RRM Ratwik, Roszak & Maloney, P.A.

TITLE IX COMPLIANCE TRAINING

Practical Solutions for a Complex Process

Jennifer K. Earley
Laura Tubbs Booth
Christian R. Shafer

WELCOME!

TITLE IX

What do you think of when you think about Title IX?

TITLE IX PROVIDES….

"[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

PROHIBITS DISCRIMINATION ON THE BASIS OF SEX

- Discrimination includes harassment
- Requires equity in treatment of complainant/respondent

NEW REGS EFFECTIVE 8/14/2020

USDOE ISSUED NEW REGULATIONS IMPLEMENTING TITLE IX

NEW DEFINITIONS

NEW INVESTIGATION REQUIREMENTS

GENERAL RESPONSIBILITIES

For Public Elementary/Secondary Schools

SCHOOLS MUST:

1

Have a policy

2

Identify Title IX Coordinator

3

Offer Supportive Measure

4

Have a grievance process

RESPONSE TO SEX HARASSMENT

- A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent..

RECIPIENT

of Federal Funds

SEX HARRASSMENT IS…

Conduct based on sex and …

SEX HARASSMENT IS…

Conduct based on sex :

1. And a school employee conditions receipt of a benefit on participating 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's education program or activity; or

3. Sexual assault, dating violence, domestic violence, or stalking, as those terms are defined by federal law.

ACTUAL KNOWLEDGE

- If an employee of the school knows of sex harassment or
- Allegations of sex harassment the district has "actual knowledge"

EDUCATION PROGRAM OR ACTIVITY

PERSON IN THE UNITED STATES

RESPONSE: NOT DELIBERATELY INDIFFERENT

- *Davis v. Monroe County Bd. of Ed.*

CASE STUDY

- LaShonda was a fifth grade student
- Reports to parents & teacher three incidents during school by a classmate named Kim
- Mom speaks to teacher
- Eventually parents speak to principal

CASE STUDY CONTINUED…

Teacher assures parents that she has spoken with principal

LaShonda reports to physical education teacher when Kim put a door stop in pants and motions toward LaShonda

P.E. teacher reports to principal

Another student asks to speak to principal but is denied

LaShonda's grades plummet, does not want to attend school, suicide note.

* *Davis v. Monroe Cty. Bd of Education,* 526 U.S. 629 (1999)

DELIBERATELY INDIFFERENT

School is deliberately indifferent if it acted unreasonably in light of the known circumstances

FORMAL COMPLAINT

Previously, a formal complaint was not required

Now a "formal complaint" is required and means:

The Complainant files a written complaint or	The Title IX Coordinator files a written complaint	No third party complaints

REPORT VS. FORMAL COMPLAINT

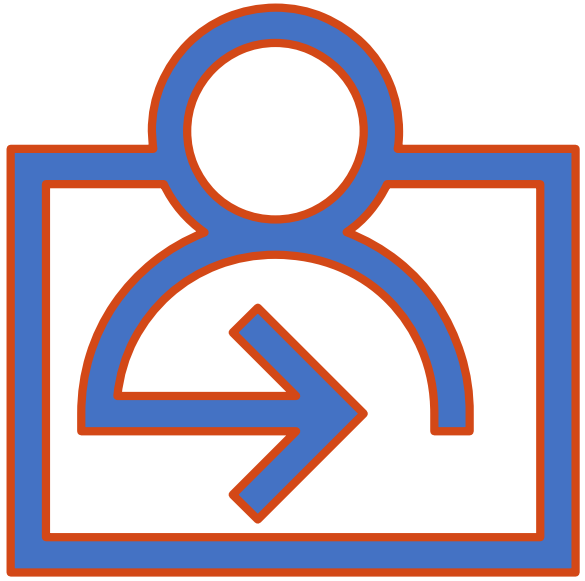
Report

- Actual knowledge by school employee of harassment or
- Actual knowledge by employee of report or
- Complainant reports to Title IX Coordinator but no formal report

Formal Complaint

- By the complainant in writing or
- By the Title IX Coordinator

SUPPORTIVE MEASURES



School must offer the complainant supportive measures regardless of formal complaint

REMEDIAL MEASURES/SELF EVALUATION

- If the USDOE determines a school engaged in discrimination, school can be ordered to take remedial action
- Schools should review the policy and MEASURE whether its being equitably enforced on an annual basis

ROLES

New regulations require that each school district have:

- Title IX Coordinator
- Investigator
- decision-maker
- Appeal Decision-Maker

TITLE IX COORDINATOR

- Understands law and policy – trained
- Can also be investigator
- May facilitate informal resolution
- MAY NOT be decision maker or appeal decision maker
- Responsible for coordination of grievance process & implementation of remedies

INVESTIGATOR

- Understands law and policy-trained to investigate
- May not be biased or have conflict of interest
- Must summarize findings in objective way
- May make recommendation but not required

DECISION-MAKER

- Understands law and policy – trained
- May not be biased or have conflict of interest
- Must issue written report in compliance with requirements
- May not be Title IX investigator and may not decide appeal

APPEAL DECISION-MAKER

- Must allow for written statement
- Be unbiased and have no conflict of interest
- May not be Title IX Coordinator or Decision-Maker

STEP ONE
ROLE OF THE TITLE IX COORDINATOR

ACTIONS TO TAKE UPON RECEIPT OF A COMPLAINT

Receipt of a "Formal Complaint" from LaShonda/Parents

Next Step

ACTIONS TO TAKE UPON RECEIPT OF A REPORT

Receipt of Report from a Witness

Content of Report is "Actual Knowledge"

Deliberate Indifference Standard Requires Contact with Complainant

Complainant Files Complaint

Next Step

Content of Complaint Results in "Actual Knowledge"

Title IX Coordinator Files Complaint

Next Step

MANDATORY DISMISSAL

A formal complaint ***must*** immediately be dismissed if:

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

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

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

PERMISSIVE DISMISSAL

A formal complaint ***may*** be dismissed if:

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

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

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

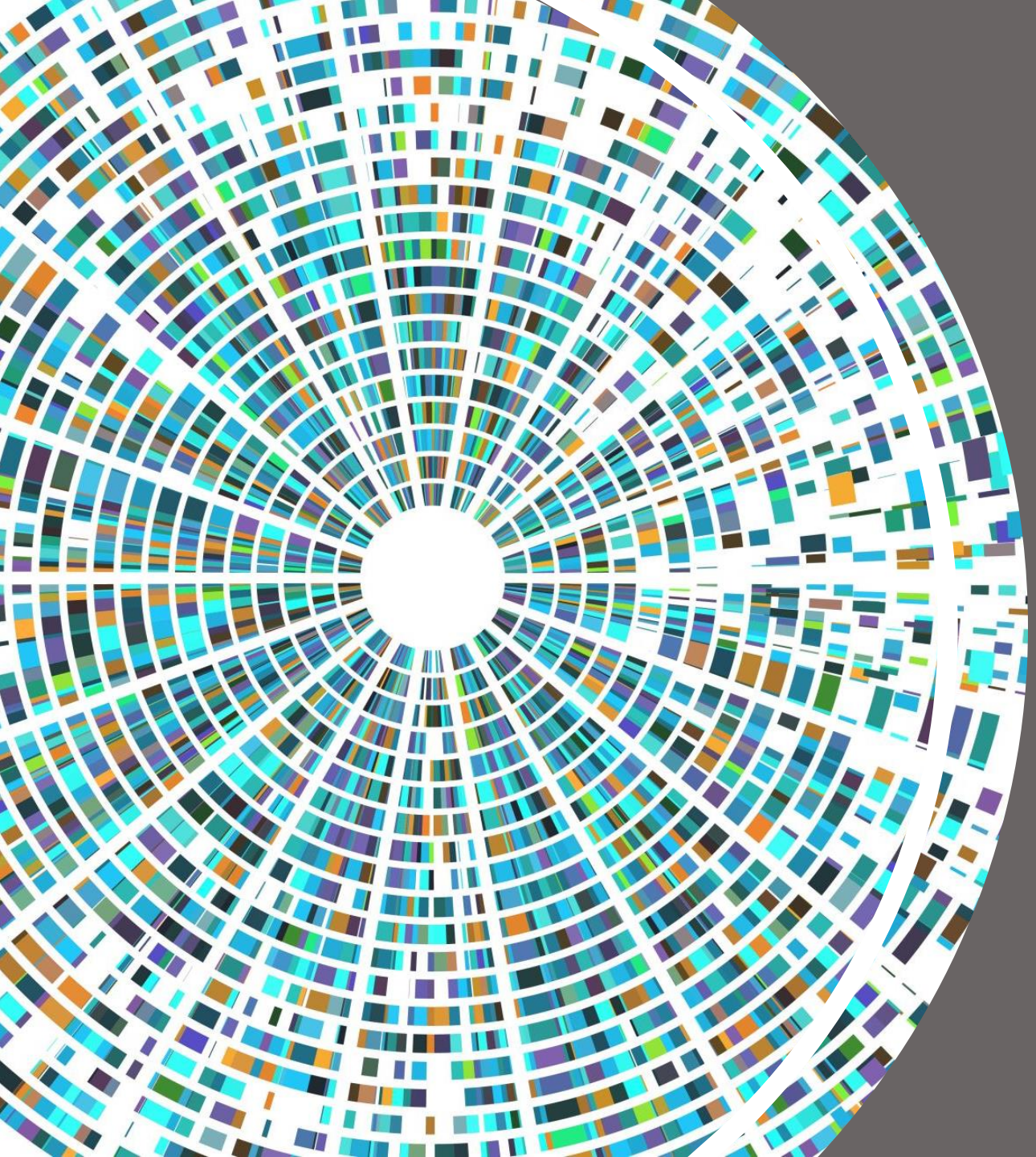
RESPONSIBILITIES WHEN DISMISSING A COMPLAINT

REFERRAL OF COMPLAINT TO OTHER STAFF OR ENTITIES

Harassment Based on Protected Class	Human Rights Office
Bullying	Building Administrator
Code of Conduct	Building Administrator
Criminal Activity	Law Enforcement
Maltreatment of a Minor	Law Enforcement or MDE

NOTICE TO PARTIES

1. Grievance/Informal Resolution Process;
2. Allegations;
3. Presumption Respondent Is Not Responsible;
4. Right to an Advisor; and
5. Code of Conduct Prohibits False Statements or Information.



