



Fundamental Training for Title IX Teams: Compliance Officers, Investigators, Decision-Makers and Facilitators of Informal Resolution District Documents

Chula Vista Elementary School District

March 2, 2023

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Objectives

- 1. Understand the LEA's obligations in responding to actual knowledge of sexual harassment
- 2. Recognize a formal complaint
- 3. Have each Title IX team member understand and be able to implement each of their roles in the formal complaint process from start to finish:
 - Notice and Opportunity for Adviser
 - Investigation
 - Opportunity to Inspect Evidence
 - Draft factual findings
 - Opportunity to Ask Questions
 - Written Decision of Responsibility
 - Appeal
 - Record Keeping Obligations
- 4. Have tools and techniques to serve impartially and without bias

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What is Title IX?

“No person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”
(United States Congress, June 23, 1972.)



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Title IX Federal 2020 Overhaul



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- DOE provide Proposed Regs November 29, 2018
 - Notice of Proposed Rulemaking (NPRM)
- Closed Public Comments February 29, 2019
- Final Rule Issued May 6, 2020
 - Codified in 34 CFR Part 106
- Final Rule became effective August 14, 2020

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What's Different?

- Actual Knowledge
- Formal Complaint
- Definition of Sexual Harassment
- Mandatory Dismissals
- Investigation and Process Requirements
 - Various, and sometimes separate roles (Title IX Coordinator, Investigator, Decision Maker, Decision Maker on Appeal, optional Informal Resolution Facilitator)
 - Written Notice
 - 2 Step Evidence Inspection Process
 - Separate Investigation Report and Determination of Responsibility
- Appeal Requirement



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What's on the Horizon

- 2022 NPRM
- Expanding the Definition of Sexual Harassment
- Changes to Investigations and Hearings



Education Secretary, Miguel Cardona



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Designating A Title IX Coordinator

- Requirement to designate and authorize an employee as the “Title IX Coordinator” and
- Notify all students and employees of
 - (1) name;
 - (2) office address;
 - (3) email address; and
 - (4) telephone number of the Title IX Coordinator.
- This designation must also be “prominently displayed” on the LEA’s website



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Other Title IX Team Roles

- Investigator
- Decision-maker
- Decision-maker on appeal
- Facilitator of informal resolution



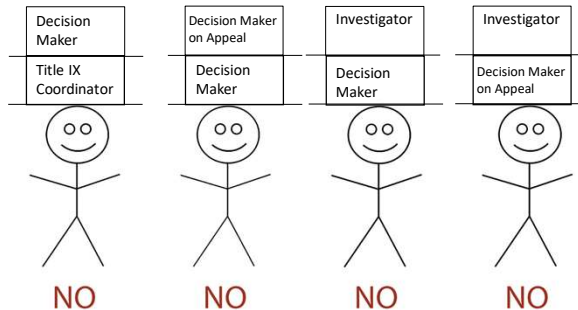
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Who Can Wear What Hats?

NOT OKAY ❌



Case Study

- On February 9, 2023, during drama class, a male student, James, recites the sexually explicit lyrics to a Cardi B song, which references oral sex. He then calls Jerry out by name and says, "Yea, that'll never happen for you, Jerry the Fairy!"
- At the end of class, the teacher, Mr. Scott, assigns the class to work in groups to make a skit.
- That night, the group, made up of Jerry, James, Amy, Max, and Jessica meet on Zoom to work on the assignment. James sends a series of photos of partially nude female classmates to Jerry individually in the Zoom chat function. Jerry did not take screenshots of the photos.

Obligation to Respond

“A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.” (34 C.F.R. § 106.44, *emphasis added*.)



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Definition: Actual Knowledge

- Who can have actual knowledge?
 - Title IX Coordinator
 - “[A]ny official of the recipient who has the authority to institute corrective measures”; OR
 - **Any Employee of an elementary and secondary school**
- Reports or observations can constitute actual knowledge
- Actual knowledge triggers further action in the form of supportive measures and information regarding how to file a formal complaint



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Case Study

- Mr. Scott heard what James said to Jerry in Zoom class.
- What actions, if any, should Mr. Scott take?



