

Burlington-Edison School District

Title IX Basics for District Administrators

February 15, 2024
8:15 to 10:30 a.m.



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DISCLAIMER

Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice.

Always consult with your District's legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal Title IX guidance.



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Today's Initial Topics

- Title IX and the 2020 Regulations
- The Roles of the Title IX Team
- Critical Definitions
- What to do when there is “Actual Knowledge”
- Supportive Measures
- Formal Complaints
- Assessing Jurisdiction



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Part 2 - Investigations

- Notice Requirements
- Understanding the Title IX Investigation Process
 - Investigation Steps and Timeline for Completion
- The Role of the Title IX Investigator
- Understanding Biases
- Evidence & Relevance
- Trauma-Informed Responses
- Evidence and Report Review Periods Unique to Title IX
- Decision-Maker's Role, Determinations, and Appeals
- Wrap-Up and Assessment



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Title IX and the 2020 Regulations

Title IX of the Education Amendments of 1972 is a Federal law that covers nondiscrimination on the basis of sex, including sexual harassment.

“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.” 34 C.F.R. § 106.31

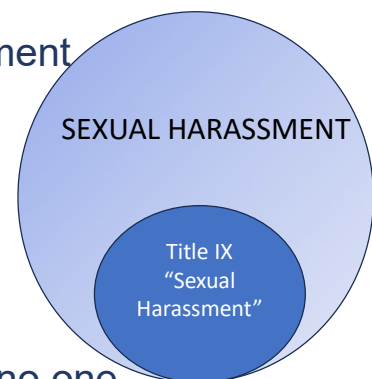


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Title IX Requirements & Other Laws

- 2020 Regs significantly changed Title IX requirements for addressing sexual harassment
- Grievance process is prescribed
- “Formal Complaints” must be investigated
- Training under Title IX is required for roles
- Title IX is a federal law that differs from Washington State law
- Title IX regulation changes are coming, but no one knows when, so must follow current requirements



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The Title IX Team



Title IX Coordinator

Serves a compliance function for the District and provides notice of policies, advice, guidance, tracks process and timelines, and may coordinate supportive measures, investigators, and monitoring.



Investigator

Trained on Title IX process and issues, trauma-informed, communicates with the Coordinator, investigates (interviews and evidence gathering), and presents the findings, but not the District's decision maker. May serve as a witness regarding the investigation.



Decision Maker

Receives the report, asks any questions, and renders a decision as to whether Title IX was violated or what remedial actions to take.



Responsible Employees/ Officials with Authority



Appellate Members



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District Procedure 3205 P

Title IX requires training for team members

- Title IX Sexual Harassment definitions
- The scope of the District's education program or activity
- Grievance process and how to conduct Title IX investigations
- Serving impartially without conflicts of interest or bias
- Responsibilities under WAC 392-190
- How to raise awareness of and eliminate bias on the bases of protected statuses



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RCW 28A.640 & BESD Policy 3205

Under Washington State law, the term “sexual harassment” means unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature if:

- submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining an education or employment;
- submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual’s education or employment; or
- that conduct or communication has the purpose or effect of substantially interfering with an individual’s educational or work performance, or of creating an intimidating, hostile, or offensive educational or work environment.



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BESD Policy 3205

Any school employee who witnesses sexual harassment or receives a report, informal complaint, or written complaint about sexual harassment is responsible for informing the district’s Title IX Coordinator.

All staff are also responsible for directing complainants to the formal complaint process.

Allegations of criminal misconduct will be reported to law enforcement and suspected child abuse will be reported to law enforcement or Child Protective Services.

A criminal investigation does not relieve the district of its independent obligation to respond to sexual harassment.