INTERIM SUPPORT MEASURES

Supportive measures, offered equally to both parties, are non-disciplinary measures including:

- Counseling
- Modification of deadlines/other adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between parties
- Changes in work or school locations
- Leaves of absence
- Increased security and monitoring

INTERIM EMERGENCY REMOVAL OF STUDENT RESPONDENTS

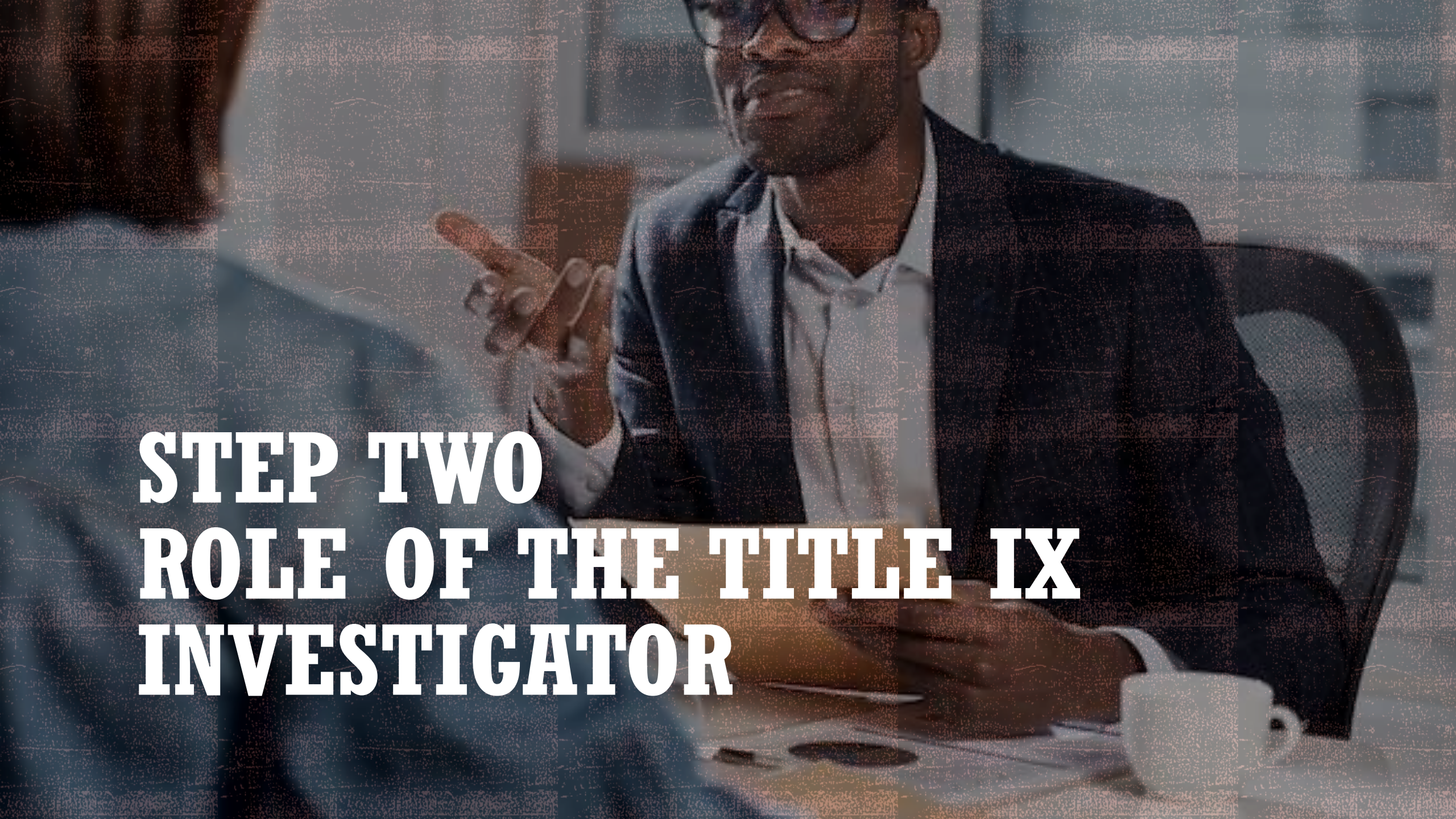
- Mandatory individualized safety and risk analysis
- Immediate threat arising from the allegations of sexual harassment
- The threat must relate to the physical health or safety of any individual
- Requires notice to the respondent and an opportunity for challenge immediately following removal
- The respondent bears the burden of proving the removal decision was incorrect
- Not applicable to offenses outside Title IX

INTERIM EMERGENCY REMOVAL OF EMPLOYEES

- Non-Applicability of Title IX Procedures
- Factors to Consider
- Possible Directives to Employees

INFORMAL RESOLUTION

- Timing
- Notice
- Non-Applicability to Employees



STEP TWO
ROLE OF THE TITLE IX INVESTIGATOR

NEW TITLE IX REQUIREMENTS FOR INVESTIGATIONS

INDEPENDENT
INVESTIGATION

THE SCHOOL OR DISTRICT BEARS THE BURDEN OF PROOF, NOT EITHER PARTY

SPECIFIC TYPES OF INFORMATION AND DATA CONCERNS IN A TITLE IX INVESTIGATION

Consideration of privileged information

Review of external medical records

Interplay between data privacy laws and Title IX

PRACTICAL CONSIDERATIONS

- Consolidation of multiple complaints
- All parties must be given an equal opportunity to present witnesses

REQUIRED NOTICES AND OPPORTUNITY TO REVIEW EVIDENCE

INVESTIGATION REPORTS

INITIAL CONSIDERATIONS: EXTERNAL REPORTS

- Remember to make any mandated reports under the Maltreatment of Minors Act
- Potential referrals to law enforcement

A BRIEF DATA PRACTICES INTERLUDE

8
9
10
11
4
15
18
21
22
25
PLAN
AHEAD

LASHONDA'S CLAIMS: WHO MIGHT THE INVESTIGATOR WANT TO INTERVIEW?

DISTRACTIONS

ACT NOW

INTERVIEW BASICS

REQUIRED INTERVIEW NOTICE

OPENING REMARKS

Explaining

Explaining the purpose of the interview

Explaining

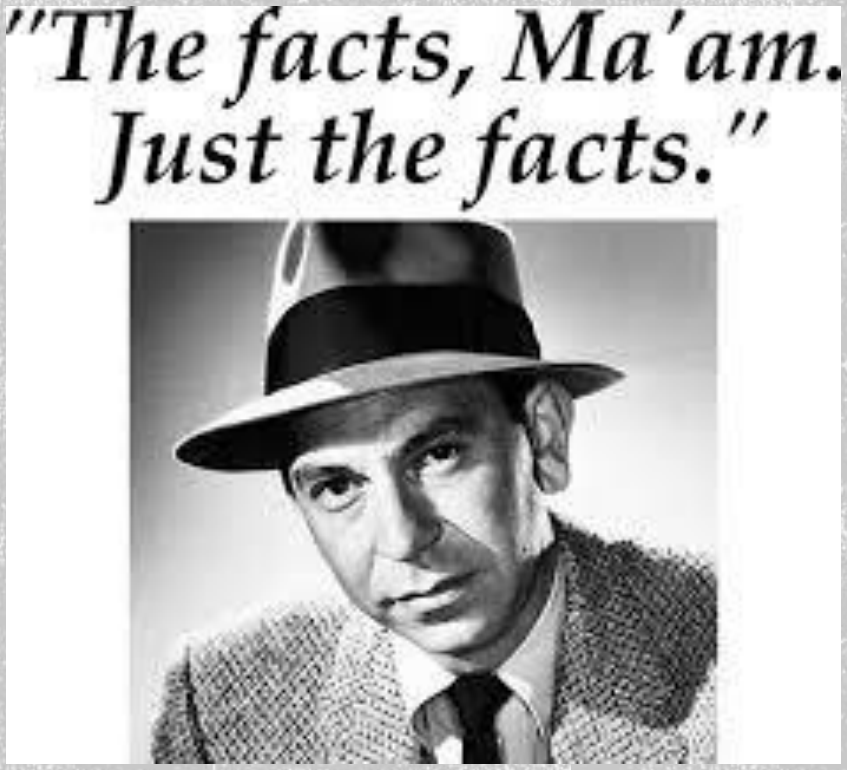
Explaining the investigation process and your role as investigator

Explaining the *Tennessen* Warning

NOT CONFIDENTIAL

ASK
THE RIGHT
QUESTIONS

DO NOT GUARANTEE RESULTS



INTERVIEWING THE COMPLAINANT AND FACT WITNESSES

INTERVIEWING THE COMPLAINANT AND WITNESSES

- Short, open-ended questions

THE INVESTIGATOR MIGHT HAVE TO DEFEND THE INTERVIEW QUESTIONS, SO…

...WATCH OUT FOR BIASES!

