

# Title IX

- Hi....
- I'm \_\_\_\_\_ from \_\_\_\_\_
- My role with Title IX is \_\_\_\_\_
- To date, I have/haven't had to deal with a Title IX question/issue.



# From 100'

State and federal laws (e.g., NYS Human Rights Law , Title VII and **Title IX**) prohibit workplace discrimination and/or harassment in schools based upon protected classifications, **such as:**

**Race**

**Color**

**National Origin**

**Religion**

**Sex**

**Sexual Orientation**

**Disability**

**Age**

**Citizenship status**

**Genetic information**

**Creed**

**Military Status**

**Marital Status**

**Domestic Violence**

**Victim Status**

**Criminal History**

**Gender Identity**

# Students...

State and Federal laws (e.g., the Dignity for All Students Act, NYS Human Rights Law and **Title IX**) prohibit discrimination and/or harassment of **students** in a school setting based upon protected classifications.



1. [Forsyth County parents outraged over explicit books in schools \(atlantanewsfirst.com\)](https://atlantanewsfirst.com)
2. [Forsyth County Schools bans books over 'explicit content' - Bing video](#)
3. [Forsyth County school library book removals may have created 'hostile environment,' government finds - Bing video](#)

**Remember... Supportive Measures & Kids**



# U.S. Department of Education



- During a February 15 District school board meeting, which the District's Superintendent attended, multiple parents and students spoke about the District's removal of books.<sup>6</sup> Many parents called for the removal of additional books, with most of their comments focused on sexually explicit content; however, some comments focused on removing books for reasons related to gender identity or sexual orientation. Also, some parents made negative comments about diversity and inclusion or critical race theory.

The students' comments at the board meeting focused on the gender identity, sexual orientation, and race or color of authors or characters in the books. Some students also raised concern about the impact of removing the books. One student stated that the book ban immediately made the environment more harsh for students; people like him who are not in the closet are watching their safe spaces disappear, and he is sick of being fearful at school. A student who identified herself as Asian said it is hard for her to find books with main characters who are of her race; she knows that people of other minority backgrounds have the same struggle and banning books written with diversity silences mainly minority voices.<sup>7</sup> A third student -- who characterized the District's

## More from the OCR:

- “Nonetheless, **communications** at board meetings **conveyed the impression that books were being screened to exclude** diverse authors and characters, including people who are LGBTQI+ and authors who are not white, **leading to increased fears and possibly harassment,**” ...
- **Students, for example, said at board meetings that they feared going to school and that the environment had become harsher,** according to the OCR.
- **“One student stated that the book ban immediately made the environment more harsh** for students; people like him who are not in the closet are watching their safe spaces disappear, and he is sick of being fearful at school,” per OCR.

The importance of “Supportive Measures”... Check out the Resolution Agreement.

## U.S. DEPARTMENT OF EDUCATION

**FOR IMMEDIATE RELEASE**

May 19, 2023

**Contact: Press Office**

(202) 401-1576 or [press@ed.gov](mailto:press@ed.gov)

### **U.S. Department of Education's Office for Civil Rights Announces Resolution of Title VI and Title IX Discrimination Investigation of Forsyth County Schools**

Today, the U.S. Department of Education's Office for Civil Rights announced the resolution of a complaint of sex, race, color, and national origin discrimination against Forsyth County Schools in Georgia.

OCR identified concerns that communications at district school board meetings provided the district notice that its library book screening process may have created a hostile environment for students; and the district's responsive steps related to the library book screening process were not sufficient to ameliorate any resultant racially and sexually hostile environment.

# New SED Guidance 6/12/2023

- Reflects changes in law which provide enhanced protections to “TGE” students;
- Clarifies info. regarding privacy, FERPA, and student records;
- Provide best practices for supporting TGE students and *recommended best practices to move away from gender-based activities*;

<https://www.nysed.gov/sites/default/files/programs/student-support-services/creating-a-safe-supportive-and-affirming-school-environment-for-transgender-and-gender-expansive-students.pdf>



See p. 22

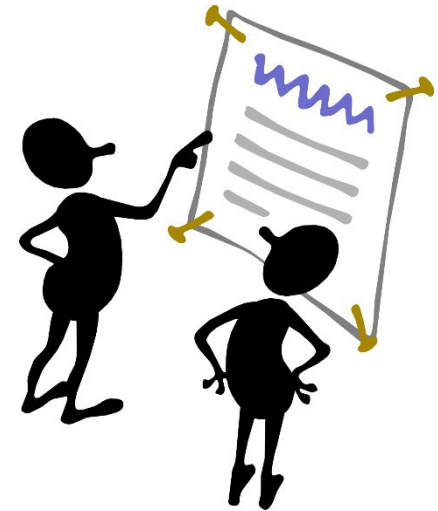
Instead of this Gender-Based Practice	Try this Gender-Neutral Option
Referring to students as "boys and girls," "ladies and gentlemen" Or Referring to a group as "guys"	Refer to students as friends, learners, scholars, pals, folks, humans, people, everyone Refer to students as experts in the field they're working in (Readers, writers, scientists, mathematicians, historians, artists, athletes, etc.)
Assuming someone's gender means they will like something (A girl student is asked if her favorite color is pink. A boy student is asked if he likes football.)	Ask students what their interests are without making assumptions about the answer
Separating by boys/girls for two groups	Separating by last names (A-L and M-Z) Separating by birthday month (January-June and July-December)  Separating by a "this or that" question (Fall or Winter? Carrots or broccoli? French toast or Pancakes?)  Count off by 2s  Equity Sticks (Popsicle sticks) <sup>65</sup>
Events such as Father-Daughter Dances	Family Dances
Prom King and Prom Queen	Royal Court
Boys play with trucks and blocks Girls play dress up and with cooking toys	Let all children participate in all activities
Blue graduation gowns for boys White graduation gowns for girls	One color for all graduates or let students choose
For formal events, boys must wear pants and girls must wear dresses	For formal events, wear white tops and black bottoms



