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Title IX Training

Presented by Peacock Keller, LLP

December 4, 2021



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Compliance

- This training is in compliance with the requirements of 34 C.F.R. Section 106.45(b)(1)(iii) and (b)(8)(iii)(C)
 - “Title IX Coordinators, investigators, decision makers [including for appeals], and any person who facilitates an informal resolution process [must] receive training on:
 - the definition of sexual harassment
 - the scope of the recipient’s education program or activity
 - how to conduct an investigation and grievance process including hearings, appeals and informal resolution processes
 - how to serve impartially, including through avoiding prejudgment of the facts at issue, conflicts of interest, and bias
 - Issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence”

“Any materials used to train [the above parties] must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.”



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Policies

- In addition to the mandated Title IX statutory and regulatory requirements, this training references certain specific additional procedures under policies regarding Title IX and related issues that are, as of the training date, in the process of finalization, and are anticipated for Board approval after the start of 2022. Any Title IX issues that may arise before adoption of said policies and procedures will be addressed under Title IX's statutory and regulatory requirements, and District Policy No. 834, which addresses those statutory and regulatory requirements. Nothing prohibits the District from following any additional, sound procedures as recommended in the proposed policies and procedures addressed in this training, which are consistent with Title IX and to the extent not inconsistent with the District's current Policy No. 834. Timeframes in Policy No. 834 are to be followed while that Policy remains in place, subject to the District's right to extend timeframes in appropriate circumstances under Title IX. Nothing prohibits the District from following additional sound procedures recommended in this training to address other issues of unlawful harassment, discrimination and retaliation to the extent those procedures have not yet been codified in District Policy but which are consistent with Title VII and other applicable laws.



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Overall Statement

- Numerous slides herein recommend that consultation with the solicitor is particularly important. However, this should not be taken to mean that the solicitor should not be involved from the inception; we recommend that the solicitor be contacted as soon as a potential Title IX violation is reported. Consult with the Superintendent or his designee about the process to follow for consulting with solicitor.



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District's Obligation

- District must not act with deliberate indifference.
- Failure to appropriately handle a Title IX sexual harassment complaint can result in liability under a second cause of action, for discrimination.
- “Deliberate indifference” – response to sexual harassment that is clearly unreasonable in light of the **known circumstances**
 - Ex: Fail to follow procedures, including investigation and notices
 - Fail to identify conduct as sexual harassment
 - Fail to pursue complaint when appropriate, even if complainant does not wish to
 - Dismissal of complaint other than for reasons permitted or required by Title IX
 - Fail to offer and document supportive measures**

Avoiding deliberate indifference is the floor, not the ceiling.



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District's Obligation

- Actual knowledge of sexual harassment → must respond in a way that is not deliberately indifferent
- **Actual knowledge** means **notice** of sexual harassment or allegations of sexual harassment to a recipient's (district's) Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, **or to any employee of an elementary and secondary school.**

34 C.F.R. § 106.30

- **Reminder: All employees must report to the Title IX Coordinator, as soon as possible, potential sexual harassment that they witness, hear about (including from a third party), or of which they receive complaint.**
 - Any Title IX Coordinator (principal) can receive report; may be appropriate to forward to different "building."

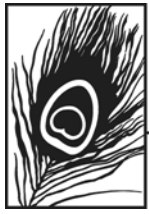


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District's Obligation

- The District is deemed to have actual notice when:
 - the Title IX Coordinator receives a report of possible Title IX violation
 - any employee witnesses a possible Title IX violation
 - any employee receives notice of a possible Title IX violation through any other means, including a report of a complainant or witness, a report of a third party, or any other means.



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District's Obligation

- Title IX and other unlawful harassment/discrimination/retaliation issues:
 - Encourage reporting by those not required to report
 - Ensure that all those who can and must report and anyone who could be a complainant have notice of policies prohibiting conduct, understanding of what may be a violation and ways to report
 - Relevant policies and procedures (including Title IX) must be made available to all who could be complainants and all who could/must report
 - Website and personal distribution; *notice to third parties.*



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District's Obligation

- Ensure students and employees receive training re: Title IX and other key policies
- Create culture that supports reporting, discourages violations
- Ensure appropriate supervision to avoid violations



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Key Personnel – Must Receive This Training

- Title IX Coordinators: Building Principals. If assignment changes, Policy and notifying materials must change
- Investigator: As designated by District case by case.
- Facilitator of Informal Resolution Process: As designated by District case by case.
- Decision Maker: Superintendent
- Person With Authority to Decide Appeal: Board of School Directors (per current policy)



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Bias and Conflict of Interest

- None of the aforementioned parties may have a conflict of interest or bias for or against:
 - complainants or respondents generally
 - an individual complainant or respondent



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Bias and Conflict of Interest

- Question of whether bias exists is based on a common sense evaluation of whether a reasonable person would believe bias is present.

- 85 FR 30248



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Bias and Conflict of Interest

- Cannot treat a party differently based on his or her sex or stereotypes about how men or women behave with respect to sexual violence.

85 FR 30238-40

Cannot ignore, blame or punish an individual based upon stereotypes about him or her

85 FR 30496

“The Department’s conception of bias is broad and includes bias against an individual’s sex, race, ethnicity, gender identity, disability or immigration status, financial ability, socioeconomic status or other characteristic.” 85 FR 30084 (***Prohibited bias in the Title IX process.***)



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Bias and Conflict of Interest

- In other words:
 - decide the matter only on its merits, not on any extraneous characteristics or biases
 - treat parties at all stages of the proceedings in accordance with law and policy/procedures, not based on any extraneous characteristics or biases



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Bias and Conflict of Interest

- The prior professional experience of an individual that a District would like to have in a Title IX role need not disqualify the individual from obtaining the requisite training to serve impartially.
- 85 FR 30252
- However...



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Bias and Conflict of Interest

- Whether a Title IX personnel has a bias and/or conflict of interest is determined on a **case-by-case basis**, and any combination of the experiences or affiliations *may* constitute bias and/or conflict of interest, depending on the circumstances



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Bias and Conflict of Interest

- **The District's grievance process must require an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence, and provide that credibility determinations may not be based on a person's status as a complainant, respondent or witness.**
- **It must not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding the privilege has waived the privilege.**



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Bias and Conflict of Interest

- The Department leaves the determination of conflict of interest in the discretion of the District.
- Bias and conflict of interest are decided on a case-by-case basis.
- Conflict of interest examples:
 - Decision maker/appeal decision maker's family member was witness
 - Investigator/decision maker/appeal decision maker accepted concert tickets from complainant or respondent
 - ***Financial/power dynamics unrelated to facts of case***



Bias and Conflict of Interest

- **KEY: All decisions must be made on basis of the *facts/relevant evidence, no extraneous factors (bias, conflicts, etc.)***
- ***Procedures could be prepared to include:***
 - a way for the parties and Title IX Team members to report bias and COI
 - a way for Title IX Team members to disclose potential bias and COIs
 - written guidelines for assessing bias and COI stating that a determination will be based on **objective** facts, and not on generalizations, stereotypes, suspicions, or conclusions
 - an objective standard for determinations like whether “based on objective facts, a reasonable person would believe that a COI exists”
 - statement that disagreement with an outcome is generally insufficient to demonstrate bias or a COI
 - analysis should be case-specific and should not be unreasonably assumed, such as based solely on the person’s research or advocacy background
- Source: Strassberger McKenna



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Bias and Conflict of Interest

- The Title IX Coordinator can serve as the investigator and/or informal resolution facilitator, but not the decision maker or appeal decision maker.
- The decision maker cannot serve in another role.
- The appeal decision maker cannot serve in another role.



