

**YOUNG  
CONAWAY**

# **Title IX Coordinator Training**

**October 26, 2020**

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# What is Title IX?

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## Title IX, 20 U.S.C. § 1681

- Prohibits discrimination “on the basis of sex”
- Applies to education programs and federally funded schools
- Protects students, employees, applicants and all other persons
- Applies to teacher-on-student sexual harassment/assault and student-on-student (peer-on-peer) sexual harassment

## Implementing Regulations

- Require designation of Title IX Coordinator to coordinate school’s responsibilities
- Require posting of information on school website
  - Title IX Policy
  - Title IX Coordinator Contact Information
  - Title IX Training Materials
- Set out grievance and complaint procedures

# Enforcement of Title IX

## Standard is “Deliberate Indifference”

OCS must respond to allegations of sexual harassment in an education program or activity promptly in a manner that is not deliberately indifferent

Plaintiff must prove:

➤ OCS had “actual knowledge”

**AND**

➤ Harassment was so severe, pervasive and objectively offensive it barred the victim from access to their education

*Response is deliberately indifferent only if it is clearly unreasonable in light of the known circumstances*

# New Regulations – Major Changes

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- ❖ Definitions and Jurisdictional Requirements – including Permissive and Mandatory Dismissals
- ❖ “Actual Knowledge” Standard on Who has to Report
- ❖ Investigation and Reports Timelines and Procedures
- ❖ Formal Resolution Procedures – Live Hearings/Written Report both with Cross-Examination
- ❖ Scope – Covers employee-on-employee situations
- ❖ Mandatory Appeals on Certain Criteria
- ❖ Recordkeeping and Retention Requirements
- ❖ Training Requirements

# Training

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Schools must require training for anyone designated as

- Title IX Coordinator
- Investigator
- Decision-Maker (including Appeals Decision-Maker)
- Any person designated to facilitate an informal resolution

## Training Materials

- Must not rely on sex stereotypes
- Must promote impartial investigations and adjudications of formal complaints

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# DEFINITIONS

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# What does “sex” mean?

Discrimination on  
the basis of “sex:

- ❖ Biological sex
- ❖ Gender
- ❖ Sex stereotyping
- ❖ Sexual orientation and gender identity
- ❖ “Sex” as a verb

# Parties

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COMPLAINANT

RESPONDENT

Alleged  
Victim

Alleged  
Perpetrator

# Sexual Harassment

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A school employee conditioning an education benefit or service upon a person's participation in unwelcome sexual conduct (often called *quid pro quo* harassment)

OR

Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it effectively denies a person equal access to the school's education program or activity (often called hostile work/educational environment harassment);

OR

# Additional Conduct Actionable Under Title IX

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## Dating Violence

Violence by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship is determined by:

- Length of relationship
- Type of relationship
- Frequency of interaction between persons involved in the relationship.

## Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to

- Fear for his or her safety or the safety of others; or
- Suffer substantial emotional distress

## Sexual Assault

An offense classified as a forcible or non-forcible sex offense by the FBI's uniform crime reporting system:

- Rape;
- Fondling;
- Incest; or
- Statutory rape.

# Actual Knowledge

When does a school have notice of a complaint?

- Actual knowledge = notice of sexual harassment or allegations of sexual harassment to OCS's
  - Title IX Coordinator; or
  - Any OCS official who has authority to institute corrective measures; or
  - **ANY EMPLOYEE OF AN ELEMENTARY OR SECONDARY SCHOOL**

# Educational Program or Activity

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Conduct must occur in “educational program or activity”

- ❖ Does not mean geography – no on/off campus bright-line rule
- ❖ Includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the harassment occurs

Conduct must be against a person in the United States

- ❖ Does not apply to study abroad

# Remember – School’s Obligation

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A school with actual knowledge of sexual harassment in an educational program or activity of the school against a person in the United States, must respond promptly in a manner that it is not deliberately indifferent. The school is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

# Mandatory v/s Permissive Dismissal

## Mandatory Dismissal

Must “dismiss” the complaint

No Title IX jurisdiction

Dismissal means dismissed from the Title IX process; school can still apply another conduct code or supportive measures