SOME SPECIFIC TIPS FOR INTERVIEWING WITNESSES AND COMPLAINANTS

SPECIAL CONSIDERATIONS FOR INTERVIEWING THE RESPONDENT

WATCH OUT FOR BIAS IN THE COMPLAINANT INTERVIEW TOO!

OPENING REMARKS

- Explaining the role of the investigator as a neutral factfinder
- Administering *Tennessen* or *Garrity* Warnings
- Establishing ground rules
- Provision of similar initial statements that were provided to the Complainant

WHAT IF THE COMPLAINANT REFUSES TO ANSWER?

SPECIFIC STRATEGIES FOR INTERVIEWING THE RESPONDENT

BACK TO LASHONDA: WHAT KINDS OF QUESTIONS MIGHT THE INVESTIGATOR ASK?

WAS THE WITNESS OR PARTY CREDIBLE?

Computer evidence

SURVEILLANCE FOOTAGE

SOCIAL MEDIA IN INVESTIGATIONS

IS THERE ANY TYPE OF ELECTRONIC EVIDENCE THAT THE INVESTIGATOR MIGHT CONSIDER IN THE LASHONDA INVESTIGATION?

COORDINATING ANY INVESTIGATION WITH LAW ENFORCEMENT

INVESTIGATION CONCLUSIONS MUST BE BASED ON RELEVANT EVIDENCE

WRITTEN INVESTIGATION REPORTS

- Time frame for completing investigation reports
- Time frame for providing investigation reports to parties
- An investigation must "fairly summarize" the relevant evidence
- The investigator does not decide if harassment occured

STRATEGIES FOR WRITING AN INVESTIGATION REPORT

AVOIDING CONFLICTS OF INTEREST

ONE MORE WORD ABOUT BIASES

STEP THREE
ROLE OF THE TITLE IX DECISION MAKER

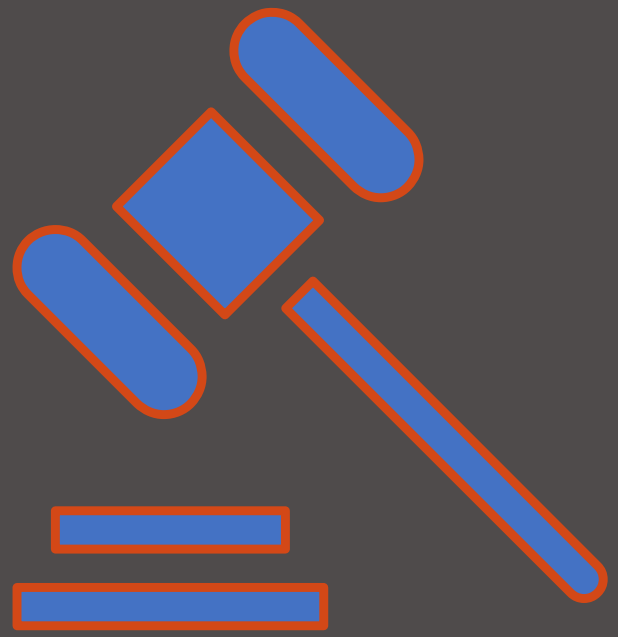
STANDARD OF REVIEW

Preponderance of the Evidence

"Preponderance of the evidence" means that the respondent will be found responsible only if it is more likely than not that he or she engaged in the conduct constituting sexual harassment.

Clear and Convincing Evidence

"Clear and convincing evidence" means that the respondent will be found responsible only if it is highly more likely to be true that the respondent engaged in the conduct constituting sexual harassment.



PROCEDURES REQUIRED PRIOR TO A DECISION

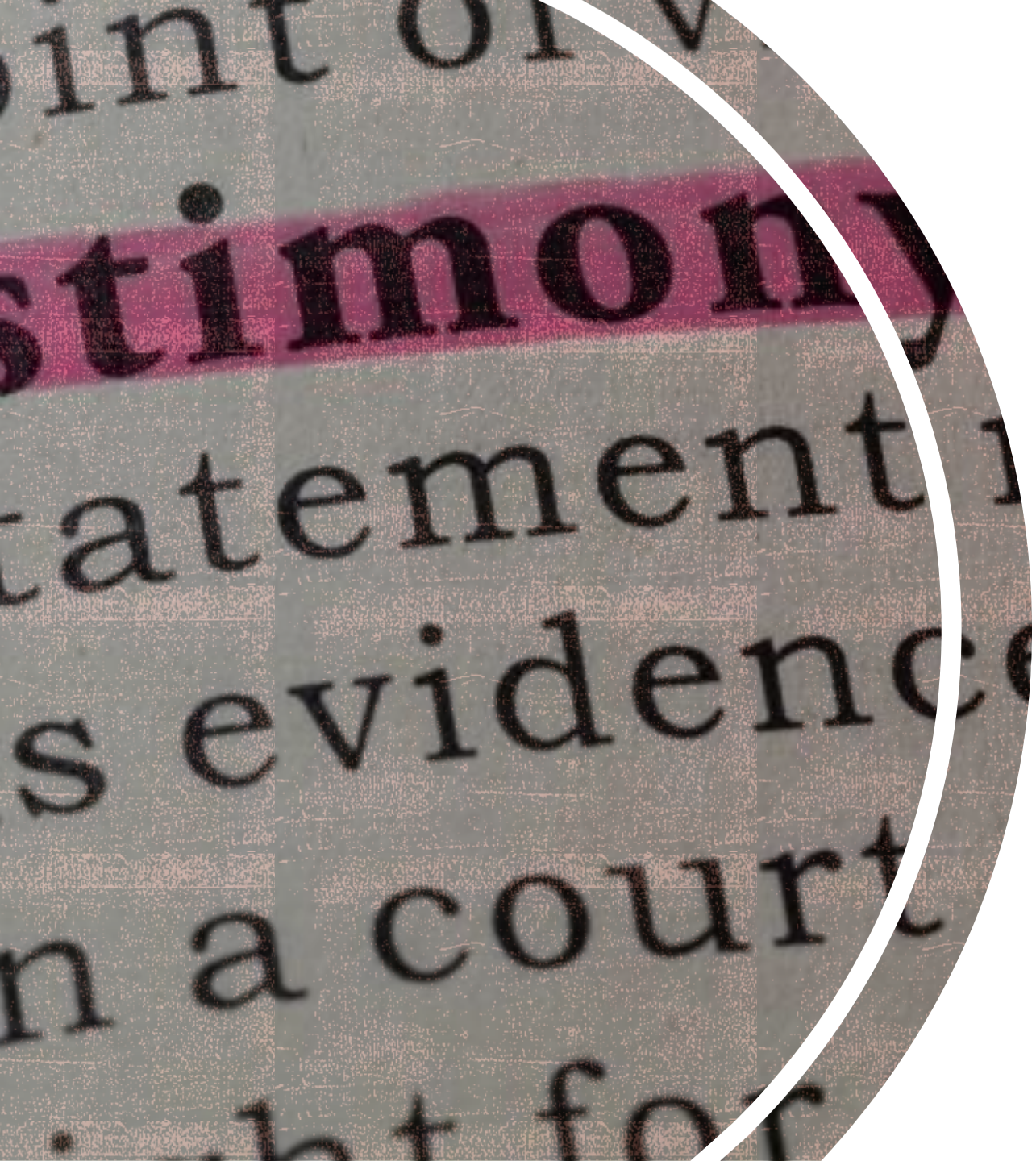
- Opportunity for Parties to Respond to the Report
- Notification of the Right to a Hearing and/or Written Questions

SUBMISSION OF WRITTEN QUESTIONS

All schools must allow for an exchange of written relevant questions, regardless of whether a live hearing is also offered.

RELEVANCY

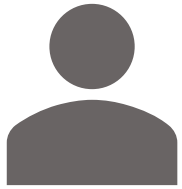
"Relevant evidence" means evidence having any tendency to make the existence of any fact more probable or less probable than it would be without the evidence.