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Bias and Conflict of Interest

- Cannot **pass judgment** on the allegations presented by either party or witnesses.
- Cannot **jump to any conclusions** without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties involved.
- Necessitates a broad prohibition on **sex stereotypes** -- decisions **must** be based on individualized facts, and not on stereotypical notions of what “men” and “women” do or not do

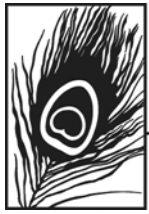


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Bias and Conflict of Interest

- **Title IX Coordinators and other personnel should not apply a “start by believing” approach** *Doing so would violate the requirement to “serve impartially.” 85 FR 30254. “The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment must not be prejudged and must be based on objective evaluation of the relevant evidence.” 85 FR 30254.*



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Bias and Conflict of Interest

- The Department **permits** institutions to apply **trauma-informed practices**, so long as doing so does not violate the requirement to serve impartiality and without bias
- It is possible, “albeit challenging,” to apply trauma-informed practices in an impartial, non-biased manner
- Any trauma-informed techniques must be applied equally to all genders 85 FR 30256, 30323



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Bias and Conflict of Interest

- Any and all stereotypes must be checked at the Title IX door.
- Leave behind any prior experiences, whether that be from past Title IX proceedings or personal experiences.
- Approach the allegations (of both parties) with neutrality at the outset.

- Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of the story.

Document *how* conclusions were reached. (Including written determination and appeal, **as well as** decisions on what evidence is relevant or directly related to allegations, what attempts to investigate were made and why any attempts failed, why certain allegations may not be found to be violations, why certain individuals' information provided was deemed not credible. Some will be documented in investigative report/written determination/appeal decision. Others should be documented at least in internal notes.)



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Definition of Title IX Sexual Harassment

- "Sexual harassment" is defined as **conduct on the basis of sex** that satisfies **one or more** of the following:
 - (1) An employee of the School District conditioning the provision of an aid, benefit or service of the School District on an individual's participation in unwelcome sexual conduct; OR
 - (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the School District's education program or activity; OR
 - (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v) of the Clery Act, "dating violence" as defined in 34 U.S.C. 12291(a)(10) of the Violence Against Women Act (VAWA), or stalking as defined in 34 U.S.C. 12991(a)(30) of the VAWA.



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Definition of Title IX Sexual Harassment

- Review policies for statutory definitions of conduct falling within sexual harassment
- Any question on definition of sexual harassment, or on any other step of the procedures: consult solicitor
- For purposes of these materials/policies/procedures, “Title IX Sexual Harassment” includes retaliation based on Title IX protected activity.

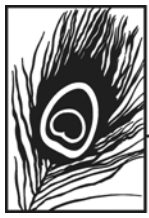


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Definition of Title IX Sexual Harassment

- Must have occurred:
 - against a person in the United States
 - in/during an education program or activity of the District
 - Includes actions against non-students/non-employees



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Scope of the District's Education Program or Activity

- “Education program or activity” includes locations, events, or circumstances over which the District exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs.

Possibilities:

- programs and activities operated by or controlled by the School District.
- during the work or school day
- field trips
- athletic/extracurricular events
- *Fact specific analysis; consult with solicitor*



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Scope of the District's Education Program or Activity

- **OCR guidance has deemed the following to be within the scope of a district's program or activity:**

(1) buildings or locations that are part of the school's operations, including remote learning platforms (behaviors over computer and internet networks, digital platforms, or computer hardware or software owned or used in the school's operations);

(2) off-campus settings where the school exercised substantial control over the respondent and context in which the alleged harassment occurred;

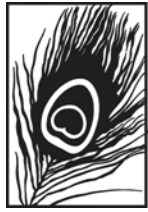


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Review

- Overview of presentation delivered at In-Service, August 24, 2021



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Consent

- Not defined by Title IX; District can choose a definition that “best serves the unique needs, values, and environment of the [school’s] own educational community.”
- Definition should be included in policy.



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How to Conduct An Investigation

- **First step:**
- **Any employee other than Title IX Coordinator witnesses or receives notice in any form of** conduct that could constitute Title IX sexual harassment → report to Title IX Coordinator immediately



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How to Conduct An Investigation

- Building principal receives a report of discrimination, sexual harassment, bullying, hazing, dating violence, or retaliation
- Report may be made to principal under “principal’s hat” or “Title IX Coordinator’s hat”
- In either case, principal must make an initial assessment of whether allegations *may* constitute sexual harassment/implicate Title IX and/or other policies



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How to Conduct An Investigation

- Report may be made verbally or on the on the Report Form (Attachment 3 to Unlawful Harassment/Discrimination/Retaliation/Title IX Sexual Harassment and Retaliation Policies)
 - **For conduct affecting students, this form is also used to report hazing, bullying and dating violence.**
- Principal can offer, but not require, that the reporter use the Report Form.
- If reporter does not use form, principal must fill out both the reporter's and the "Official use only" sections of the Report Form



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How to Conduct An Investigation

- Report Form for conduct against staff includes reports of Title IX sexual harassment and retaliation and all other forms of unlawful discrimination, harassment and retaliation applicable to employees.
- Report Form for conduct against students includes reports of all of the above, plus bullying, hazing, and dating violence (assuming a dating violence policy is adopted.)
- Report Form for conduct against third parties includes reports of Title IX sexual harassment and retaliation and any other prohibited discrimination/harassment/retaliation applicable to third parties.

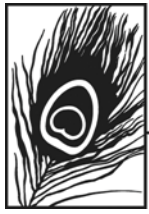


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How to Conduct An Investigation

- Title IX Coordinator Receives Report:
 - Conduct initial assessment
 - Review Report (“Report” is used here to mean either verbal, or the Report Form.) Use Report Form to gather/document information from an oral report if necessary.
 - Promptly contact the complainant (alleged victim)
 - Use the “For Official Use Only” section to gather additional information from the complainant and/or other parties as necessary to conduct an initial investigation.
 - **If Title IX implicated (even a possibility of a Title IX violation), when receive report or at any point thereafter in initial assessment, offer supportive measures to the complainant.**

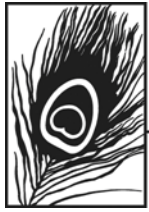


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How to Conduct An Investigation

- The key is not missing *implication* of Title IX/*possible* Title IX violation, because this triggers offering supporting measures to complainant. Implication = easy standard to meet.
- When in doubt (unless very clear from outset that Title IX is *not* at issue), deem Title IX to be implicated and offer supportive measures.
- This does not necessarily mean you will ultimately decide to offer or file a formal complaint....but, when in doubt, offer it.



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How to Conduct An Investigation

- Three key decision points:
 - Is Title IX implicated?
 - After initial investigation -> offer complainant option of filing Title IX Complaint?
 - Decide to file Title IX Complaint if complainant does not wish to do so?
- Consideration of when, under Title IX, a district **may or must** dismiss a formal complaint, and policy guidance/best practices on when to pursue a formal complaint even if complainant does not want to, can be helpful even in early stages of analysis.



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How to Conduct An Investigation

- Title IX's initial investigation requirements:
 - Offer supportive measures if Title IX implicated
 - Offer complainant the opportunity to file formal Title IX complaint if appropriate
 - Explain continued availability of supportive measures regardless of whether file formal complaint
 - Explain procedure for filing formal complaint
 - *You may have sufficient information upon initial contact to complainant to decide to offer formal Title IX complaint and related steps, above. May need some additional **limited** investigation, but, this is not a full/formal investigation; just enough to decide if offering formal complaint is appropriate. When in doubt, offer formal complaint.*



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How to Conduct An Investigation

- **Document** all supportive measures offered, complainant's response to offer, what is actually implemented, what is adjusted over time.



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How To Conduct An Investigation

Initial Assessment: Other Practical Steps/Policy and Procedure Requirements

- The Title IX Coordinator shall ***initially assess*** whether the reported conduct:
 1. Meets the definition of Title IX sexual harassment. *(Again, indicate Title IX is implicated unless certain from the outset it does not. Initial investigation may develop facts as to whether this definition is met; may make sense to try to develop now, but do not need to answer this question definitively, and in some cases, may be better left to formal investigation. If additional, formal investigation needed to make that determination, offer formal complaint.)*
 2. Occurred in a District program or activity under the control of the District and against a person in the United States. *(Whether under the control of the District will be fact specific. (Again, indicate Title IX is implicated unless certain from the outset it does not. Initial investigation may develop facts as to whether this definition is met; may make sense to try to develop now, but do not need to answer this question definitively, and in some cases, may be better left to formal investigation. If additional, formal investigation needed to make that determination, offer formal complaint.)*
 3. Involves other Board policies, the Code of Student Conduct, or similar Code of Conduct for employees.
 4. Indicates, based on an individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of an individual. *(This analysis will be documented – Report Form – For Official Use Only.)*
 5. Involves a student identified as a student with a disability under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act.



