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# NEW TITLE IX REGULATIONS – TRAINING SESSIONS

# TITLE IX DECISION MAKING & DRAFTING REPORTS

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## GROUND RULES



- Questions
  - You can email me questions during the presentation or put questions in the comment box, and I will make sure to address those questions during our break or at the end.
    - [elizabeth@scottscrivenlaw.com](mailto:elizabeth@scottscrivenlaw.com)
  - We will take breaks for questions at various points throughout the presentation.
- Please keep your video on so we can see your smiling faces.
- Please mute on your end unless you are asking or responding to a question.
- We will be sending certificates of completion after every training.

## YOUR TITLE IX TOOLBOX



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

[https://scottscrivenlaw-my.sharepoint.com/:f:/p/julia/EgCbgl2SOuBOhRE-npBwzKwBjpGAsvY6OTcPUkeu\\_rjSXA?e=StYaWI](https://scottscrivenlaw-my.sharepoint.com/:f:/p/julia/EgCbgl2SOuBOhRE-npBwzKwBjpGAsvY6OTcPUkeu_rjSXA?e=StYaWI)

- The folder also contains other useful resources we will reference during the training.

# AGENDA



- 9:00 – 9:30 Determining the Decision Making Process and Finding a Decision Maker
- 9:30 – 10:30 The Decision Making Process
- 10:00 – 10:30 Making a Determination of Responsibility and Drafting the Written Report
- 10:30 BREAK
- 10:45 – 11:00 Q & A
- 11:00 – 11:20 Making a Determination of Responsibility and Drafting the Written Report, Cont.
- 11:20 – 11:45 Appeals and Finalizing the Complaint Process
- 11:45 – 12:00 Q & A

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LET'S REVIEW....



## 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).

## 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. This is your report/decision.

## THE TITLE IX COORDINATOR'S ROLE



- **Title IX Coordinator(s)**
  - Must promptly contact Complainant, discuss available supportive measures (with or without a formal complaint), and explain process for filing a formal complaint.
  - Responsible for effective implementation of any remedies.
  - New documentation requirements:
    - Measures taken to restore or preserve equal access to the program or activity;
    - The basis for the conclusion that the District's response was not deliberately indifferent.



## WHAT IS THE DETERMINATION WE WILL BE MAKING?



- Whether the respondent has engaged in “sexual harassment” in violation of Title IX and its regulations.
  1. A district employee conditioning the provision of an aid, benefit, or service on the 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 recipient’s education program or activity; or
  3. “Sexual assault” as defined the Clery Act, or “dating violence,” “domestic violence,” or “stalking” as defined in the Violence Against Women Act (VAWA).

## HERE'S WHAT HAS HAPPENED SO FAR:



- The district has received a formal complaint of sexual harassment.
- The district has provided supportive measures to the Complainant.
- The Title IX Coordinator has determined the complaint will not be dismissed and the district should proceed with a formal investigation.
- The Title IX Coordinator has provided both parties notice of the alleged violation(s) and investigation.
- The investigator has investigated the allegations by conducting interviews with the Complainant, the Respondent, and any witnesses, and has reviewed all available evidence.
- The investigator has sent both parties and their advisors the relevant evidence and given them 10 days to submit a response.
- The investigator has considered the parties' responses, created an investigative report, and sent a copy of the investigative report to both parties and their advisors.

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SO NOW WHAT?



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**NEXT STEP: DETERMINING THE DECISION MAKING  
PROCESS AND APPOINTING A DECISION MAKER**



## HOW WILL THE DISTRICT MAKE A DETERMINATION REGARDING RESPONSIBILITY?



- What procedure will the district use? Two options:
  - Adopt a hearing procedure.
  - Reach a decision through a written decision making process.

# HEARINGS



- Required for postsecondary institutions, which include vocational schools.
- K-12 school districts may choose to include hearings in their grievance processes but are not required to.
- If the grievance process includes a live hearing, the following is required:
  - The parties' advisors are permitted to ask live questions of the other party(ies) and witnesses.
  - Questioning must be conducted directly, orally, and in real time. At the same geographic location or connected by technology, at the option of the Career Center.
  - If the hearing is conducted with all parties at the same geographic location, upon request, the Career Center must facilitate questioning with the parties located in separate rooms and connected by technology.
  - The decision maker must determine whether each question is relevant before allowing the other party or witness to answer it.
  - If a party does not have an advisor present, the district must provide one for free.
  - In determining responsibility, the decision maker may only rely on statements by parties or witnesses who agree to be questioned.
  - The District must create a recording or transcript of the hearing.