WHAT EVIDENCE MAY BE APPROPRIATE TO EXCLUDE OR ALLOW IN LASHONDA'S CASE?

LIVE HEARINGS

Recording



Appointment of Advisor

Questioning

THE DETERMINATION

- Identification of the allegations
- Description of the procedural steps taken
- Findings of fact
- Conclusions applying the code of conduct/policy
- Assignment of responsibility, rationale, sanctions and remedies
- The procedure for appealing the determination of responsibility

STEP FOUR
IMPLEMENTATION OF THE DECISION AND THE APPEALS PROCESS (ROLE OF THE APPELLATE DECISION-MAKER)

POTENTIAL REMEDIES

May include but are not limited to:

- Education
- Continued supportive measures
- Discipline
- Restorative Justice

APPEAL

- Either party may appeal:
  - Determination of Responsibility or
  - Dismissal

APPEAL ON THE BASIS OF…

- Procedural irregularity that impacted outcome
- New evidence not available at the time of investigation that could impact outcome
- Conflict of Interest or Bias on part of investigator, Title IX Coordinator

SCHOOL MUST….

- Ensure appeal decision maker is not the investigator or Title IX Coordinator
  - And employs same standards as decision maker
- Provide notice to both parties
- Ensure each party has reasonable opportunity to submit written statement
- Issue a written decision

Questions

Ratwik, Roszak & Maloney, P.A.

730 Second Avenue South, Suite 300
Minneapolis, Minnesota 55402

(612) 339-0060
Fax (612) 339-0038
www.ratwiklaw.com

TITLE IX REQUIRED TRAINING
A Practical Approach to a Complex Process
Online Training --
August 6, 2020

Jennifer K. Early
jke@ratwiklaw.com

Laura Tubbs Booth
ltb@ratwiklaw.com

Christian R. Shafer
crs@ratwiklaw.com

Frank E. Lagan

Online Training --
August 6, 2020

NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel.

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WHAT EVERONE NEEDS TO KNOW ABOUT THE NEW TITLE IX REGULATIONS

Title IX prohibits discrimination based on sex by entities that receive federal funding. Under the new regulations to Title IX taking effect August 14, 2020, a school or school district's Title IX Coordinator, Investigator, Decision-Maker, and Informal Resolution Process Facilitator must all be trained on the following topics: the definition of sexual harassment, the scope of a school's education program or activity, the new regulatory requirements of the Title IX investigation and grievance process, and how to avoid conflicts of interest and bias. Investigators and decision-makers must also be trained on how to recognize relevant evidence and questioning. The purpose of this training is to cover those topics, to explain the new regulations, and to offer practical advice on how to conduct and resolve a Title IX investigation under the new grievance procedure.

I. DEFINITIONS

A. Sexual Harassment. The first major change is that sexual harassment is now defined, by regulation, as conduct on the basis of sex that also satisfies one or more of the following conditions:

1. A school employee conditioning the provision of an aid, benefit, or service of school on an individual's participation in unwelcome sexual conduct;

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's education program or activity; or

3. Sexual assault dating violence, domestic violence, or stalking, as those terms are defined by federal law.

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

    b. "Dating Violence" means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. Whether such a relationship exists depends on the length of the relationship, the type of relationship, and the frequency of interaction between the

persons involved in the relationship. *See* 34 U.S.C. § 12291(a)(10).

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

d. "Stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or suffer substantial emotional distress. *See* 34 U.S.C. § 12291(a)(30).

34 C.F.R. § 106.30(a)

B. **Actual Knowledge**. Actual knowledge, which triggers a school or district's duty to respond in a manner that is not deliberately indifferent, means, in relevant part, "notice of sexual harassment or allegations of sexual harassment to a recipient'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(a) (emphasis added). "This standard is not met when the only official of the recipient with actual knowledge is the respondent." *Id.*

C. **Complainant**. "Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment." 34 C.F.R. § 106.30(a).

D. **Respondent**. "Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment." 34 C.F.R. § 106.30(a).

E. **Party.** The term "party" refers to a complainant or a respondent. The term "parties" refers to both. Some reports of sexual harassment may involve multiple complainants or multiple respondents, or both. For purposes of

clarity, these materials use the singular form. However, these regulations apply equally to both single- and multi-complainant or respondent complaints.

F. Supportive Measures. The term "supportive measures" or "interim supportive measures" means "non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed." 34 C.F.R. § 106.30(a). Supportive measures "are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment." *Id.* Examples include "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restriction]ns on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures." *Id.*

Supportive measures are coordinated by the Title IX Coordinator, and should be kept confidential, to the extent that maintaining confidentiality does not otherwise interfere with the provision of supportive measures.

G. Education Program or Activity. "Education program or activity" includes locations, events, or circumstances over which the school or district exercised substantial control over both the respondent and the context in which the sexual harassment occurs. 34 C.F.R. § 106.44(a).

II. GENERAL RESPONSIBILITIES

A. Designation of Title IX Coordinator. Every school or school district must designate at least one Title IX Coordinator. 34 C.F.R. § 106.8(a). The Title IX Coordinator receives complaints of sexual harassment and sex discrimination, either by telephone, e-mail, mail to their office, or in person. *Id.* Accordingly, the identity of the Title IX Coordinator and that person's contact information must be provided to (1) applicants for admission and employment, (2) students, (3) parents or legal guardians, (4) employees, and (5) all unions and professional organizations that have collective bargaining or professional agreements with the school or district. *Id.*

B. Dissemination of Policy. Schools and school districts must provide notice to the persons listed in Paragraph A above that the school or district does not discriminate on the basis of sex in its education program or activities, including in employment, that it is required by Title IX not to discriminate in such a manner, and that questions regarding Title IX may be referred to the Title IX Coordinator. 34 C.F.R. § 106.8(b)(1).

This notice must be listed on the school or school district's website, and in each handbook or catalog that it makes available to students, parents, employees, applicants for employment or admission, and unions. 34 C.F.R. § 106.8(b)(2).

C. Grievance Procedure. The new regulations establish the guidelines for a grievance procedure. *See* 34 C.F.R. § 106.45. All schools and/or school districts who receive federal funding are required to adopt a grievance procedure that complies with the regulations. 34 C.F.R. § 106.8(c).

III. General Rules for Responding to a Report of Sexual Harassment

A. Respond, and Respond in a Manner that is Not Deliberately Indifferent. When a school or district has actual knowledge of an allegation of sexual harassment, it has a duty to respond to that complaint in a manner that is not deliberately indifferent. 34 C.F.R. § 106.44(a). "Deliberate indifference" means a response that is "clearly unreasonable in light of the known circumstances." *Id.*

It is the responsibility of the Title IX Coordinator to contact the complainant promptly, discuss supportive measures that are available with or without the filing of a formal complaint, consider the complainant's wishes with respect to supportive measures, and explain the process for filing a formal complaint to the complainant. *Id.*

The response must treat the complainant and respondent equitably, by offering supportive measures to the complainant, and by following the grievance process if a formal complaint is filed. *Id.*

STEP ONE – ROLE OF THE TITLE IX COORDINATOR

I. RECEIPT OF A COMPLAINT

A. Verify Document Meets the Standard of a Formal Complaint

1. Report is a physical document (not an oral report), filed either in person, electronically or by mail.

2. The report is filed by a complainant (or complainant's parent) or signed by the Title IX Coordinator.

3. The report alleges sexual harassment against a respondent and requests that the school or school district investigate the allegation of sexual harassment.

B. Responding to a "Report" or "Actual Knowledge" of Sexual Harassment

1. Information is conveyed about conduct that could constitute "sexual harassment."

2. The information or report was received by the:

   a. Title IX Coordinator;

   b. any school or school district employee who has authority to institute corrective measures on behalf of the school or school district; or

   c. any employee of an elementary or secondary school.

3. Respond in a manner that is not deliberately indifferent when they have knowledge of a complaint, regardless of whether or not the complaint is a formal complaint.

4. If the Title IX Coordinator obtains actual knowledge of sexual harassment based on observations or an oral complaint, the complaint should be reduced to writing and signed by either the complainant or the Title IX Coordinator in order to create a "formal complaint."

II. INITIAL EVALUATION OF THE COMPLAINT

A. Immediate Dismissal of Complaint

1. Standard for Mandatory Dismissal of a Complaint

   A formal complaint must be dismissed if:

   a. The conduct alleged in the formal complaint, even if proven, does not meet the definition of sexual harassment set by the regulations and school policy;

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

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

2. Standard for Permissive Dismissal

   A formal complaint may be dismissed if:

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

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

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

3. Responsibilities When Dismissing a Complaint

   a. The parties shall be notified, in writing, if a formal complaint is dismissed and the reason(s) for the dismissal.

   b. Dismissal of a formal complaint does not preclude the imposition of discipline arising out of the same conduct for any other violations of the student code of conduct or the school's or school district's policies.