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Title IX Role and Law Enforcement

- Law enforcement involvement does not negate the District's Title IX duties
- Different legal standards and jurisdictions apply to the investigations
- Coordinate with your Title IX Coordinator, Risk Management, and School Resource Officers / Police & Sheriff Departments
- Balancing Act - District Duties vs. Criminal Investigation
- Cases with explicit images as evidence need to be handled appropriately



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Interplay of Title IX and Other Duties

This is not an exhaustive list, but other policies to keep in mind:

- 3205P Standard Complaint Process for Sexual Harassment that does not fall under Title IX
- 3207 – Harassment, Intimidation, and Bullying
- 3210 – Nondiscrimination
- 3241 – Student Discipline
- Special Education/Section 504 Obligations
- Boundary Violations
- Mandatory Reporting of Child Sexual Abuse



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Request for Confidentiality

If a Complainant asks:

- That their name not be revealed to the alleged perpetrator or
- asks the District not to investigate or seek action

These are tricky because:

- Mandatory reporting requirements
- Honoring the request can limit the District's ability to fully respond
- Respondent cannot be disciplined
- Supportive measures might require discussions with others

Consult with the Title IX Coordinator!



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Title IX Process



Sexual Harassment reported

Formal Complaint by Complainant/Title IX Coordinator

Notice of Allegations

Investigation

*Decision / Corrective Action

Appeal

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Language Used in Title IX

“Recipient” refers to recipients of federal funds from the U.S. Department of Education, i.e., the District.

“Complainant” - an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

- The Complainant may not be the same person as the person who provided notice or filed the complaint. Other terms you may use here: Reporter, Parent, Witness, Title IX Coordinator

“Respondent” - an individual who has been reported and alleged to be the perpetrator of conduct that could constitute sexual harassment.



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Title IX Defines “Sexual Harassment”

Conduct on the basis of sex that qualifies one or more of these:

1. “Quid Pro Quo” Sexual Harassment
2. “Severe, Pervasive, and Objectively Offensive” Harassment
3. “Sexual Assault” - defined as Rape, Fondling, or Incest
4. “Dating Violence,” “Domestic Violence,” and “Stalking”



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Sexual Harassment



Conduct *on the basis of sex* that satisfies one or more of the following:

Quid Pro Quo - An employee of the District conditions the provision of an aid, benefit, or service of the District on an individual's participation in unwelcome sexual conduct.

"Harassment" –

- Unwelcome conduct
- [on the basis of sex]
- determined by a reasonable person
- to be so severe, pervasive, and objectively offensive that it
- effectively denies a person equal access to the District's education program or activity.

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Sexual Assault Definitions



Rape –

- Penetration, no matter how slight,
- of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person,
- without the consent of the Complainant, including instances where the Complainant is incapable of giving consent because of
 - age or
 - temporary or permanent mental or physical incapacity.

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Sexual Assault Definitions



Statutory Rape –

- Nonforcible sexual intercourse
- with a person who is under the statutory age of consent in Washington

Incest –

- Nonforcible sexual intercourse
- between related persons within the degrees wherein marriage is prohibited by Washington State law.

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Consent

- Words or actions that a reasonable person in the Respondent's perspective would understand as agreement to engage in the sexual conduct at issue
- Due to age "incapable of giving consent," in Washington State:
 - A person under age 16 OR
 - A person under the age of 18 (16 or 17) if the other person is more than 5 years (60 months) older than them.
- A person who is incapacitated by drugs, alcohol, medical condition, disability, unconscious, or asleep is considered to be incapable of giving consent



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Other Sexual Assault Definitions



“Fondling”

- The touching of the private body parts of another person (buttocks, groin, breasts)
- for the purpose of sexual gratification,
- forcibly and/or against that person’s will (non-consensually) or
- not forcibly or against the person’s will in instances where the Complainant is incapable of giving consent because
 - of age or because of temporary or
 - permanent mental or physical incapacity.

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Dating Violence Definition



“Dating violence” —

- Violence committed by a person who
- is or has been in a social relationship of a romantic or
- intimate nature with the Complainant.
- The existence of such a relationship shall be determined based on the Complainant’s statement and
- with consideration of
 - the length of the relationship,
 - the type of relationship, and
 - the frequency of interaction between the persons involved in the relationship.



*Dating violence is different than domestic violence but can include sexual assault

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Domestic Violence Definition



“Domestic Violence” - A felony or misdemeanor violent crime by

- Complainant’s current or former spouse or intimate partner
- A person the Complainant has a child with
- A person who is or has cohabitated with the Complainant as a spouse or intimate partner
- A person similarly situated to a spouse under Washington’s domestic or family violence laws
- Another person who the Complainant is protected from under WA’s domestic or family violence laws.