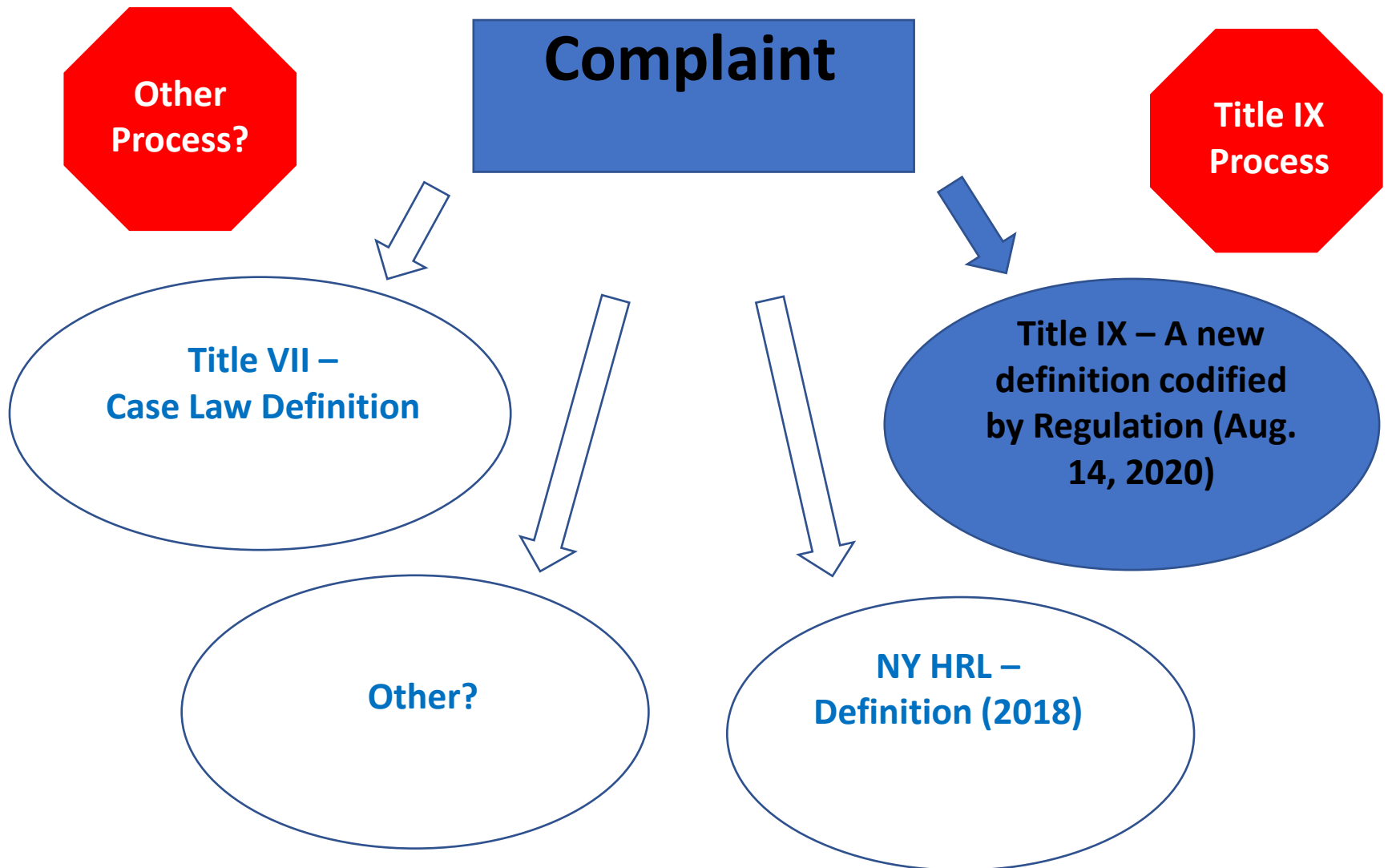


# What about others? (Vendors, visitors, etc.)

Federal Statutes  
Federal Regulations  
NYS Statutes  
NYS Regulations  
Local Policy (BOE Policy)  
Work Rules  
Code of Conduct  
Student Rules



## The Process...for example





[New Workplace Discrimination and Harassment Protections | Division of Human Rights \(ny.gov\)](https://www.dhr.ny.gov)

**IMPORTANT UPDATES TO THE  
NEW YORK STATE HUMAN RIGHTS LAW**

On August 12, 2019, Governor Cuomo signed legislation that strengthened protections against discrimination and harassment in the New York State Human Rights Law. The provisions of this law will go into effect at various times between August 2019 and August 2020. A brief description of these provisions, and their effective dates, is provided below.