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How to Conduct An Investigation

Key: If subject matter of report covers Title IX subject matter, either as initially reported or *at any point* after you receive report or conduct initial investigation, even if don't ultimately conclude it's a Title IX issue for further addressing under formal grievance procedures (which is not the same as determining whether or not a violation occurred):

- check off all boxes on Report Form including "For Official Use Only" form indicating that Title IX is the nature of the complaint/policy that is implicated
- check off any other policy that is implicated *at any point* after you receive report or conduct initial investigation (may have been violated, nature of report; no determination of violation necessarily needs to be made yet (can be done under procedures of separate policy or will be done under Title IX formal complaint investigation if part of same course of conduct)
- *offer supportive measures to complainant if Title IX implicated*
- begin/continue gathering info to determine whether to proceed to Title IX formal complaint procedure (first steps of which would be to offer complainant option to file formal complaint and explain procedures therefor, explain that supportive measures will continue to be available regardless of whether formal complaint filed, and decide whether to file formal complaint if against complainant's wishes)
- *involve complainant's parents in all discussions, even if age 18 or older*



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How to Conduct An Investigation

- Caveat:
 - If the complainant/reporter, school staff or others with professional knowledge relating to the complainant's health and well-being indicate that notifying the parents/guardians could cause serious harm to the health or well-being of the complainant or other person(s), the Title IX Coordinator will determine, in consultation with such individuals and upon advice of legal counsel, whether to withhold or delay notification of the report to the complainant's parents/guardians.



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How to Conduct An Investigation

After initial information gathered, if allegations would or could be sexual harassment if proven, or if more investigation could indicate sexual harassment occurred, proceed to formal complaint steps.

Note: Initial information may also include physical evidence; you should review that which is reasonably available at the initial assessment stage.

Caveat: These calls may be close, and will turn on facts of specific cases. As facts develop, additional/different policies may be implicated. Reaching out to solicitor from inception is strongly recommended.



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How to Conduct An Investigation

- The “For Official Use Only” form calls for a Recommended Course of Action. This can include proceeding with a formal Title IX Complaint, deciding not to do so, and/or proceeding under another policy.
- This is point at which Title IX Coordinator decides whether to offer formal complaint.
- Determination of whether a Title IX violation actually occurred must not be made at this point.
- **Challenge: Need to determine based on limited investigation whether there is enough to merit additional, formal investigation.**



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How to Conduct an Investigation

- Offer complainant (and family if complainant is a student) continued supportive measures *and opportunity to file formal complaint*.
- Decide whether to pursue formal complaint even if complainant elects not to (see later slides)
- The Title IX Coordinator shall also determine what supportive measures may be offered to the respondent
- Must not restrict rights protected under the U.S. Constitution, including the First, Fifth and Fourteenth Amendments (consult with solicitor if necessary)



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How to Conduct An Investigation

- **Recommended Course of Action:**
 - **If initial investigation indicates that another policy *may have* been violated *in addition to Title IX* and related to same course of conduct:**
 - **Check off that policy as well under Recommended Course of Action. Investigate same along with Title IX investigation and include same in Investigative Report/Written Determination/discipline AND take any other steps required under relevant other policy(ies), including investigation, documentation and/or discipline. Title IX formal complaint investigation may satisfy investigation requirements.**



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How to Conduct An Investigation

- **Recommended Course of Action:**
 - **If initial investigation indicates that another policy *has* been violated in addition to Title IX related to same course of conduct:**
 - **Check off that policy as well under Recommended Course of Action. Include same in Investigative Report/Written Determination/Discipline AND take any other steps required under relevant other policy(ies), including documentation and/or discipline. No discipline until Title IX formal grievance process complete if same course of conduct/tied up in Title IX violation.**



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How to Conduct An Investigation

- If initial investigation determines that **not Title IX, but another policy, has been or may have been violated**, indicate that policy under Recommended Course of action. Initial investigation conducted up to this point may be sufficient to satisfy some of all investigation requirements of that policy and make determination. Follow any additional investigatory, documentation and/or discipline steps of the other policy(ies).



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How To Conduct An Investigation

- Results of Hazing Policy investigation must be reduced to a report and shared with complainant, accused, and others directly involved, as appropriate.



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How To Conduct An Investigation

- Bullying Policy Fact Finding Form: may be largely subsumed within Title IX initial or formal investigation. May want to complete all Bullying Policy documentation, even if duplicative, to be thorough.



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How To Conduct An Investigation

- The aforementioned advisories on following steps in other policies (possible violations of which are part of same course of conduct as possible Title IX violations) apply regardless of whether Title IX formal complaint procedures followed or if Title IX process ends after initial assessment.



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How To Conduct An Investigation

- Written Determination re: Title IX violation can and should cite violations found of other policies, as well.
- Letters regarding discipline/expulsion adjudication/statement of charges to employee must reference all policies violated.



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How To Conduct An Investigation

- As you can see, issues can be intertwined. If any allegations related to a certain course of conduct during the Title IX formal investigation implicate Title IX, best to investigate all as part of Title IX investigation and not discipline unless/until it is complete, or unless otherwise allowed under the Title IX Informal Resolution Process.
- Conduct completely separate from Title IX can be disciplined under other policies even if did not go through formal grievance process, but, see caution above...
- **Parsing these out can be complicated with potential pitfalls...consultation with solicitor is recommended!**



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How to Conduct An Investigation

- **Note:** Appropriate supports (ex., SAP team referral) should be provided even when Title IX supportive measures are not implicated, when it is the right course under other policies/procedures.



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How to Conduct An Investigation

- **After determination is made to *offer* formal complaint (enough initial evidence of possible Title IX violation):**
- **Complainant may not want to proceed with a formal complaint.**
- **District *may* decide to move forward with formal complaint (and in some cases, should do so)**
- **We will come back to this!**



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How to Conduct An Investigation

- **Question 24: If a complainant has not filed a formal complaint and is not participating in or attempting to participate in the school's education program or activity, *may* the school's Title IX Coordinator file a formal complaint?**
- **Answer 24: Yes. A Title IX Coordinator may file a formal complaint even if the complainant is not associated with the school in any way.**
- **In some cases, a school may be in violation of Title IX if the Title IX Coordinator does not do so. For example, the preamble explains that if a school "has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority," OCR may find the school to be deliberately indifferent (i.e., to have acted in a clearly unreasonable way) if the school's Title IX Coordinator does not sign a formal complaint, "even if the complainant . . . does not wish to file a formal complaint or participate in a grievance process." Put simply, there are circumstances when a Title IX Coordinator may need to sign a formal complaint that obligates the school to initiate an investigation regardless of the complainant's relationship with the school or interest in participating in the Title IX grievance process. **This is because the school has a Title IX obligation to provide all students, not just the complainant, with an educational environment that does not discriminate based on sex.****



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How to Conduct An Investigation

- **Question 29: May a school stop offering its Title IX grievance process due to the COVID-19 pandemic?**
- **Answer 29: No.** A school must follow its policies for receiving and responding to reports of sexual harassment and may not adopt a policy of putting investigations or proceedings on hold due to COVID-19. For additional discussion of schools' ongoing Title IX obligations during the COVID-19 pandemic, please see OCR's [Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment](#).



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How to Conduct An Investigation

- **Question 30: How should a school proceed in the Title IX sexual harassment grievance process when a party or a witness is temporarily unable to participate due to a disability?** Answer 30: A school has “discretion to apply limited extensions of time frames during the grievance process for good cause, which may include, for example, a temporary postponement of a hearing to accommodate a disability.”
- However, when deciding whether to grant a delay or extension, a school must balance the interests of promptness, fairness to the parties, and accuracy of adjudications.
- The school also must promptly notify all parties of the reason for the delay and the estimated length of the delay, in addition to important updates about the investigation.
- Additionally, a school must not delay investigations or hearings solely because in-person interviews or hearings are not feasible. Instead, a school must use technology, as appropriate, to conduct activities remotely, in a timely and equitable manner, and consistent with the applicable law. For additional information, please see [34 C.F.R. § 106.45\(b\)\(1\)\(v\)](#).