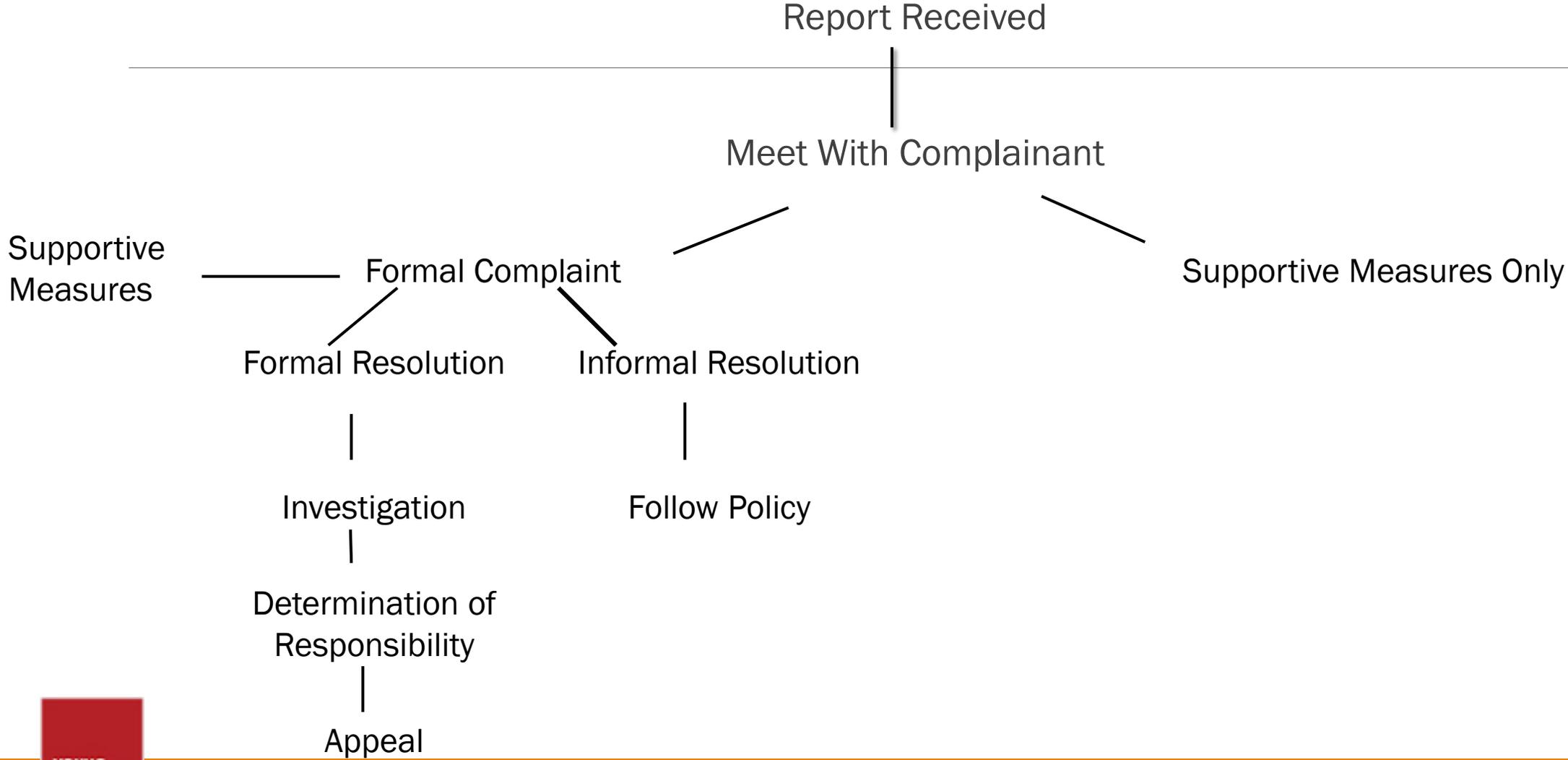
Practical difficulty – Knowing if a complaint implicates Title IX jurisdiction at various stages of the process

## Permissive Dismissal

New rule allows to school to dismiss complaint with prompt and simultaneous written notice to the parties if at any time:

- Complainant notifies Title IX Coordinator in writing that complainant would like to withdraw the formal complaint or any allegations;
- Respondent is no longer enrolled in or employed by the school; or
- Specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint or allegations

# Overview of Process



# Title IX Coordinator

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# Identification Requirements

- **Must identify at least one employee as Title IX Coordinator**
  - **May also have one or more deputy coordinator**
  - **May have separate coordinators for complaints involving employees and complaints involving students**
- **Must be referred to as “Title IX Coordinator”**

Must notify applicants, employees, students, parents/guardians and officially recognized unions/professional organizations of

- Name
- Title
- Email Address
- Phone Number

Name/title and contact information must be prominently displayed on website and in each handbook or catalogue made available to applicants, employees, students, parents/guardians, and any recognized employee union/professional organization

# Other Requirements

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- ❖ Must not have a conflict of interest
- ❖ Must not have a bias for or against complainants or respondents generally or a specific individual
- ❖ Need not be a stand-alone position but should have adequate time to devote to Coordinator responsibilities
- ❖ Must have required training

# Training

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- Definitions of sexual harassment
- Scope of education program or activity
- How to conduct grievance process
- How to serve impartially, including:
  - Avoiding prejudgment of facts
  - Avoiding bias
  - Avoiding conflict of Interest

