otherwise use judgment when asking questions and drafting the investigation report to determine whether the question or evidence is related to a fact that would potentially impact the outcome of the complaint, and whether the evidence makes that fact more or less likely to be true.

Proceeding with the Investigation

1. **Notice of all Interviews/Meetings:** The investigator must create and provide a written notice when a party's participation is invited or expected for an interview or meeting. The written notice must include the date, time, location, participants, and purpose of the interview or meeting, and be provided with sufficient time for the party to prepare to participate.

2. **Suggestions for *All* Interviews:**

A. Draft a List of Questions Beforehand as a Guide: Prepare for each interview by compiling questions that may illicit information directly related to the allegations in the formal complaint. Realize that throughout the interview, you will likely need to ask additional questions or reapproach your original list of questions, depending on what you learn from the interviewee. This is intended as a guide, and not a final all-inclusive list.

B. Explain the Purpose of the Interview. This explanation should correlate with the statement of purpose that was provided in the notice of interview. Do not make any comments that could be perceived as minimizing the complaint or taking a side. Investigators should not expressly or implicitly guarantee any particular outcome of the investigation or suggest or imply that disciplinary action will be taken against the respondent. Throughout all interviews, remember the respondent is presumed not responsible until the grievance process is completed.

C. Explain your Role as the Investigator. Regardless of any other role you may have in the District (e.g., principal), make it clear that your role in this is as an impartial investigator who is gathering facts. You will not be making a determination of responsibility.

D. Explain the Investigation Process. Explain that interviews are being conducted of the parties, witnesses, and others with relevant information, that any other evidence will be gathered, and that the District will follow up on information it receives.

Explain the prohibition against retaliation for the individual's initiation of or involvement in the complaint investigation process and ask the interviewee to report any retaliation (from whatever source) immediately.

When interviewing a party (complainant or respondent), also discuss the opportunities that party will have to review and respond to the evidence once it is gathered, and the separate opportunity they will have to review and respond to the investigation report.

E. Explain Confidentiality.

i. Information received during the scope of an investigation may constitute an education record subject to FERPA and therefore may be protected, at least to some extent.

ii. Separately, the following provision is found in the School Code of NDCC: If a complaint is filed concerning a school district employee and an administrative investigation is conducted, any record or document generated as part of the administrative investigation is

confidential and not subject to the requirements of this section or section 44-04-18 [see below], until the investigation is completed. The investigation and any determination of disciplinary action may not exceed sixty days from the date the complaint is filed. NDCC 15.1-07-25(2)

1. North Dakota Century Code provides that records relating to a public entity's internal investigation of a complaint against a public employee for misconduct are exempt until the investigation of the complaint is complete, but no longer than seventy-five calendar days from the date of the complaint. NDCC 44-04-18.1(6)

iii. Ultimately, Title IX requires that evidence directly related to the formal complaint allegations be provided to the complainant, respondent, and their advisors for review and response, and likewise, the investigative report containing relevant information must also be shared with the parties and their advisors. There may be other times when information must be released in accordance with Title IX.

Accordingly, it is important to not promise confidentiality.

F. Take Notes: While you are conducting the interview, take notes of the information you learn. Write down direct quotes from the interviewee when appropriate. Take your time so your notes are thorough and accurate. The notes will be information directly related to the allegations in the complaint and will therefore be shared with the parties, so keep in mind that they need to be professionally and accurately compiled.

G. Anticipate that you May have to Defend the Interview Questions in Court or an Administrative Appeal. Be impartial and thorough and ask questions that are directly related to the formal complaint allegations.

H. Don't Discuss Too Much. Use your judgment as to how much to tell the witness about the complaint, subject to data privacy and Title IX requirements. Again, the interviewee should be talking more than the investigator.

I. Ask Open-Ended, then More Specific Questions.

i. Who, what, when, where, why, how?

ii. Ask them what information they have relevant to the complaint allegations and allow them to respond, but then be sure to follow up and get as detailed of information as possible.

iii. Avoid "leading" questions (e.g., "Isn't it true that Stacey said ___").

iv. Do not allow an interviewee to divert from responding to the questions or provide generalizations or conclusions instead of facts. If a witness answers "I don't know" or "I can't recall," rephrase the question or break it down to determine whether the witness does not have the information or is being evasive.

v. Be professional, but also make it clear you are taking this fact-gathering role seriously.

