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# NEW TITLE IX REGULATIONS

## FOCUS: INVESTIGATIONS

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# YOUR TITLE IX TOOLBOX



- Training materials from this session are available at the following link:

<https://scottscrivenlaw-my.sharepoint.com/:f:/p/julia/EsHO6vR3exZBIrdvRM2BIIUB6-gYEPbjqdvT8JN-ObaE8w?e=YDkq7d>

- The folder is your Title IX Toolbox.
- It also contains other useful resources we will reference during the training.

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# **YOUR TRAINING OBLIGATIONS UNDER THE NEW TITLE IX REGULATIONS**



# TRAINING REQUIREMENTS



- Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an informal resolution process must receive training on:
  - the definition of sexual harassment in the regulations,
  - the scope of the recipient's education program or activity,
  - how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, **as applicable**, and
  - how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

# INVESTIGATOR-SPECIFIC TRAINING REQUIREMENTS



- Districts must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in the regulations.

## TRAINING REQUIREMENTS



- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution must be made available on the school's website, if it has one.
- Training materials must be kept for 7 years.

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# TITLE IX BACKGROUND



## TITLE IX BACKGROUND



No 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).



# BACKGROUND ON TITLE IX REGULATIONS



U.S. Department of Education, Office for Civil Rights (OCR) issues a Dear Colleague Letter and Q&A; rescinds Obama-era guidance.

**Sep. 2017**

OCR released the highly anticipated final rule.

**6 May 2020**

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**2021**

**Nov. 2018**

Notice of Proposed Rulemaking seeking comments on changes to the Title IX regulations.

**14 Aug. 2020**

August 14, 2020  
• Final rule becomes effective.

# TITLE IX BACKGROUND



- **Q: Whom does Title IX protect?**
- **A: Any person participating in an educational program in the United States that receives federal financial assistance.**
  - Students.
  - Staff.
  - Applicants for admission.
  - Visitors and community members.

# TITLE IX BACKGROUND



- **Q: What does Title IX protect against?**
- **A:** Exclusion from participation in, or denial of benefits of, any educational program or activity on the basis of sex.

# TITLE IX ENFORCEMENT – REGULATORY



- United States Department of Education’s Office for Civil Rights (“OCR”) oversees Title IX compliance. OCR also enforces other federal civil rights laws that apply to schools.
- OCR issues regulations regarding Title IX. See 34 C.F.R. Part 106.
- OCR has the power to receive complaints alleging violations of Title IX, investigate complaints, issue remedial measures and sanctions, and even take away a school’s federal funding for violations of Title IX.

# TITLE IX ENFORCEMENT - LAWSUITS



- Individuals may file private lawsuits to seek awards of money damages.
- *Franklin v. Gwinnett Public Schools* (1992): Money damages are an available remedy in a private lawsuit alleging a school's intentional discrimination in violation of Title IX.
- *Gebser v. Lago Vista Independent School District* (1998): A school district is liable for failing to respond to a teacher's sexual harassment of a student if a school official who had authority to institute corrective measures on the district's behalf had **actual notice** of, and was **deliberately indifferent** to the teacher's misconduct.
- *Davis v. Monroe County Board of Education* (1999): A school district is liable for failing to respond to a student's sexual harassment of another student if the district was **deliberately indifferent** to known acts of harassment in its programs or activities, and the harassment was **so severe, pervasive, and objectively offensive** that it effectively barred the victim's access to an educational opportunity or benefit.

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# **NEW TITLE IX TERMS AND DEFINITIONS**



## NEW TITLE IX LINGO (TERMS)



**Recipients:** School districts are now referred to as “recipients.”

**Complainant:** A person alleged to be the victim of conduct that could constitute sexual harassment.

**Respondent:** A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

**Supportive Measures:** These are your “interim measures.”

**Determination of Responsibility.** Finding whether a person is responsible for sexual harassment.

**Advisors:** Parties may have an advisor, who may be an attorney, participate in the process.

## NEW TITLE IX LINGO (DEFINITIONS)



### Sexual Harassment: Conduct on the basis of sex that satisfies one or more of the following:

- An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (i.e., *quid pro quo* sexual harassment);
- 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 recipient's education program or activity; OR
- "Sexual assault," "dating violence," "domestic violence," or "stalking," as defined by the Clery Act.