# Coordinator Role In Reporting

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- ❖ Any person may report sex discrimination, including sexual harassment, to the Title IX Coordinator, regardless of whether the person reporting is alleged to be the target of the conduct
- ❖ Issues to consider:
  - Third Party reports
  - Unwilling complainants
  - Anonymous reporting
- ❖ Reports may be made at any time (including during non-business hours) by telephone, email or mail
- ❖ Formal complaints may be filed with the Coordinator in person, by email, by mail or by any other method designated by the school
  - Ex. online reporting system
- ❖ “Formal Complaint” = any document filed by a complainant
- ❖ Formal complaint can be physically or electronically signed by complainant
- ❖ Title IX Coordinator may sign a complaint but does not become the complainant or party to the complaint

# **SUPPORTIVE MEASURES**

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# Supportive Measures

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- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, reasonably available and without fee or charge to complainant or respondent
- Before or after filing formal complaint, or where no formal complaint has been filed
- Designed to restore or preserve equal access to educational program or activity
- Continue through the conclusion of the grievance process when applicable
- Can be continued even after a finding of non-responsibility
- Provided without unreasonably burdening the other party
- Designed to protect the safety of all parties or OCS's educational environment, or deter sexual harassment

# What is “Unreasonably Burdensome”?

- ❖ No specific definition – consider unique circumstances
- ❖ Does not depend solely on continued to access to academic programs
- ❖ Must take into account nature of the educational programs, activities, opportunities and benefits – not solely those programs that are “academic” in nature
- ❖ Grievance process should be conducted in reasonably timely manner to avoid supportive measures imposed pending the outcome of the grievance process being unreasonably burdensome

# Examples of Supportive Measures

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- Counseling
- Extension of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Leaves of absence
- Increased security and monitoring
- Sending student to principal's office
- Educational conversations
- Changing student seating
- Changing class assignments

# Caution!

Must go through  
grievance process

Disciplinary sanctions should NOT be used as supportive measures.

Suspension, expulsion and termination of employment are inherently disciplinary

# Emergency Removal

## Student

- ❖ May remove a Respondent from an education program or activity after:
  - ❖ Undertaking individualized safety and risk analysis
  - ❖ Determining an immediate threat to physical health or safety of any student or individual arising from the allegations justifies removal
- ❖ Must provide Respondent with notice and an opportunity to challenge the decision immediately following the removal
- ❖ Any decision to remove a student for more than 10 school days requires a Board hearing

# Emergency Removal

## Employee

- ❖ Non-student employee may be placed on administrative leave during the pendency of grievance process
- ❖ Employees must be placed on administrative leave under certain circumstances (e.g., complaint of abuse of student by school employee)

# Interaction with Other Laws

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- Students and employees are still entitled to applicable provisions of IDEA, Section 504 and ADA
- For students
  - Consider whether a manifestation determination is necessary for students with IEP or Section 504 Plan (10 days of disciplinary removal)
  - Consider provisions of an IEP or Section 504 Plan in designing interim supportive measures
- For employees
  - Consider whether interactive dialogue is necessary to discuss reasonable accommodations due to a known disability

# Supportive Measures - Title IX Coordinator Responsibilities

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- Title IX Coordinator must promptly contact complainant to:
  - Discuss availability of supportive measures
  - Consider complainant's wishes with respect to supportive measures
  - Inform complainant of the availability of supportive measures with or without the filing of a formal complaint; and
  - Explain the process for filing a formal complaint
  
- Title IX Coordinator is responsible for overseeing the implementation of supportive measures for the school
  - Coordinate with other employees on a need-to-know basis
  - Check in with parties regarding the provision and effectiveness of supportive measures
  - Burden of arranging and enforcing supportive measures must remain on OCS, not on any party

# **Bias and Impartiality**

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# Bias

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Bias is prejudice in favor of or against one person or group compared with another.

Opposites of Bias:

Fair

Objective

**Must avoid the intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings.**

- ❖ Title IX Coordinator is not on “anyone’s side”
- ❖ Title IX Coordinator’s main goal is overseeing a fair and impartial process.
- ❖ Coordinator does not have an interest in the outcome of the grievance process, but rather in ensuring that the process is followed with integrity and the rights of the parties are respected.

# Examples of Bias

- ❖ Assuming that complainants or respondents generally are more likely to tell the truth
- ❖ Assuming that respondents are presumptively responsible for alleged sexual misconduct
- ❖ Assuming victim was “Asking for it” based on what they wore, how much they had to drink, how they were dancing, etc.