J. Ask Hard Questions. The subject matter may very likely be uncomfortable. That does not absolve the investigator or the District of its obligation to obtain the necessary, relevant information and otherwise provide due process.

K. Observe Witness Demeanor. Document those observations in the investigation notes.

L. Ask for Documents, Electronic Evidence, Etc. Ask each interviewee if s/he has any tangible evidence that corroborates his/her recollection of events. Documents such as e-mail correspondence, notes, diary entries, photographs, time sheets, or calendars, might all contain relevant and valuable information. Recordings of voice mail messages might also contain helpful information. Electronic information such as text messages, social media messages/comments, and other things may also be relevant.

M. Visuals. If helpful, have the witness draw a picture of the alleged misconduct, the scene where it occurred, or of any other relevant matter. It may also be helpful to have the witness take you to the site of the alleged misconduct for a personal inspection.

N. Ask for Identities of Other Witnesses. Ask each interviewee to identify anyone else who was a witness to or has information relevant to the alleged harassment.

O. Ask for Any Remaining Thoughts. Before ending an interview, ask for any other information the interviewee thinks may be helpful or that they would like to provide.

P. Retaliation. End each interview with a reminder that retaliation is prohibited. They must not retaliate, and they should also immediately report any retaliation they believe they receive.

3. Additional Suggestions for the *Complainant's* Interview:

A. Keep Neutrality and Equality in Mind. The investigator must remember that their alleged bias for or against a complainant or respondent, or complainants or respondents in general, may form the basis of an appeal of the final determination regarding responsibility.

   i. The investigator should plan and structure the interview of the complainant to ensure that a fair and equal opportunity will be given to the respondent to address the same issues.

   ii. Ground rules for the interview, such as not interrupting and remaining respectful/professional, may be given, so long as they are also later given to the respondent during the respondent's interview.

B. Complainant's Concerns. Remember the complainant may be embarrassed or fear retaliation. If helpful, let the complainant know you recognize this at the beginning of the interview.

C. Ask the Complainant if Extent of Complaint Has Been Covered. In order to safeguard against the complainant later coming up with additional allegations that the District has never been informed of and then claiming the District did not respond appropriately to those allegations, it is important to ask the complainant whether what they have stated is everything that forms the basis of his/her complaint.

D. Impact. Inquire what impact the alleged conduct had on the complainant. This is particularly critical for an evaluation of whether the alleged conduct is severe, pervasive, *and* objectively offensive, and is effectively denying the complainant equal access to the District's education program or activity.

E. Complainant's Requests. If the complainant asks that you not do anything with the information he/she tells you, explain that the District must take appropriate action and why. If helpful, review policy AAC with them.

F. Do Not Make Promises. Do not make any promises about what the investigation will entail, when it will be completed, or what the outcome will be. Remind him/her that you are only the investigator, and not also the decision-maker. Do not disclose the identity of witnesses, except to the extent required by Title IX.

G. Retaliation. Ask the complainant to bring any retaliation to your attention and explain what that means.

H. Supportive Measures. Remind the complainant that questions about supportive measures can be directed to the Title IX Coordinator.

4. Additional Suggestions for the *Respondent's* Interview:

A. Keep Neutrality and Equality in Mind. The investigator must remember that their alleged bias for or against a complainant or respondent, or complainants or respondents in general, may form the basis of an appeal of the final determination regarding responsibility.

i. The investigator should review the summary, notes, and any recording from the complainant's interview and then plan and structure the interview of the respondent to ensure the respondent's interview will be comparable to the complainant's interview, including with respect to who is in attendance, what questions are asked, what topics are covered, and what statements regarding the investigation process are made by the investigator.

ii. If given to the complainant during their interview, address the same ground rules for the interview with the respondent, such as not interrupting and remaining respectful/professional.

iii. Go over any other statements, explanations, or procedures that were provided to the complainant.