## NEW TITLE IX LINGO (DEFINITIONS)



### Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment **to any employee.**

### Obligation to Respond

- A school with **actual knowledge** of sexual harassment in a program or activity against a person in the U.S. must respond promptly and in a manner that is **not deliberately indifferent.**

## NEW TITLE IX LINGO (DEFINITIONS)



### Deliberate Indifference

- Failure to respond reasonably in light of known circumstances.
- (Old rule: The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.)

# NEW REQUIREMENTS



- Prescriptive grievance procedures.
- Reasonably prompt timeframes.
- Must select evidentiary standard.
- Abandonment of single investigator/decision-maker model.
- Jurisdictional decisions and dismissal of formal complaints.
- Lots of due process.

# TITLE IX TEAM MEMBERS



## **Title IX Coordinator**

Initially contacts and offers supportive measures. Assesses and sometimes files complaints. Documents and manages the process.



## **Investigator**

Person designated to investigate, gather evidence and compile an investigation report.  
  
(May be Title IX Coordinator).



## **Decisionmaker**

Person who issues a written determination regarding responsibility.  
  
Cannot be the same person as the Title IX Coordinator or the Investigator.



## **Appeals Designee**

Must offer both respondent and complainant an opportunity to appeal.  
  
Cannot be the same person as the Title IX Coordinator, Investigator, or the Decisionmaker.

# NEW PROCESS



- Initial report
- Response to report
- Formal complaint
- Possible dismissal
- Informal resolution optional
- Investigation
- Hearings (optional)
- Decision/Determination of Responsibility
- Remedies/Discipline
- Appeal

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# THE SCOPE OF YOUR ROLE AS INVESTIGATOR



# FIVE SIGNIFICANT CHANGES TO INVESTIGATIONS



- Mandatory separation between the investigation function and decision-making.
- Respondent is not just “innocent until proven guilty,” but must be presumed not responsible for the conduct throughout the entire investigation process.
- Parties are entitled to view all of the evidence in the case, even if it is not relevant.
- Confidentiality of party and witness names is over.

# DUTY TO AVOID BIAS AND CONFLICTS OF INTEREST



- Your focus is the integrity of the process. Never an outcome.
- Recognize and understand what your biases are so that you can put them aside.
- Cultural competency – understand your microaggressions or unconscious biases.
- Check ego at the door.



# HOW MANY HATS CAN AN INVESTIGATOR WEAR?



## Investigator

Person designated to investigate, gather evidence and compile an investigation report.

Investigator may also be the Title IX Coordinator.



## Decisionmaker

Person who issues a written determination regarding responsibility.

Cannot be the same person as the Title IX Coordinator or the Investigator.



## Appeals Designee

Must offer both respondent and complainant an opportunity to appeal.

Cannot be the same person as the Title IX Coordinator, Investigator, or the Decisionmaker.

## MORE ON THE SEPARATION BETWEEN INVESTIGATOR AND DECISION-MAKER



- The Preamble to the Regulations says that an investigation report can reach a conclusion or recommendation. However, this is not recommended.
- In response to questions, the DOE has clarified that an investigator can testify to their opinions at a hearing and that decision-makers can have discussions with the investigator about their opinions.
- No matter how much sharing occurs between Investigator and Decision-Maker, it is the Decision-Maker's job to issue an independent and objective decision.

# CONFIDENTIALITY



Recipients cannot restrict either party's ability to discuss the allegations or gather and present evidence.

Recipients must keep confidential the identity of a person who complains or reports sexual harassment, including parties and witnesses, except as permitted by law or to carry out the purpose of these regulations.

Will these responsibilities be frustrated in practice?

# JURISDICTION – SCOPE OF INVESTIGATION



- To file a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient.
- “Education program or activity” includes locations, events, or circumstances over which the recipient exercised **substantial control** over both the **respondent and the context** in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

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# INVESTIGATION #1: STUDENT COMPLAINANT AND RESPONDENT

Katie is a Junior on the school's dance team and has dated two different football players this year. She had sex with both of them and now that she has broken up with them, they've told the entire team about the details of everything they've done. The boys have shared intimate texts and sexting between the two of them and now the whole school knows. Katie has been called a "slut" and a "whore" by various classmates, but especially by Nick, her most recent boyfriend. Twice she has been in the hallway at school at her locker and had her butt grabbed by someone, and she doesn't know who it was. She files a formal complaint naming Nick as the Respondent and delivers it to the Title IX Coordinator.