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Supportive Measures

- Non-disciplinary, non-punitive, and individualized
- Designed to restore or preserve equal access to the educational program or activity without unreasonably burdening the other party
- Designed to protect the safety of all parties or the educational environment
- Title IX Coordinator is responsible for coordinating the implementation of the supportive measure(s)



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Case Study

- When Mr. Scott reports the incident to the Title IX Coordinator, what should the Title IX Coordinator do?



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Case Study

- The Title IX Coordinator talks with Jerry and discusses supportive measures. Jerry refuses. They also discuss the process for filing a formal complaint. Jerry does not wish to file a formal complaint.
- How should the Title IX Coordinator respond?



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Who Can File a Formal Complaint?

- Complainant is defined as:
 - an individual who is alleged to be the victim of conduct that could constitute sexual harassment
 - Complainants must be participating in or attempting to participate in the education program or activity of the LEA within which the formal complaint is filed
- Employees, not just students, may be complainants under Title IX (*North Haven Bd. of Educ. v. Bell*, 102 S.Ct. 1912 (1982).)
- Parents/legal guardians can file a formal complaint on behalf of their child, but they are not considered a “complainant.”



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Formal Complaint

- Document or electronic submission that contains complainant's physical or electronic signature, or otherwise indicates that the complainant is the one submitting the complaint
- Filed in person, by mail, or by electronic mail
- Alleging sexual harassment against a respondent
- Requesting that the LEA investigate the allegation of sexual harassment
- Can be signed by Title IX Coordinator



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Definition: Sexual Harassment

- Sexual harassment is defined as
 - (1) any quid pro quo harassment by a LEA's employee;
 - (2) "any unwelcome conduct that a reasonable person would find so severe, pervasive, **and** objectively offensive" that it "**denies**" a person equal educational access;
 - (3) sexual assault;
 - (4) dating violence;
 - (5) domestic violence; or
 - (6) stalking



School's Education Program or Activity

- Alleged conduct must have occurred in a LEA's "education program or activity"
- Includes locations, events, or circumstances which the school exercises substantial control over both the respondent and the context in which the sexual harassment occurred

Case Study

- Jerry's mother, Molly, sees Jerry crying after class. Jerry tells her what's been going on (the comment in class and the pictures sent to the group). Molly sends the following email to Mr. Scott:

Dear Mr. Scott,

My son Jerry told me he was very upset because another boy, James, has been bullying him in drama class. How could you let this happen without telling me? I expect the school will be doing something about this. Please let me know what your plan of action will be immediately.

-Molly



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Case Study

- Mr. Scott forwards the email to the Title IX Coordinator.
- How should the Title IX Coordinator proceed?



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Case Study

- After speaking with the Title IX Coordinator, Molly files a written, signed complaint that complies with the required formalities. She describes the allegations in detail.
- Is Molly now the complainant?
- Does the conduct in the allegations meet the definition of sexual harassment?



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Mandatory Dismissals

- LEAs must dismiss a formal complaint of sexual harassment, for purposes of Title IX, when the alleged conduct:
 1. would not constitute sexual harassment under the new definition
 2. did not occur in the LEA's education program or activity
 3. the alleged conduct did not occur against a person in the United States.



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Discretionary Dismissals

- The LEA *may* dismiss a formal complaint or any allegations therein if at any time during the investigation:
 - The complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegation therein; or
 - The respondent is not enrolled or employed by the LEA; or
 - Specific circumstances exist to prevent the LEA from gathering of evidence to reach a determination as to the formal complaint or allegations therein.
- Written notice required for all dismissals.



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Case Study: Check for Understanding

- What if Molly had only known about the first comment on Zoom, and not the second incident where James sent suggestive pictures? Would that change the analysis?