Effective August 12, 2019:

- The Human Rights Law is to be liberally construed, under New York State law, **without reference to any federal law that may lead to a more restrictive result.**

Effective October 11, 2019:

- The Human Rights Law now explicitly includes protection in employment from **harassment based on any protected class.** In addition, **domestic workers are now also protected from harassment on all bases.** A list of all protected classes can be found in the adjoining section.
- The Human Rights Law now protects victims of harassment, including sexual harassment, in important new ways:
  - Harassment is against the law whenever an individual is subjected to **inferior terms, conditions or privileges of employment.**
  - The harassment **need not be severe or pervasive** in order for the employer to be liable. (However, the employer may raise a defense that the actions were not **more than “petty slights or trivial inconveniences”**).
  - In order to establish liability, the complainant does **not have to identify a similarly situated person/employee** that was treated more favorably.
  - A complainant **does not have to complain to their employer or file a formal grievance** in order to establish liability.

- **Non-employees working in the workplace are protected from all discrimination.** The protections extend to contractors, subcontractors, vendors, consultants or others providing services in the workplace
- **Punitive damages** may be awarded against private employers.
- **Attorney’s fees may be awarded** in all employment cases.
- Under New York law, settlements of employment discrimination claims can only include the conditions of confidentiality if it is the **complainant’s preference** and agreements regarding nondisclosure must be **“in writing to all parties in plain English, and, if applicable, the primary language of the complainant.”**

Effective January 1, 2020:

- Under New York law, settlements of employment discrimination claims cannot prevent complainants from speaking to an attorney, the New York State Division of Human Rights, the U.S. Equal Employment Opportunity Commission, local human rights commissions, or any other form of law enforcement.

Effective February 8, 2020:

- The Human Rights Law will **apply to all employers within New York State**, even those with fewer than four employees. See adjoining section for more on the Law’s protections.

Effective August 12, 2020:

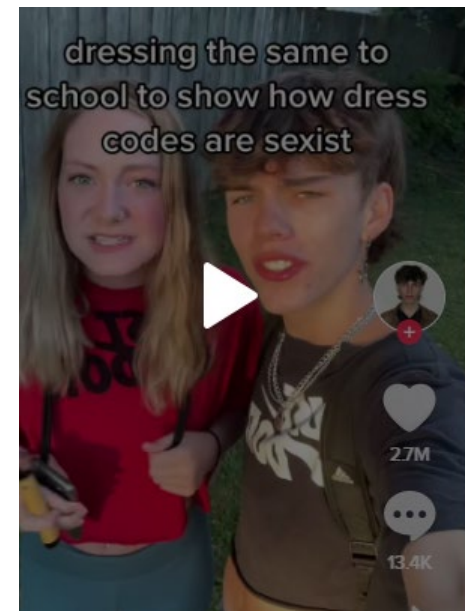
- The one-year statute of limitations for filing with the Division will be extended to **three years for sexual harassment in employment cases only.**

Protected Classes
• <b>Age</b>
• <b>Creed</b>
• <b>Disability</b>
• <b>Domestic violence victim status</b>
• <b>Gender identity or expression</b>
• <b>Familial status</b>
• <b>Lawful source of income (in housing only)</b>
• <b>Marital status</b>
• <b>Military status</b>
• <b>National origin</b>
• <b>Predisposing genetic characteristics</b>
• <b>Pregnancy-related condition</b>
• <b>Prior arrest or conviction record</b>
• <b>Race/color</b>
• <b>Sex</b>
• <b>Sexual orientation</b>
• <b>Retaliation for opposing unlawful discriminatory practices</b>

# “Dress Coded”?

- **Dress Codes** – if not consistent for the sexes, may be discriminatory.
  - Separate rules for boys and girls?
  - **“I was dress coded!”** DHR Complaints

[Bing Videos](#)



# Harassment



Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA)

Harassment, *generally*, consists of subjecting an individual, **on the basis of his/her membership in a protected class**, to unwelcomed conduct and/or communications that the individual must endure as a condition of employment or is **severe or pervasive** enough to create an intimidating, hostile, or abusive environment.

# **Title IX** -Anti-Harassment & Non-Discrimination

**Sexual harassment** - a form of gender or sex discrimination.

**Includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender.**

# Under Title IX, § 106.30



*Sexual harassment* means conduct on the basis of sex that satisfies one or more of the following:

- 1) 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; [**Quid Pro Quo**]
- 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 [**Hostile Environment**]
- 3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U. S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

# Title IX, as amended on August 14, 2020,

... prohibits **sex discrimination** in programs and activities of all educational institutions, including school sponsored travel that occurs away from school, so long as the school receives federal financial assistance.