B. Referral of Complaint to Other Staff or Entities

1. Referral or Coordination of Allegations of Harassment Based on Protected Class

2. Referral or Coordination of Allegations of Bullying

3. Referral or Coordination of Allegations of Code of Conduct Violation

4. Referral or Coordination with Law Enforcement

5. Maltreatment of Minors Reporting

III. NOTICE OF ALLEGATION

A. Individuals Who Must Receive Notice of the Complaint

Upon receipt of a formal complaint, the Title IX Coordinator will provide all known parties with a written notice.

B. Contents of Notice

1. Notice of this grievance process, including any informal resolution process;

2. Notice of the allegations, including sufficient details to the extent they are known at the time.

    a. "Sufficient details" includes, but is not limited to: the identities of the parties involved in the incident; the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident;

    b. To the extent that any of these details are not known at the time the formal complaint is filed, the Title IX Coordinator must provide a supplemental notice when new or additional information is discovered.

3. A statement that the respondent is presumed not responsible and that a determination regarding responsibility will be made at the conclusion of the grievance process;

4. Notice that the parties may have an advisor of their choice; and

   NOTE: *A party is entitled to the advisor of their choice. 34 C.F.R. § 106.45(b)(5)(iv). The advisor may be, but need not be, an attorney. Id . The advisor must be permitted to attend any meeting or grievance proceeding that the party attends. Id. However, the school or school district may limit the extent to which the advisor may participate in such meetings, so long as the restrictions are imposed equally on both the complainants' advisors and respondents' advisors. Id.*

5. Notice informing the parties of any provision of the school or school district's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

C. Time Requirements for Providing Notice

The initial written notice must be provided to both parties with sufficient time for either party to prepare before any initial interview.

D. Interim Support Measures

1. Notice to the Complainant

   The Title IX Coordinator is responsible for contacting the complainant promptly, to:

   a. Discuss supportive measures that are available with or without the filing of a formal complaint;

   b. Consider the complainant's wishes with respect to supportive measures; and

   c. Explain the process for filing a formal complaint to the complainant.

2. What Constitutes an Interim Support Measure

   Supportive measures are non-disciplinary measures including: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties,

changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

3. Equality of Access to Support Measures

   a. Interim Support Measures must be provided on an equal basis to all parties.

   b. Any measure that is made available to a complainant shall not be denied to a respondent, and vice versa.

4. Confidentiality

   Any supportive measures provided to either party shall be maintained as confidential, to the extent that confidentiality will not impair the school or school district's ability to provide such measures.

IV. EMERGENCY REMOVAL OF STUDENT RESPONDENTS

A. Presumption of Non-Removal

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

B. Standards for Immediate Removal

1. A mandatory individualized safety and risk analysis must be conducted.

2. The respondent must pose an immediate threat arising from the allegations of sexual harassment.

3. The threat must relate to the physical health or safety of any student or other individual, including the respondent themselves.

C. Procedural Requirements of Emergency Removal for Students

1. A respondent who is removed on an emergency basis must be notified of the school or school district's decision.

2. A respondent must be provided with an opportunity to challenge the decision immediately following removal.

3. The respondent bears the burden of proving that the removal decision was incorrect.

D. Non-Applicability to Conduct Outside Title IX

Schools and school districts may still suspend, exclude, expel, or otherwise remove a student from school for any reason other than a pending sexual harassment investigation.

V. INTERIM EMERGENCY REMOVAL OF EMPLOYEE

A. Permissible Removal of Non-Student Employee

A school or school district may place a non-student employee who is accused of sexual harassment on administrative leave pending the completion of the investigation without any specific limitation that would otherwise be applicable to students.

B. Factors to Consider

When making such a decision to place an employee on administrative leave pending investigation, among other factors, the school or school district may wish to consider the following:

1. The applicability of any restrictions or procedures on placement of an employee on administrative leave in a contract or collective bargaining agreement;

2. Whether the employee has the ability to destroy relevant information;

3. Whether a secret investigation may adduce more relevant evidence; and

4. Whether placing the employee on administrative leave is necessary to limit the employer's potential exposure to losses and/or negative publicity.

C. Directives During Administrative Leave

Depending on the specific situation, employers may wish to issue specific directives to employees placed on paid leave. Such directives typically include:

1. Prohibiting the employee from performing any work for the school or school district;

2. Prohibiting the employee from having retaliatory contact with complainants or witnesses about the investigation;

3. Requiring the employee to turn in all employer property, including electronic files;

4. Directing the employee to appear for an interview; and

5. Ordering the employee to not access any of the employer's electronic resources during the investigation;

VI. INFORMAL RESOLUTION

A. Timing

1. A school or school district may offer informal resolution at any time after a formal complaint has been filed and before a determination regarding responsibility has been made.

2. No party may be forced to participate in such a process.

3. Both parties must voluntarily consent in writing to the informal resolution process.

4. The grievance process may be suspended while the parties work through the informal resolution process.

B. Required Notice

Before obtaining the parties' voluntary written consent, the school or school district must provide a notice that contains the following information.

1. The allegations;

2. The requirements of the informal resolution process, including the circumstances under which it would preclude the parties from resuming a formal complaint rising from the same allegations;

3. A provision specifying that any party has the right to withdraw from the process at any time prior to agreeing to an informal resolution, at which point the formal grievance process will resume; and

4. Any consequences from participating in the informal resolution process, including the records that will be maintained or could be shared.

C. Non-Availability of the Informal Resolution Process

Informal resolution is not available where the allegation is that an employee sexually harassed a student.

STEP TWO- ROLE OF THE TITLE IX INVESTIGATOR

I. GENERAL RULES FOR CONDUCTING INVESTIGATIONS

A. Independent Investigator. The investigator must be a neutral party, with no conflicts of interest regarding or bias for or against either the complainant or respondent, or complainants or respondents in general.

B. Burden of Proof. The school or district retains, at all times, the burden of proof and the burden of gathering sufficient evidence to reach a determination regarding responsibility. This burden does not rest on either party. 34 C.F.R. § 106.45(b)(5)(i).

C. Privileged Information. A school or district cannot require, allow, rely upon, or use evidence that either constitutes or seeks disclosure of any information protected by a legally-recognized privilege, unless the person holding such privilege has waived the privilege. 34 C.F.R. § 106.45(b)(1)(x). Examples of privileged information that may arise in this context would include communications between spouses, between a party and that party's attorney, or communications with clergy seeking religious or spiritual aid. *See* Minn. Stat. § 595.02.

D. External Records. A party's medical or psychological records may only be obtained, accessed, considered, disclosed, or otherwise used with the voluntary written consent of the student, or of a parent if the student is a minor. As part of this consent, students and parents should be advised that any medical or psychological records that are disclosed to the investigator will be shared with the other party or parties in the course of the investigation, as all parties have the right to review and respond to all evidence prior to the completion of the investigation report.

E. Data Privacy. The duty to comply with the new Title IX regulations are not obviated or alleviated by the Family Educational Rights and Privacy Act ("FERPA"). 34 C.F.R. § 106.6(e). The commentary relating to the regulations makes clear that the same applies to state laws, such as the Minnesota Government Data Practices Act ("MGDPA").

F. Consolidation of Complaints. Multiple formal complaints may be consolidated into a single investigation if the allegations of sexual harassment arise out of the same facts or circumstances. 34 C.F.R. § 106.45(b)(4).

G. Presentation of Evidence. The parties must be given equal opportunities to present witnesses, including both fact and expert witnesses, as well as other inculpatory and exculpatory evidence. 34 C.F.R. § 106.45(b)(5)(ii). The school or district cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. 34 C.F.R. § 106.45(b)(5)(iii).

H. Notice of Interviews & Other Proceedings. If a complainant or respondent is expected to attend a hearing, investigative interview, or other meeting, that party must be given written notice of that hearing, interview, or meeting, with sufficient time to prepare. The notice must contain the date, time, location, and purpose of the meeting, hearing, or interview, as well as a list of the other individuals who will attend or participate.

I. Review of Evidence. All parties and their advisors must be given the opportunity to inspect and review any evidence obtained by the investigation that is directly related to the allegations, regardless of whether or not the school or district intends to rely on that evidence to reach a determination. 34 C.F.R. § 106.45(b)(5)(vi). This requirement extends to all evidence, inculpatory or exculpatory, whether obtained from a complainant, respondent, witness, or other third party, so long as the evidence is directly related to the allegations in the complaint. *Id.*

The parties must have at least ten (10) days to submit a written response to the evidence before the investigator can complete the investigation report. 34 C.F.R. § 106.45(b)(5)(vi). The investigator must consider any written responses from the parties before completing the report. *Id.*

J. Investigation Reports. The investigative report must fairly summarize relevant evidence. 34 C.F.R. § 106.45(b)(5)(vii). A copy of the investigative report must be provided simultaneously to all parties and advisors. *Id.* Each party must have an additional 10 days to respond to the investigation report in writing. *Id.*

II. CONDUCTING AN EFFECTIVE INVESTIGATION – FIRST STEPS

A. Before Investigating, Some Up-Front Reporting May Be Necessary.

1. Report any suspected crimes to law enforcement. Examples of crimes that should be reported to law enforcement include, but are not limited to, assault, sexual assault, possession or distribution of child pornography, etc.