* To be Domestic Violence under Title IX, the people must have an intimate relationship.

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Stalking Definition



“Stalking” - Engaging in a course of conduct directed at a specific person that would cause a reasonable person to —

- Fear for the person’s safety or the safety of others; or
- Suffer substantial emotional distress.
- **Course of conduct** means two or more acts in which the stalker directly, indirectly, or through third parties, by any action or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
- **Reasonable person** = a reasonable person under similar circumstances and with similar identities to the Complainant.
- **Substantial emotional distress** = significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

* Per Title IX this should not be read to violate the First Amendment.

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Actual Knowledge

The District is deemed to have “actual knowledge” of *sexual harassment* if any of the following apply:

- **Notice of sexual harassment or allegations of sexual harassment to**
 - The District’s Title IX Coordinator, OR
 - Any official of the District who has the authority to institute corrective measures on behalf of the District, OR
 - **Any employee of an elementary and secondary school.**
- “Actual knowledge” can be verbal, written, email, text, or via electronic means.
- “Actual knowledge” can come from anyone; the person does not need to be participating or attempting to participate in a District program and can even be anonymous.



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Is this a Title IX Issue?

- A middle school student keeps asking out other students, they don’t like it, and the student won’t stop
- A student reports being touched by a 21-year-old, off-campus, and adult is not affiliated with District (not student, staff, or volunteer)
- A first-grade special education student repeatedly touches others
- A high school student makes an offensive sexual comment that is heard by several students and reported
- A staff member makes a comment about a student’s shirt being too low cut, and it makes a student uncomfortable



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Issues that are Not Title IX

Still Require Action and Coordination:

- Overzealous Student - Counseling, HIB, or contact agreement
- Non-District Adult - Mandatory reporting
- First-grade student with touching - Special education support
- Single but widely-reported incident(s) - Building-wide steps
- Inappropriate conduct by staff – Human Resources
- Other student conduct – HIB / Student Conduct



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Got Knowledge? Notify the Title IX Coordinator!

The Title IX Coordinator must promptly (and confidentially):

- Contact the Complainant to discuss supportive measures
- Supportive measures are available with or without the filing of a formal complaint
- Explain the complaint process for filing a formal complaint.
- Consider the Complainant's wishes
- Determine next steps
- Determine jurisdiction and whether it falls within Title IX



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“Formal Complaint”

- Document filed by a Complainant or signed by the Title IX Coordinator
- Alleges “sexual harassment” against a Respondent
- Requests that the District investigate the allegation and
- Must contain a signature or other method indicating the Complainant is the person filing the formal complaint.
- Filed with the Title IX Coordinator in person, by mail, or by e-mail
- Parent/guardian can file on their student’s behalf.



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“Supportive Measures”

Non-disciplinary, non-punitive individualized services 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, the educational environment, or deter sexual harassment.

- offered as appropriate, as reasonably available, and without fee
- to the Complainant or the Respondent – regardless of formal complaint filing (before or after the filing of a formal complaint or where no formal complaint has been filed).



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“Supportive Measures”

Examples: safety plans, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, leaves of absence, increased security and monitoring of certain areas of the campus, training and statements, and other measures. See 3205P.

- The District must maintain confidentiality about supportive measures to the extent possible without impairing the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.



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No Formal Complaint Filed?

- The District has a duty to provide a safe environment and should provide support measures or take other steps to address the “sexual harassment”
- Title IX Coordinator may sign a “formal complaint”
 - The Complainant is not associated with the District in any way (a former student);
 - The Respondent has a pattern of alleged sexual harassment and is in a position of authority (failing to do so may be “deliberate indifference”) or
 - What was reported is sufficiently serious that other students may be at risk or denied opportunities in the education environment.



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Is a Title IX Investigation Necessary?

1. Is the Complainant enrolled or attempting to enroll in a District program?
2. Did the conduct occur in a program or activity of the District?*
3. Do the allegations in the complaint, *if true*, rise to the level of “sexual harassment” as defined by Title IX?