... prohibits different treatment on the **basis of sex in all aspects of a school's educational programs or activities** – students & staff, when such treatment effectively prevents an individual from accessing the educational programs or activities.

... prohibits **retaliation** against an individual for opposing or reporting discrimination, complaining about discrimination, or participating in a discrimination investigation.



# Title IX also

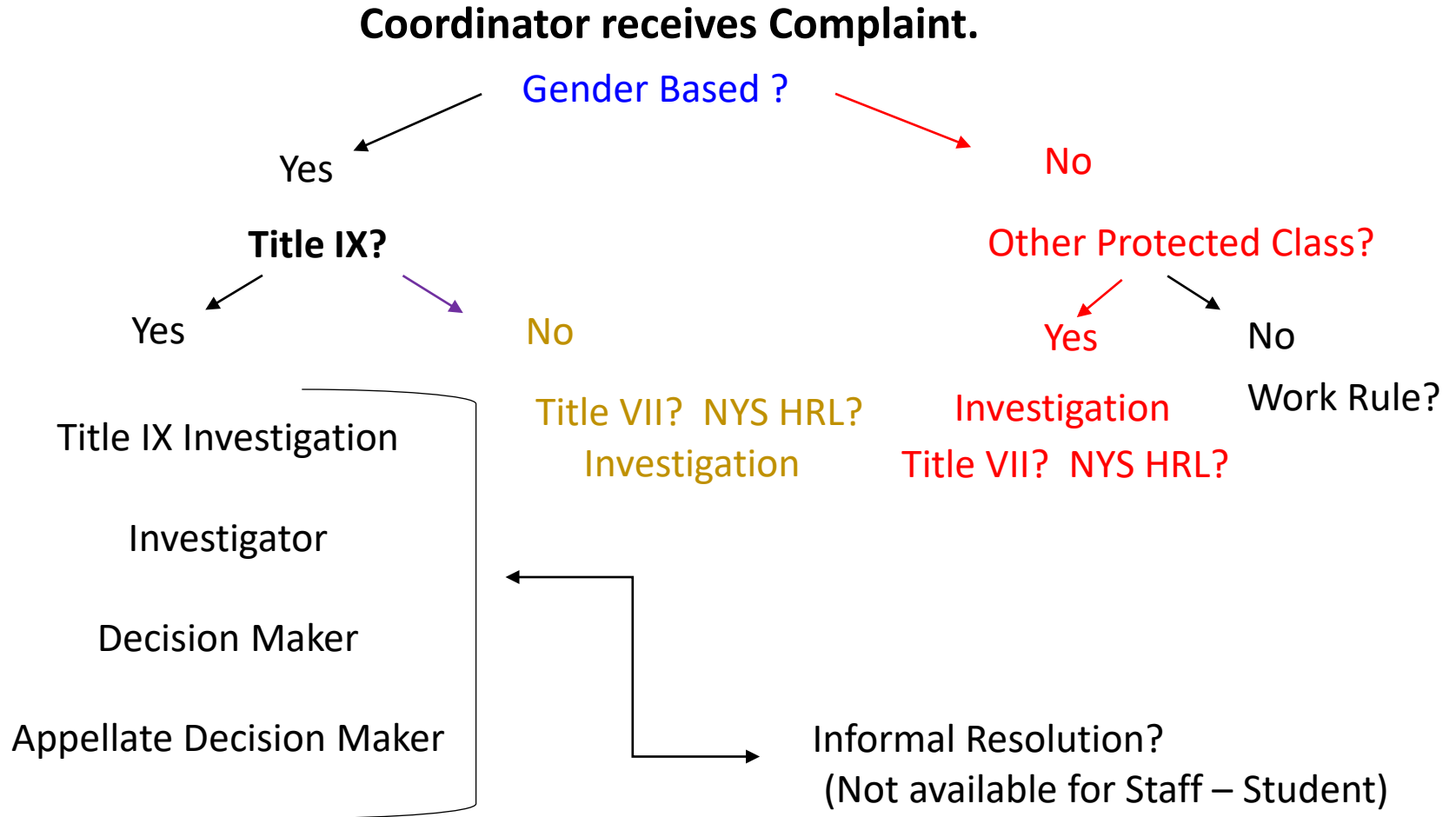
... **requires schools to have policies and procedures** for prevention and correction of violations, as well as how they will respond to allegations of sexual harassment and/or discrimination.

...**codifies** that sexual assault, dating violence, domestic violence, and stalking are forms of sexual harassment.

...**provide due process protections to those facing accusations** of sexual harassment.

...**requires specific training** for individuals involved in implementing and enforcing Title IX procedures.

# What policy and rules apply?



# Talking Title IX

**Recipient**

**The District**



**Complainant**

**The person who brought the Complaint**

(must be participating in or attempting to participate in the education program or activity (or a parent of a minor doing so)).

**Respondent**

**The accused.**

**Formal Complaint** - a document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.

# Our Obligations

## Respond

respond **promptly** and **supportively**;

## Resolve

**resolve allegations** of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment; and

## Implement

effectively implement remedies for victims [**Title IX Coordinator responsibility**].