# Unbiased Process

- ❖ Gives parties equal opportunities for participation at every stage
- ❖ Presumes innocence until a determination regarding responsibility is made
- ❖ Results in a determination made based on an objective review of all relevant, available evidence

# Unbiased Process

Provides both parties with equivalent rights to:

- Written notes and documents
- Access to OCS's resources
- Introduce witnesses and evidence
- Review and respond to other party's evidence
- Participate in grievance procedures
- An objective determination based on all facts

# Conflicts of Interest

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- ❖ A conflict of interest exists when the Coordinator, Investigator or Decision-Maker has a personal or professional interest in a case that prevents them from discharging their duties in a fair, neutral and impartial manner
- ❖ Conflicts of interest may arise due to the Coordinator's, Investigator's or Decision-Maker's relationship to a party or witness
- ❖ May also arise when Coordinator, Investigator or Decision-Maker has a stake in the outcome of the process (e.g., personnel evaluations based on increasing or reducing number of founded complaints)
- ❖ Other circumstances that negatively affect the individual's neutrality

# OTHER RESPONSIBILITIES

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TITLE IX COORDINATOR

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- ❖ Title IX Coordinator should review or be involved in the review of any policies relating to OCS's Title IX obligations
    - ❖ This may include ensuring consistency between non-Title IX policies and handbook provisions
      - ❖ Student conduct and discipline
      - ❖ Employee conduct and discipline
      - ❖ Other grievance procedures

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- ❖ Coordinator should coordinate a training program to ensure adequate training of all stakeholders:
    - ❖ Investigators
    - ❖ Decision-Makers
    - ❖ “Appropriate persons”
      - ❖ ALL employees
  - ❖ All training materials must be published on OCS’s website

# Training

- ❑ Investigators
- ❑ Decision-Makers
- ❑ Appeal Decision-Makers

- ❖ Definition of “sexual harassment”
- ❖ Scope OCS’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 avoiding prejudice, bias and conflicts of interest)
- ❖ Must not rely on sex stereotypes
- ❖ Must promote impartial investigations and adjudications of formal complaints

# Additional Training for Decision-Makers

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- Training on technology to be used at live hearing (if applicable)
- Issues of relevance
- Questions of evidence (including relevance of questions about complainant's sexual predisposition or prior sexual behavior)

# Additional Training for Investigators

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- Training on issues of relevance to create investigative report that fairly summarizes the evidence

# Formal Grievance Process

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TITLE IX COORDINATOR OVERSEES AND SERVES AS AN INFORMATIONAL RESOURCE DURING A FORMAL GRIEVANCE AND SHALL **NOT** SERVE AS INVESTIGATOR, DECISION-MAKER OR APPEAL DECISION-MAKER

# Formal Complaint Filed – What's Next

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Formal grievance process with investigation  
and determination of responsibility

OR

Complainant may opt for informal resolution  
(except concerning allegations that an  
employee sexually harassed a student) if  
parties provide voluntary, written consent

# Mandatory Dismissal

Title IX  
Coordinator must ensure dismissal of formal complaint where:

## No Title IX Jurisdiction

- Conduct alleged does not constitute sexual harassment;
- Conduct alleged did not occur in OCS's program or activity; or
- Conduct alleged did not occur in United States

# Permissive Dismissal

**Title IX  
Coordinator  
should also  
evaluate the  
grounds for  
permissive  
dismissals:**

- Complainant notifies Coordinator in writing that they wish to withdraw formal complaint or any allegations therein;
- Respondent is no longer enrolled or employed by OCS; or
- Specific circumstances prevent OCS from gathering evidence to reach determination

# Investigators and Decision-Makers – Title IX Coordinator’s Responsibilities

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- ❖ Must receive or have required training
- ❖ Are unbiased and impartial
- ❖ Do not have a conflict of interest in the case
- ❖ Understand and comply with OCS’s process for investigating and resolving complaints

*Title IX Coordinator must assign an alternate investigator or decision-maker as needed.*

# INVESTIGATION

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# Essential Elements of Investigation

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- Process school uses to resolve complaints of sexual discrimination or sexual harassment
- Investigator is the initial fact-finder
  - CANNOT be the individual who makes a determination regarding responsibility, including sanctions
- Must be:
  - Adequate
  - Reliable
  - Unbiased
  - Impartial
  - Prompt
  - Provide equal opportunity for both parties to present witnesses and other evidence

# Investigator

- Cannot be decision-maker or appeal decision-maker
- Can be internal or external
- Must be impartial and unbiased in general and in the specific case
- Should be recused if there is a conflict of interest

# Factors

Specific steps in Title IX investigation will vary depending on:

- Nature of the allegation
- Age of student(s) involved
- Size and structure of school
- Any applicable state or local requirements
- What school has learned from past experiences

# Key Procedural Elements

## Written Notice

- ❖ Written notice of investigation sent to parties
  - ❖ Identities of parties involved in the incident
  - ❖ Conduct alleged
  - ❖ Date and location of incident
  - ❖ Respondent's entitlement to presumption of innocence
  - ❖ Parties' right to an advisor of their choice, at party's expense, who may be an attorney
  - ❖ Parties' right to review and comment on evidence
- ❖ If new allegations are added, must issue new written notice

# Key Procedural Elements

## Prior Written Notice of Interviews

Prior written notice of interviews to parties with sufficient advance time to prepare

- Date
- Time
- Location
- Participants
- Purpose

# Key Procedural Elements

Burden of Proof

Evidence  
Gathering

Burden of proof and evidence gathering is on OCS, not parties

- May be preponderance of the evidence OR clear and convincing
- Must use same standard for all complaints of sexual harassment against students and employees

