BERCHEM MOSES PC

Title IX Grievance Process from Start to Finish

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rgoldberg@berchemmoses.com www. berchemmoses.com www.connecticuteducationlawblog.com

BERCHEM MOSES PC

Presented By:

Rebecca Goldberg, Esq.

75 Broad Street
Milford, CT 06460
(203) 783-1200

1221 Post Road East
Westport, CT 06880
(203) 227-9545

What You'll Learn

- When Title IX Grievance Procedures Apply
- Definition of Sexual Harassment Under Title IX
- Grievance Process
- Interplay with Other Policies/Laws
- Best Practices
- Pitfalls

When Do Title IX Grievance Procedures Apply?

- When there is an allegation of sexual harassment (as defined by Title IX) in an education program or activity receiving federal funds.
- "Education program or activity" includes any location, event, or circumstance over which the Academy exercises substantial control over the harasser and the context in which the harassment occurs.
  - Includes conduct occurring at school, on a school bus, field trip, at an extracurricular activity, function, and program even if outside of school, and conduct during remote learning.
  - Does **not** include:
    - Private social media outside of school (might be if additional conduct occurs in a school program or activity as an outgrowth of the initial conduct)
    - Conduct outside the U.S.
- Title IX covers sex, including sexual orientation and gender identity, but not other protected statuses (e.g. race).
- Title IX applies to employees and students. Other laws also protect employees (like Title VII of the Civil Rights Act).

Definition of Sexual Harassment

- Sexual Harassment is conduct on the basis of sex.
- It can be defined in one or more of the following ways:
  1. An Academy employee conditioning an aid, benefit, or service on participation in an unwelcome sexual conduct (Quid Pro Quo - This for That)
  2. Unwelcome sexual conduct that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the Academy's education programs or activities
  3. Sexual assault, dating violence, domestic violence, or stalking as defined by identified statutes

Review of Title IX Basics

- Academy's response to be equitable and prompt; emphasis on transparency, fairness, no bias or conflict, and may not be based on stereotypes.
- Must adopt grievance procedures to address formal complaints of sexual harassment.
- Grievance procedures require personnel be assigned to discrete roles: Title IX Coordinator, Investigator and Decision-Makers as well as Informal Resolution Facilitators.
- Grievance procedures to be used when a formal complaint is filed by a Complainant or initiated by the Title IX Coordinator.
- Informal reports/complaints can be brought by anyone: all submissions require a response, but only formal complaints require Title IX grievance procedures to be followed.
- Retaliation for participation/non-participation in Title IX process is prohibited. Discipline for submitting a false claim is not considered retaliation.

Need to Respond to Sexual Harassment

- Must respond to allegations of sexual harassment of which it has actual knowledge.
- Failure to respond violates Title IX as deliberate indifference and may violate other laws.
- Actual knowledge by any employee is deemed actual knowledge by the Academy.
  - Ensure employees at all levels know how to make a report.
- Administrators need to know: as soon as a situation seems like it could involve Title IX, STOP and contact the Title IX Coordinator. Other than ensuring immediate needs are met (safety, calming a crying student, etc.), the first step is to contact the Title IX coordinator.
- Do not investigate, request written statements, etc.

Recipient's Response

- The Title IX Coordinator must promptly contact the Complainant to discuss the availability of supportive measures, and consider the Complainant's wishes in doing so, advise of the right to file a formal complaint and how to do so. Respondent to also be offered supportive measures. Involve parents of minors.
- No punitive measures (e.g., discipline, transfer or other sanctions) to be taken until or unless the grievance process is completed and a determination of responsibility is made, i.e., due process.
- Does not prohibit immediate removal of a Respondent on an emergency basis to protect an individual from an immediate threat to physical health or safety, provided an individualized safety and risk analysis is performed. Notice and an opportunity to challenge the decision must be provided.
  - The right to remove does not supersede rights of students with disabilities under IDEA or Section 504.

Supportive Measures

- Supportive measures are:
  - non-disciplinary
  - non-punitive
  - individualized services as appropriate
- Some examples include:
  - course modifications
  - schedule changes
  - increased monitoring
- They must be offered even where a formal complaint has not been filed.
- Intent is to restore the status quo without unreasonably burdening the other party.