2. **Maltreatment of Minors Reporting.** Remember your obligation as a mandated reporter when you know or have reason to believe a child is being neglected or physically or sexually abused or has been neglected or physically or sexually abused within the preceding three years. See Minn. Stat. § 626.556.

B. Act Promptly. Even minimal delays may result in lost evidence or provide opportunities to conceal the truth or come up with a "story." In addition, the investigation must follow any applicable legal timelines, including any Title IX requirements.

C. Data Practices Consideration in Investigations.

1. ***Tennessen* Warnings.** The MGDPA states that an individual who is asked to provide any private or confidential data concerning the individual shall be informed of the following: (Minn. Stat. § 13.04, subd. 2)

   a. The purpose and intended use of the requested data;

   b. Whether the individual may refuse or is legally required to supply the requested data;

   c. Any known consequences arising out of supplying or refusing to provide the private or confidential data; and

   d. The identity of other persons or entities authorized by state or federal law to receive the data.

   BEST PRACTICE: Although the Department of Education has concluded that Title IX obligations are not obviated by FERPA or state data privacy laws, the failure to administer a *Tennessen* Warning may still result in the district's (or school's) inability to use, store, or disseminate the collected data. A broadly written *Tennessen* Warning should be provided before all interviews, especially interviews of the parties.

2. ***Garrity* Warnings.** Public employers must administer a Garrity Warning when requiring employees to provide information as a condition of maintaining employment. *Garrity v. New Jersey*, 385 U.S. 493 (1967). If a public employer directs an employee to answer interview questions upon penalty of discipline, the information obtained by that employer and any subsequent information obtained

as a result of the compelled statement cannot be used in subsequent criminal proceedings against the employee. Accordingly, if law enforcement officials are also investigating the conduct in question, it may be a good idea to contact the investigating officer before administering a *Garrity* Warning.

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

Garrity warnings should only be given to employees.

D. Determining the Scope and Strategy of the Investigation. Most investigations follow the same pattern: (1) receive complaint and/or interview complainant; (2) interview fact witnesses; and (3) interview the respondent. Under the new Title IX regulations, however, both parties must be afforded an equal opportunity to present witnesses. Accordingly, a fourth step, reviewing witnesses identified by the respondent, may need to be added to this pattern in Title IX investigations.

At each stage of this process, the investigator should reevaluate whether additional investigation is warranted or needed and who should be interviewed next.

1. Review Policies Beforehand. It is beneficial to review any applicable school (or district level) policies prior to conducting the investigation. As a best practice, the investigator should also review the grievance procedure prior to conducting the investigation.

2. Identifying Fact Witnesses. For purposes of Title IX investigations, both the complainant and the respondent must have the opportunity to present fact witnesses. However, the investigator may also independently determine that an individual should be interviewed as a fact witness. When making this determination, the investigator should consider the following:

a. Does the complaint list witnesses to the alleged misconduct?

b. Does the complaint leave out individuals who may have important information relevant to the investigation?

c. Who was present for the alleged misconduct?

d. Who can provide necessary background information?

e. Who received the initial complaint?

Keep in mind that additional witnesses may also be identified through a review of the relevant documents or other evidence.

E. Determining Who Will be Present at Each Interview. As mentioned, parties are entitled to advance notice of who will be present at each interview or proceeding, as well as the purpose of that interview. 34 C.F.R. § 106.45(b)(5)(v). A party has the right to have their advisor present during the interview. 34 C.F.R. § 106.45(b)(5)(iv).

However, depending on the circumstances, it may be beneficial to have more than one school or district representative present. The investigator will need to make a determination as to who else may be present.

Upon request, an employee who is in a union has a right to have a union representative present if it appears that the interview may result in discipline. Some union contracts provide this right even if there is not a request by the employee. Investigators should bear this in mind when preparing for the interview of an employee-respondent.

F. Prepare a Response to Common Distractions. Before conducting any interview, the investigator should decide how he/she will respond to the following types of complications:

1. The interview subject demands that the interview be recorded;

2. The interview subject's advisor or union representative repeatedly interjects or tries to help the interview subject frame his or her answers;

3. The interview subject refuses to answer questions;

4. The interview subject asks who you have interviewed or plan to interview;

5. The respondent asks whether the employer is going to discipline him or her; and

6. The respondent or his/her union representative asks for a written list of questions or asks to be allowed to submit written answers to questions in lieu of a face-to-face interview.

III. INTERVIEW BASICS

A. Provide Required Notice. As discussed above, the Title IX regulations require that complainants and respondents be provided notice containing certain required elements with "sufficient time" to prepare for the interview.

B. Explain the Purpose of the Interview. Do not make any comments that could be perceived as minimizing the complaint. This explanation should also reflect the statement of purpose that was provided in the notice of interview.

C. Define your Role in the Investigation. Regardless of your other roles, make it clear that you are there as an impartial investigator. Do not take sides.

D. Explain the Investigation Process. Explain that the school or district will follow up on information it receives, in accordance with Title IX procedures. Ask the interviewee to report any retaliation (from whatever source) immediately. When interviewing a party (complainant or respondent), discuss the opportunities that party will have to respond to the evidence and the investigation report.

E. Do *Not* Promise Confidentiality. Information received during the scope of an investigation is subject to the MGDPA and FERPA. As discussed above, information provided during a Title IX investigation may be available to the complainant, respondent, and, potentially, other witnesses. and must be released in accordance with its provisions. In addition,

F. Ask Specific Questions. Who, what, when, where, why, how? Get as detailed of information as possible. Do not allow an interview subject to make generalizations or to offer conclusions as opposed to facts.

G. Ask the Tough Questions. Even if the subject matter is uncomfortable—in a sexual harassment investigation, the subject matter is often

uncomfortable. That does not absolve the investigator or the school or district of its obligation to provide due process.

H. Ask for Documents. Ask each interviewee if he/she has any tangible evidence that corroborates his/her recollection of events. Documents such as e-mail correspondences, notes, diary entries, time sheets, or calendars, might all contain relevant and valuable information. Recordings of voice mail messages might also contain helpful information.

I. Ask Each Interview Subject to Identify Other Witnesses to the Alleged harassment.

J. Do *Not* Guarantee Results. Investigators should not expressly or implicitly guarantee any particular outcome of the investigation. Nor should they suggest or imply that disciplinary action will be taken against the respondent. Remember, the respondent is presumed not responsible until the grievance process is completed.

IV. GENERAL TIPS FOR INTERVIEWING COMPLAINANTS AND FACT WITNESSES

A. Ask Short, Open-Ended Questions. The goal is to have the witness talk more than the investigator. Investigators should avoid "leading" questions. This is not a time for cross-examination.

B. Always Cover the Who, What, When, Where, Why and How Questions. Follow each line of questioning to its logical conclusion based on the witness's *personal knowledge*, as opposed to what he or she has heard from others. Get the details.

C. Assume that the Investigator will Defend the Interview Questions in Court or an Administrative Appeal. Be impartial and thorough. Keep in mind that the investigator's notes and interview summaries *will* be considered relevant evidence and be made available to the parties. Take thorough, but professional notes.

D. Keep Bias in Mind. The investigator should also bear in mind that their alleged bias for or against a complainant or respondent, or complainants or respondents in general, may form the basis for an appeal of the final determination regarding responsibility. The investigator should plan and structure their interview of the complainant to ensure that a fair and equal opportunity will be given to the respondent to address the same issues.

E. **Observe Witness Demeanor.** Document those observations in the investigation notes.

F. **Follow Up.** If a witness answers "I don't know" or "I can't recall," break the question down and/or rephrase it to determine whether the witness does not have the information or is being evasive. If you believe the witness is being evasive, circle around and come back to the question at other points in the interview. If you have an objective reason to believe that the witness would know or remember particular information, do not hesitate to express surprise when the witness answers "I don't know" or "I don't remember."

G. **Visual Representations.** If you believe it would be helpful, have the witness draw a picture of the alleged misconduct or the location at which it occurred. It may also be helpful to have the witness take you to the site of the alleged misconduct for a personal inspection.

H. **Disclose as Little as Possible.** Use your judgment as to how much to tell the witness about the complaint, subject to data privacy and Title IX requirements.

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

J. **Impact.** Inquire about the impact of the alleged conduct. This is particularly critical for an evaluation of whether the alleged conduct is severe, pervasive, and objectively offensive, and is effectively denying the complainant equal access to the school or district's education program or activity.

K. **Understand the Complainant's Concerns.** Remember the complainant may be embarrassed or fear retaliation.

L. **Take Appropriate Action.** If the complainant expresses a desire that you do not do anything with the information he/she tells you, explain that the school district must take appropriate action and why.

M. **Do Not Make Promises.** Do not make any promises about who will be interviewed or when the investigation will be completed. Do not disclose the identity of witnesses, except to the extent required by Title IX.

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

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

V. INTERVIEWING THE RESPONDENT

A. **Avoiding Bias.** Prior to interviewing the respondent, the investigator should review the summary, notes, and any recording, if applicable from the complainant's interview. The investigator should then prepare questions to ensure that the respondent's interview will be comparable to the complainant's interview, including with respect to who is in attendance, what questions are asked, what topics are covered, and what statements regarding the investigation process are made by the investigator.