*Respondent is entitled to presumption of innocence*

# Key Procedural Elements

## Gag Orders

No “gag orders” restricting parties from discussing allegations or gathering and producing relevant evidence

OCS must also protect against retaliation and intimidation of parties and witnesses

Schools can require parties and advisors to sign confidentiality/non-disclosure agreement to ensure that evidence is not used for any purpose other than participation in Title IX proceedings

## Additional Considerations

- ❖ Are there any other ongoing school or criminal investigations of the incident?
  - ❖ If so, determine the scope of each investigator's role
- ❖ May information be shared among investigators?
- ❖ If forensic evidence is involved, should law enforcement or a forensic expert be consulted to ensure evidence is correctly interpreted?

# Confidentiality

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- ❑ OCS must keep confidential the identity of any individual who has made a report or complaint of sex discrimination or sexual harassment, or has been identified as the perpetrator or respondent to any such report or complaint, or is a witness to any complaint or investigation
  - ❑ Except as required to carry out the purposes of Title IX (including the conduct of any complaint resolution process), applicable law, or as permitted by FERPA
- ❑ All information must be maintained in a secure manner
- ❑ Do not over-promise confidentiality – due process and other considerations may require disclosure of information obtained through investigation
- ❑ Notify complainant of the information that will be disclosed, to whom it will be disclosed and why

# Conducting Interviews

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Investigator should develop a general investigation plan

- ❖ Gather and review any relevant documents, policies or other evidence
- ❖ Determine where interviews will take place (neutral, private, convenient)
- ❖ Prepare pre-interview points; consider providing in writing
- ❖ Determine order of interviews
- ❖ Develop list of questions for each that will help you determine whether more likely than not that the complaint is founded under Title IX and school policy

# Interviews

Points to review with complainant, respondent and witnesses:

- ❖ Explain process
- ❖ Expectation of honest cooperation, and result (if any) of refusal to honestly cooperate
- ❖ Request or state expectation of confidentiality/discretion as appropriate
- ❖ Explain policy on non-retaliation and how to report retaliation
- ❖ Explain OCS's position on confidentiality

# Basic Interview Questions

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- Who committed alleged act?
- Who else was around?
- What exactly occurred or was said? Include details.
- When did it occur? Was it a one-time event? Repeated, ongoing event?
- Where did it occur?
- How did you react? Did it affect you?
- Are there other individuals who might have relevant information?
- Did you tell anyone about it?
- Ask for any available evidence (including social media content)
- Probe for hidden agendas

# Other Interview Tips

- Consider personality, tone, and psychological dynamics
- Focus on facts avoid spending too much time discussing “why?” questions
- Avoid prejudging evidence
- Consider all possibilities
- Be an active listener
- Take notes or record
- Control emotions, be investigative rather than an advocate

# Obtaining Witness Statements

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- Written in first person
- Focus on facts, not conclusions (may include how the incident affected the individual)
- If the investigator writes the statement for the witness, get confirmation of accuracy
- Consider having it notarized or including statement, “based upon my personal knowledge, the above facts are true and correct”

# Handling Evidence

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- ❖ Be aware of “chain of custody” issues
- ❖ Maintain investigation file containing:
  - ❖ Investigator’s notes (running record of actions taken; interviews conducted)
  - ❖ Written statements
  - ❖ Paper and electronic records
  - ❖ Photographs, videos and audio recordings
  - ❖ Any other evidence received, both inculpatory and exculpatory

# Making Credibility Determinations

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- Avoid making credibility determinations based on an individual's gender, sexual orientation, gender identity or other protected characteristic
- Avoid making credibility determinations based on an individual's status as a complainant, respondent or witness

# Standard of Proof

## Judicial Standards of Proof

- Beyond a reasonable doubt (used in criminal cases)
- Clear and convincing evidence (highly likely)
- Preponderance of evidence (more likely than not)
  - Civil cases
  - Discrimination and civil rights cases

# Acceptable Standard of Proof for Title IX

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## CLEAR AND CONVINCING

- Highly Likely

## PREPONDERANCE OF THE EVIDENCE

- Exists when 50.1% of the evidence supports the allegations in the complaint
- Not based on the amount of evidence, but on the credibility determinations and weight given by the investigator

*Either standard is acceptable under Title IX as long as the same standard is applied to all complaints of sex discrimination and sexual harassment and the same standard applies to complaints against students as against employees.*

# RELEVANCE

What is  
“relevant”  
evidence?