Formal Complaint: Grievance Procedures

- Upon receipt of a formal complaint, a recipient must provide written notice to the parties, which includes:
  - notice of the allegations in sufficient detail (names, conduct alleged, date, location)
  - statement of presumption of innocence
  - notice of the right to use an advisor (need not be a lawyer)
  - notice of any provision in any Code of Conduct or similar policy about making false statements or providing false information
- Allow the parties to prepare a response prior to an *initial* interview.

Informal Report

- An informal report of sexual harassment may be made by anyone (can be someone other than the subject of the sexual harassment i.e., staff, students, a third party, a parent).
- Forms are available for reporting sexual harassment but may be conveyed orally as well.
- **All informal reports are to be made to or brought to the attention of the Title IX Coordinator. If you learn about any situation, whether it involves students or employees, that could potentially implicate Title IX, you must notify the Title IX Coordinator.**
- School employees receiving an informal report or who otherwise possess actual knowledge of sexual harassment must notify the Title IX Coordinator. Completion of a written informal report form by the reporter or school personnel to whom it was reported is recommended.
- Title IX Coordinator will speak with the individual making the informal report to learn facts and identity the subject of the harassment in order to speak with the potential complainant(s) (subject(s) of reported sexual harassment).
- Informal report may be turned into formal complaints only by the Complainant or the Title IX Coordinator.

Distinct Roles and Responsibilities

- Regulations expand the role and responsibilities of a Title IX Coordinator and requires that additional Academy personnel fill distinct roles in the grievance process.
- Academy must identify individuals to fill these roles:
  - Title IX Coordinator
  - Investigator
  - Decision-Maker
  - Decision-Maker on Appeal, if applicable
  - Facilitator of Informal Resolution
- Individuals filing all roles are to be trained.
- It is important to know the roles and responsibilities assigned to each person to ensure compliance with the law/policy/regulation and to ensure no overlapping of roles and to facilitate a better understanding of your role.

Which Personnel Fill These Roles?

Title IX Coordinator: Shannon VanderSwaagh

Additional roles may be assigned on case-by-case basis. Typically:

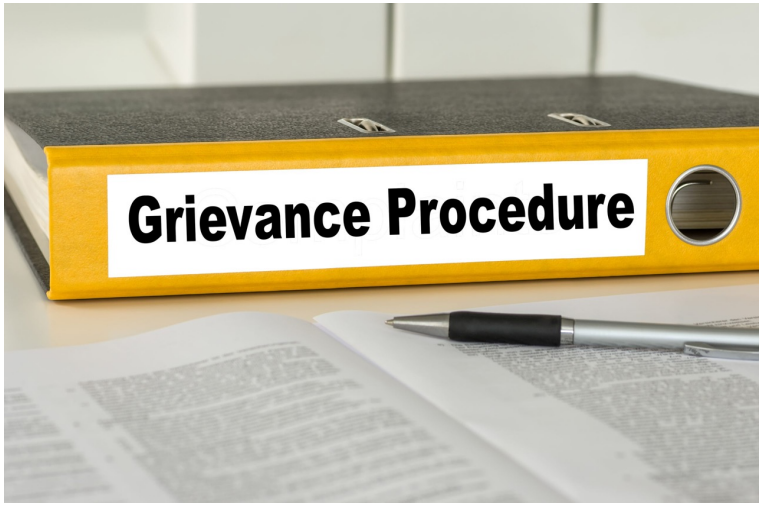
- Investigators: Assistant Principals or Dean of Students
- Decision-Maker: Principals
  - Cannot be the investigator or the Title IX Coordinator.
- Decision-Maker on Appeal: Head of School or Associate Head of School
- Informal Resolution Facilitators: Title IX Coordinator, Director of Campus Safety, counselors, and/or school social worker

Roles may be outsourced (e.g. to counsel)

First Steps – Title IX Coordinator

- Meets with Complainant and reviews the Title IX policy/regulation and option to file a formal complaint.
- May assist with filing the formal complaint or file on their own.
- Discusses supportive measures with Complainant and Respondent (explaining this occurs with or without a formal complaint).
- Collaborates with school administrators and/or HR about implementation of supportive measures and need for modifications to the measures.
- Provides written notice of a formal complaint or directs such notice to be provided to the parties; sends or directs an additional notice if allegations are revised (initial notice must be sent prior to the conducting of an initial interview with a Respondent).
- Designates roles and monitors compliance with grievance procedures.