## WRITTEN DECISION MAKING PROCESS



- If the district opts not to include hearings in the grievance process:
  - No interaction between the parties or live questioning is required.
  - The district need not appoint a hearing officer.
  - Districts must:
    - Appoint a Decision Maker.
    - Afford each party an opportunity to submit written, relevant questions to the other party or witnesses.
    - Exclude questions that are not relevant and explain the reason for the exclusion to the asking party.
    - Provide each party with the answers to their questions.
    - Allow for additional, limited follow-up questions from each party.

## WHO SHOULD THE DECISION MAKER BE?



- The Decision Maker must not be:
  - Biased.
  - Conflicted.
  - The Title IX Coordinator, the investigator, or the person who will hear the appeal (if there is one).
- The Decision Maker must be:
  - Appropriately trained.
  - Capable of timely reviewing the investigative report and making a determination of responsibility.



## WHO MUST THE DECISION MAKER NOT BE?



- The decision maker must not be **biased**.
  - Black's Law Dictionary: Bias is a mental inclination or tendency; prejudice; predilection.
  - May not be biased for or against complainants or respondents generally.
  - May not be biased for or against the individual complainants or respondents involved in the formal complaint.

## WHO MUST THE DECISION MAKER NOT BE?



- The decision maker must not be conflicted.
  - Black's Law Dictionary: "Conflict of interest" means a real or seeming incompatibility between one's private interests and one's public duties.
  - May not have a conflict of interest in favor of or against complainants or respondents generally.
  - May not have a conflict of interest in favor of or against the individual complainants or respondents involved in the formal complaint.

## WHO MUST THE DECISION MAKER NOT BE?



- The decision maker must not be the Title IX Coordinator, the investigator of the complaint, or the person who will hear the appeal.

## WHO MUST THE DECISION MAKER BE?



- The decision maker must be appropriately trained on:
  - The Title IX regulations' definition of sexual harassment.
  - The scope of the district's education program.
  - How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable. If live hearings are used, the decision maker must receive training in any technology to be used.
  - How to serve impartially, including by prejudgment of the facts at issue.
  - Conflicts of interest.
  - Bias.
  - Relevance of questions and evidence, including regarding the relevance of a complainant's sexual predisposition or prior sexual behavior.
  - Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

## WHO SHOULD THE DECISION MAKER BE?



- The decision maker should be capable of timely reviewing the investigative report and making a determination of responsibility.
- A District administrator who has the power to discipline the Respondent.

## WHO WILL THE DECISION MAKER BE?



- Think through who this person (or persons) will be in your district.
  - Superintendent?
  - Other administrator?
  - Outside party?

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- A district would like to use an outside attorney as its Title IX decision maker. A few weeks ago, this person Tweeted on his personal Twitter account: “To survivors everywhere, we believe you.”
  - What if a few years ago, the person the district would like to use as a decision maker commented on a Facebook post about Harvey Weinstein, “#metoo,” but the person never provided more information or made another post or public comment about sexual harassment?

HYPOTHETICAL:

Finding the right decision maker.

- 
- What if the person the district would like to use as the decision maker is the next-door neighbor of the Complainant and his parents?
    - What if the decision maker just moved into the house and hasn't met the Complainant or his parents yet?
    - What if the decision maker does not know the family well, but waves hello or goodbye whenever he sees his neighbors?
    - What if the decision maker and the Complainant's family have each lived in their houses for over 10 years and sometimes have dinner at each other's houses?
    - What if the decision maker and the Complainant's family have a long-running dispute over re-paving their shared driveway?

HYPOTHETICAL:

Finding the right decision maker.



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- The district would like to use the Superintendent as its decision maker in all Title IX formal complaints. A few weeks before the Superintendent received the final investigative report, the Superintendent made a decision to expel the Respondent from school for drinking alcohol on school grounds.
  - What if the Respondent and his parents successfully appealed the suspension?

HYPOTHETICAL:

Finding the right decision maker.

# INFORMAL RESOLUTION



- 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.