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2. Jurisdiction / Program or Activity

- Does the District have substantial control over the Respondent?
- Did the matter occur against a Complainant in the United States?

AND

- Did the matter occur on the District's property or in/during an online class? OR
- Did the matter occur at an off-campus building owned or controlled by the District? OR
- Did the matter occur off campus, but at a District-sponsored event?



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3. Is it a Title IX Sexual Harassment Issue?

Conduct on the basis of sex that qualifies one or more of these:

1. "Quid Pro Quo" Sexual Harassment
2. "Severe, Pervasive, and Objectively Offensive" Sexual Harassment
3. "Sexual Assault" - Rape (including Statutory Rape), Fondling, or Incest
4. "Dating Violence," "Domestic Violence," or "Stalking"



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Is this a Title IX Matter?

If all of these are true – Title IX grievance process must be used
(but, if any are NOT true, then it is dismissed as a Title IX matter)

1. The Complainant is enrolled or is attempting to enroll in a District program.
2. The conduct occurred in a program or activity of the District.
3. The allegations, *if true*, rises to the level of “sexual harassment” as defined by Title IX?
 - Provide notice and offer support measures (to both parties)
 - May offer a “voluntary informal resolution,” but not if staff/student
 - Cannot discipline the Respondent until a decision of responsibility is made at the end of the process.*



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*Exception for emergency removals, but high standard

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Title IX Process for Formal Complaints

Sexual Harassment reported

Formal Complaint by Complainant/Title IX Coordinator

Notice of Allegations

Investigation

*Decision / Corrective Action

Appeal



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Notice Requirements

- Copy of 3205P to the Complainant and Respondent
- Notice of the allegations (who, what, where, and when, if known)
- Sufficient time and detail to prepare a response before an initial interview
- Right to an advisor of their choice to inspect and review evidence
- Respondent is presumed not responsible until decision at end of process
- Notice of prohibition of retaliation
- May notify about policies that prohibit false statements



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Timeline for the Process

At the conclusion of the investigation, the decision-maker (superintendent or designee) must issue a written determination of responsibility regarding the alleged sexual harassment within **thirty (30) calendar days** of receipt of the complaint, unless:

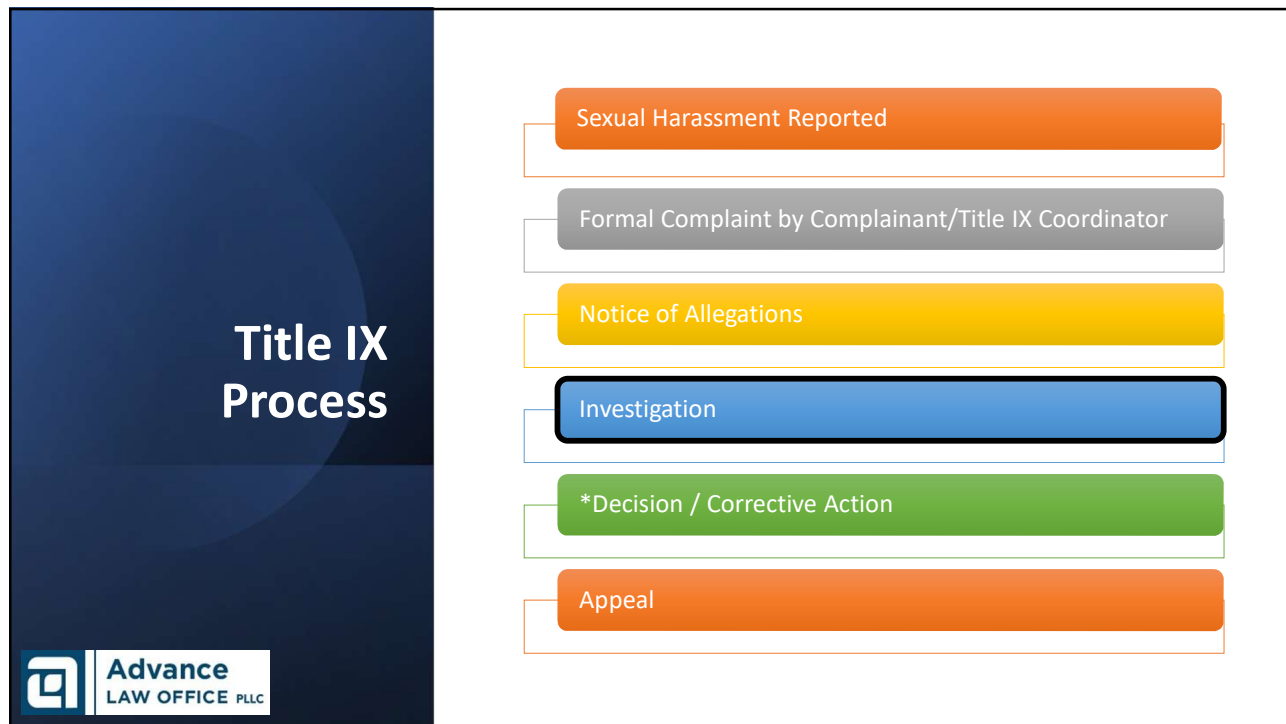
- Otherwise agreed to by the Complainant or
- If exceptional circumstances related to the complaint require an extension of the time limit