Formal Complaint: Grievance Procedures



- The burden of proof rests on the recipient (Academy), not either party.
  - Either preponderance of the evidence or clear and convincing evidence (as set by your policy)
- Both parties shall be given the opportunity to present witnesses and evidence.
- Focus on transparency – witnesses are named, evidence is shared, etc.
- "Gag orders" are prohibited.
- No discipline for Respondent for sexual harassment until process is complete.
  - Emergency removal when warranted
  - Administrative leave for employees

Formal Complaint: Investigation

- Discuss and obtain signed nondisclosure agreements from the parties as early in the process as possible; preferably during initial interviews to enable sharing of evidence (as required). Title IX trumps FERPA.
- Investigator interviews parties and witnesses and gathers evidence.
- Keep notes of interviews, but maintain them as personal notes. Do not share with anyone or they become a student record. Interview summaries can become part of the evidence.
- Investigator provides both parties the evidence (including exculpatory evidence) with at least 10 days to submit comment.
- Investigator drafts investigation report summarizing the evidence. Investigator DOES NOT determine credibility or make findings of fact.
- TIP: Investigator should make sure the report is clear and specific enough that someone with no prior knowledge could understand it and have sufficient information. The Investigation Report must be thorough enough to allow the Decision-Maker to make a decision without relying on information obtained outside the process.

Formal Complaint: Investigator Handoff to Decision-Maker

- Investigation report is sent to both parties and the Decision-Maker.
- Investigator is no longer involved in the process.

Formal Complaint: Decision-Maker

- Decision-Maker notifies parties of their rights to (1) submit a written response to the Investigator's report and (2) submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.
  - The Decision-Maker must exclude irrelevant questions and must explain to the party proposing the question any decision to exclude a question as not relevant.
- After at least 10 days, Decision-Maker issues a determination with specific elements, most significantly findings of fact, conclusions as to whether sexual harassment occurred, and what remedies to apply. May need to *recommend* rather than make final disciplinary decision if other due process requirements exist (e.g., expulsion hearing, teacher termination hearing).

Formal Complaint: Final Decision/Written Determination of Responsibility

- The Decision-Maker issues a written determination that:
  - identifies the allegations constituting sexual harassment
  - describes the procedural steps taken from receipt of the complaint through the investigation
  - makes findings of fact supporting the determination
  - makes conclusions (sexual harassment did or did not occur)
  - includes a statement of and rationale for each allegation, including a determination of responsibility, any sanctions imposed on the Respondent, and any remedies to restore or preserve equal access to education program or activity to be provided to the Complainant
  - describes the procedure and basis for a possible appeal
- The Title IX Coordinator is responsible for the effective implementation of any remedies.

Formal Complaint: Dismissals

- Mandatory
  - Conduct **alleged in complaint**, even if proved, does not constitute sexual harassment as defined by Title IX
  - Conduct did not occur in Academy's education program or activity
  - Conduct did not occur against a person in the United States
- Permissive
  - Complainant notifies Title IX coordinator in writing that the Complainant wants to withdraw the formal complaint or any allegations therein
  - Respondent no longer enrolled or employed by the Academy
  - Specific circumstances prevent Academy from gathering evidence sufficient to reach a determination re: the complaint
- Can still discipline under other provisions of code of conduct

Formal Complaints: Appeals

- Either party may appeal the decision of responsibility or dismissal of a formal complaint or allegation therein.
- Appeal may only be based upon and granted for the following reasons:
  1. a procedural irregularity that affected the outcome;
  2. new evidence that was not reasonably available at the time of the determination and could affect the outcome; and
  3. conflict of interest on the part of the Title IX Coordinator, the Investigator, or Decision-Maker.
- May, but need not, offer an appeal equally to both parties on an additional basis.
- Written notice of the appeal must be provided to both parties, and they shall be provided with an opportunity to submit a written statement in support of/challenging the appeal.
- Written decision must be issued.

Formal Complaints: Informal Resolution

- Informal resolution may be offered by the Title IX Coordinator if a formal complaint is filed.
- A full investigation need not be conducted as long as written consent of both parties is obtained and the allegation does not involve an adult Respondent and a student Complainant.
- May include a broad range of strategies, including, mediation and restorative justice.
- Must be facilitated by trained personnel.
- Any party has the right to withdraw from the informal resolution process at any time and may resume the formal grievance process.