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How to Conduct An Investigation

- Notice and opportunity to respond to additional allegations must be given **throughout formal grievance process.** (Follow Title IX notice procedures and those of any other Policy/procedure that may apply.)
- Once formal grievance process is complete, in many cases, this investigation process will be sufficient to have fully investigated possible violations of other policies as well. **Make sure anything additional, under any other applicable Policy or procedure, that is needed for investigation, is followed.**



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How to Conduct An Investigation

- **Important:** All reporting and documentation as required under Educator Misconduct Act, Act 168 ("Pass the Trash"), Child Protective Services Act, et., must also be completed.
- Employee passing a potential Title IX violation on to Title IX Coordinator does not alleviate employee from responsibility of making a Child Protective Services Report if applicable!



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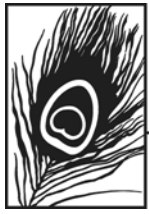
How to Conduct An Investigation

- **A particular word about discrimination and other unlawful harassment/other sexual harassment:**
- If conduct is identified prior to the formal complaint process as potential unlawful discrimination or other unlawful harassment/sexual harassment or retaliation (but clearly not Title IX sexual harassment, which includes Title IX retaliation): follow discrimination procedures (similar to Title IX but generally less complex.)
- If conduct is identified by investigation **during** the formal complaint process as not meeting the definition of Title IX sexual harassment:
 - dismiss the complaint
 - procedures related to other unlawful harassment/discrimination/retaliation must be followed, to the extent not already subsumed by Title IX procedures followed to date.



How to Conduct An Investigation

- Remember, it is possible that sexual misconduct may not constitute Title IX sexual harassment. It still must be addressed under any Policy/Code of Conduct of which it is a violation.
 - → Code of Conduct (student or employee)
 - → Possible law enforcement referral
 - → Possible Bullying and/or Hazing Policy violation
 - → Possible Dating Violence Policy violation
 - → Possible Discrimination Policy violation
- Other types of unlawful harassment, discrimination and retaliation, **to be addressed under unlawful discrimination/harassment/retaliation policy and procedures:**
 - Title VII: Discrimination and harassment **because of** race, religion, national origin, and sex (including gender identity and sexual orientation) in the workplace (against employees)(however, if it is sexual harassment, still falls under Title IX procedures if it meets Title IX definition)
 - ADA/Section 504 of the Rehabilitation Act: Disability-based discrimination and harassment (students, employees, third parties in some circumstances)
 - Pennsylvania Human Relations Act: Race, color, religion, ancestry, age (40 and above), sex, national origin, non-job related disability, known association with a disabled individual, GED instead of high school diploma (against employees) however, if it is sexual harassment, still falls under Title IX procedures if it meets Title IX definition)
 - Title IX discrimination based on sex, including gender identity and sexual orientation (against students)(but only harassment under the Title IX definition is covered by Title IX procedures)
 - Age Discrimination in Employment Act: (against employees 40 and over)
 - ***Sexual harassment that does not meet Title IX definition may still meet Title VII! Severe OR pervasive standard. Allegations cannot be dismissed simply because don't meet Title IX definition.***



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Gender Identity and Sexual Orientation

- [Executive Order 13988](#), dated January 20, 2021, on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.
- Thus, gender identity and sexual orientation are now protected characteristics. Discrimination or sexual harassment and related retaliation on either or both of these bases is prohibited. Applies to students, employees and third parties.



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How to Conduct An Investigation

- **As part of initial assessment (prior to deciding whether to move to formal complaint):**

If respondent is a special education student/student with a 504 plan, *or* “*thought to be*”:

- Contact Coordinator of Special Education
- Be mindful of any adverse effect of supportive measures on complainant’s or respondent’s right to FAPE, consult with special education, consider all interests and decide best course of action.



How to Conduct An Investigation

- **As part of initial assessment (prior to deciding whether to move to formal complaint):**
- **All students and employees:** The District may remove a respondent from its education program or activity on an emergency basis, provided that the District undertakes 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.
- This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.



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How to Conduct An Investigation

- Still need IEP team permission for removal constituting a change of placement:
 - More than 10 consecutive or 15 cumulative school days for same underlying/continued behavior/pattern
 - More than 1 school day for a student identified as intellectually disabled
 - **Emergency removal analysis: consult with solicitor**



How to Conduct An Investigation

- Remember 45 day unilateral interim placement for special education students, for specific offenses
- ***Special circumstances.*** School personnel **may** remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child -
 - (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA (the District);
 - (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or
 - (3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA (the District).
- 34 C.F.R. Section 530



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How to Conduct An Investigation

- *For purposes of unilateral changes in placement, a knife with a blade of less than 2 and ½ inches is not considered to be a weapon. "Weapon" for this purpose is defined as a device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury*
- **18 U.S.C. Sec. 930(g)(2)**
- *For purposes of unilateral changes in placement, "serious bodily injury" means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ or mental faculty. **18 U.S.C. Sec. 1365(h)(3)***



How to Conduct An Investigation

- ***Notification.*** On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in [§ 300.504](#).
- 34 C.F.R. Section 930(h)



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How to Conduct An Investigation

- **As part of initial assessment (prior to deciding whether to move to formal complaint), or if a threat becomes apparent at any time thereafter:**
- If the district has determined, based on an individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of any student or other individual due to the allegations of Title IX sexual harassment, the respondent (student) **may** be removed from the district's education program or activity or moved to an alternative setting, consistent with all rights under federal and state laws and regulations, and Board policy, including but not limited to the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.
- If the respondent is an identified student with a disability, or thought to be disabled, the Title IX Coordinator shall contact the Coordinator of Special Education to coordinate the required actions in accordance with Board policy.
- The respondent (**special or regular education**) shall be provided with notice and provided an opportunity for due process, in accordance with law, regulations and Board policy. **Consult with solicitor.**



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How to Conduct an Investigation

- Relevant personnel with knowledge of respondent (student or employee) and situation should be involved in emergency removal analysis (ex., special education teacher, school counselor, social worker, classroom teacher, etc.)



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How to Conduct An Investigation

- **As part of initial assessment (prior to deciding whether to move to formal complaint), or if a threat becomes apparent at any time thereafter:**
- When an employee, based on an individualized safety and risk analysis, poses an immediate threat to the health or safety of any student or other individual, the employee **may** be removed on an emergency basis.
- An accused nonstudent district employee must be placed on ***paid*** administrative leave during the pendency of the grievance process for formal complaints, consistent with all rights under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, and in accordance with state law and regulations, Board policy and an applicable collective bargaining agreement or individual contract. **Consult with solicitor.**



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How to Conduct An Investigation

- Law enforcement may need to be contacted, based on Safe Schools reporting requirements or other reasons of safety/due diligence. Investigator shall inform the Title IX Coordinator, who shall contact law enforcement, unless the matter is so urgent that the investigator should make the contact first.
- Need not wait until/unless formal complaint investigation has been concluded to contact law enforcement
- Possibly wait until law enforcement has concluded its investigation to make written determination by decision maker
- Will law enforcement's investigation replace the need for District to investigate?
 - No. District is still required to give certain notices and substantive rights to parties, such as right to review and respond to evidence. District must still issue investigative report and written determination.
 - May combine efforts with law enforcement. Stay in contact with law enforcement and solicitor.