● Notice to the parties must include:

- ✓ the allegations,
- ✓ the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and
- ✓ any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

## Written Notice Prior to Informal Resolution

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# THE DECISION MAKING PROCESS



## SO, WHERE WERE WE?



- The investigator has considered the parties' responses, created an investigative report, and sent a copy of this investigative report to both parties and their advisors.
- The district has appointed a qualified and appropriate decision maker to reach a determination of responsibility.

## DECISION MAKING PROCESS



- Before reaching a decision, the decision maker must:
  - Afford each party the opportunity to submit written, relevant questions that the party wants to ask of any party or witness.
  - Determine whether the question the party wants to ask is relevant and exclude any question that is not.
  - Provide each party with the answers to their questions.
  - Allow for additional, limited follow-up questions from each party.

## DECISION MAKING PROCESS – ALLOWING QUESTIONING



- What if a party or witness refuses to answer a question?
  - For Career Centers conducting hearings: “If a party or witness does not submit to cross-examination at the **live hearing**, the decision maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision maker cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”
  - This requirement is specific to live hearings but proceed with caution in relying too heavily evidence provided by a party or witness who refuses to answer questions and thus may be considered to not have submitted to cross-examination.

## DECISION MAKING PROCESS – ALLOWING QUESTIONING



- The decision maker may only allow relevant questions.
- What is a relevant question?
  - “Relevance” is not generally defined in the regulations.
  - Under the Federal Rules of Evidence, evidence is relevant if:
    - It has any tendency to make a fact more or less probable than it would be without the evidence;  
and
    - The fact is of consequence in determining the action.



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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. They've 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 and delivers it to the Title IX Coordinator.

- **Respondent to Complainant:** Have you quit the dance team since the conduct you alleged began?
- *Is this a relevant question?*

HYPOTHETICAL:

Determining relevance.

## DECISION MAKING PROCESS – ALLOWING QUESTIONING



- What is a relevant question?
  - Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant.
  - Unless:
    - Offered to prove that someone other than the Respondent committed the conduct alleged by the Complaint; or
    - Concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

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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. They've 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 and delivers it to the Title IX Coordinator.

- **Respondent to Complainant:** How many people have you had sex with?
- **Complainant to Respondent:** How many people have you had sex with?
- *Are these relevant questions?*

HYPOTHETICAL:

Determining relevance.

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Emma is a Sophomore student who has struggled academically. Her math teacher suggested she start meeting with him after school for private tutoring/review, at no cost. Her parents are aware. Emma meets with her teacher for two months in his classroom with the door shut, and then during a tutoring meeting the teacher leans in towards her, puts his hand on her stomach, and kisses her. She was stunned, didn't say anything, and went home and told her 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 for Emma. Respondent to Complainant: How many people have you had sex with?

- Respondent to Complainant: Did your first kiss happen after you put your hand on a boy's stomach and then kissed him?
- Respondent to Complainant: Were you given a detention last year for plagiarizing a paper then lying about it?

HYPOTHETICAL:

Determining relevance.

## DECISION MAKING PROCESS – ALLOWING QUESTIONING



- What is an allowable question?
  - “The grievance process may not require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally protected privilege, unless the person holding the privilege has waived it.”
  - Legal Privilege (See Ohio Revised Code section 2317.02).
    - Confidential communications between attorneys and clients.
    - Confidential communications between doctors and patients.
    - Confidential communications between counselors or therapists and clients.
    - Confidential communications between religious clerics and parishioners.

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# MAKING A DETERMINATION OF RESPONSIBILITY AND DRAFTING THE WRITTEN REPORT



# INVESTIGATIVE REPORT VS. DETERMINATION OF RESPONSIBILITY

## Investigative Report

- The investigator should be a **fact finder**.
  - Gather the facts.
  - Provide sufficient details to provide context and information on the importance of specific evidence.
  - Explain what questions were asked, what evidence was reviewed, and why the investigator made the choices to ask those questions and review that evidence.
  - Explain what evidence the investigator believes is most important and why. Explain what evidence the investigator believes is unimportant and why.
  - Explain why the investigator thinks certain evidence or statements are more or less credible.