Special Considerations for Special Education

- The Title IX regulations do not provide specific guidance on applying the Title IX process to situations involving special education students, either as a complainant or respondent.
- Title IX procedures require significant transparency such as notification of the identity of a complainant/respondent and requiring that collected evidence be shared with and among the parties/parents. This protocol creates many unanswered questions about the applicability to special education students.
  - Is an additional level of privacy owed to a special education student?
  - What information may or may not be shared about a special education student?
  - Is parental consent required to share records?

Special Considerations for Special Education

- What is Clear?
  - A complainant or respondent's status as a special education student or 504 student does not change whether a finding of responsibility will or can be made.
  - The focus is on the **conduct** and whether it meets the definition of sexual harassment. Intent or capacity to understand is not necessarily relevant to such a finding. Arguably, it might be relevant to a determination of a remedy.
  - The regulations make it clear that Title IX trumps FERPA.
  - Notwithstanding, consideration must always be given to providing due process, consistent with state and federal law.
  - Nothing in Title IX should be construed to alleviate the Academy's obligations under the IDEA (e.g. emergency removal process).

Implementing Remedies While Complying with Special Education Laws

- Refer student for PPT for supportive measures and/or if found responsible for sexual harassment or other violation
- When the Academy seeks to change the placement of a special education student for a period of more than ten (10) school days in any given school year, the school must:
  - provide the parent with procedural safeguards; and
  - conduct a manifestation determination.
- Manifestation PPT must occur within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of conduct. The following questions must be addressed:
  1. Was the conduct in question caused by or did it have a direct or substantial relationship to the child's disability? Or…
  2. Was the conduct in question the direct result of the failure to implement the IEP?

What About Other Laws?

- Title VII/CFEPA – Employee victims only. Lower standard for conduct: severe or pervasive; conduct may occur outside of work setting. No specific investigation protocol.
- Teen Dating Violence/Bullying – Follow separate protocols.
- Child Abuse/Neglect – Report to DCF.
- Other kinds of discrimination/harassment – Conduct investigation separate from Title IX for harassment covered by other laws (e.g. Title VI, ADA).
- Collective bargaining agreements – Need to comply with contract unless unlawful to do so. Discipline must follow the contract and may be grieved, etc.