B. **Opening Remarks.** Prior to asking any questions, the investigator should explain the following to the respondent, the respondent's advisor, and the respondent's union representative, if applicable,:

1. The role of the investigator as a neutral fact finder;

2. The *Tennessen* Warning, which the respondent should be asked to sign prior to asking any questions;

3. Ground rules for the interview, such as not interrupting each other and professional conduct; and

4. Any other initial statements, ground rules, or explanations that were provided to the complainant.

C. **Refusals to Answer.** The investigator should decide in advance how to respond if the respondent refuses to voluntarily answer questions. Typically, an individual will voluntarily cooperate if he/she knows that the interview may be his/her only chance to tell his/her side of the story. A typical *Tennessen* Warning contains language to that effect. If the respondent is an employee and he/she decides not to answer anyway, the investigator should consider whether he/she is willing or able to issue a *Garrity* Warning to compel answers.

D. Follow-up Questions. Be prepared to ask appropriate follow-up questions in order to obtain the full response to each allegation. In addition to the general considerations discussed above, the following tips may help an investigator get the full response from a respondent:

1. **Be Blunt.** Do not dance around delicate topics. Ask the question directly.

2. **Ask Why.** If the respondent admits to any particular action, ask what his/her intent was.

3. **Check Credibility.** If the respondent denies the allegations, ask whether he/she believes anyone would have a reason to fabricate the allegations.

4. **Closing Remarks.** Before ending the interview, the investigator should:

   a. Ask for any other information that may be helpful, or other information that the respondent would like to provide;

   b. Provide the respondent with the same information regarding retaliation that was provided to the complainant;

   c. As with the complainant, the respondent's ability to gather and present evidence cannot be restricted. 34 C.F.R. § 106.45(b)(5)(iii). Again, the investigator will need to be careful regarding how he or she phrases the warning to the respondent not to tamper with witnesses.

5. **Additional Tips for Interviewing the Respondent**

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

   b. Insist on details of the respondent's version of the facts. Do not settle for a general denial.

c. Do not merely state the complainant's allegations and ask the respondent to simply verify or deny. Remember, the respondent is entitled to the same opportunity to present evidence as the complainant.

d. Do not threaten.

e. Do not describe what disciplinary action might be taken. Advise the respondent that any decisions regarding disciplinary action will be made at the conclusion of the investigation, and only after a determination regarding responsibility has been made.

f. Do not make any promises about when the investigation will be completed or who will be interviewed.

g. Do not reveal the names/identities of witnesses.

VI. ASSESSING CREDIBILITY

A. Credibility Clues. When interviewing the complainant, the respondent, or any other witness, the investigator should look for credibility clues.

1. Eye contact;

2. Unnatural or inconsistent hesitancies;

3. Change in skin coloration (i.e. face turning red or white);

4. Change in pitch of voice;

5. Change in affect over the course of the interview;

6. Subtle or direct attempts to influence the outcome of the investigation through inducement or threat;

7. Statements reflecting a skewed view of reality.

B. Consistency. When assessing credibility, consider the consistency of the witness/party statements.

1. Are there other witnesses or documents that support or refute the interviewee's testimony?

2. Is the conduct of the parties consistent with their description of the overall environment?

3. Does the chronology make sense from a practical standpoint?

4. Is the described behavior consistent with what came before and afterward?

5. Are there unexplainable lapses in recollection or periods of time that are not accounted for?

VII. PRESERVING ELECTRONIC EVIDENCE

A. Computer Evidence. School districts should take steps to preserve any evidence of sexual harassment that may exist on school district computers. For example:

1. Secure an employee's computer by physically removing it from the employee's office or work area.

   a. Where the investigation involves a student who does not have a specific computer, secure any computer evidence available. Involve IT where necessary.

2. Disable the employee's password and ability to access the employer's computer system.

3. Allow only a knowledgeable computer technician, technical coordinator, or computer forensic specialist to access the computer. Do not hesitate to hire an outside computer forensic specialist when necessary.

4. Preserve the chain of custody. You should be able to identify everyone who touched the computer from the time it was removed from the employee's work area or office.

5. Before searching the computer, verify that the school district's computer use policy states that the computer is the sole property of the district and that the computer and any data stored or processed on it is subject to monitoring at any time without notice. Such language will defeat a claim that the employee had a reasonable expectation of privacy in the data stored on the computer.

B. Video Surveillance. Preserve any surveillance video footage.

C. Utilizing Social Media in Investigations

1. **Is it Relevant?**

2. **Public social media sites.** At least two courts have held that individuals have no expectation of privacy with respect to information posted to a completely public social media site. *See Moreno v. Hartford Sentinel*, 172 Cal.App.4th 1125 (Cal. App. 5, 2009) (no reasonable expectation of privacy regarding Myspace writings open to public view); *see also U.S. v. Charbonneau*, 979 F.Supp. 1177 (S.D. Ohio 1997) (no reasonable expectation of privacy regarding posting in a public "chatroom").

3. **Private pages on social networking sites.** At least one court has held that individuals do not have a reasonable expectation of privacy in material posted on a "private" social media page. *Romano v. SteelCase Inc.*, 30 Misc.3d 426 (N.Y. Sup. Ct. 2010). The court's decision was based on the nature of social media as a tool for mass dissemination of information, a fact that users are well aware of. The court specifically noted that hundreds of people may be able to access a "private" social media page and held that, "in this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking." *Id*. at 434 (citing Dana L. Fleming and Joseph M. Herlihy, *Department Heads Up: What Happens when the College Rumor Mill Goes Online? Privacy, Defamation and Online Social Networking Sites*, 53 B.B.J. 16 (Jan./Feb. 2009).

4. **School Officials Should Not Retain Copies of Actual or Suspected Child Pornography.** In March, 2008, a high school assistant principal in Loudoun County, Virginia, was charged with possession of child pornography and failure to report child abuse because he mishandled a sexting investigation. *State v. Ting-Yi Oei*, Loudon County, Virginia (2008).

VIII. COORDINATING INVESTIGATION WITH LAW ENFORCEMENT

A. Spoliation of Evidence. When a complaint involves accusations of criminal activity, the investigator should be careful to conduct his or her

investigation in a manner that does not spoil or disturb the evidence that law enforcement will need to gather.

1. As stated above, the school or district should report any suspected crime to law enforcement. The district or school should then attempt to work cooperatively with law enforcement so that the investigation does not inadvertently impair the criminal investigation.

2. The school or district should preserve the evidence it collects.

B. Relying on a Police Investigation. A school or school district generally may not rely on the results of a police investigation in lieu of conducting its own investigation. There are several reasons for this.

1. The degree of sophistication and quality of police work can vary from one town to the next. Some schools conduct more thorough investigations than law enforcement.

2. A school investigator has no control over the police investigation, and no ability to assess the credibility of witnesses in a police investigation.

3. A school district is not always able to access all the information the police gather. This impacts the school district's ability to assess the reliability of the information and to obtain the full picture of what occurred.

4. Police operate under a different standard than public schools. The police may find insufficient evidence to proceed, which could mean that there is not enough evidence to convince a jury beyond a reasonable doubt that a crime has been committed. At the same time, there could be more than sufficient evidence to take action under a "clear and convincing" or "preponderance of the evidence" standard. Similarly, even where police do not wish to proceed with charges, there may be enough evidence for a school district to proceed with discipline.

IX. WHAT DOES IT MEAN TO BE RELEVANT?

Both investigators and decision-makers are tasked with limiting their reports and/or the questions asked by the parties during cross-examination to information and questions that are "relevant."

A. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and when "the fact is of consequence in determining the action." Fed. R. Evid. 401.

B. The **only** type of evidence that is **never** relevant in a Title IX investigation is evidence relating to the complainant's sexual predisposition or prior sexual behavior. *See* 34 C.F.R. § 106.45(b)(1)(iii) & 106.45(b)(6).

C. Other than this restriction, an investigator must use judgment when drafting the investigation report to determine whether the evidence is related to a fact that would potentially impact the outcome of the complaint, and whether the evidence makes that fact more or less likely to be true.

1. Investigators must be cautious, however, to avoid intruding on the role of the decision-maker and resolving issues of responsibility in the investigation report. Such overreach may expose the investigator to an allegation of bias, or could constitute a procedural irregularity justifying appeal.

D. Likewise, when reviewing a written cross-examination question, or a question at a live hearing, the decision-maker must decide whether the question goes to a fact that will help determine the outcome of the complaint, and whether an answer to that question would make the fact more or less likely to be true.

X. WITING AN INVESTIGATION REPORT

A. **Timing of Completion of Investigation Report.** The Title IX regulations provide that, "prior to completion of the investigative report," the school or district "must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy." The parties have at least ten days to submit a written response to the investigator before the investigation report can be completed.

B. **Provision of Investigation Report to Parties.** The investigation report must be provided to the parties at least ten days before the decision-maker makes a decision (or at least ten days before any hearing, if the school or district has a hearing procedure).

C. **Required Contents of the Investigation Report.** The Title IX regulations provide that the investigation report must "fairly summarize" the relevant evidence.