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How to Conduct An Investigation

- Obligation to conduct the investigation under the **formal grievance process and follow all steps thereof, including issuance of the written report**, will not be negated by the fact that a criminal or child protective services investigation of the allegations is pending or has been concluded. The investigator should coordinate with any other ongoing investigations of the allegations, **including *potentially* agreeing to request for a delay in fulfilling the district's investigative responsibilities** during the fact-finding portion of a criminal or child protective services investigation. Such delays shall not extend beyond the time necessary to prevent interference with or disruption of the criminal or child protective services investigation and the reason for such delay shall be documented by the investigator.
- **Continue to provide supportive measures throughout any such delays.**



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How to Conduct An Investigation

- **Upon conclusion of initial assessment and offering of formal complaint:**
- If complainant/family wants to file formal complaint:
 - He/she/they sign report; report is filed; formal grievance process proceeds.



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How to Conduct An Investigation

- If complainant/family does not want to file formal complaint:
 - District is authorized to, and in many circumstances should still do so, if:
 - actions limited to supportive measures are not a sufficient response to alleged behavior
 - a formal complaint process is necessary to investigate and address the situation adequately. **For example, if disciplinary action would be warranted if allegations are true, if the respondent is an employee, or if further investigation is needed to assess the extent of the behavior and impact on others, it may be clearly unreasonable not to initiate the formal complaint process.**
 - **If the District “has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority.”**
 - **Only the Title IX Coordinator is authorized to initiate the formal complaint process despite a complainant’s wishes, but the Title IX Coordinator may consult with the solicitor and other District officials in making this decision.**



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How to Conduct An Investigation

- In addition to implementing the Title IX sexual harassment procedures, **the Title IX Coordinator shall ensure** that reported conduct which meets the definition of other laws, regulations or Board policies, is also appropriately addressed in accordance with the applicable laws, regulations or Board policies, including but not limited to, incidents under the Safe Schools Act, reports of educator misconduct, threats, or reports of suspected child abuse.



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How to Conduct An Investigation

- Throughout the Title IX sexual harassment procedures, the District shall make reasonable accommodations for identified physical and intellectual impairments that constitute disabilities for any party, and address barriers being experienced by disadvantaged students such as English learners and homeless students, consistent with the requirements of federal and state laws and regulations and Board policy.
- See prior slide re: disabilities and delays.



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How to Conduct An Investigation

- Confidentiality regarding the supportive measures offered and the identity of the following individuals shall be maintained, except as may be permitted by law or regulations relating to the conduct of any investigation:
 - person making the report
 - complainant
 - respondent
 - witnesses
- All supportive measures provided by the District shall remain confidential, to the extent that maintaining such confidentiality would not impair the ability of the District to provide the supportive measures.



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Investigation: Formal Complaint

Reasonably prompt timeframes shall be established for the conclusion of the grievance process for formal complaints, including timeframes for the informal resolution process and timeframes for filing and resolving appeals.

The established timeframes included in these procedures may be adjusted to allow for a temporary delay or a limited extension of time frames for good cause. Written notice of the delay or extension and the reason for such action shall be provided to the complainant and the respondent, and documented with the records of the complaint. Good cause may include, but is not limited to, considerations such as:

1. The absence of a party, a party's advisor or a witness.
2. Concurrent law enforcement activity.
3. Need for language assistance or accommodation of disabilities.



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Investigation: Formal Complaint

- ***If delayed, ensure that supportive measures continue to be provided and documented.***



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Investigation: Formal Complaint

- Formal complaint *must* be dismissed at any time during the investigation or written determination if:
- it is determined that none of the allegations, if true, would meet the definition and parameters of Title IX sexual harassment within the District's jurisdiction; or
- the matter merits review and possible action under the Code of Student Conduct and other Board policies or procedures/policies related to discrimination complaints or other issues **(and review/action under Title IX is not merited.)**

Written notice shall be promptly and simultaneously issued to the parties of any allegations that are dismissed in compliance with Title IX. Written notification shall state whether the allegations will continue to be addressed pursuant to the Code of Student/Employee Conduct, or other Board policies and/or procedures.

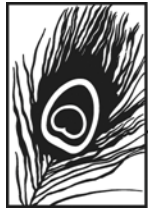


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Investigation: Formal Complaint

- Formal complaint *may* be dismissed at any time during the investigation or written determination if:
 1. A complainant provides written notification of withdrawal of any allegations or of the formal complaint. *But see rules on when District **should** proceed, even against complainant's wishes.*
 2. The respondent is no longer enrolled or employed by the District in a District program or activity.
 3. Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint or allegations. *If there is any reasonably possible way to gather evidence, pursue it.*



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Investigation: Formal Complaint

- Written notification is required if complaint or any allegations thereof dismissed, regardless of whether for mandatory or permissive reasons.
- A dismissal may be appealed via the appeal procedures.



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Investigation: Formal Complaint

- The District may consolidate formal complaints against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.



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Investigation: Formal Complaint

- Respondent must be presumed not responsible until conclusion of formal complaint investigation.
- *No discipline can be applied* for allegations implicating a Title IX violation unless and until the formal complaint investigation is concluded. (See some exceptions.)
- Respondent can be disciplined for non-Title IX violations prior to or without formal complaint process being followed/concluded, but if conduct is closely tied to/arises from same set of facts as potential Title IX violation, better not to discipline unless/until formal complaint investigation concluded. *Consult with solicitor.*



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Investigation: Formal Complaint

- After a formal complaint is filed, the Title IX Coordinator must provide a notice to the complainant and respondent, and their families (if students), advising of:
 1. Notice of the District's grievance process for formal complaints and any informal resolution process that may be available.
Include a copy of Policy and Procedures.
 2. Notice of the allegations potentially constituting Title IX sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:
 - a. The identity of the parties involved, if known.
 - b. The conduct allegedly constituting sexual harassment.
 - c. The date and location of the alleged incident(s), if known.



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Investigation: Formal Complaint

3. A statement that a written determination regarding responsibility shall be made at the conclusion of the grievance process for formal complaints and, until that time, the respondent is presumed not responsible for the alleged conduct.
4. Notice that parties may have an advisor of their choice, who may be, but is not required to be, an attorney. The advisor and/or the parties/their families may inspect and review evidence.
5. Notice that Board policy and the District's Code of Student Conduct/Employee Conduct prohibits knowingly making false statements or knowingly submitting false information to school officials during the grievance process.
6. Notice to all known parties of any additional allegations that the District decides to investigate during the course of the investigation. (Must provide updated written notice as needed.)



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Informal Resolution Process

- **The informal resolution process cannot be offered or used to facilitate a resolution for any formal complaint where the allegations state that an employee sexually harassed a student.**
- At any time after a formal complaint has been filed, but prior to reaching a determination of responsibility, **if the Title IX Coordinator believes the circumstances are appropriate, the Title IX Coordinator may offer** the parties the opportunity to participate in an informal resolution process, which does not involve a full investigation and adjudication of the Title IX sexual harassment complaint.
- The District may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal Title IX sexual harassment complaints. Similarly, the District may not require the parties to participate in an informal resolution process.
- Informal resolutions can take many forms, depending on the particular case. Examples include, but are not limited to, mediation, facilitated discussions between the parties, restorative practices, acknowledgment of responsibility by a respondent, apologies, a requirement to engage in specific services, or supportive measures.



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Informal Resolution Process

- When offering an informal resolution process, the Title IX Coordinator shall:
 1. Provide the parties a written notice disclosing the following:
 - a. The allegations.
 - b. The requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations; provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process for formal complaints.
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.



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Informal Resolution Process

2. Obtain the parties' voluntary, written consent to the informal resolution process. As part of the consent process, all parties shall be informed of the rights being waived by agreeing to the informal resolution process, and shall acknowledge such agreement in writing.

- The informal resolution process shall be conducted within twenty (20) school days of the parties' signed agreement for the informal resolution process. **Policy deadline.**
- The parties must mutually agree to the resolution.
- If the matter is resolved to the satisfaction of the parties, the District employee facilitating the informal resolution process shall document the nature of the complaint and the proposed resolution of the matter, have both parties sign the documentation and receive a copy, and forward it to the Title IX Coordinator.