Record Keeping

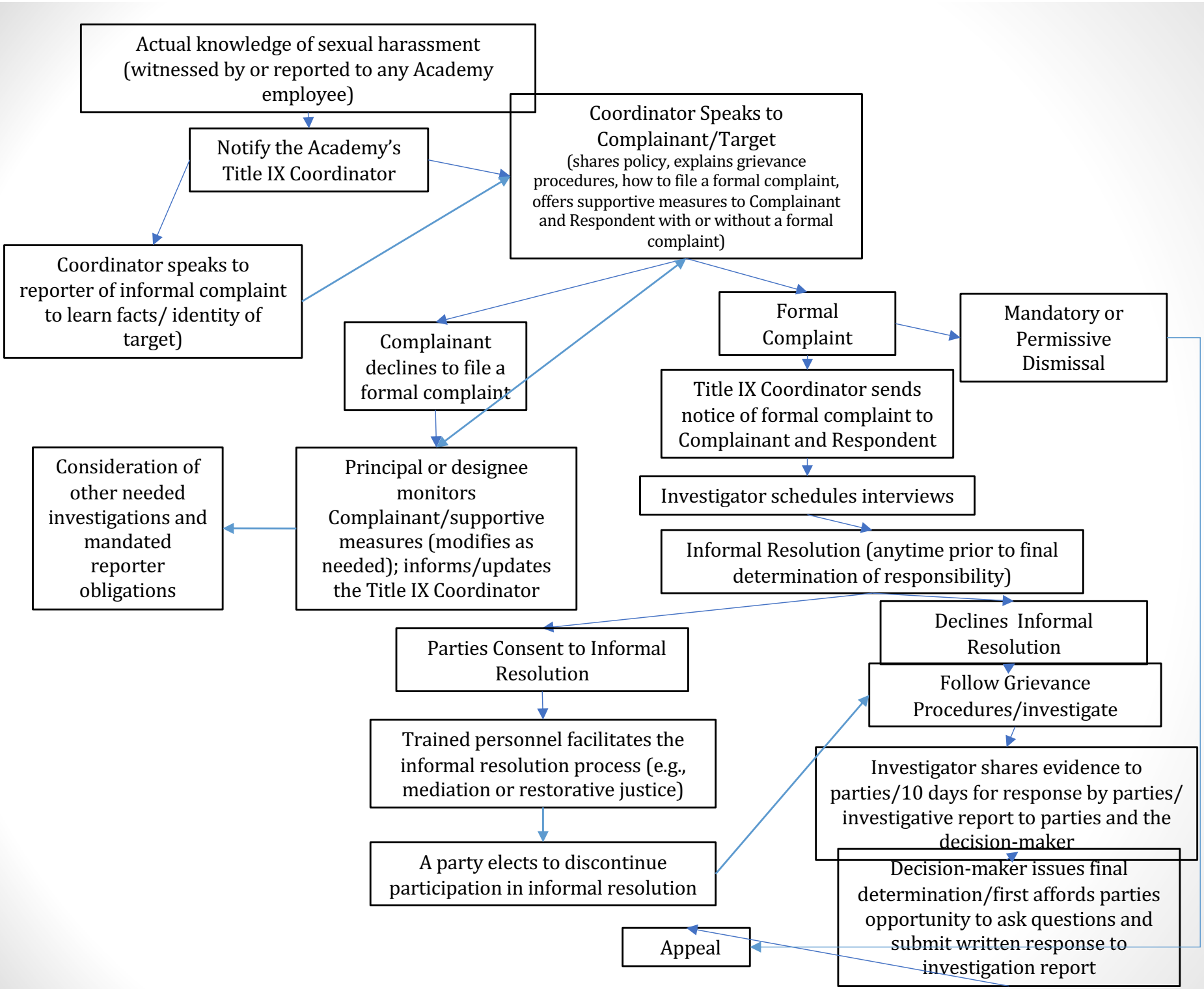
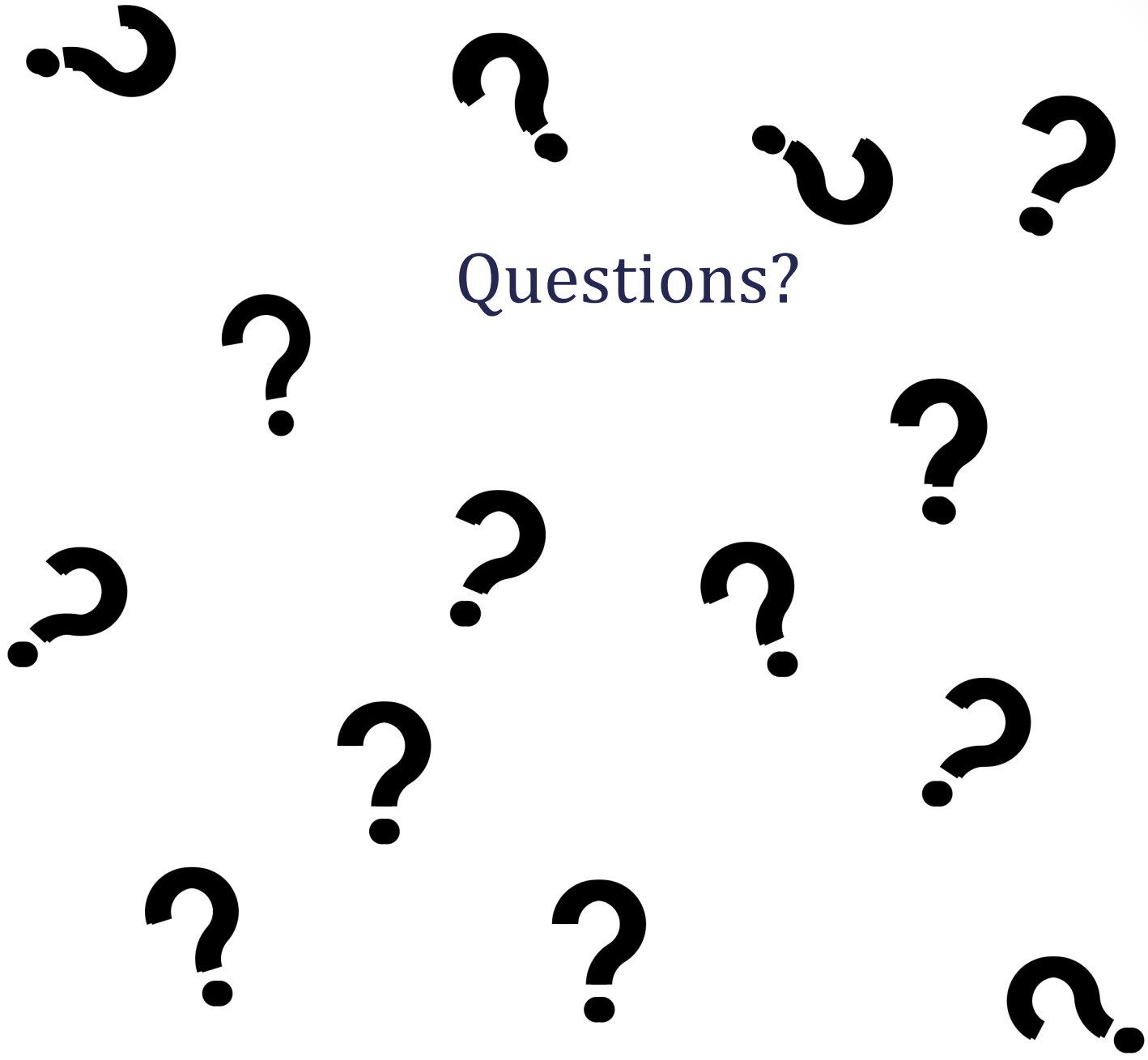
- Recipient must keep for seven (7) years records of each sexual harassment investigation, including, investigatory records, determinations regarding responsibility, disciplinary sanctions, remedies including supportive measures, appeals, and informal resolution and results.
- Identity of a person who files a complaint or reports sexual harassment must be protected to the extent permitted by law, and except as provided under the regulations, e.g., notice and evidence provided to the Respondent and representative.
- Recipient must keep for seven (7) years any materials used to train Title IX Coordinators, investigators, decision-makers, and any employee designated to facilitate an informal process. Training materials to be posted to the Academy's website.
- Must keep record of why Academy's response was not deliberately indifferent.