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## INVESTIGATION #2: STUDENT COMPLAINANT/STAFF RESPONDENT

Billy is a Sophomore student who has struggled academically. His math teacher suggested he start meeting with her after school for private tutoring/review, at no cost. His parents are aware. Billy meets with his teacher for two months in her classroom with the door shut, and then during a tutoring meeting the teacher leans in towards him, puts her hand on his stomach, and kisses him. He was stunned, didn't say anything, and went home and told his parents. The following day the parents call the school counselor and tell her what happened. They do not want to see the teacher ever again and they do not want to participate in an investigation because it will be too traumatic and embarrassing for Billy.



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**YOUR ROLE AS INVESTIGATOR:  
STEP ONE – PROVIDING THE NOTICE OF  
INVESTIGATION AND ALLEGATIONS**



- ✓ Notice of the grievance process, including any informal resolution process;
- ✓ Notice of the allegations, including sufficient detail (i.e., names of known parties, the conduct alleged to be sexual harassment, and the date and location of the conduct, if known) to allow the respondent to prepare a response before an initial interview;
- ✓ A statement that the respondent is presumed not responsible for the conduct and that responsibility will be determined at the conclusion of the grievance process;
- ✓ Notice of the parties' right to have an advisor (who may be, but is not required to be, an attorney) and to inspect and review evidence; and
- ✓ Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process.

## Written Notice Start of Formal Complaint



## PARTIES TO THE INVESTIGATION



- May consolidate formal complaints against more than one respondent, by more than one complainant against one or more respondents, or by one party against another party, where the allegations arise out of the same facts or circumstances.
- If new allegations emerge that will be part of the investigation, you must provide a revised written notice identifying the new allegations.

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**REVIEW OF TEMPLATES:  
NOTICE OF ALLEGATIONS AND INVESTIGATION  
DESIGNATION OF ADVISOR FORM  
CONSENT TO INFORMAL PROCESS**

**NOTE: THE INFORMAL PROCESS IS NEVER  
AVAILABLE WHEN AN EMPLOYEE IS THE  
RESPONDENT**

## MANAGING AN ADVISOR'S INVOLVEMENT



- Both parties have an equal opportunity to have others present during any grievance proceeding, including the opportunity to be accompanied by an advisor who may be, but is not required to be, an attorney.
- Employees will typically have a union representative and/or an attorney represent them.
- Students may bring a parent or advisor.
- Make sure to have a pre-interview discussion with representatives/advisors about the limitations of what they can do/say in the interview.
- You may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

# INFORMAL RESOLUTION CONDITIONS



- Districts may not offer an informal resolution process unless a formal complaint is filed.
- Districts may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment.
- Districts may not require the parties to participate in an informal resolution process.
- However, at any time prior to reaching a determination regarding responsibility the district may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient provides written notice disclosing certain items (next slide).
- Prior to informal resolution, the district must obtain the parties' voluntary, written consent to the informal resolution process.
- Districts cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

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# **YOUR ROLE AS INVESTIGATOR: STEP TWO – GATHERING EVIDENCE**



# GATHERING EVIDENCE – COMPLYING WITH THE REGULATIONS



- Burden of proof rests on the Recipient at all times.
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Cannot restrict the parties from discussing the allegations under investigation or from gathering and presenting relevant evidence.
- Must provide to any party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

# GATHERING EVIDENCE – BEGIN WITH AN ORGANIZED FILE



- Binders are great. Set up an automatic protocol for each investigation. A binder with pre-determined tabs and a Table of Contents that you can fill in as you go.
- Tabs: Notice of Allegations, Advisor Forms, Complainant Interview, Respondent Interview, Witness Interviews, Text Messages and Social Media, Evidence from Complainant, Evidence from Respondent, Draft Report, Final Report, Correspondence with Complainant and/or Advisor, Correspondence with Respondent and/or Advisor, Notes, etc.
- Start a Timeline and a Witness List to use throughout your investigation.
- Remember that all of your evidence must be provided to the parties eventually, and so keep original copies of things clean.

## GATHERING EVIDENCE – HOW TO BEGIN



- What records should you be looking at and/or asking for?
- Who do you interview first?
- What witnesses have the Complainant and Respondent asked you to interview?



# INTERVIEW CONSIDERATIONS



- Identify potential witnesses.
- Determine what questioning is appropriate based on the following factors:
  - Age of the student(s);
  - Nature of the offense;
    - Involve students?
    - Staff?
    - Sexual background of Complainant?
  - Video or other evidence available;
  - Trustworthiness/credibility of witnesses; and
- Balance thoroughness and disruptiveness.