- ❖ Evidence that is of consequence to the outcome of the investigation
- ❖ Evidence that makes any fact more or less probable than it would be without the evidence

# RELEVANCE

- Does not exist in a vacuum – the relevance of any particular piece of evidence is determined in relation to what is required to make a determination regarding responsibility
- Determining relevance is different than determining how much weight to give the evidence
  - Irrelevant evidence – Exclude from consideration
  - Relevant evidence – Include for consideration
    - Determine how much weight to be given compared to other evidence

# RELEVANCE

Prior sexual  
behavior or sexual  
predisposition

Questions about a complainant's prior sexual behavior or sexual predisposition are *NOT* relevant EXCEPT to the limited extent they are *offered to prove that someone other than respondent committed the conduct, or as related to specific incidents between the complainant and respondent to prove consent*

# The Written (Investigative) Report

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- ❑ Must ask questions and sort through evidence to produce a summary of relevant evidence
- ❑ Prior to the completion of the written report, each party must be provided with copies of evidence directly related to the allegations in the complaint
  - ❑ Each party must have 10 days to submit a written response to the Investigator
  - ❑ Investigator must “consider” the written responses prior to completing the written report.
- ❑ Written report must fairly summarize relevant evidence
- ❑ Final written report must be provided to each party and the parties’ advisors (if any) at least 10 days prior to the decision-maker making a determination regarding responsibility
  - ❑ Parties must be given opportunity to review and provide a written response to the written report
- ❑ Beware of record-keeping requirements – Investigation materials must be maintained for 7 years.

# Bias and Impartiality

Investigator must be unbiased and impartial

- Bias is prejudice in favor of or against one person or group as compared to another
- Investigator is not on anyone's "side"
  - Goal is to help decision-maker reach determination of responsibility based on reliable, relevant evidence
  - Goal is NOT to achieve any particular outcome
  - Avoid becoming emotionally invested or slipping into advocacy
- Conflicts of Interest exist when Investigator has a personal or professional interest in a case that prevents them from discharging their duties in a fair, neutral and impartial manner

# Unbiased Investigation

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- ❖ Gives parties equal opportunities for participation
- ❖ Presumes innocence until a determination regarding responsibility is made
- ❖ Provides parties with equivalent rights to:
  - ❖ Written notices
  - ❖ Introduce witnesses and evidence for Investigator's consideration
  - ❖ Review and respond to the other party's evidence
  - ❖ Credibility determinations based on specific factors, not a party's status as complainant or respondent

# Determination of Responsibility

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CANNOT BE MADE BY INVESTIGATOR OR TITLE IX COORDINATOR

## Who Should Decision- Maker Be?

- Cannot be same as Title IX Coordinator or Investigator for that case
- Cannot be the same as Appeal Decision-Maker
- May be one person or a multi-member panel

# What is Decision Maker's Role?

- ❖ Act as neutral
- ❖ Determine what questions are relevant to the case
- ❖ Objectively evaluate all relevant evidence both inculpatory and exculpatory
- ❖ Reach determination regarding responsibility without giving any deference to the investigative report
- ❖ Mandatorily dismiss complaint:
  - ❖ That do not rise to level of “Sexual harassment”; or
  - ❖ Did not occur in education program or activity; or
  - ❖ Did not occur against a person in the US

# Decision-Making Process

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## Written

- OCS's policy provides for the written option

## Live Hearing

*K-12 is not required to hold live hearings and little structure is provided for by regulations regarding live hearings at K-12 level.*

# Cross Examination

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- ❑ Occurs in some form in both the written and live hearing options
- ❑ DOE determined it is necessary for due process
- ❑ DOE presumes Decision-Maker will control advisors and advocates to ensure no party is abused by cross-examination process

# Live Hearing Requirements

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- Each party is permitted to have an “advisor” who could be an attorney or other representative
- Each advisor is permitted to ask the other party and any witnesses all relevant questions, challenge credibility and conduct cross-examination
- If a party does not have an advisor, OCS must provide one free of charge to conduct cross examination on behalf of that party
- OCS must provide technology to allow the live hearing to take place with parties in separate rooms if requested
  - Technology training must be provided to the decision-maker
- OCS must create audio or video recording, or written transcript of the live hearing and make it available to all parties

# Written Option

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- ❑ Instead of a live hearing, decision-maker may allow each party to submit written questions to any party or witness
- ❑ Decision-maker provides each party with the answers, and allows for additional, limited follow-up questions from each party

# Cross- Examination Procedure in Written Option

Each party's  
advisor will  
submit questions  
for cross-  
examination

- ❖ Decision-Maker's Role
  - ❖ Decide if questions are relevant and:
    - ❖ Ask the question if relevant; or
    - ❖ Decline to ask an irrelevant questions, and explain why the question is irrelevant to the asking party in writing

# Relevance – Evidentiary Definition

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Evidence having any tendency to make the existence of any fact of consequence to the determination at issue more or less probable than it would be without the evidence

Determining relevance is different than determining how much weight (strength) to give evidence

- ❖ Irrelevant evidence – Excluded
- ❖ Relevant, but not much weight – Included for consideration

# Relevance – Privileged Information

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- Any party's medical, psychological, and similar records are not relevant unless voluntarily provided by that party
- Any information protected by a legally recognized privilege (ex. attorney-client privilege) is not relevant
  - Ex. Cannot ask: “What did your attorney tell you about whether these actions were consensual?”