Best Practices

- Make sure this is a Title IX case before launching the process. Consider other avenues instead of or in addition to Title IX.
- Consider role assignment carefully at the outset.
- Follow all steps carefully using template documents.
- Ensure a thorough investigation with open-ended questions, use of corroborating evidence (e.g. videos), and witnesses.
- Make sure investigation report covers all relevant information.
- Keep roles discrete.
- Make sure written determination includes all required components and that any discipline is feasible considering other laws/collective bargaining agreements.

Pitfalls

- Not bringing the Title IX Coordinator into the situation right away.
  - Teachers/administrators should not be asking questions, investigating, etc. beyond addressing immediate needs.
- Assigning the wrong staff for the situation.
  - Does the Pupil Personnel Director know how to investigate/discipline staff, especially those in a union?
  - Guidance counselors of the students involved generally should not be used for any step other than informal resolution.
- Investigative report leaves too many questions so Decision-Maker lacks enough information to make a decision.
- Taking too long so that problems fester.
- Moving too fast and not being thorough (remember supportive measures allow for needs to be met while the process is pending).


Actual knowledge of sexual harassment (witnessed by or reported to any Academy employee)
Notify the Academy's Title IX Coordinator
Coordinator Speaks to Complainant/Target (shares policy, explains grievance procedures, how to file a formal complaint, offers supportive measures to Complainant and Respondent with or without a formal complaint)
Coordinator speaks to reporter of informal complaint to learn facts/ identity of target)
Complainant declines to file a formal complaint
Formal Complaint
Mandatory or Permissive Dismissal
Title IX Coordinator sends notice of formal complaint to Complainant and Respondent
Investigator schedules interviews
Informal Resolution (anytime prior to final determination of responsibility)
Consideration of other needed investigations and mandated reporter obligations
Principal or designee monitors Complainant/supportive measures (modifies as needed); informs/updates the Title IX Coordinator
Parties Consent to Informal Resolution
Declines Informal Resolution
Follow Grievance Procedures/investigate
Trained personnel facilitates the informal resolution process (e.g., mediation or restorative justice)
Investigator shares evidence to parties/10 days for response by parties/ investigative report to parties and the decision-maker
A party elects to discontinue participation in informal resolution
Decision-maker issues final determination/first affords parties opportunity to ask questions and submit written response to investigation report
Appeal

Questions?