D. Tips for Writing an Investigation Report.

1. Summarize each interview separately.

2. Include a list of each exhibit considered.

3. Identify the allegations under investigation.

4. Make specific findings and identify the relevant evidence that supports each finding.

5. If any evidence is excluded as irrelevant, explain why that evidence was excluded.

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

7. Write objectively, avoiding unnecessary adjectives. For example, it may be necessary to describe a party as wearing a "yellow" shirt. Unless quoting a party or witness as part of a witness summary, however, it is unnecessary (and potentially evidence of bias) to refer to an action as "brutal" or "traumatic."

8. Write professionally. Remember that the investigation report will be sent to the parties before a determination is made, the decision-maker (who may be the investigator's superior at the school or district), and, potentially, will be an exhibit in further administrative proceedings or a lawsuit.

    a. Check spelling and grammar before finalizing the investigation report.

    b. Avoid colloquialisms, jargon, slang, profanity, and contractions, unless directly quoting a party or witness, in which case, the word or phrase should be inside of quotation marks.

9. The investigation report should be concise, but thorough.

XI. AVOIDING BIAS AND CONFLICT OF INTEREST

A. Conflicts of Interest. The investigator's role is to investigate the complaint objectively. Accordingly, the investigator cannot have any personal interest in the outcome of the investigation. The following are examples of personal interests that may present a conflict of interest that disqualifies the investigator from serving impartially:

1. Financial interest in the outcome of the investigation.

2. Personal interest stemming from the investigator's personal relationship with a party to the investigation, or that of the investigator's family.

3. Professional interest or incompatible roles within the school or district.

B. Bias. The investigator must now allow any personal bias to influence the outcome of the investigation. A biased investigation, such as one based on the predetermination that "all boys are violent" or "all girls are liars" will likely result in an appeal and/or liability under Title IX. Similarly, the investigator cannot allow his or her past experience with a particular party or witness to influence the outcome of the investigation. Instead, all investigations must be based on credible, relevant evidence considered as part of that investigation.

C. Addressing Implicit Biases.

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

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

3. Impose the same ground rules, adopt the same tone of voice, and otherwise treat all interviewees the same, regardless of race, sex, gender, sexual orientation, disability status, religion, or other protected class status.

4. Avoid "spokesperson questions" such as asking for the "female's" view on things or the "boys' perspective."

4. Investigators should examine their own behavior and be aware of their own unconscious biases. An investigator should refrain from making assumptions about different student or employee groups based on race, sex, gender, sexual orientation, disability status, religion, or other protected class status.

STEP THREE – ROLE OF THE DECISION-MAKER

I. REVIEW OF INVESTIGATION REPORT

A. Standard of Review

1. The Decision-Maker is responsible for reviewing the Investigator's report and determining whether the respondent is responsible for the conduct alleged.

2. In determining whether the conduct occurred, the Decision-Maker must use one of the following the standards of evidence selected by the school or school district:

   a. "Preponderance of the evidence" is understood to mean a conclusion that a fact is more likely than not to be true."

   b. "Clear and convincing evidence" means that a fact is highly probable to be true.

3. It is suggested in the preamble to the regulations that when the evidence is truly 50/50, the determination should be non-responsibility on the part of the respondent.

4. The same standard of proof shall apply regardless of whether the respondent is a student or a staff member.

B. Opportunity for Parties to Respond to Report

1. The Decision-Maker is responsible for receiving the response of the parties or their advisors to the investigation report.

2. The response must be delivered to the decision-maker within ten (10) calendar days from the day that the investigation report is provided to the parties.

C. Notification of Rights to a Hearing/Written Questions

After receipt of the responses, if any, the Decision-Maker should notify the parties of either the scheduling of a hearing and their rights during the hearing or the rights relative to the submission of written questions.

II. WRITTEN QUESTIONS

A. Submission of Written Questions

1. All schools must allow for an exchange of written questions, between the parties regardless of whether a live hearing is also offered.

2. After the investigation report has been sent to the parties, and before the Decision-Maker makes a determination regarding responsibility, the parties must be permitted to submit written, relevant questions to be asked of any other party or witness.

B. Relevancy

1. Upon receipt of the written questions, the Decision-Maker makes determinations as to what is relevant, and may exclude irrelevant questions as long as the party asking the question receives an explanation as to why the question is not relevant.

2. The Regulations do not contain a definition or standard by which relevancy determinations are to be made other than noting that the ordinary meaning of the word should be understood and applied.

3. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and when "the fact is of consequence in determining the action." Fed. R. Evid. 401.

4. The only type of evidence that is never relevant in a Title IX investigation is evidence relating to the complainant's sexual predisposition or prior sexual behavior, unless:

    a. such questions and evidence about prior sexual behavior are offered to prove that someone other than the respondent committed the alleged conduct; or

    b. if the questions and evidence concern a specific incident so the complainant's prior sexual behavior with respect to the respondent are offered to prove consent.

C. Privileged Information

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

D. Time Limitations

The Regulations do not contain a specific time limitation for the written question process but require that the process must include sufficient time for follow-up questions.

III. LIVE HEARINGS

A. Live Hearings are Optional

1. K-12 schools have the option to allow for a live hearing as part of the grievance process, but are not required to do so.

2. There is no specific time frame as to when a hearing must be held. The Decision-Maker must provide the parties with notice of the hearing and sufficient time for the parties to prepare to participate.

B. Procedures for Live Hearings

1. Recording

   Any live hearing must be recorded or transcribed, and made available to the parties for inspection and review.

2. Appointment of Advisor

   a. A complainant and a respondent are entitled to have an advisor during the investigation portion of the complaint/grievance process as well as during any live hearing.

   b. If the party does not have a representative, the school or school district is required to appoint one for that party at the cost of the school or school district.

3. Questioning

a. At the hearing, each party's advisor is allowed to ask relevant questions of the other party or parties, and of the witnesses and to examine and follow-up with questions including those challenging credibility.

b. Cross-examination may only be conducted directly, orally, and in real time by the parties' adviser and never by the party personally.

c. The Decision-Maker must decide whether each question is relevant before the party or witness answers the question.

d. A party may request that the live hearing occur with the parties located in separate rooms with technology enabling the Decision-Maker and parties to simultaneously see and hear the party or witness answering questions.

e. If a party or witness refuses to submit to cross-examination at the hearing, the Decision-Maker cannot rely on any statement of that party when making a determination regarding responsibility; however, the Decision-Maker also cannot draw an inference regarding responsibility based solely on a party's or witness's absence.

III. WRITTEN DETERMINATIONS REGARDING RESPONSIBILITY

A. Obligation of Decision-Maker to Issue a Written Determination

After reviewing the investigation report, the parties' submissions in response to the investigation report, the written cross-examination questions and answers, and any live hearing testimony (if any), the Decision-Maker must issue a written determination simultaneously to all parties.

B. Contents of the Determination

The report must contain the following information:

1. Identification of the allegations potentially constituting sexual harassment;

2. A description of the procedural steps taken under this process, including any notifications, interviews, hearings, and other methods used to gather evidence, if applicable;

3. Findings of fact supporting the determination;

4. Conclusions applying the school or school district's code of conduct or policies to the facts found by the Decision-Maker;

5. A statement of the result as to each allegation, including:

   a. a determination regarding responsibility;

   b. the rationale for the result;

   c. any disciplinary sanctions imposed on the respondent, and

   d. any remedies designed to restore or preserve the complainant's equal access to the school or school district's education program or activity.

6. The procedure for appealing the determination of responsibility.

C. Referral of the Determination

A copy of the report should be forwarded to the Title IX Coordinator who is responsible for implementing any remedies.

D. Finality of the Determination

The determination of the Decision-Maker only becomes final when the appeal period expires or any appeal is adjudicated.

STEP FOUR – IMPLEMENTATION OF THE DECISION AND THE APPEALS PROCESS

A. The opportunity to appeal a dismissal or a determination of responsibility must be equally available to both parties. 34 C.F.R. § 106.45(b)(8)(i). The school or district may set the length of the appeal period. 34 C.F.R. § 106.45(b)(1)(v).

B. There are three grounds for appeal that the school or District is required to recognize:

1. A procedural irregularity affected the outcome of the matter;

2. New evidence that was not reasonably available at the time of the determination or dismissal and that could affect the outcome of the matter; or

3. The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent, and the conflict of interest or bias affected the outcome of the matter.

34 C.F.R. § 106.45(b)(8)(i). The school or district may designate additional bases as it deems appropriate, so long as the basis for appeal is equally available to complainants and respondents. 34 C.F.R. § 106.45(b)(8)(ii).

C. For all appeals, the school or district's process must include the following:

1. Notify the other party in writing when an appeal is filed.

2. Use a different, adequately trained, decision-maker than the decision-maker who made the additional determination. This decision-maker cannot be the Title IX Coordinator or the investigator.

3. Give both parties a reasonable, equal opportunity to submit written statements in support of, or challenging, the determination or dismissal.

4. Issue a written decision describing the result of the appeal and the rationale for the result simultaneously to both parties.