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Informal Resolution Process

- Within twenty (20) school days after the complaint is resolved in this manner, the Title IX Coordinator shall contact the complainant to determine if the resolution was effective and to monitor the agreed upon remedies. **Policy requirement.**
- **The Title IX Coordinator shall document the informal resolution process, responses from all parties, and an explanation of why the District's response was not deliberately indifferent to the reported complaint of sexual harassment.**
- **If Step 2 Informal Resolution Process results in the final resolution of the complaint, an investigation does not proceed.**



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Informal Resolution Process

- IR may result in discipline, if the parties had notice of this possibility and agree to the same
- Even if parties agree to an IR resolution, the Title IX Coordinator can move forward with a formal complaint, if the parties had notice of this An IR facilitator can be a witness in a subsequent investigation or hearing, if the parties had notice of this
- Consult with solicitor on all of the above!



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Investigation: Formal Complaint

- **Designation of Investigator:** The Title IX Coordinator shall assess whether the investigation should be conducted by the building principal, another district employee, the Title IX Coordinator or an attorney and shall promptly assign the investigation to that individual.



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Investigation: Formal Complaint

- The designated investigator, if other than the Title IX Coordinator, shall work with the Title IX Coordinator to assess the scope of the investigation, who needs to be interviewed and what records or evidence may be relevant to the investigation. The investigation stage shall be concluded within twenty (20) school days. ***Policy deadline.** Can be extended for certain reasons; see Procedures.
- When investigating a formal complaint ***and throughout the grievance process***, the investigator shall do all of the following:



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Investigation: Formal Complaint

- **Note:** Affording these procedural rights to the parties “throughout the grievance process” means that the District may have to apply flexibility (ex., if a party presents evidence or a witness after the deadline, which in some cases may even be on appeal)



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Investigation: Formal Complaint

- The Investigator must gather **all available evidence sufficient to reach a determination regarding responsibility.**
- The investigator should:
 - undertake a thorough search,
 - for relevant facts and evidence,
 - while operating under the constraints of completing the investigation under designated, reasonably prompt timeframes,
 - and without powers of subpoena.
- 85 FR 30292



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Investigation: Formal Complaint

- The investigator shall bear the burden of proof and gather evidence and conduct interviews sufficient to reach a written determination.
- During the process of gathering evidence, unless the District obtains the voluntary, written consent of the party, or the party's parent/guardian when legally required, the District cannot access, consider, disclose or otherwise use a party's records which are protected by legal privilege, such as those records made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with providing treatment to the party.



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Investigation: Formal Complaint

- The investigator must:
- Objectively evaluate all available evidence, including inculpatory and exculpatory evidence.
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.



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Investigation: Formal Complaint

- Provide the parties with the same opportunities to have others present during any interview or other meeting or grievance proceeding, including an advisor of the party's choice. The District may establish restrictions, **applicable to both parties**, regarding the extent to which the advisor may participate.



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Investigation: Formal Complaint

Provide written notice to any party or witness whose participation is invited or expected during the investigation process (interviews or other meetings) with the following information, in sufficient time for the party to prepare to participate:

- a. Date.
- b. Time.
- c. Location.
- d. Participants.
- e. Purpose of all hearings, investigative interviews or other meetings.



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Investigation: Formal Complaint

- If at any point the investigation expands to include additional allegations that were not included in the initial notice provided upon initiation of the grievance process for formal complaints, the investigator shall alert the Title IX Coordinator.
- The Title IX Coordinator shall provide written notice of the new allegations to the known parties.



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Investigative Report

- The investigator shall draft an investigative report that fairly summarizes relevant evidence and shall provide the investigative report to all parties and to the designated decision-maker.



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Investigative Report

- Prior to the completion of the investigative report, the investigator shall:
 1. Send to each party and the party's advisor, if any, the following evidence subject to inspection and review in electronic or hard copy format. Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is **directly related** to the allegations, including evidence the district does not intend to rely on to reach a determination regarding responsibility and any inculpatory and exculpatory evidence, whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. **Note: Not everything that is *directly related* is *relevant*. Only *relevant* evidence is to be included in the investigative report.**
 2. Provide the parties at least ten (10) days (**Title IX requirement**) following the date on which the evidence was provided to them to submit a written response to the Title IX Coordinator. (In all steps, provide same amount of time, including any extensions, to both parties, and notify of timeframe or extensions in writing.)
 3. Consider the written responses prior to completion of the investigative report.



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Investigative Report

- The investigator must:
 - draft an investigative report that fairly summarizes relevant evidence
 - provide the investigative report to the parties and their advisors in an electronic format or hard copy, and provide the parties at least 10 days (**Title IX requirement**) prior to the date that the written determination is made, to review and provide written responses to the investigator.
 - ***Allow sufficient time to receive and review written responses; due date for written responses and issuance of written determination should not be on same day.***
 - **Communicate all timeframes in writing to parties.**
 - provide a copy of the final investigative report to the decision maker; make any revisions first, as may be warranted based on the parties' responses



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Investigative Report

- **Before investigative report is finalized:**

- Use responses to amend the investigative report as appropriate, with notations of what is changed in the final report.
- This finalized version is what goes to the decision maker.
- Include the responses as an exhibit or appendices in the final report that goes to the decision maker.

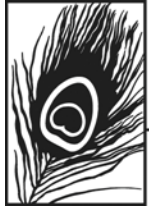


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Investigative Report

- “[T]hese final regulations do not prescribe the contents of the investigative report **other than specifying its core purpose of summarizing relevant evidence.**” 85 FR 30310
- **✓ Good practice to include:**
 - Summary of allegations
 - Policy provisions implicated
 - Timeline of investigative process
 - Description of the procedural steps taken
 - Summary of relevant evidence (required)
 - Summary of documents and other evidence collected/reviewed, including that which was not deemed directly related or relevant, and why not so deemed
 - Any unsuccessful efforts to interview
 - Any unsuccessful efforts to obtain documents or other evidence
 - Parties’ responses



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Investigation: Formal Complaint

- If at any point the investigation reveals that the conduct being investigated may involve a violation of criminal law, the investigator shall promptly notify the Title IX Coordinator, who shall promptly inform law enforcement authorities about the allegations and make any additional required reports, in accordance with law, regulations and Board policy.
- Investigator may need to contact law enforcement directly if it is urgent.



Investigation: Formal Complaint

- **Remember, it is the District's responsibility to gather evidence and bear the burden of proof.**
- **Presumption of non-responsibility:**
 - ORC tells us that this presumption was included to establish impartiality, **not** to create a prejudgment:
 - "The presumption does not imply that the alleged harassment did not occur; the presumption ensures that recipients [schools] do not take action against a respondent *as though* the harassment occurred prior to the allegation being proved . . ." *Preamble page 851*
 - "The presumption does not imply that a respondent is truthful or that a complainant is lying . . ." *Preamble page 853*
 - *It may be worth explaining this to the parties in writing.*
 - *Source: Strassberger McKenna*



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Written Determination and District Action

- **Designation of Decision-Maker:**

- To avoid any conflict of interest or bias, the decision-maker cannot be the same person as the Title IX Coordinator or the investigator. The responsibility as the decision-maker for complaints of Title IX sexual harassment shall generally be designated to the Superintendent.

- If the Superintendent has a conflict of interest or is a party in the formal complaint process, he shall disclose the conflict and the Title IX Coordinator shall designate another individual to serve as the decision-maker.



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Written Determination and District Action

- A written determination of responsibility (written determination) can be finalized no sooner than ten (10) days from the day on which the investigator completed the investigative report and provided it to all parties, and in no event shall it be finalized sooner than the date on which each party has the opportunity to submit questions and follow-up questions and the decision maker has the time to consider all such questions and responses. Before the decision-maker reaches a determination regarding responsibility, the decision-maker shall:
 - afford each party (respondent and complainant) the opportunity to submit written, relevant questions that a party wants to be asked of any party or witness
 - provide each party with the answers, and
 - allow for additional, limited follow-up questions from each party (respondent and complainant)



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Written Determination and District Action

- The decision maker shall give the parties the opportunity to submit relevant questions for a party or witness in writing to the decision maker within a reasonable time to be set by the decision maker.
- The decision maker shall determine which, if any, questions are relevant and shall submit relevant questions to the party(ies) and/or witness(es) to which they are directed within a reasonable time to be set by the decision maker.
- The party(ies) and/or witness(es) who received the questions shall have a reasonable time to be set by the decision maker to submit responses to the decision maker.
- The decision maker shall submit all responses to each party within a reasonable time to be set by the decision maker.