B. Respondent's Concerns. Be prepared for anger and defensiveness on the part of the respondent. As with the complainant, avoid making any statements that could be interpreted as bias for or against the respondent, regardless of any emotion displayed by the respondent.

C. Refusals to Answer. The investigator should decide in advance how to respond if the respondent refuses to voluntarily answer questions. Typically, an individual will voluntarily cooperate if s/he knows that the interview may be their only chance to tell their side of the story. If the respondent is an employee and decides not to answer anyway, the investigator can explain the *Garrity* Warning as it relates to any criminal investigation. Ultimately, though, the threat of discipline for insubordination is a no-go under the Title IX regulations; *the parties are allowed to choose not to cooperate*. Aside from outright refusals, as with other interviews, do not settle for a general denial of the allegations by the respondent. Keep in mind the respondent is entitled to the same opportunity to present evidence as the complainant.

D. Promises/Retaliation/Supportive Measures. Like with the complainant, do not make promises to the respondent about the investigation process or outcome. If asked, remind the respondent that any disciplinary decisions will be made at the conclusion of the investigation and only after a determination of responsibility has been made. Like with the complainant, remind the

respondent of the prohibition against retaliation, and that supportive measures can be discussed with the Title IX Coordinator.

5. Assessing Credibility

A complainant's, respondent's, or witness's response to questions alone is often not the only thing an investigator may consider. When interviewing any of these individuals, the investigator should be assessing their credibility. Information already received from other witnesses or evidence may refute or support the interviewee's version of events. The investigator can be looking for consistency in the information obtained from all parties and witnesses.

Credibility considerations may also include clues such as, but not limited to:
1. Eye contact and other body language;
2. Unusual hesitations;
3. Change in skin coloration (e.g., face turning red or white);
5. Change in tone or affect over the course of the interview; and
6. Unexplainable lapses in recollection.

Inspection & Review of Evidence

Upon receipt of all evidence the parties would like the investigator to consider, the investigator must provide both parties and their advisors (if any) an equal opportunity to review and respond to the evidence gathered during the investigation when such evidence is directly related to the allegations set forth in the formal complaint, including evidence the District does not intend to rely on in reaching a determination regarding responsibility.

The parties must be provided at least 10 days to review and respond to the evidence gathered, and any responses will be considered by the investigator prior to completion of the investigation report.

The evidence must be shared in an electronic format or hard copy. If the evidence will be shared electronically, do so in a technologically secure manner.

The evidence should be shared with the parties and their advisors simultaneously.

The Investigative Report

After the investigation process is complete, the investigator must complete a written report *fairly summarizing the* ***relevant*** *evidence*. Here are some suggestions for creating an appropriate investigation report:

1. Identify the allegations from the formal complaint.

2. A description of the procedural steps taken during the investigation.

3. Summarize each interview separately.

4. Include a list of each exhibit of evidence considered.

5. In order to address possible privacy concerns regarding the inclusion of irrelevant evidence, the U.S. DOE explains that the investigator may redact from the investigative report information that is not relevant but which is contained in documents or evidence that is relevant.

6. If any evidence was excluded as irrelevant, explain why that evidence was excluded (remember rape shield provisions).

7. Explain any credibility determinations and the basis for each determination (e.g., the witness's statement is not credible because he or she contradicted himself or herself multiple times or is directly contrary to video evidence).

8. Consider the parties' responses to their review of the evidence, if any.

9. Make specific findings (but not determinations regarding responsibility) and identify the relevant evidence that supports each finding.

10. Write professionally and objectively. Avoid colloquialisms, jargon, slang, profanity, and contractions, unless directly quoting a party or witness, in which case, the word or phrase should be inside of quotation marks. Consider the requirements to remain unbiased and neutral, which extends to the creation of the report. The report will have an audience: it must be sent to the parties before a determination is made, the decision-maker will review it, and it could potentially be produced in further administrative proceedings or a lawsuit.

11. Review and proofread the report, ensuring it is accurate and thorough.

The investigator must provide a copy of the completed report to the complainant, respondent, their advisors (if any), and to the designated decision-maker. This should be done simultaneously.