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# TAKING STATEMENTS

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- Begin interview process as soon as possible.
  - Never promise confidentiality, but explain the safety precautions the District will take (e.g., no disclosure of personally identifiable information in public records).
  - Consider the role of the parents: Notification? Representation?
  - Get their story in their own words, first in general, then more specifically.
  - Follow up to get specific facts, not generalities.
  - Don't forget "anything else?"

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# INTERVIEWING CHILDREN

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- Do not avoid interviewing students.
  - Determine if you will have a parent present (Board Policy typically does not require this for school interviews.)
  - Consider who will interview child (male, female, known/trusted adult)
  - Consider if Children Services should interview first (consider age of child, subject matter of interview, etc.)

# INTERVIEWING CHILDREN



- Interview Structure:
  - Introductory--set general ground rules regarding discussion.
    - Agreement to tell the truth.
    - Reminder they should not guess.
    - Correct you if you are wrong.
  - Rapport-Building--talk about things other than the target incident.
  - Free-Recall—ask open-ended questions.
- Open-ended questions provide higher quality information.
  - Ex: “Where were the other students?” v. “Were the other students in the hallway?”
- Young students – look for the core of the story to be true; minor inconsistencies are common and do not speak to the larger credibility of the narrative.

## SPECIAL WITNESS CONSIDERATIONS: DIFFICULT WITNESSES



- What if a student witness refuses to cooperate?
- Do not allow witnesses or parties to provide ambiguous answers, or to not fully answer your question.

## SPECIAL WITNESS CONSIDERATIONS: DIFFICULT WITNESSES



- What if a Respondent-Employee refuses to testify?
- Can you force testimony under *Kalkines v. United States*, 473 F.2d 1391, 1393 (Fed. Cir. 1973)?
- Note: Testimony provided in the above scenario may not be used for a criminal prosecution.

# SPECIAL WITNESS CONSIDERATIONS: CONDUCTING A TRAUMA-INFORMED INTERVIEW



Trauma-informed investigating and interviewing include the following key components:

- 1) understanding the impact of trauma on a neurological, physical, and emotional level;
- 2) promoting safety and support;
- 3) knowing positive ways to respond that avoid re-traumatization; and
- 4) providing choice with a goal of empowerment.

# SPECIAL WITNESS CONSIDERATIONS: CONDUCTING A TRAUMA-INFORMED INVESTIGATION



- Making the interview more comfortable and build rapport— having a box of tissues in the room; letting them choose their drink; maybe a white noise machine if it is in a busy space; letting them choose their seat/side of the table. Never “rank” the trauma (e.g., “you’re lucky you don’t remember” or ranking based on whether you were drugged or not drugged, or whether it was someone you know or a stranger, etc.)
- Avoid Asking “why” questions. “Why did you...” It sounds too judgmental.
  - Why assumes that there was another option that they didn’t choose.
  - Instead, can ask “how did it happen that...?”



## SPECIAL CONSIDERATIONS – DELAYS



- Grievance process allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.
- Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

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**YOUR ROLE AS INVESTIGATOR:  
STEP THREE – TURNING EVIDENCE INTO A  
DRAFT REPORT**



- ✓ **Fairly summarize relevant evidence.**
- ✓ **Evaluate all relevant evidence objectively, including both inculpatory and exculpatory evidence.**
- ✓ **Make credibility determinations that are not based on a person's status as a Complainant, Respondent, or Witness.**
- ✓ **"Show your work" for all of the above in order to have a complete report.**

## **Written Investigation Report**

# FAIRLY SUMMARIZING RELEVANT EVIDENCE



## Do...

- Be specific.
- Memorialize witnesses interviewed, records reviewed/created.
- Document the District's efforts. (e.g., if a witness would not cooperate/be interviewed).
- Come to a factual conclusion about what happened and make credibility determinations.
- Come up with an action plan – Safety Plan, Professional Development, etc. and document it.

## Don't...

- Be too general.
- Use legal definitions or terms.
- Refer to conversations with legal counsel.
- Refer to conversations with insurers.
- Make conclusions to make someone happy. This is our one chance to get it right.
- Be afraid to take action if there is misconduct that just doesn't fall into the definitions investigated.