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Option for Informal Resolution

- Optional
- LEAs cannot offer this when an employee is alleged to have sexually harassed a student



Option for Informal Resolution

Requirements:

- Provide the parties with written notice disclosing the sexual harassment allegations;
- Provide requirements of an informal resolution process;
- Provide any consequences that may result from participating in the informal resolution process; and
- Obtain the parties' voluntary, written consent to the informal resolution process.

Time to Investigate

Actual Knowledge + Formal Complaint + Sexual Harassment + Educational Program or Activity + in United States = INVESTIGATION and/or informal resolution



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Title IX Investigations

- Now With More Due Process Than Ever!
 - Notice
 - Two-Step Evidence Inspection Process:
 - Step 1: Inspection and Review of Evidence before investigation report finalized
 - Step 2: Obligation to give parties the opportunity to submit questions after report is finalized but before a determination of responsibility is made
 - Live hearing option
 - Written determination



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Notice

- Title IX Coordinator must send written notice of the allegations to both parties upon receiving a formal complaint.
- What must be in the written notice?
 - grievance process
 - sufficient details of the allegation(s)
 - advisor
 - false statement or false information



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Opportunity to Obtain an Advisor

- “Provide the parties with the same opportunities to have others present during the grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be an attorney.”
- May limit the advisor’s participation so long as applied equally to both parties



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Promises of Confidentiality?

- Because of the due process requirements in the new regulations, LEAs cannot and should not promise total confidentiality
- Reports cannot be confidential
- Information given by all witnesses may be shared with the parties



Case Study

- James' father informs the school that he has hired an attorney. He insists all communications go through the attorney. Soon after, the Title IX Coordinator reaches out to schedule an interview with James. The attorney insists that the interview take place at her office. She also demands that she be given a list of all witnesses so she personally can depose them.
- How should the Title IX Coordinator respond?

Emergency Measures

- The LEAs should not impose discipline on a student respondent without first complying the formal Title IX grievance process, which includes notice and opportunity to obtain an advisor.
 - (34 C.F.R. § 106.45(b)(5).)
- Consider how this might impact other obligations (e.g. mandatory expulsion recommendations).



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Emergency Removal

- Can remove a respondent on an emergency basis if the District:
 - does an individualized safety and risk analysis;
 - determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal;
 - and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal



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Case Study

- Let's change the facts for a moment. In this alternative situation, During class, James violently attacks and gropes Jerry.
- Molly presents this information in a formal complaint to the Title IX Coordinator.
- Can the school suspend Jerry?



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Planning the Investigation

- Create an investigation plan. This is a working document.
- Consider including:
 - (1) date Formal Complaint was received;
 - (2) involved parties and witnesses;
 - (3) Title IX Team roles;
 - (4) scope of investigation;
 - (5) relevant policies;
 - (6) communication log



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Determine Investigation Scope

- Led by the formal complaint and your policies
- In consultation with the Title IX Coordinator
- Be detailed in writing the allegations
 - Specific with actions and time frames: who, where, when?



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Plan to Gather Evidence

- Sequence of interviews:
 - Generally start with complainant, then witnesses, then respondent.
 - Be okay with circling back to witnesses if need be.
- Consider how to communicate/invite witnesses
- Consider location (privacy, confidentiality and comfort)
- Have a consistent note-taking method



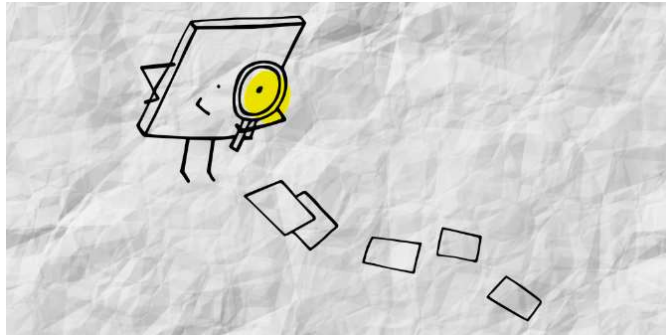
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What Kind of Evidence?