## Determination of Responsibility

- The decision maker should be a **decision maker**.
  - Make credibility determinations, including whether parties and witnesses were telling the truth.
  - Make determinations about what happened and when.
  - Make determinations about the relative importance of facts and evidence.
  - ***Make a determination regarding whether the Respondent sexually harassed the Complainant that is supported by the facts, as presented by the investigative report and reviewed by the decision maker.***
  - ***Make a determination about whether the Respondent violated any other District rules.***
  - ***Make determinations regarding appropriate sanctions and remedies.***

## MAKE A DETERMINATION REGARDING RESPONSIBILITY



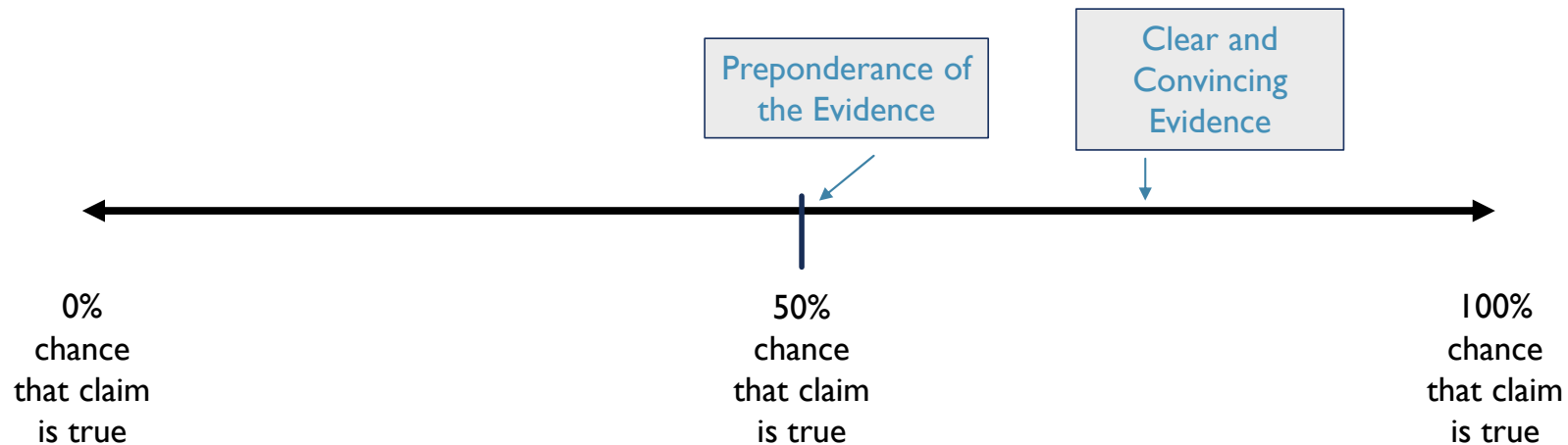
- Apply the standard of evidence your district has chosen to use:
  - Preponderance of the Evidence.
  - Clear and Convincing Evidence.
- The same standard of evidence must be used for all formal complaints of sexual harassment against students and employees.



# WHICH STANDARD OF EVIDENCE SHOULD YOUR DISTRICT USE?



- “Preponderance of the Evidence” means there is greater than 50% chance that the claim is true.
- “Clear and Convincing Evidence” means the claim is highly and substantially more likely to be true than untrue.



# WHICH STANDARD OF EVIDENCE SHOULD YOUR DISTRICT USE?



- Aim for consistency across other policies and practices:
  - Other discrimination harassment policies (race, religion, national origin, disability, etc.).
  - Employee discipline and termination.
  - Student discipline.
  - Preponderance of the evidence has been the required standard of proof for Title IX and other discrimination claims for many years. It remains the standard of proof for other claims of discrimination.
- Think about deliberate indifference.

## WHAT RULES APPLY TO THE DECISION MAKER'S CONSIDERATION OF THE EVIDENCE?



- Objectively evaluate all relevant evidence, both inculpatory and exculpatory.
  - “Inculpatory evidence” is evidence that shows, or tends to show, a person’s involvement in an act, or evidence that can establish responsibility.
  - “Exculpatory evidence” is evidence that tends to excuse, justify, or absolve the alleged fault or responsibility as a Respondent.
- Make credibility determinations that are not based on a person’s status as a complainant, respondent, or witness.
- Continue to presume that the Respondent is not responsible for the alleged conduct until a **final** determination regarding responsibility is made.
- Remember that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the **District**, not the Complainant or Respondent.

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BREAK



## WHAT IS SEXUAL HARASSMENT?



- Determine whether the respondent has engaged in “sexual harassment” in violation of Title IX and its regulations.
  1. A district employee conditioning the provision of an aid, benefit, or service on the 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 recipient’s education program or activity; or
  3. “Sexual assault” as defined the Clery Act, or “dating violence,” “domestic violence,” or “stalking” as defined in the Violence Against Women Act (VAWA).