When an extension is needed, the District must notify the parties in writing of the extension rationale and the anticipated response date.



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The Trained Title IX Investigator

- Serves impartially and is wary of biases
- Conducts a prompt and thorough investigation
- Understands “relevance” and objectively evaluates all evidence, including both inculpatory and exculpatory evidence (and avoids rabbit holes)
- Has the ability to assess “credibility” and articulate bases for their credibility determinations
- Writes an Investigation Report that fairly summarizes relevant evidence for the parties and the decision-maker



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Interviews

- Must give notice so parties have time to prepare for interviews.
- Take steps to safeguard privacy and protect the investigation
- Consider the extent to which you reveal information for effective interviews
- Do *not* communicate about the investigation until it is complete, including how long it will take



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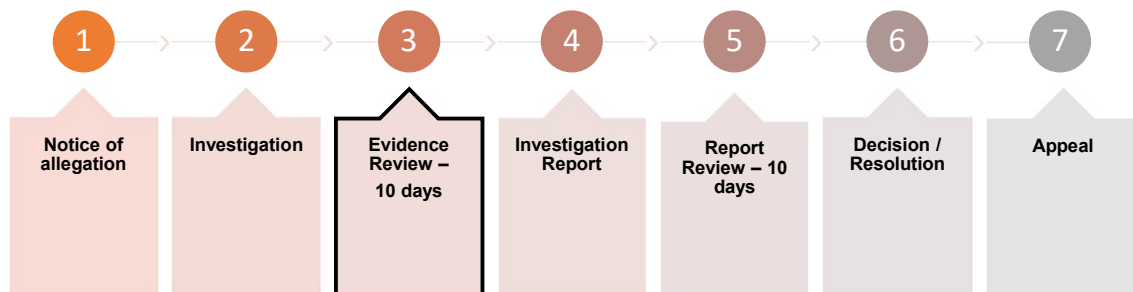
Trauma-Informed Interviews



- Provide a safe, private space for physical and emotional well-being during the interview
- Encourage participants to share what they can recall– do not expect or demand chronological recall
- Gather information in a fair and balanced manner, and ask neutral, open-ended questions (“help me understand”)
- To prevent retraumatizing or corrupting memory, try to limit the number of interviews
- Ask directly about any issues that may impact the interviewee or their memory
- Even non-complainants are affected by trauma, so be aware of resources and direct parties to the Title IX Coordinator for support

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Investigation Steps



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Evidence Review

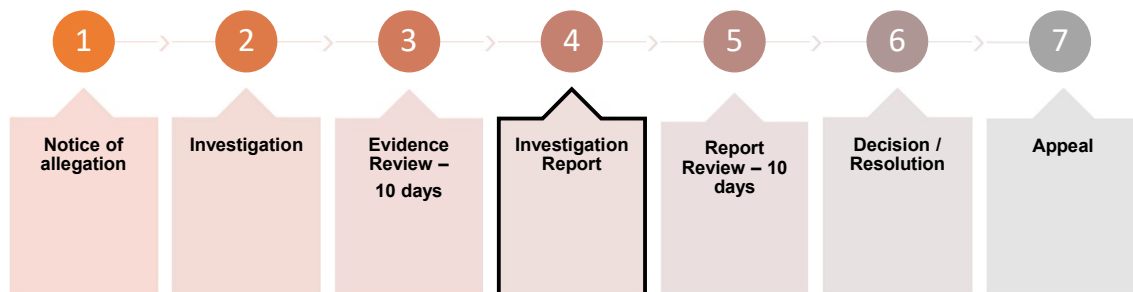
Prior to the completion of an investigative report:

- The parties must be given an equal opportunity to inspect and review any evidence obtained in the investigation and meaningfully respond
- All evidence directly related to the allegations raised in the formal complaint, including evidence you do not intend to rely on in reaching a determination of responsibility, regardless of the source
- The parties must have at least ten (10) days to submit a written response for the investigator to consider



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Investigation Steps



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Required Report Contents

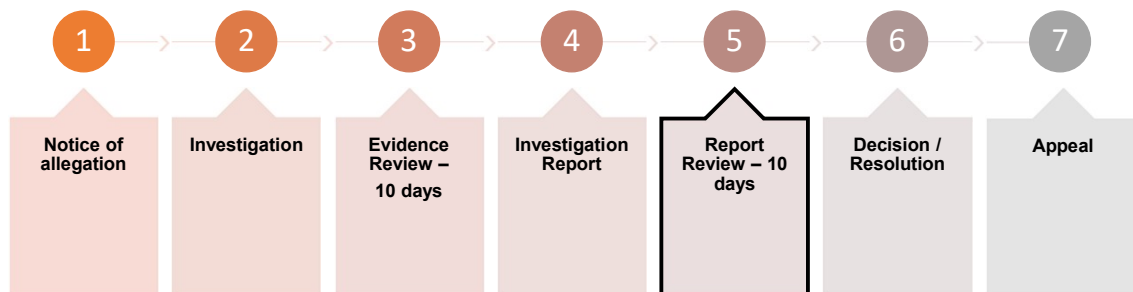
- How allegation was reported
- Date of formal complaint
- Identity of investigator(s)
- Applicable policies
- Standard of proof and credibility factors
- Evidence gathered and from whom, including rejected/why
- Summary of relevant evidence
- Findings of fact (not determinations of policy or responsibility)
- Timeline – Procedural Steps



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Investigation Steps



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Report Review – 10 days

- When the report is done – the District sends the investigation report to each party and each party's advisor for their review and written response
- The Decision Maker must wait at least ten (10) days prior to a determination regarding responsibility to give the parties a chance to review and respond to the report



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Decision Maker Duties During Report Review

The Decision Maker must:

- Give each party the opportunity to submit written, *relevant* questions to be asked of any party or witness,
- Provide each party with the answers, and
- Allow for additional, limited follow-up questions from each party.



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Relevance

Relevancy of evidence considerations:

- 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
- Exculpatory evidence tends to excuse, justify, or absolve the person of the allegations
- Inculpatory evidence places responsibility on the person



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Relevance

Per the Title IX regulations Complainant's sexual predisposition or prior sexual behavior is ***not relevant*** unless:

- Offered to prove that someone other than Respondent committed the sexual harassment, or
- if it concerns specific incidents of the Complainant's prior sexual behavior with the Respondent and offered to prove consent

Medical records: Cannot access, consider, disclose, or use a party's medical or mental health records as evidence unless party provides voluntary, written consent. The same is true of other privileged communications.



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Decision Maker's Duty for Relevant Questions

If the question is not relevant, explain the reasoning

If the question is relevant, take the following actions:

- Send the question to the relevant party or witness
- Obtain an answer
- Send the answer to the asking party

In the interest of fairness to both parties, it is recommended that the answer be shared with both parties.