When the parties are issued the investigative report, they should be notified of their rights to submit written, relevant questions to another party or witness <u>within 3 days</u>, and to submit a written response to the investigative report <u>within 10 days</u>. The investigator, decision-maker, and Title IX Coordinator may need to strategize regarding how this notice is provided and by whom. It seems the investigator may be in the best position to provide the notice at the same time the investigative report is shared with the parties and their advisors.

Role of Title IX Decision-Maker

Generally, the Decision-Maker:

1. Only serves as decision-maker if s/he is a neutral party with no conflicts of interest or bias for or against either the complainant or respondent (or complainants or respondents in general);
2. Reviews the investigative report;
3. Provides the parties an opportunity to submit written, relevant questions to another party or a witness within 3 days from submission of the investigative report to them;
4. Provides the parties 10 days, from submission of the investigative report to them, to review and respond in writing to the report, with any such responses being reviewed by the decision-maker;
5. Makes a determination as to whether the respondent is responsible for the alleged conduct using a standard of the "preponderance of the evidence";
6. If it is determined that the respondent engaged in sexual harassment in violation of Title IX, the decision-maker determines whether disciplinary or punitive sanctions against the respondent are warranted, and if so, what those should be, as well as whether any remedies should be offered to the complainant; and
7. Provides written notice of the determination to the complainant and respondent simultaneously along with an explanation of appeal rights.

Right of Parties to Submit Written Questions

In accordance with AAC-BR2, within 3 days of receipt of the investigation report, the parties may submit relevant written questions to the designated decision-maker for the other parties and/or witnesses to answer before a determination regarding responsibility is reached.

Rape Shield Protection: At no time will the complainant be required to answer questions regarding the complainant's sexual predisposition or prior sexual behavior, unless questions about prior sexual behavior are offered to prove someone other than the respondent committed the alleged conduct, 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.

Exchange of Questions and Answers: Upon receipt of written questions from a party, the designated decision-maker will pass on appropriate and relevant questions to the party or witness for response. The decision-maker should explain that written responses must be

promptly submitted to the designated decision-maker, who will then provide the written responses to both parties. The parties may submit reasonable and relevant follow-up questions to the designated decision-maker for answer by the other party or a witness in the same manner as initial written questions.

Relevancy Determinations: When reviewing a written cross-examination question, the decision-maker must decide whether the question goes to a fact that will help determine the outcome of the complaint, and whether an answer to that question would make the fact more or less likely to be true. The decision-maker must explain in writing to the party proposing the question any decision to exclude a question as not relevant.

Right of Parties to Respond to the Investigative Report

Within 10 days of receipt of the investigation report, the parties may submit a written response to the report to the designated decision-maker. The deadline to submit a written response to the investigation report may not be delayed by the submission or pendency of written questions.

The question/answer exchange therefore overlaps with this 10-day period within which the parties may review and respond to the investigative report. It is suggested that the decision-maker err on the side of ensuring due process is provided when time constraints impact the question/answer and follow-up question/answer process.

Determination of Responsibility

Standard of Evidence: The "preponderance of the evidence" standard must be used. To meet this standard, the decision-maker must determine that conduct constituting sexual harassment in violation of Title IX *more likely than not occurred.*

Following the written submission of questions/answers procedure and receipt of any written responses to the investigative report by the complainant and respondent, the designated decision-maker must review these items and the investigative report and reach a determination regarding responsibility as to each allegation by applying the preponderance of the evidence standard.

In reaching a determination on responsibility, the designated decision-maker must objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence. In doing so, the designated decision-maker may make credibility judgments based on, for example, factors of plausibility and consistency in party and witness statements. Corroborating evidence is not required to reach a determination of responsibility on the part of the respondent. It is suggested in the preamble to the regulations that when the evidence is truly 50/50, the determination should be non-responsibility on the part of the respondent.

The decision-maker, similar to the investigator, cannot require, allow, rely upon, or use evidence that either constitutes or seeks disclosure of any information protected by a legally-recognized privilege, unless the person holding such privilege has waived the privilege.