## WHAT IS SEXUAL HARASSMENT?



- I. A district employee **conditioning** the provision of an aid, benefit, or service on the individual's participation in **unwelcome** sexual conduct.
  - *Quid pro quo* harassment.
  - Whether *quid pro quo* harassment exists may be implied from the circumstances; the exchange need not be explicit.
  - *Quid pro quo* harassment need not be severe, pervasive, and objectively offensive. Even a single instance is “inherently offensive and serious enough to jeopardize equal educational access,” even when only verbal conduct is at issue.

## WHAT IS SEXUAL HARASSMENT?



- What is “unwelcome conduct”? Subjective standard.
  - OCR: “The Complainant’s subjective statement that the Complainant found the conduct to be unwelcome suffices to meet this ‘unwelcome’ element.”
  - Does not require an explicit statement to the Respondent that the conduct is unwelcome.
  - A sexual relationship between an employee and a student will constitute sexual harassment regardless of whether the student nominally consented or welcomed the sexual activity.

## WHAT IS SEXUAL HARASSMENT?



- What does it mean to **condition** something on participation in sexual conduct?
  - K-12 students are generally expected to submit to the instructions and directions of teachers, such that if a teacher makes a student feel uncomfortable through sex-based or other sexual conduct (e.g., back rubs or touching students' shoulders or thighs), it is likely that the students will interpret that conduct as implying that the student must submit to the conduct in order to maintain the educational benefits (e.g., not getting in trouble or continuing to please the teacher and earn good grades).
  - In situations where an employee did not intend to commit quid pro quo harassment (e.g., where the teacher did not realize that what the teacher believed were friendly back rubs had sexual overtones and made students feel uncomfortable), the District may take the specific factual circumstances into account in deciding what remedies are appropriate for the complainants and what disciplinary sanctions are appropriate for the respondent.



## WHAT IS SEXUAL HARASSMENT?



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 recipient's education program or activity.
  - Unwelcome conduct.
  - Severe **and** pervasive **and** objectively offensive.
  - Effectively denies equal access to the education program or activity.

## WHAT IS SEXUAL HARASSMENT?



3. “Sexual assault” as defined the Clery Act, or “dating violence,” “domestic violence,” or “stalking” as defined in the Violence Against Women Act (VAWA).
  - “Sexual Assault” means “any sexual act directed against another person, without the consent of the victim including instances when the victim is incapable of consent” or “unlawful, nonforcible sexual intercourse.” “Sexual act” includes forcible rape, forcible sodomy, sexual assault with an object, forcible fondling (the touching of private body parts of another person for the purpose of sexual gratification), incest, or statutory rape.
  - “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; and where the existence of such a relationship is determined based on a consideration of the length of the relationship, the type of the relationship, and the frequency of interaction between the persons involved in a relationship.
  - “Domestic Violence” includes 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 applicable domestic or family violence laws, or by any other person against an adult or youth victim who is protected by applicable domestic violence laws.
  - “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.

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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. They've 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 and delivers it to the Title IX Coordinator.

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?

HYPOTHETICAL:

Sexual Harassment Determinations

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Emma is a Sophomore student who has struggled academically. Her math teacher suggested she start meeting with him after school for private tutoring/review, at no cost. Her parents are aware. Emma meets with her teacher for two months in his classroom with the door shut, and then during a tutoring meeting the teacher leans in towards her, puts his hand on her stomach, and kisses her. She was stunned, didn't say anything, and went home and told her 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 for Emma.

A district employee conditioning the provision of an aid, benefit, or service on the individual's participation in unwelcome sexual conduct?

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?

“Sexual assault” as defined the Clery Act, or “dating violence,” “domestic violence,” or “stalking” as defined in the Violence Against Women Act (VAWA).

HYPOTHETICAL:

Sexual Harassment Determinations

### The Written Determination of Responsibility Must Include:

- Allegations potentially constituting sexual harassment;
- Description of procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- **Findings of fact supporting the determination;**
- **Conclusions regarding the application of the district's code of conduct to the facts;**
- **A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, disciplinary sanctions for the Respondent, and remedies designed to restore or preserve equal access to the district's education program or activity to be provided to the Complainant.**
- Procedures and permissible bases for the Complainant and the Respondent to appeal.