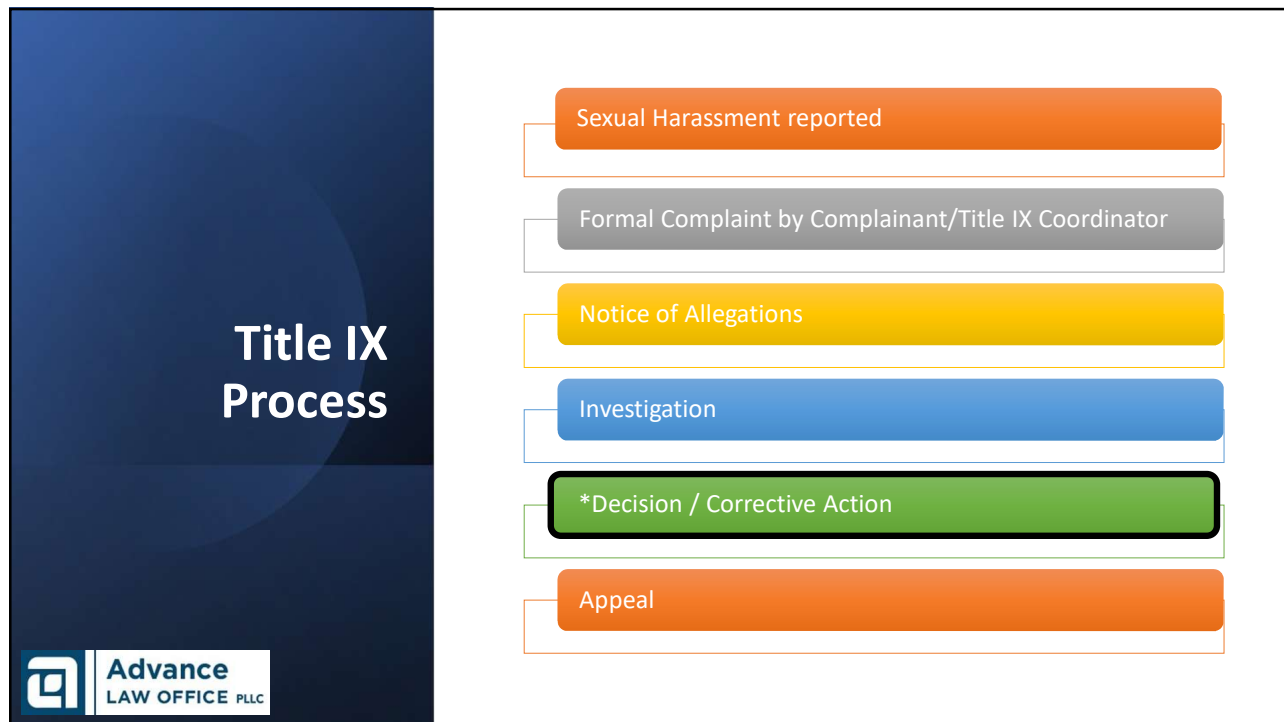


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Investigation Steps



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Requirements for Decision-Maker's Decision

Per 3205P decision :
 At the conclusion of the investigation, the decision-maker (Superintendent's designee) must issue a written determination of responsibility regarding the alleged sexual harassment. The Decision contains much of the same information as the Report, but with some key additions:

- **Conclusion:** A statement and rationale as to whether a "preponderance of the evidence" establishes that the Complainant was "sexually harassed" under any of the Title IX definitions for each allegation/issue
- **Corrective/remedial actions** - applying the District's code of conduct policies to the facts: disciplinary and other sanctions for the Respondent, remedial actions for Complainant, and steps the District will take to prevent recurrence
- **Appeal rights**

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Requirements for the Decision

- The decision must be provided in a language the complainant can understand and may require language assistance for complainants with limited English proficiency as required by Title VI of the Civil Rights Act of 1964.
- The Decision must be issued to the parties simultaneously.
- When the District issues the decision, the District must also send a copy of the response to the Office of the Superintendent of Public Instruction (OSPI)