## Treat

**treat complainants and respondents (the accused) equitably**;

# Where does Title IX Apply?

Schools MUST respond when sexual harassment occurs in the school's education program or activity, against a person in the United States

What is the scope of your District's education program & activity? (...exercised substantial control over both the respondent and the context in which the sexual harassment occurs)?

- District Website
- Your District's Board Policies
- Ask – what “all” do we do?

# Who will play what role?

- Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process...

Training is critical.



- Train **all** employees – K-12 schools must respond whenever **any employee** has notice of sexual harassment, including allegations of sexual harassment.

- **The Coordinator(s)**

- Coordinates efforts to comply with Title IX.
- Acts without conflict of interest or bias.
- May not be the same person as the Decision Maker.



- **The Investigator(s)**

- Conduct investigation without conflict of interest or bias.
- Create an “investigative report” that fairly summarizes relevant evidence.
- May not be the same person as the Decision Maker.

- **The Decision Maker(s)**

- Arrive at decision without conflict of interest or bias.
- Issue written determination regarding responsibility.
- May not be the same person as the Title IX Coordinator or Investigator.

- **The Decision Maker(s) for the Appeal**

- May not be the same person as the Decision Maker, the Investigator or Coordinator.

- **Any Person who facilitates an Informal Resolution**

- *Must also be trained.*
- Acts without conflict of interest or bias (like others).



# Training Requirements Include:

Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process...must be trained on:

- Definition of sexual harassment.
- Scope of education program or activity.
- How to conduct an investigation and grievance process including appeals and informal resolution process.
- How to serve impartially, including by avoiding prejudgment of the facts, conflicts of interest and bias.



# Training requirements also include:

- Investigators
  - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Decision Makers
  - Technology for a live hearing (likely not applicable to K-12)
  - Issues of relevance of questions and evidence (including relevance of sexual predisposition or prior sexual behavior)

All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process **must be made publicly available on the District's website.**



Coordinator(s)

Person(s)  
designated to  
facilitate an  
informal resolution  
process

Investigator(s)

Decision Maker(s)

Decision Maker(s)  
on Appeal

- Do NOT pass judgment prior to obtaining and evaluating all relevant information**
  
- Ensure you are free from conflict**
  
- Do NOT allow bias to cloud your judgment**

# AVOID PREJUDGMENT

***Presumption: the respondent is not responsible for alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.***

- Prejudgment - made without sufficiently investigating and/or evaluating the situation.
- Neither a Complainant nor a Respondent should be subjected to prejudgment.
- May be caused by the stereotypes and biases.
- May be caused by the way a Complainant and/or Respondent act during the preliminary stages of the Title IX process.

# Avoid Conflicts of Interest

- Avoid situations in which a person is in a position to **derive personal benefit** from actions or decisions made in their official capacity.
- May be the result of familial relations, emotional connections, financial situations, past circumstances, etc.
- Any situation in which **an individual does not have the ability to assess the situation and participate impartially** is a conflict of interest, whether the conflict is perceived, potential, and/or actual.

# Avoid Bias

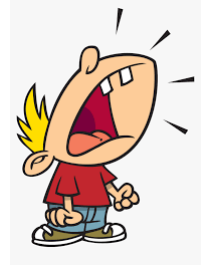
- prejudice in favor of or against one thing, person, or group compared with another...
- commonly attached to preconceived notions we hold about particular characteristics and/or traits (i.e. age, race, sex, etc.)...
- **Do NOT make assumptions** based on beliefs.
- **Pay attention to facts** as they come out.
- Think critically while assessing the facts.
- Make a conscious effort to **avoid applying what you think you know** to the situation

# Take-Aways

- **Equality** – treat all parties equally and fairly, regardless of their involvement in the situation at hand and who they are.
- **Gather ALL facts prior to formulating an opinion.**



# Let's pause – A Story &...



He is my mother's best friend.

I went to high school with her. We didn't hang out but know the same people.

I've wrote them a letter of recommendation, but it was a year ago.

She is my spouse's boss' wife.

He's my father in law's stepson.

We used to tutor kids together.

He was my son's youth football coach.

I've never said it to anyone, but I can't stand him.

My spouse dated them before we got together.

# “The Reasonable Person Standard”

...whether a “reasonable person” would perceive the conduct as being sexual harassment...**viewed from the eye of the recipient, including their particular circumstance.**

## May I Require Confidentiality?

- **Recipient must keep confidential the identity of any individual who has made a report or complaint, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by FERPA, or as required by law, or to carry out the purposes of Title IX Regulations.**
- Not restrict the ability of **either party** to discuss the allegations under investigation or to gather and present relevant evidence



# No RETALIATION

The Title IX Rules contains an **anti-retaliation provision** to protect individuals from suffering intimidation, threats, coercion, or discrimination.