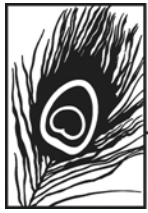


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Written Determination and District Action

- Each party may submit limited follow-up questions regarding any of the answers received to the initial questions. Follow-up questions must be submitted by each party to the decision maker within a reasonable time frame to be set by the decision maker.
- Limited follow up questions shall be sent by the decision maker to the parties and/or witness(es) to whom they are directed within a reasonable time frame to be set by the decision maker.
- The party(ies) and/or witness(es) who received the follow-up questions shall have a reasonable time frame to submit responses to the decision maker.
- The decision maker shall submit all responses to each party within a reasonable time frame to be set by the decision maker.



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Written Determination and District Action

- **All materials sent by the decision maker to parties or witnesses at any of the above steps shall be sent to each party and witness simultaneously.**
- **The decision maker shall consider the responses to all questions and follow up questions in preparing the written determination.**



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Written Determination and District Action

- **Recommendation: First offer to parties to provide initial and follow-up questions and answers should be made, in writing, at same time that final investigative report is provided.**



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Written Determination and District Action

- Questions and evidence in the question and answer process just discussed, about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- **Note: In general,** evidence includes statements, photographs, clothes, etc.
- The decision-maker shall explain to the party (**in writing/document explanation**) proposing the questions about any decision to exclude a question as not relevant.



Written Determination and District Action

- The decision-maker must issue a written determination for the conduct alleged in formal complaints. To reach this determination, the decision-maker shall apply the preponderance of the evidence standard, meaning that the party bearing the burden of proof must present evidence which is more credible and convincing than that presented by the other party or which shows that the fact to be proven is more probable than not. (“50% + 1”)
- In considering evidence, the decision-maker shall ensure credibility determinations are not based on an individual’s status as a complainant, respondent or witness, or any other irrelevant factor.
- ***District has the option of changing to clear and convincing evidence standard in its policy.*** Colorado v. New Mexico, 467 U.S. 310 (1984):” ‘Clear and convincing’ means that **the evidence is highly and substantially more likely to be true than untrue**; the fact finder must be convinced that the contention is highly probable.”



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Written Determination and District Action

- After considering all relevant evidence, the decision-maker shall issue a written determination simultaneously to both parties that includes:
 1. Identification of the allegations potentially constituting Title IX sexual harassment.
 2. A description of the procedural steps taken from the receipt or signing of the formal complaint through the written determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence. **(Ensure you also have adequate documentation of the initial assessment.)**
 3. Findings of fact supporting the determination.
 4. Conclusions regarding the application of the District's Code of Student/Employee Conduct or Board policies to the facts.



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Written Determination and District Action

5. A statement of, and rationale for, the result as to each allegation, including:
 - a. Determination regarding responsibility.
 - b. Any disciplinary sanctions. (Ordinary sanctions and procedures apply. Special education protections and procedures apply.)

6. Any remedies designed to restore or preserve equal access to the District's education program or activity that will be provided by the District to the complainant. Such remedies may be punitive or disciplinary and need not avoid burdening the respondent. **(Note: When a formal complaint is filed, you can consider what supportive measures may be offered to the respondent.)**



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Written Determination and District Action

7. The procedures, deadline and permissible bases for the complainant and respondent to appeal.



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Written Determination and District Action

- The written determination shall be provided to the parties simultaneously. The determination becomes final either:
 1. On the date that the District provides the parties with the written decision of the result of the appeal, if an appeal is filed;
 2. Or, if an appeal is not filed, on the date on which an appeal would no longer be considered timely, in accordance with the timeframe established for appeals.



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Written Determination and District Action

- The Title IX Coordinator shall be responsible to ensure that any remedies are implemented by the appropriate District officials and for following up as needed to assess the effectiveness of such remedies.
- Disciplinary actions shall be consistent with the Code of Student/Employee Conduct, Board policies and administrative regulations, district procedures, applicable collective bargaining agreements/Act 93 Plan, and state and federal laws and regulations, including specific requirements and provisions for individuals with disabilities.



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Appeals

- The District must offer both parties an equal right to appeal:
 - a determination of responsibility
 - the District's dismissal of a Title IX formal complaint or any allegation in the Title IX formal complaint.

The scope of appeals related to Title IX sexual harassment are limited to the following reasons for appeal as stated in the Title IX regulations:

1. A procedural irregularity that affected the outcome of the matter.
2. New evidence that could affect the outcome was not reasonably available at the time the decision to dismiss or determination of responsibility was made.
3. The Title IX Coordinator, investigator(s) or decision maker(s) had a conflict of interest or bias for or against the individual complainant or respondent or for or against complainants or respondents generally that affected the outcome of the matter.



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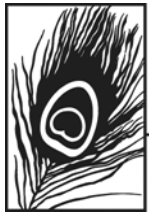
Appeals

District can add grounds for appeal. If done, should be by policy, after consultation with Solicitor.



Appeals

- Policy procedures:
- Written notice of a party's appeal shall be submitted to the Title IX Coordinator within five (5) school days after the date on which the written determination was issued to the parties. **Policy deadline (The phrase "policy deadline" throughout this training refers to deadlines that are recommended to be set by policy, but are not required by Title IX.)**
- Notice of appeal shall include a brief statement describing the basis for the appeal.



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Appeals

- The Title IX Coordinator shall ensure that the designated appeal authority is not the same person as the decision-maker that reached the determination, the investigator, or the Title IX Coordinator. The designated appeal authority may be the District solicitor or outside counsel.



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Appeals

- For all appeals, the designated appeal authority shall:
 1. Provide written notice to the other party when an appeal is filed and implement appeal procedures equally for both parties.
 2. Provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the stated basis for the appeal. Supporting statements shall describe in detail as applicable the procedural irregularities asserted to have affected the outcome of the determination, the nature of any new evidence which could affect the outcome, or the nature of any bias or conflict of interest asserted to have affected the outcome, with an explanation of how the outcome was affected by such factors. If evidence exists supporting the basis for appeal, it shall accompany the supporting statement, or it shall identify where such evidence may be found.



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Appeals

- If the party filing the appeal wishes to submit a supporting statement, it must be submitted to the appeal authority and simultaneously provided to the other party within five (5) school days of the date on which the written notice of appeal was provided to the parties.

If the other party wishes to submit a statements in opposition to the appeal, it must be submitted within five (5) school days of the date that the supporting statement was provided to the opposing party.

- If a statement in opposition to an appeal refers to any evidence beyond what is described in a supporting statement, it shall accompany the statement in opposition, or it shall identify where such evidence may be found.



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Appeals

The person with appeal authority must:

1. Determine whether the appeal meets the grounds for permitted reasons for appeal and justifies modifying the written determination.
2. Issue a written decision describing the result of the appeal and the rationale for the result within twenty (20) school days of the date that the notice of appeal was submitted.
3. Provide the written decision simultaneously to both parties. A copy of the written decision shall also be provided to the Title IX Coordinator.

Issues of additional evidence and it's effect on the record/outcome should be discussed with counsel!

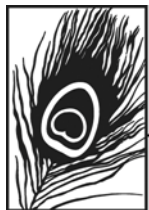


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Recordkeeping

- The District shall maintain the following records for a of a minimum of seven (7) years after conclusion of procedures and implementation of disciplinary sanctions and/or remedies, or in the case of a complainant or respondent who is a minor, until the expiration of the longest statute of limitations for filing a civil suit applicable to any allegation:
 1. Each Title IX sexual harassment investigation, including any written determination regarding responsibility and any audio or audiovisual recording or transcript, and disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the District's education program or activity.
 2. Any appeal and the result.
 3. Any informal resolution and the result.