# FAIRLY SUMMARIZING RELEVANT EVIDENCE



DON'T	DO
<p><b>“He has the party classroom.”</b></p>	<p><b>“Mr. Jones stays after school every day for at least 1.5 hours and allows students to come to his classroom to listen to music and socialize with the classroom door shut.”</b></p>
<p><b>“He stalked her every day.”</b></p>	<p><b>“Michael left his last period class every day last week in order to be at Melinda’s class when it ended. He then followed her to her locker and out to her car.”</b></p>
<p><b>“The coach used sexual innuendo as jokes.”</b></p>	<p><b>“The coach made the comment that No. 6 and No. 9 were standing right next to each other.”</b></p>

# TURNING EVIDENCE INTO A REPORT

## ASSESSING CREDIBILITY



- Credibility is the process of weighing the accuracy and veracity of evidence.
- Evaluate the source, content, and plausibility of testimony in light of other evidence.
- Assessment of credibility does not include making conclusions about whether a witness or evidence is credible, or judging the comparative credibility of evidence or witnesses. It stops just short of that, pointing to discrepancies without deciding them.

# EVALUATING INFORMATION: EVALUATING CONFLICTING EVIDENCE



- You are the finder of fact.
- Common sense and credibility determinations.
- Consider the witnesses' opportunity to observe what happened versus hearsay.
- Consider whether testimony matches up with hard evidence such as texts, photographs, videos, social media, etc.
- Demeanor of witnesses. What do they have to lose/gain?

# TURNING EVIDENCE INTO A REPORT

## AVOIDING BIAS



- Distinguish undisputed evidence from contested evidence.
- Let the evidence lead to a conclusion – do not interpret the evidence with a goal to reach a particular conclusion.
- Avoid having a “hunch” from the beginning or judging based upon appearance or the “type” of girl/boy.
- Avoid “first impression bias.”
- There will be gaps in evidence – if you cannot fill those gaps, do not use your assumptions or speculation.



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**YOUR ROLE AS INVESTIGATOR:  
STEP FOUR – PROVIDING THE PARTIES WITH  
EVIDENCE**



## OBLIGATION TO PROVIDE EVIDENCE



- Must provide both parties an equal opportunity to inspect and review any evidence obtained as a part of the investigation that is **directly related to the allegations raised in a formal complaint**, including the evidence upon which the recipient does not intend to rely in reaching a determination.
- Must do this at this time so that each party can “meaningfully respond to the evidence prior to the conclusion of the investigation.”
- You must provide the evidence in an electronic format or hard copy and give the parties at least 10 days to submit a written response. If a written response is provided, consider it in completing your final report.

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**YOUR ROLE AS INVESTIGATOR:  
STEP FIVE – DRAFTING YOUR FINAL REPORT  
AND PROVIDING IT TO THE DECISION-MAKER**





# **REVIEWING THE FINAL REPORT TEMPLATE**



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**YOUR ROLE AS INVESTIGATOR:  
STEP SIX – PREPARE TO BE A WITNESS AT A  
HEARING**



## INVESTIGATOR TESTIMONY AT A HEARING



- Yes, you may be called as a witness at a hearing by the Decisionmaker, Complainant, or Respondent!
- Testimony should be factual. It is OK to have a copy of your report and your evidence to review.

## INVESTIGATOR TESTIMONY AT A HEARING



- You should not be required to testify regarding evidence that you may have learned that was not directly related to the complaint.
- Allow time before responding for objections to be ruled upon.
- Decisionmaker should not solicit your opinion on responsibility at the hearing.

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# DETERMINATION OF RESPONSIBILITY





## NEXT STEPS – AFTER INVESTIGATION



- Must give the final report to both parties at least 10 days prior to a hearing, or determination, for their review and written response.
- The decision-maker either conducts a hearing or a question exchange.
- **Question Exchange:** After receiving the investigation report and before reaching a determination of responsibility, the decision maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

## NEXT STEPS – AFTER INVESTIGATION



- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.
- Decision-maker renders a determination of responsibility.
- Remedies and sanctions are provided AFTER a determination of responsibility.

# GROUNDS FOR APPEAL



Both parties have the right to appeal a determination of responsibility or a dismissal for the following reasons:

1. A procedural irregularity affected the outcome;
2. New evidence that was not reasonably available at the time of the determination and could affect the outcome;
3. Conflict of interest on the part of the Title IX Coordinator, Investigator, or Decisionmaker that affected the outcome; or
4. Other reasons as permitted by the recipient.

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**THANK YOU!**