- ▶ Schools are prohibited from retaliating against an individual because they have **asserted a right protected by Title IX**; made a Title IX complaint or **participated** in a Title IX investigation, proceeding, or protested sex discrimination.  
106.71, 100.7(e)

# cont.(106.71)



- **No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX** ...because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.
- **Intimidation, threats, coercion, or discrimination**, including charges ...for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, **for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.**
- The recipient 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 may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, **or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.**
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

# Retaliation: 1<sup>st</sup> A and False Statements

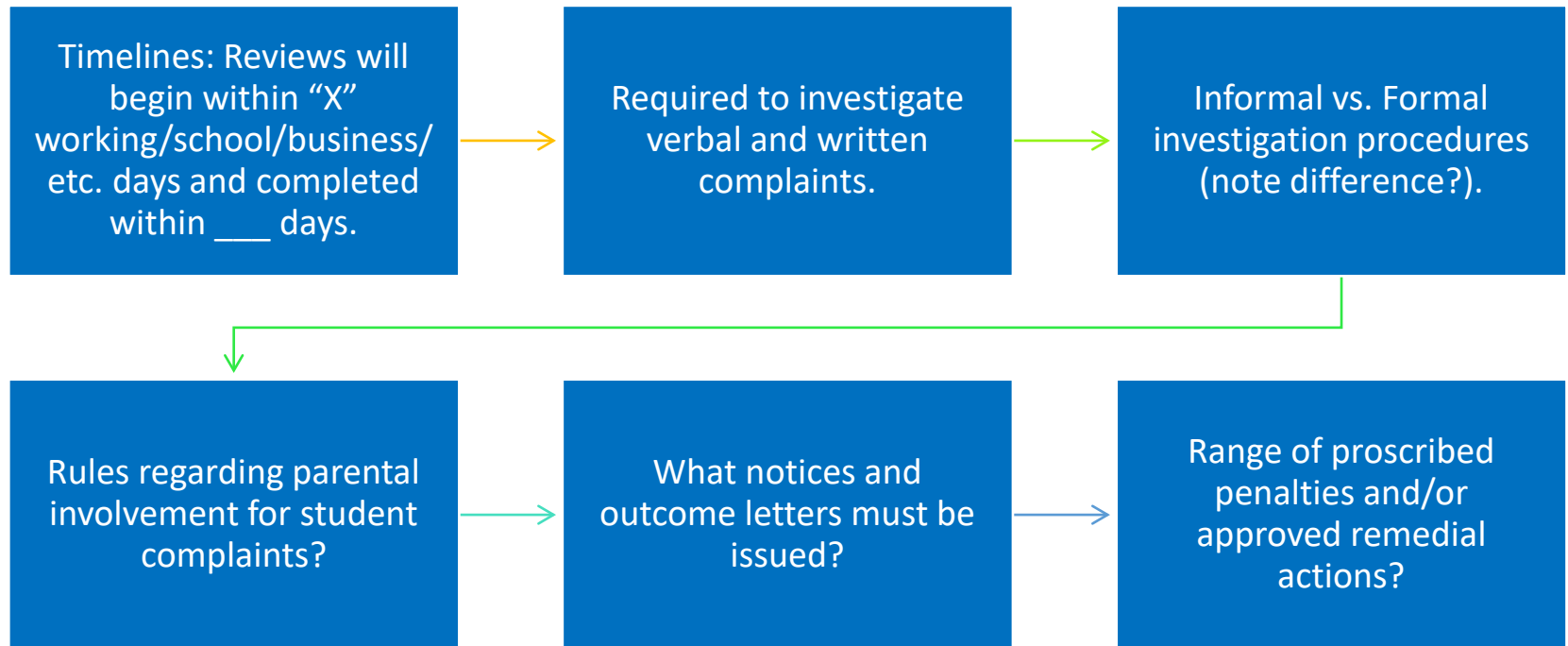
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement *in bad faith* in the course of a grievance proceeding under this part does not constitute retaliation, provided, however, that a determination regarding *responsibility, alone, is not sufficient* to conclude that any party made a materially false statement in bad faith.

# No Retaliation if...

A negative employment action that merely occurs after an employee engages in protected activity is not per se retaliation.

Employees continue to be subject to all job requirements & rules of the employer after having engaged in such protected activity.

# Your Title IX Policy is your roadmap...



Keep in mind: Code of Conduct, other policies, collective bargaining agreements?

# Be mindful of the overlap



Principals, DASA Coordinators,

“HR” Personnel

&

Title IX Coordinator

Now, let's get started...

# The Coordinator - Verbal Complaint

## If a verbal complaint:

- Detail the questions/responses.
- Narrow down specific details– who, what, where, when, why?
- End Interview with:
  - “Is there anything else you want to add that I have not asked about?”
  - “Is there anything you would like to correct or clarify?”
- **Explain the process – formal complaint?**
- THEN... if Complainant desires, have Complainant write a statement, (or draft a statement outlining the allegations as described by the Complainant, and at the end of the document write a statement such as: *“The above statement is accurate and complete as to the events described and are true to the best of my recollection.”* Ask Complainant to review, sign and date the document if it is in fact accurate.
- **If Complainant refuses to file, determine if you (the Coordinator) will sign the Complaint and thereby initiate a “Formal Complaint”** and grievance process.