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Recordkeeping

3. All materials used to train the Title IX Coordinator, investigators, decision-makers, and any person who facilitates an informal resolution process. **The District shall make the same publicly available on its website.**
4. Records of any District actions, including any supportive measures, taken in response to a **report or formal complaint** of Title IX sexual harassment. **In each instance, the District shall document:**
 - **the basis for its conclusion that its response *was not deliberately indifferent***
 - **that it has taken measures designed to restore or preserve equal access to the District's education program or activity**
 - **If the District does not provide a complainant with supportive measures, *then the District must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.* The documentation of certain bases or measures does not limit the District in the future from providing additional explanations or detailing additional measures taken (best to document everything).**



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Recordkeeping

- **The District may wish to develop:**
- Uniform investigation report form
- Uniform written determination form
- Uniform appeal form
- Additional uniform forms for various notices to parties at these steps in process
- Consult with solicitor



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Additional Practices for Fostering An Inclusive Workplace Free of Unlawful Harassment and Discrimination

- Act with uniformity in decision making regarding who receives District resources, access to programs, etc.
 - This includes materials and equipment
 - Reasons for treating anyone differently must be based on legitimate, program/business related reasons
 - Even if motivation is not based on unlawful reasons, inconsistent treatment can lead to allegations of unlawful discrimination
- **Recommendation:** Have policies/procedures in place, including regarding allocation of District resources, and follow them.

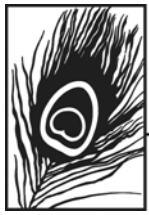


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Additional Practices for Fostering An Inclusive Workplace Free of Unlawful Harassment and Discrimination

- (1) Complainant may establish a *prima facie* case of unlawful discrimination by showing that he or she is a member of a protected class, was qualified to gain/retain a position or other term or condition of employment, that he or she was denied the position/term/condition by the employer, and that another individual not a member of the protected class was treated more favorably, **OR** "can provide facts which 'if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'" Willis V. UPMC Children's Hospital of Pittsburgh, 808 F.3d 638, 644 (3d Cir. 2015).
- (2) If employee establishes the above, that is enough to "get the foot in the door." Employer then has the burden of showing a legitimate, non-discriminatory reason for the action.
- (3) If employer establishes (2), employee can still prevail if he or she establishes that employer's proffered reason was merely a pretext.



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Additional Practices for Fostering An Inclusive Workplace Free of Unlawful Harassment and Discrimination

- **A second analysis: Disparate impact**
- An unlawful employment practice based on disparate impact will be established if:
 - Complainant demonstrates that the employer used a particular employment practice that caused a disparate impact on the basis of any of the protected characteristics of the complainant (ex., race, age, religion, gender, etc.)
 - The complainant is able to demonstrate through specific factors that an alternative employment practice exists and the employer refused to adopt the same.
 - After either of the above are established, it is the employer's burden to demonstrate that a specific employment practice does not cause a disparate impact, or that if it does, that the practice is required by business necessity.
- **Remember, business necessity may not be used as a defense against a claim of intentional discrimination.**



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Additional Practices for Fostering An Inclusive Workplace Free of Unlawful Harassment and Discrimination

- “Locker room talk”
- “Just joking....lighten up!”
- “You can’t take a joke”
- “You can’t take a compliment”
- **Intent vs. Impact**



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Additional Practices for Fostering An Inclusive Workplace Free of Unlawful Harassment and Discrimination

- **“Second generation discrimination”**
 - often more subtle and pervasive
 - unconscious biases can affect decision making and actions in:
 - providing access to opportunities and benefits
 - assigning work/less favorable tasks
 - investigations and outcomes
 - daily interactions



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Additional Practices for Fostering An Inclusive Workplace Free of Unlawful Harassment and Discrimination

- Microaggressions (see handout)
- Why are such actions/statements a problem?
 - Contrary to a collegial workplace or supportive learning environment
 - Can constitute unlawful harassment/discrimination
 - Can be evidence of unlawfully discriminatory intent



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Relevance

- Relevance not defined by Title IX
- Relevance determinations need to be made:
 - **By investigator regarding:**
 - evidence (including but not limited to written statements of the parties submitted in response to draft investigative report) to be included in investigative report
 - **By decision maker regarding:**
 - questions submitted by parties prior to issuance of written determination
 - all facts and evidence to be relied upon in making decision (Written determination has already summarized relevant evidence. Decision maker must identify which findings of fact support determination, and the rationale for the result as to each allegation.)



Relevance

- Relevance determinations need to be made:
 - By individuals with appeal authority re: reasons given for appeal
 - Do the facts surrounding the investigation/decision support one of the bases for appeal?
 - Could the outcome change based on the reason asserted?
 - **Possibility exists of sending case back for further development of the record; consultation with counsel is strongly advised on appeal process; technical issues involving how to handle evidence that is new or allegedly not properly considered.**
- “A party who believes the investigator reached the wrong conclusion about the relevance of the evidence **may argue** again to the decision-maker (i.e., as part of the party’s response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant[.]”

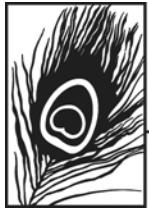


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Relevance

- Definition of relevance: Proving, or tending to prove, an element of the definition of sexual harassment.
- *evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true* (i.e., on what is relevant).”
- 85 FR 30294
- ***Consult with solicitor***



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Relevance

- **May not:**
- Adopt an “undue/unfair prejudice” rule. 85 FR 30294 (But, see next slide re: sexual history or predisposition.)
- Adopt a rule prohibiting evidence of character or prior bad acts. 85 FR 30248
- Exclude certain types of relevant evidence (*e.g.* lie detector test results, or rape kits).



Relevance

- Questions submitted by a party prior to issuance of final determination about the **complainant's** (this rule protects complainants only) sexual predisposition or prior sexual behavior are not relevant, unless the same:
 - are offered to prove that someone other than the respondent committed the conduct alleged by the complainant; or
 - concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent
 - Ex: The parties are in a relationship and a certain act is something to which they have both consented in the course of their relationship.



Relevance

- **Note:** The aforementioned questions (sexual predisposition/prior sexual behavior) may be allowed in review and inspection of evidence even if the two criteria are not met as long as **directly related** to the allegations in the complaint, but cannot be considered in the summary of **relevant** evidence in investigative report, or in final decision or appeal, **unless** one of the two criteria are met.
- **Potentially complex area; consultation with solicitor is strongly advised.**

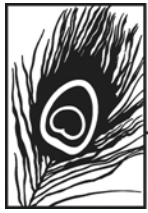


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Relevance

- **Other information considered *per se* not relevant:**
 - Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent; and
 - Any information protected by a legally recognized privilege unless waived (ex., attorney-client, medical records, spousal)



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Relevance

- To make relevance determinations:
- Review the allegations
- Compare evidence to the elements of the alleged policy violation to see if evidence impacts the elements
- Assess whether the evidence makes the allegations more or less likely



Credibility

- If there are conflicting versions of **relevant** events, decision-maker (and possibly appeal authority) will have to weigh each party's **credibility**
 - Credibility assessments can be critical in determining whether the alleged policy violation in fact occurred
 - The duty is not to “believe one story over the other” but to assess each piece of evidence, independently, and as part of the bigger picture, to determine whether the preponderance of the evidence supports a finding of responsible or not responsible for a policy violation.
 - **Investigator** can make credibility determination, but cannot be decision maker. Confused? Call solicitor.
- Source: Strassberger McKenna



Credibility

- Credibility assessment factors to consider include:
- **Inherent plausibility:** Is the information believable on its face? Does it make sense?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation, video, entry logs) that corroborates the party's testimony?
- **Past record:** Did the Respondent have a history of past similar behavior?
- **Demeanor:** Did the person seem to be telling the truth or lying? Use caution here.
- **Per OCR, none of the above factors are determinative as to credibility.**
- **Document how you reached conclusion on credibility.**



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District May Elect for the Grievance Process to Include a Hearing

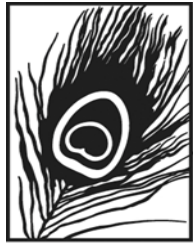
- Additional, precise steps must be followed.
- If desired, District should work with solicitor. Procedures/policies will need to address hearing.



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Questions or concerns?



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