- Documents
- Photos
- Social media posts



Intermission

Interviewing Techniques

- Questions designed to elicit all the information needed for the decision-maker to make a determination of responsibility regarding each allegation
- The “funnel method”
- Silence is golden
- Reflect and ensure you covered everything
 - “Is there anything else I should be aware of?”



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Trauma-Informed Interviewing

- Definitions of trauma:
 - A deeply distressing or disturbing experience. (Oxford Dictionary)
 - An emotional response to a terrible event like an accident, rape or natural disaster. (American Psychological Association)



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Broad Types of Trauma

- (1) threat to life or limb;
- (2) severe physical harm or injury, including sexual assault;
- (3) receipt of intentional harm or injury;
- (4) exposure to the grotesque;
- (5) violent, sudden loss of a loved one;
- (6) witnessing or learning of violence to a loved one;
- (7) learning of exposure to a noxious agent; and
- (8) causing the death of severe harm to another.

(Wilson & Sigman, 2000.)



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Impact of Trauma

- Immediately after the event, shock and denial are typical.
- Longer term reactions include unpredictable emotions, flashbacks, strained relationships and even physical symptoms like headaches or nausea.
- For students, experiencing traumatic stress can severely impact their ability to learn, remember, or manage their emotions and behavior



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Trauma in Title IX Investigations

- In a Title IX investigation interview, the signs of trauma can manifest as memory loss, lack of focus or inconsistent versions of the same story.



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How to be Trauma-Informed

- Be aware of how trauma alters how people see the world
- Shift your mindset from “What is wrong with you?” to “What happened to you?”



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What Does a Trauma-Informed Title IX Employee Do?

- Build relationships
- Foster trust
 - Be communicative
 - Be transparent
 - Be reliable
- Give choice and agency
- Know signs of trauma and consider them



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Practical Tips for Trauma-Informed Interviewing

- Hold the interview in a comfortable, confidential and neutral place.
- Empower by letting the party choose the time and date of interview and where to sit in the room.
- Offer water. Have tissues handy.
- Ask open-ended questions. For example, “What else happened?” instead of “What happened next?” Other good phrases: “Tell me more about that.” Or “What do you remember about that?”
- Keep interviews under 1.5 hours. Be willing to circle back if you need to stop or run out of time.



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Empathy Without Bias

- Acknowledge pain, not facts
 - “I understand this is a painful process.” Or “I can see this is hard for you to talk about.”
- Avoid statements that would indicate you have come to a conclusion about what occurred



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Opportunity to Inspect Evidence

- Significant change in Final Rule – uncharted waters
- Parties must be given at least ten (10) days to review all evidence gathered by the investigator, including both inculpatory and exculpatory evidence, that is **directly related** to the allegations raised in the formal complaint.
- Timing – before the investigator issues the investigative report



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What Information Must Be Shared?

- “Directly related to the allegations”
- “Directly related” vs. relevant
 - Broad scope
- Even if it will not be relied upon in the determination
- Redaction allowed if it is not “directly related”



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How to Share the Information?

- Preamble suggests the Department wants this done in hard copy or digital form rather than at the District office
- Can do this in a manner that prevents dissemination
 - For example, require parties to sign non-disclosure agreement



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Case Study

- Investigator interviews Max, who explains that James has been texting him lewd texts all summer. Max gives the investigator screen shots of the texts, but asks that the investigator not tell James that he showed the texts or he would “never live it down.”
- How should the investigator respond?



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FERPA Implications

- If there is a conflict between FERPA and Title IX, Title IX governs
- Student information may be redacted if it is not directly related to the allegations
 - The Department cautions not to redact more than necessary
- Maintain a “privilege log” and allow parties to dispute whether it is directly related



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Case Study

- The investigator discovers that Mr. Scott had recorded his lesson. Student faces and names are visible.
 - Must the investigator share this recording with the parties?
- The investigator reviewed the cum files of both Jerry and James and discovered that James had no history of discipline but that Jerry was disciplined for tagging a locker in 9th grade.
 - Must the investigator share Jerry's cum file with the parties?