## Coordinator...

- **Review and refer to your Policy** – it should include or direct you to the process you must follow.
- **Review the Complaint:**
  - Is there an alleged violation on the face of the complaint **that falls within the scope of Title IX? If true....** (Other policy/rule?)
  - Inform Complainant of the range of **Supportive Measures** and **consider the Complainant's wishes** regarding Supportive Measures.
  - If a Title IX “Formal Complaint”
    - may offer **informal resolution process (who will facilitate this)**
    - **identify** roles: Investigator, Decision Maker, Decision Maker on Appeal,
    - hand off to **Investigator (can be Coordinator) with Policy.**



# “Grievance Process” & Dismissal of Title IX Complaints

Must investigate in a formal complaint, but...

**Must dismiss** the formal complaint - sexual harassment under Title IX:

- if the conduct alleged in the formal complaint **would not constitute sexual harassment** as defined in § 106.30 **even if proved**,
- the conduct **did not occur in the recipient’s education program or activity**, or
- the conduct did **not occur in the United States**.

**May dismiss** the formal complaint or any allegations therein:

- if at any time a complainant notifies the Title IX Coordinator in writing that the complainant **would like to withdraw** the complaint or any allegations therein;
- the respondent is **no longer enrolled or employed** by the recipient; or
- **specific circumstances prevent the recipient from gathering evidence** sufficient to reach a determination as to the formal complaint or allegations therein.

Upon dismissal, must promptly send written notice of the dismissal and reason(s) simultaneously to the parties.

# The Coordinator

Be familiar with your  
Policy and Complaint  
Procedure

## Initial Referral and/or Complaint

- Review Policies & Procedures (...again) – Check **time requirements**.
- Review **the Complaint** initially?
  - Is it on the District's complaint form?
  - Does it outline the facts and allegations?
  - Is it signed and dated?
  - **Does it request the recipient investigate the allegation of sexual harassment?**

Whether verbal initially or in writing, still have an obligation to investigate.

- If “Formal” – issue a “**Notice of Allegations**” to both parties.

# Supportive Measures

## Attn. Coordinators

**Supportive measures:** non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge *to the complainant or the respondent* before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

The recipient must maintain as **confidential any supportive measures** provided to the complainant or respondent, *to the extent* that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. *The Title IX Coordinator is responsible for “coordinating” the effective implementation of supportive measures.*

# Supportive Measures – the Complainant & Respondent

A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by *following a grievance process that complies with § 106.45* before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

*The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30 [even without a formal complaint],*

- consider the complainant's wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint,
- and explain to the complainant the process for filing a formal complaint.

# Examples - Supportive Measures

may include:

- Counseling (EAP?),
- extensions of deadlines, course-related adjustments,
- modifications of work or class schedules,
- escorts,
- mutual restrictions on contact between parties,
- change in work location,
- leaves of absence,
- increased security & monitoring of certain areas of the school/campus,

# Interim Action – Removal



***Emergency Removal*** – Nothing in this part precludes a recipient from *removing a respondent from the recipient’s education program or activity on an emergency basis*, provided that the recipient undertakes an ***individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.***

***Administrative leave*** – Nothing in this subpart precludes a recipient from ***placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45.***

These provisions may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

# Notice of the Allegations



Upon receipt of a formal complaint, must provide written notice to the parties who are known.

Must include:

- **the district's grievance process**, including informal resolution process
- **the allegations of sexual harassment** potentially constituting sexual harassment as defined in § 106.30, **including sufficient details** known at the time and **with sufficient time to prepare a response before any initial interview**
  - **identities of the parties** involved in the incident, if known, the **conduct allegedly constituting sexual harassment** under § 106.30, and **the date/location of the alleged incident**, if known
- a statement that the **respondent is presumed not responsible for the alleged conduct** and that a determination regarding responsibility is made at the conclusion of the grievance process
- inform the parties that they **may have an advisor of their choice, who may be, but is not required to be, an attorney**, and may inspect and review evidence
- inform the parties of any provision in the **recipient's code of conduct** that **prohibits knowingly making false statements or knowingly submitting false information** during the grievance process
- If, in the course of an investigation, **the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided**, the recipient **must provide notice of the additional allegations to the parties** whose identities are known

# Informal Resolution Process



**At any time prior to reaching a determination** - recipient may facilitate an informal resolution process, **such as mediation**, that does **not** involve a full investigation and adjudication, **provided that the recipient:**

- (i) Provides to the parties a **written notice disclosing: 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;
- (ii) Obtains the parties' **voluntary, written consent** to the informal resolution process; and
- (iii) **Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.**



## Informal Resolution Process, cont.

- Person designated to conduct informal resolution process must be trained
- A formal complaint **must be filed first**
- A recipient **may not require** as term of employment, etc.
- A recipient **may not require** the parties to participate
- **No** bias or conflict (like others)
- Be a “**mediator**”



# The Investigator



## Steps include:

- Review Policy.
- Review Complaint.
- Prepare to interview the Complainant.
- Interview the Complainant.
- Review work histories to extent appropriate.
- Secure documentary evidence.
- Identify and interview fact witnesses.
- Secure other documentary evidence?
- Interview the Accused.
- Final evidentiary follow up.
- Create draft report.
- Provide draft report and evidence to parties, and give opportunity to respond.
- Consider responses and finalize report.
- Provide final report to both parties, their advisors and the Title IX Coordinator.