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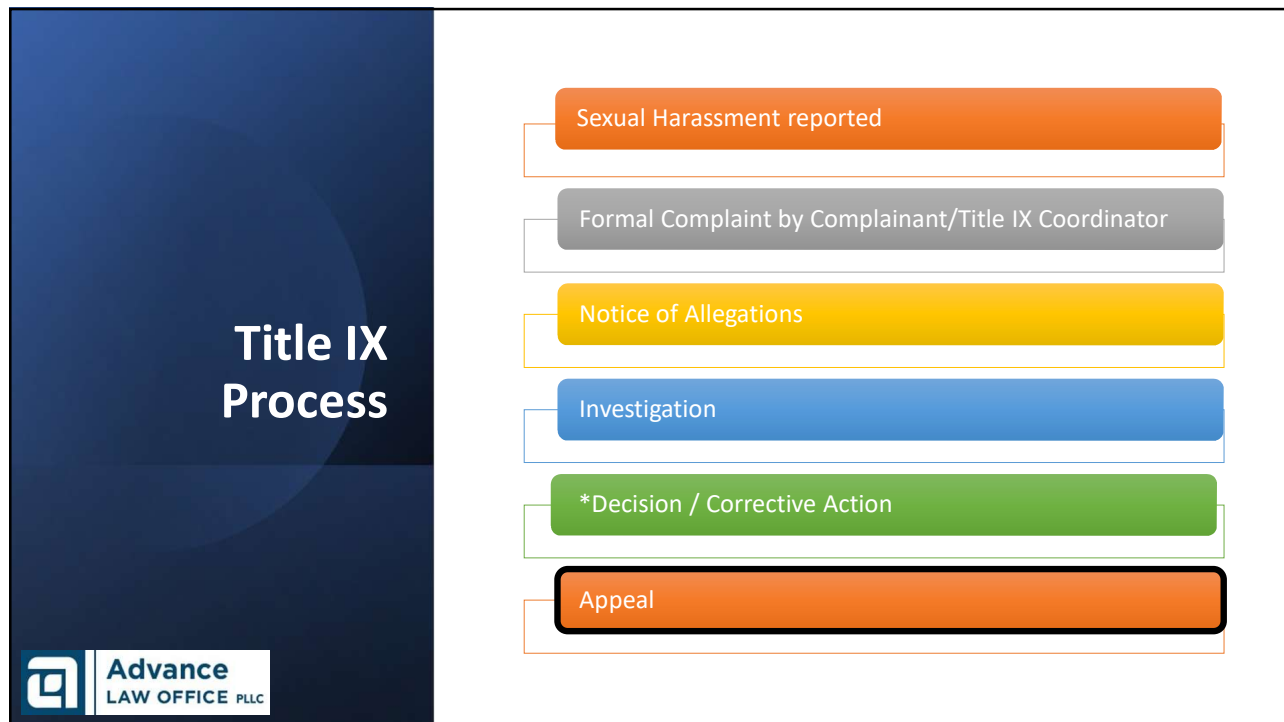
Implementing Corrective Measures

Any corrective measures deemed necessary will be instituted as soon as possible, but in no more than thirty (30) days after the decision maker's written response, except:

- *If the respondent is appealing the imposition of discipline,* the District is barred by due process considerations or a lawful order from imposing the discipline until the appeal process is concluded.
- Staff can also pursue complaints through the collective bargaining agreement process or anti-discrimination policy.



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3205P Appeal Process – Level One

- If the Complainant or Respondent(s) disagrees with the decision, they may appeal in writing to the Superintendent within ten (10) calendar days following receipt of the decision.
- The District will implement appeal procedures equally for both parties and provide notice to the other party when an appeal is filed.
- The decision maker for the appeal may be the Superintendent or a Designee, but cannot be the original decision maker, the investigator, or the Title IX Coordinator, and must be trained as required by the procedure and Title IX

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3205P Appeal – Level One

- The Appeal Decision Maker will review statements, the report and evidence, the decision, and any other relevant material.
- Both parties will be allowed a reasonable, equal opportunity to submit a written statement supporting or challenging the initial determination's outcome.
- The Superintendent or Designee will ensure that a written appeal decision is issued within 30 days to both parties, unless otherwise agreed to for good cause.



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Appeal Levels One and Two

- The decision must be in writing and will describe the result of the appeal and the rationale for the result, and a copy must be sent to OSPI.
- The decision must include notice of the right to appeal to OSPI.
- The decision will be provided in a language that the Complainant can understand.



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Wrap-Up



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