# Questions Prohibited

In either live hearing or using written option, questions concerning the complainant's sexual predisposition or prior sexual behavior are NOT relevant unless:

- Offered to prove someone other than respondent committed the conduct alleged; or
- Incidences concern prior sexual behavior with the respondent and are offered to prove consent

# Credibility Assessments

Give testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive

- Do not rely on “demeanor” alone – can be inaccurate, especially in traumatic situations
- Take trauma into account
- Other factors for credibility
  - Consistency
  - Plausibility
  - Reliability
  - Motive
  - Bias?

# Determining Responsibility

Following live hearing or written exchange of questions, decision-maker must determine responsibility

- ❖ Keep an open mind until all relevant evidence has been heard and don't come to any judgment or conclusion until reviewing all permissible and relevant evidence
  - ❖ May not consider anything other than relevant evidence
- ❖ Make sound reasoned decision
  - ❖ Determine the facts based on the information presented
  - ❖ Determine what evidence to believe, the importance of the evidence and the conclusions to draw therefrom

# Evidence Standard

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## PREPONDERANCE OF THE EVIDENCE

- More likely than not
- What is more plausible?
- What corroborating evidence is supportive?
- Sometimes – Who do you believe more and why?

## CLEAR AND CONVINCING

- Highly probable; highly and more substantially likely to be true

# Evidence Standard

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- May use either standard as long as:
  - Same standard used for formal complaints against students as for formal complaints against employees, including faculty; and
  - Same standard of evidence applied to all formal complaints of sexual harassment
- Neither standard is as high as the standard of evidence in criminal cases – “beyond a reasonable doubt”

# Analyzing the Elements of Prohibited Conduct

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- ❑ To find a violation, there must be evidence, using preponderance of the evidence standard, that every element of violation has been met
- ❑ How?
  - ❑ Review definition
  - ❑ Break down definition into elements
  - ❑ Sort evidence according to elements
- ❑ If you have preponderance of evidence that each element is present you have a violation
- ❑ If you do not have a preponderance of the evidence that each element is present, you do not have a violation
- ❑ If you have a preponderance of the evidence that one or more elements is not present, then you do not have a violation

# Example

## Quid Pro Quo

- ❖ Conduct on the basis of sex
- ❖ By an employee
- ❖ That conduct conditions the provisions of an aid, benefit, or service on an individual's participation in sexual conduct
- ❖ That sexual conduct is unwelcome

# Example

## Hostile Environment

- ❖ Conduct on the basis of sex
- ❖ That is unwelcome
- ❖ That a reasonable person has determined is so severe, pervasive and objectively offensive ...
- ❖ That it effectively denies a person equal access to education program or activity

# Example

## Sexual Assault

- ❖ Conduct on the basis of sex
- ❖ Qualifies as one of the following:
  - ❖ Rape
  - ❖ Sodomy
  - ❖ Sexual assault with an object
  - ❖ Fondling
  - ❖ Incest
  - ❖ Statutory Rape
- ❖ In cases of rape, sodomy, sexual assault or fondling, there was either:
  - ❖ No consent; or
  - ❖ Victim was incapable of giving consent because of age or temporary/permanent mental or physical incapacity

# Remember – Scope of Education Program/Activity

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Behavior addressed must occur in school's education program or activity

- All operations of school
- Locations, events and circumstances over which OCS exercised substantial control over both respondent and the context in which sexual harassment occurs

# Written Decision

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- ❑ Identification of Allegations
- ❑ Procedural Steps
- ❑ Findings of Fact
- ❑ Application of Facts to Code of Conduct
- ❑ Statement of Results and Rationale for Each Allegation
- ❑ Sanctions and Remedies
- ❑ Appeal Procedures

# Written Decision

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- Ensure Title IX Coordinator receives a copy of decision and any other documents involved in process for required 7-year retention
- Must be provided to parties simultaneously
- Determination is not FINAL until:
  - Date of written determination following appeal; or, if no appeal is taken
  - Date the appeal deadline expires

# Sanctions and Remedies

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- Range of possible sanctions must be described in policy
- Focus not just on discipline, but also on restorative remedies to prevent recurrence
- Don't forget about other legal obligations

# Sanctions

## Examples

- ❖ Written Warning
- ❖ Suspension
- ❖ Expulsion
- ❖ Demotion
- ❖ Termination

# Other Legal Obligations

- ❖ Student Conduct Policies
- ❖ Suspension/Expulsion beyond 10 days
- ❖ IDEA/504 Students
- ❖ Employee Due Process Procedures

# Remedies

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- ❖ Title IX Coordinator responsible for implementing remedies
- ❖ May be the same or similar to interim supportive measures
- ❖ Must be designed to restore or preserve equal access to education programs or activities
- ❖ Need not be non-disciplinary or non-punitive and need not avoid burdening the respondent
- ❖ Range of possible remedies must be included in policy
- ❖ Evaluated by DOE under “deliberate indifference” standard