# Written Determination of Responsibility

## PROVIDING THE WRITTEN DETERMINATION TO THE PARTIES



- The District must provide the written determination simultaneously to the parties.
  - Must actually give the written determination to the parties, either electronically or physically.
  - Cannot just show them the report, as was often the practice in the past.
- The written determination becomes final on either:
  - The date that the District provides the parties with the written determination of the result of an appeal, if an appeal is filed; or
  - If an appeal is not filed, the date on which an appeal would no longer be considered timely.

## CONFIDENTIALITY: TITLE IX AND FERPA



- “The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.”
- The Title IX regulations require districts to disclose certain personally identifiable information and records of students. Districts cannot condition this disclosure on consent.
  - The district must provide relevant evidence to both parties and their advisors.
  - The district must provide both parties a copy of the investigative report.
  - The district must provide both parties a copy of the determination of responsibility.

## CONFIDENTIALITY: TITLE IX AND TITLE IX



- The District must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness.
- **Except** as required to carry out the purposes of the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding arising under those regulations.



# DECISION MAKING BEFORE AND AFTER AUGUST 14, 2020

## Before

- One person typically served as the investigator and decision maker.
- Evidence relevant to the determination was usually not shared with either party.
- Witnesses statements usually were not shared with either party.
- No rules specifically limited the evidence that could be relied on.
- The detailed final reports often were not shared with either party.
- The decision maker had discretion over how to write the final report of the investigation.

## After

- The decision maker and the investigator cannot be the same person.
- Evidence relevant to the determination must be shared with both parties.
- Witness statements relevant to the determination must be shared with both parties.
- Evidence must meet the definition of “relevance” in the regulations to be considered.
- The detailed final reports must be simultaneously shared with both parties.
- The decision maker must follow a strict template in writing the determination of responsibility.

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# APPEALS



## BASIS FOR APPEALS



- Districts must offer all parties an appeal from a determination regarding responsibility, and from a district's dismissal of a formal complaint or any allegations in a formal complaint, on the following bases:
  - A procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, Investigator(s), or Decision Maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.
  - Any other bases, as long as offered equally to both parties.

## PROCEDURES FOR APPEALS – NOTICE OF APPEAL



- Include appeal procedures, including deadlines, in your district's grievance process.
  - Whom should parties notify of their appeal? (Title IX Coordinator?)
  - What will the deadline be to notify the district of the appeal?
    - The deadline can be fairly quick, e.g., between 3 and 5 days.
    - The grievance process can allow for limited, equitable extension of time for good cause.
  - How should the party notify the appropriate person of the appeal (e.g., in writing, at a particular email address, via mail)?
  - What information must be included in the notice of the appeal?
- Restate the appeal procedures outlined in the grievance process in each written determination of responsibility, and also refer the parties to the grievance process.

- When an appeal is received, notify the other party(ies) in writing of the appeal, and implement appeal procedures equally for both parties.
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the determination of responsibility.
  - The grievance procedure should specify the deadline for submitting this statement. (Like the notice of appeal, this timeline can be fairly quick.)
  - The grievance procedure should specify any other requirements for this statement.

## Written Notification of Appeal

## WHO SHOULD THE APPEALS DECISION MAKER BE?



- The Appeals Decision Maker must not be:
  - Biased.
  - Conflicted.
  - The Title IX Coordinator, the Investigator, or the Decision Maker.
- The Appeals Decision Maker must be:
  - Appropriately trained.
  - Capable of timely reviewing the Determination of Responsibility and deciding the issue on appeal.
  - Able to impose discipline on the Respondent.

## WHO SHOULD THE APPEAL DECISION MAKER BE?



- Think through who this person (or persons) will be in your district. Keep in mind that this person will be reviewing the actions of the Title IX Coordinator, Investigator, and Decision Maker.
  - Administrator?
  - Superintendent?
  - Board President?
  - Board Designee?
  - Outside party?

## DECIDING THE APPEAL



- The Appeal is not a Re-Do, but a Review.
  - Confine the review of the Determination of Responsibility to the specific issue raised in the Appeal and the statements the parties submitted in the Appeal.
  - The Appeals Decision Maker should not substitute his/her judgment for that of the Decision Maker, especially regarding factual determinations.
  - If no additional investigation is needed, the Appeals Decision Maker should identify the error and correct it, explaining how that changes the Determination of Responsibility, sanctions, and/or remedies.
  - If additional investigation is needed, the Appeals Decision Maker should “remand” the Complaint to the Decision Maker, with instructions on how to correct the error and appropriately revise the Determination of Responsibility.