Disciplinary Measures: If the decision-maker determines the respondent engaged in sexual harassment in violation of Title IX, the decision-maker must determine whether disciplinary or punitive sanctions against the respondent are warranted, and if so, what those sanctions should be. AAC-BR2 includes a non-exhaustive list of possible disciplinary measures. In making a decision regarding disciplinary or punitive measures, the decision-maker may consider the following criteria:

- Ages of the parties involved;
- Relationship between the parties involved;
- Severity of the conduct;
- How often the conduct occurred, if applicable, and
- How the District resolved similar complaints, if any, in the past.

Remedies for the Complainant: Upon making a determination of responsibility, the decision-maker must also determine any appropriate remedies to be offered to the complainant to restore or preserve the complainant's equal access to the education program or activity. Such remedies may include supportive measures and need not be non-disciplinary or non-punitive in nature and need not avoid burdening the respondent.

Written Notice of Determination of Responsibility

The decision-maker must provide written notice of the determination of responsibility to the complainant and the respondent simultaneously. The Title IX Coordinator should also receive the notice. The notice of determination must identify:

1. The allegations alleged to constitute sexual harassment;
2. The procedural steps taken from the receipt of the formal complaint through the determination of responsibility, including notifications to parties, interviews of parties and witnesses, site visits, and other methods used to gather evidence;
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the District's code of conduct to the facts of the conduct allegedly constituting Title IX sexual harassment;
5. A determination regarding responsibility for each allegation and the decision-maker's rationale for the result;

6. Any disciplinary sanctions the District will impose on the respondent and whether the District will provide remedies to the complainant; and
7. Information regarding the appeals process and the District's procedures and permissible bases for the complainant and the respondent to appeal (which is explained in AAC-BR2).

The notice of determination must not describe the individualized remedies to be provided to the complainant.

The Title IX Coordinator must communicate remedies separately to the complainant to discuss what remedies are appropriately designed to preserve or restore the complainant's equal access to the education program or activity. The Title IX Coordinator must create a monitoring plan to evaluate the effectiveness of the disciplinary sanctions, remedies and/or supportive measures identified in the determination of responsibility to help prevent recurrence.

The decision-maker's determination only becomes final when the appeal period expires or any appeal is decided.

Appeal Process
(and involvement of the Appeal Decision-Maker)

The complainant or the respondent may appeal the determination of responsibility, including the severity or proportionality of any disciplinary sanction instituted as a result of the determination of responsibility.

The complainant and the respondent may also appeal any dismissal, whether discretionary or mandatory, of a formal complaint or allegation contained in a formal complaint.

However, an appeal must be based on the existence of one or more of the following:

1. Procedural irregularity that affected the outcome of the matter;

2. New evidence that was not reasonably available when the determination of responsibility or dismissal decision was made that could affect the outcome of the matter; or

3. 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 that affected the outcome of the matter.

An appeal must be submitted in writing to the appeal decision-maker within 7 calendar days after receipt of the notice of determination or dismissal, and must identify the base(s) on which the appeal is being filed.

Conflict of Interest & Bias: The appeal decision-maker, like the investigator and initial decision-maker, must be free from conflict of interest and bias.

Written Notice of Appeal: Upon receipt of an appeal, the appeal decision-maker must promptly provide written notice of the appeal to both parties and inform them of their right to submit written statements supporting or challenging the outcome and the deadline by which such statements must be submitted.

Supportive Measures: Supportive measures in place should continue throughout the appeal process.

Review by Appeal Decision-Maker: In considering the appeal, the appeal decision-maker must review:

- All relevant evidence submitted to the investigator during the investigation,
- The parties' responses to the investigation report (if any),

- The answers to relevant questions exchanged prior to the initial determination (if any),
- The decision-maker's written determination, and
- Any written statements filed by the complainant or respondent following initiation of appeal to determine if the determination of responsibility or dismissal decision was appropriate.

Written Notice of Decision: The appeal decision-maker must provide written notice of the appeal decision and the rationale of that decision to the complainant and the respondent simultaneously.

The determination of responsibility or dismissal decision becomes final after the time period to file an appeal has expired, or if a party does file an appeal, after notice of the appeal decision has been sent to the parties.

Until the determination of responsibility is final, the District must refrain from acting on the determination of responsibility while maintaining the status quo through supportive measures designed to ensure equal access to the education program or activity.