# Remedies

## Examples

- Counseling modifications
- Accommodations to class schedules or school work
- Restrictions on contact between the parties
- Increased Monitoring

# Appeal Process

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# Appeal Procedures

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- OCS must notify other party in writing when appeal is filed
- Give both parties a reasonable, equal opportunity to submit a written statement
- Issue a written decision describing the result of the appeal and rationale
- Provide written decision simultaneously to both parties

# Appeal Decision-Maker

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- ❖ Must not be Title IX Coordinator, Investigator or Initial Decision-Maker
- ❖ Can be individual or multi-member panel
- ❖ Not the full School Board
- ❖ Avoid conflict of interest and bias

# Mandatory Appeals

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- Procedural irregularity that affected the outcome of the matter
- New evidence not reasonably available at the time of the determination regarding responsibility or dismissal
  - Evidence could affect outcome
- Title IX Coordinator, Investigator or Decision-Maker had a conflict of interest or bias for or against either party that affected the outcome

# Permissive Appeals

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- May offer an appeal on any other basis, as long as the opportunity is offered to both parties equally
- Examples
  - Whether the evidence met the identified standard of proof
  - Whether the sanction is proportional to the policy violation

# Impartiality, Bias and Conflict of Interest

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DECISION-MAKERS AND APPEAL DECISION-MAKERS

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# Impartiality

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- Avoid stereotypes or generalizations about groups of people (ex. “victim-blaming” or “believe all women”)
- Decision-Makers must endeavor NOT to develop a personal relationship with one party over another, including based on whether parties are remote for live hearing

# Conflicts of Interest

- Decision-Makers may have to recuse themselves from certain cases if conflict of interest exists
- Disclose and recognize conflicts of interest
  - Familiarity or connection to party?
  - Stake in the outcome?

# Confidentiality

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- ❖ Must keep confidential the identity of any individual who has made a report or complaint, any respondent and any witness except as:
  - ❖ May be permitted under FERPA;
  - ❖ As required by law; or
  - ❖ To carry out the investigation and hearing procedures
- ❖ Keep identities and information confidential to the hearing and resolution process – only talk to school officials who “need to know”

# Informal Resolution

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“DEFAULT” IS THAT FORMAL COMPLAINT MUST BE INVESTIGATED AND ADJUDICATED BY OCS. HOWEVER, OCS MAY CHOOSE TO OFFER PARTIES AN INFORMAL PROCESS TO RESOLVE THE COMPLAINT AFTER FORMAL COMPLAINT HAS BEEN FILED.

# EXAMPLES

- ❖ Mediation
- ❖ Arbitration
- ❖ Restorative Justice
  - ❖ Requires Respondent to admit wrongdoing

# Requirements

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- May not be required in lieu of formal grievance process
- May be initiated any time prior to reaching determination regarding responsibility
- Any party may withdraw from informal resolution process at any time prior to finalizing
- Must have reasonably prompt time frames
- Written notice of allegations should alert the parties to the availability of any Informal Resolution OCS has made available
- Must obtain parties voluntary, written consent

# Employee-to- Student Sexual Harassment

OCS cannot offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student.

# Disclosures

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- ❖ To parties and minors' parents or legal guardians
- ❖ Disclosing allegations, requirements of informal resolution process and right to withdraw therefrom
- ❖ If OCS will allow informal resolution facilitators as witnesses in subsequent formal grievance processes, that fact must be disclosed to parties
- ❖ Consequences of participating in informal resolution process, such as fact that records will be maintained or could be shared or not shared.
  - ❖ OCS determines confidentiality of informal resolutions (and must inform parties of nature and consequences of any confidentiality provisions)

# Facilitators

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- Must be free from conflicts of interest, bias and trained to serve impartially
- Training
  - Definition of sexual harassment
  - Scope of OCS's education program or activity
  - How to conduct informal resolution process
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias

# OUTCOMES

- ❖ Written agreement between parties
- ❖ May include provisions similar to Interim Supportive Measures
- ❖ May include disciplinary measures
- ❖ Provide finality for parties

# Recordkeeping and Retention

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## The following must be maintained for SEVEN years

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- Each sexual harassment investigation, including determinations, audio or visual recordings, disciplinary sanctions, and any remedies provided to the complainant;
- Any appeal and the result therefrom;
- Informal resolution, if any; and
- All material used to train Coordinators, Investigators, and those who facilitate informal resolution, and decision-makers with regard to sexual harassment

# The following must be created and kept for **SEVEN** years

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- Any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment
- Document the basis for the conclusion that your response was not deliberately indifferent
- Document that you have taken measures designed to restore or preserve access to the educational program or activity
- If no supportive measures are given to complainant, document why it was not clearly unreasonable