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Writing the Investigative Report

- Purpose of the report is to “summarize the relevant evidence” for the decision-maker to make a determination of responsibility.
 - Who performed the investigation
 - When the respondent received notice of the allegations
 - Which witnesses and parties were interviewed and when
 - Summaries of witness testimony
 - What locations were visited during the investigation
 - All types of evidence reviewed



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Investigator's Relevancy Assessment

- The importance of the relevance standard at this phase
- Include relevant evidence in the investigative report whether it is “inculpatory or exculpatory.”
- The Department recognized the cost and burden this puts on the LEA



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Case Study: Summary of Evidence

- Summary of Evidence
 - Recording of class
 - Screenshots of text messages from James to Max from the summer
 - Jerry and James' cum files
 - Witness statements
 - Jerry: Gave a verbal account that is consistent with the written complaint signed by Molly.
 - James: Admitted to making the comment in Mr. Scott's drama class but denied that he sent suggestive pictures to anyone, ever.



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Case Study: Summary of Evidence

- Mr. Scott: Described Jerry as a poor student who failed to memorize his lines. Confirmed he heard James' comment and found it offensive and mean. He also stated he thought Jerry and James "never got along."
- Amy, Max and Jessica: Confirmed they heard the comment in class and found it offensive.
 - Max stated James sent him suggestive pictures over the summer.
 - Amy said she hates James because he "broke Jessica's heart" last year.
 - Jessica stated that she spoke to Jerry after their group project and he sounded distressed. He didn't say why but said that James was "being awful again" and "ruining his life."
- What should the investigator include/exclude in the investigative report?



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Handoff to the Decision-Maker

- At least ten (10) days prior to the determination of responsibility, send the report to each party and the party's advisors in electronic format or hard copy, for their review and written response.



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Opportunity to Submit Questions

- Second window of 10-day period
- The decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants to be asked of any party or witness and provide each party with the answers, and allow for additional, limited follow-up questions from each party



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Another Relevancy Assessment

- “Ordinary meaning of relevance should be understood and applied”
- Not allowed: “sexual predisposition” or prior sexual behaviors
- Unless, “questions or evidence are offered to show that someone other than the respondent committed the alleged conduct, or if the questions or evidence about a complainant’s specific incidents of sexual behavior are offered to prove consent to the alleged behavior”



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Case Study

- Jerry poses the following questions to James:
 - Where did you attend middle school?
 - Is it true you have three older brothers?
 - Did you date Jessica your freshman year?
 - Did you break up with Jessica because you wanted to go further, and she didn't?
- James poses the following questions to Jerry :
 - You have joked about Cardi B. songs with me before. Is this true?
 - Why did you rat me out?
- Amy testified that she had seen James say lewd things to Jerry before in math class. James sends the following questions for Amy:
 - Is it true you cheated you on a math exam?
 - Is it true you told Jessica that you hate James?
- Amy refuses to answer any of the questions from James.



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Discussion: Best Practices

- LEAs have the ability to control this process
- The parties should understand that these questions are not coming from the investigator or the District.
- Other considerations?



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Making a Determination of Responsibility

- Decision-maker reviews:
 - the investigative report
 - additional information from the question exchange stage
- Then makes factual findings and determinations of responsibility using preselected standard of evidence



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Standards of Evidence

- Preponderance of the Evidence
 - More likely than not true. Feather test.
- Clear and Convincing
 - Highly probable that it is true.