- Identify the basis/bases for appeal.
- Describe the **relevant** procedural steps taken from the receipt of the formal complaint to the issuance of the Determination of Responsibility.
- Describe the **relevant** findings of fact and **relevant** conclusions in the Determination of Responsibility.
- Include a statement of, and rationale for, the result as to each basis for appeal.
- Describe the result of the appeal.

## **Appeal** **Decision**

## THE WRITTEN APPEAL DECISION



- What are possible results of the appeal?
  - The Determination of Responsibility is “affirmed.”
  - The Determination of Responsibility is completely or partially “reversed,” and the Appeals Decision Maker comes to a different conclusion.
  - The complaint is “remanded” to the Investigator for limited further investigation in accordance with specific instructions from the Appeal Decision.

## PROCEDURES FOR APPEALS – NOTIFYING PARTIES OF THE RESULT



- Issue a written appeal decision describing the result of the appeal and the rationale for the result.
- Simultaneously provide the written appeal decision to both parties.

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Emma is a Sophomore student who has struggled academically. Her math teacher suggested she start meeting with him after school for private tutoring/review, at no cost. Her parents are aware. Emma meets with her teacher for two months in his classroom with the door shut, and then during a tutoring meeting the teacher leans in towards her, puts his hand on her stomach, and kisses her. She was stunned, didn't say anything, and went home and told her 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 for Emma. Respondent to Complainant: How many people have you had sex with?

The Decision Maker determined that the Respondent sexually harassed Emma, under the first two prongs of the sexual harassment definition in the regulations. After receiving a copy of the Determination of Responsibility, the Respondent appeals, alleging the Investigator, who is the Respondent's building principal, is biased against him because the principal has made numerous comments in past school assemblies that people who complain about sexual harassment should be believed, and that false complaints of sexual harassment are "very rare."

HYPOTHETICAL:

Appeals

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## A WORD ON “REASONABLY PROMPT TIME FRAMES”



## REASONABLY PROMPT TIME FRAMES



- Before we even reached the Decision Making and Appeals process:
  - The Respondent must be provided sufficient time to prepare a response to the Complaint before any initial interview;
  - The Complaint is investigated (provided it is not delayed for good cause), and all parties are provided sufficient advance notice of interviews to allow them to prepare to participate;
  - All relevant evidence is sent to both parties, who are given 10 days to respond;
  - The Investigator creates the Investigative Report, which is sent to both parties and their advisors at least 10 days before any decision is made on the basis of that report;
- Then...
  - The Decision Maker allows each party to submit questions, reviews those questions, provides the answers to the other party, provides the other party's answer to the asking party, and allows for limited follow-up questions;
  - The Decision Maker issues a Determination of Responsibility;
  - The parties have the opportunity to appeal;
  - If there is an appeal, the other party is notified of the appeal and given the opportunity to submit a statement before the appeal is determined and provided to both parties.

## REASONABLY PROMPT TIME FRAMES



- This is all to say...
  - To the best of your abilities, stick to the time frames in your district's grievance processes and keep this process moving.
  - There may be situations in which the time frame must be extended for "good cause." Make sure you know what the "good cause" is if that happens.
  - Title IX Coordinators should make an effort to keep in touch with parties during this process to make sure they understand what is going on, what the next steps will be, and that the Complaint process is moving forward (even though it might not seem that way).

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# SANCTIONS





## SANCTIONS



- The district may not impose any disciplinary sanctions or other actions that are not supportive measures against a Respondent until the grievance process has concluded.
- The Determination of Responsibility becomes final either on the date the appeal is resolved or the date the appeal is no longer timely.
- The sanctions must be among those listed or described in the grievance process as within the range of possible disciplinary sanctions and remedies.
- The Title IX Coordinator is responsible for effectively implementing any sanctions and/or remedies.

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# REMEDIES



## REMEDIES



- The Determination of Responsibility must include a statement of whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the Complainant.
- Remedies may be the same as supportive measures, but after the Determination of Responsibility becomes final, need not be non-disciplinary or non-punitive, and need not avoid burdening the Respondent.

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QUESTIONS?