EVIDENCE



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What to Include in Determination

- Allegations potentially constituting sexual harassment
- Procedural steps taken
- Findings of fact
- Conclusions regarding respondents conduct
- Disciplinary sanctions, if applicable
- Appeal rights



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Making Factual Findings

- Make a factual finding regarding every material allegation in the complaint
 - Sustained or not sustained
- Sample language: “The complainant’s allegation that [insert allegation] is sustained/not sustained. The investigator finds by [a preponderance of the evidence OR clear and convincing evidence] that...”



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Assessing Credibility

- Credibility factors to consider:
 - Corroboration/Lack of corroboration
 - Consistent/Lack of Consistency
 - Knowledge or opportunity to observe
 - Inherent plausibility
 - Motive to falsify
 - Consistent past conduct



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Case Study

- Jerry's allegation that James recited sexually explicit lyrics then directed a derogatory insult at him in Mr. Scott's drama class is sustained. Notably, James admitted to making the comment and video footage corroborated Jerry's account. While James stated the comment was a joke, four witnesses who were present at the time, gave consistent accounts that the comment was mean-spirited and offensive.
- Jerry's allegation that James sent him suggestive pictures in the Zoom chat is sustained. Although James denied that he did so, the preponderance of the evidence weighs against his denial. Specifically, Max gave a credible account that James sent him substantially similar photos over the summer. Further, Jessica stated that she spoke to Jerry shortly after their Zoom group meeting and he sounded upset, which weighed in favor of Jerry's allegation.



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Conclusions Regarding the “Code of Conduct”

- The decision-maker must then apply the factual findings to the applicable “code of conduct” or other relevant policies and procedures to determine responsibility.



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Tips for Report Writing

- Build and use a template
- Write as you go, don't wait until all interviews are complete
- Use the active voice
- Use headings, bullet points and tables as necessary



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Appeals

- Two stages where appeals rights kick in:
 1. determinations of responsibility
 2. dismissals of formal complaints.
- Decision-maker on appeal should be different from the decision-maker, Title IX Coordinator and/or Investigator



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Basis for Appeal

- A procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time of the determination of 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 the complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.



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How to Handle Appeals

- The LEA notifies the other party in writing;
- The LEA gives both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the determination of responsibility or dismissal;
- The LEA reviews the written statements and issues a written decision describing the result of the appeal and rationale; and
- The outcome of the appeal must be provided in writing simultaneously to both parties



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Case Study

- The decision-maker made a finding of responsibility that, by preponderance of the evidence, James' conduct violated the District's sexual harassment policy.
- James submits an appeal, arguing that the decision-maker only gave him 8 days to submit questions for the parties, instead of 10. This, in fact, is true and all of the parties had been given 8 days, not 10.



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Record-Keeping

- LEAs must maintain the following records for seven (7) years:
 - Each sexual harassment investigation including any determination of responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the LEA's education program or activity
 - Any appeal and the result therefrom
 - Any informal resolution and the result therefrom
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.



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How to Serve Impartially

- Impartiality is a legal requirement
- Practice fundamental fairness to both parties
- Avoid bias



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Understanding Bias

- Preconceived judgment or opinion without just grounds and based on insufficient knowledge
- Can be conscious or unconscious
- Biases, or stereotypes, are beliefs that most members of a group have some characteristic.
- Examples:
 - women are nurturing
 - “boys will be boys”



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Types of Bias

- Explicit Bias: An explicit stereotype is the kind that you deliberately think about and report
- Implicit Bias: An implicit bias is one that is relatively inaccessible to conscious awareness and/or control
- Confirmation Bias: The tendency to seek out, favor or interpret information in a manner that confirms previously held beliefs
- Priming: The unconscious influence of external information on what we expect to be an independent decision



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Implicit Association Test

- <https://implicit.harvard.edu/implicit/Study?tid=-1>



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Tips for Eliminating Bias

- Avoid early hypotheses and recognize all possible outcomes.
- Obtain and consider all relevant information.
- Ask open-ended questions.
- Give the parties a meaningful opportunity to be heard and respond.
- Avoid making findings until all the evidence is gathered, including the question and answer phase.



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Questions



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