*“A recipient also must ensure that **investigators receive training** on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of [the Regulations].”*

## Evidence

*“A recipient must ensure that **decision-makers receive training** on ...issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant...”*

See Your Policy

**Preponderance of the Evidence standard  
or  
Clear and Convincing Evidence standard.**

**“Preponderance of evidence”** standard: burden of proof is met when the party with the burden **convinces the decision maker** that there is a **greater than 50% chance that the claim is true.**

**“Clear and convincing”** standard: burden of proof is met when the **evidence shows that the claim is highly and substantially more likely to be true than untrue**; the **decision maker must be convinced that the contention is highly probable.**

# Relevance

Evidence is **relevant** if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

**Inculpatory evidence:** shows, or tends to show, a person's involvement in an act, or **evidence that can establish guilt.**

**Exculpatory evidence:** evidence favorable to the respondent. (i.e., that exonerates or tends to **exonerate the respondent of guilt**)

# Remember “Rape Shield” Protections

- A complainant **may not be asked prior sexual conduct or sexual predisposition,**
- nor may evidence to prove the same be admitted,
- **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.**

# Interview the Complainant

After reviewing policy & complaint, interview Complainant, secure evidence, interview witnesses and interview the accused.

**Follow Policy** (but try to interview w/in 5 days of initial complaint (**sooner the better**)), provide written notice of investigative interview (date, time, location, participants & purpose w/ sufficient time to prepare).

## Interviews:

- **Script/Outline**
- **Audio tape?**
- Union/Attorney/Other representatives? (**“Advisor of Choice”**)
- *Provide parties with the **same opportunities to have others present** during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; *however, the recipient 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.**

# Interview the Complainant



## The Investigator:

- Narrow down specific details of each allegation – who, what, where, when, why?
- Identify witnesses, date and time, location, circumstances and specific words used.
- End Interview with:
  - **“Is there anything else you would like to add that I have not asked you about?”**
  - **“Is there anything you would like to correct or clarify?”**
  - **Retaliation**



**REMEMBER:  
CONSIDER  
RELEVANCE**

Immediately request and secure video evidence.

Request and review personnel file/student file of complainant and respondent.

Request and review personnel file/student file of critical fact witnesses.

If necessary, interview supervisor not involved with substance of complaint regarding work history of the complainant and respondent.

The Complaint should drive the document/evidence request(s).

## After Interviewing Complainant & Identifying Relevant Evidence... “Pause”

- After interviewing the Complainant & reviewing Documentation, review the Notice of Allegations.
  - “Do I need to issue a **new/revised Written Notice of Allegations** to the Complainant and Accused?” (Inform Coordinator)
  - Have I **preserved the evidence** (for Complainant and Respondent?)
- Identify & prepare to interview fact witnesses, if any (Remember - Consider Relevance).
- Reminder – Before interviewing the accused:
  - A New Notice of Allegations should be issued before interview with accused if new allegations arise.
  - Sufficient time should be provided for accused to have a representative present as required under Title IX.

Continue to Consider - Informal Resolution Process?

# Interview - “Fact” Witnesses

sooner rather than later (Consult Policy).

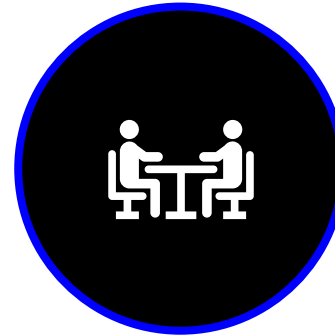
- Who – What – Where – When – Why? (Challenge as appropriate with evidence, recordings, etc.)
- Inform the importance of truthfulness/cooperation...
- Contemporaneously memorialize the witness’ account.
- Retaliation**
- Confidentiality?



# What if the witness is uncooperative or you suspect untruthful?



**UNTRUTHFUL? ATTEMPT  
TO REDIRECT TO  
TRUTHFUL ANSWERS.**



**IF NECESSARY, SUSPEND  
THE INTERVIEW AND  
RESCHEDULE WITH A  
UNION REP PRESENT.**

# FOLLOWING INTERVIEWS...

Request updated evidence as necessary.

Conduct re-interviews for any discrepancies or clarifications between competing witness statements.

Am I ready to interview the accused (the Respondent)?

Remember, if appropriate, a “New Notice of Allegations” should be issued before interview with accused.

Provide sufficient time for accused to have a representative present as required under Title IX.

# The Accused has rights...

**Weingarten** (Union) rights should be stated (right to rep).

- Any waiver of Union representation should be in writing.

**Garrity** Rights *where necessary* stated (the govt cannot compel someone to be a witness against himself/herself).

**Cadet** Rights – be aware.

***Regardless of a refusal to answer – ask every question./inform will have to move forward without their input.***

*“I, [insert name] have been advised of my right to have a Union representative present at my interview on [insert date], and I waive such right. I recognize that anything I say during the interview may be used by my employer for disciplinary purposes.”*

# Interview the Accused



Should be the last interview – issue appropriate notice of interview (date, time, etc.).

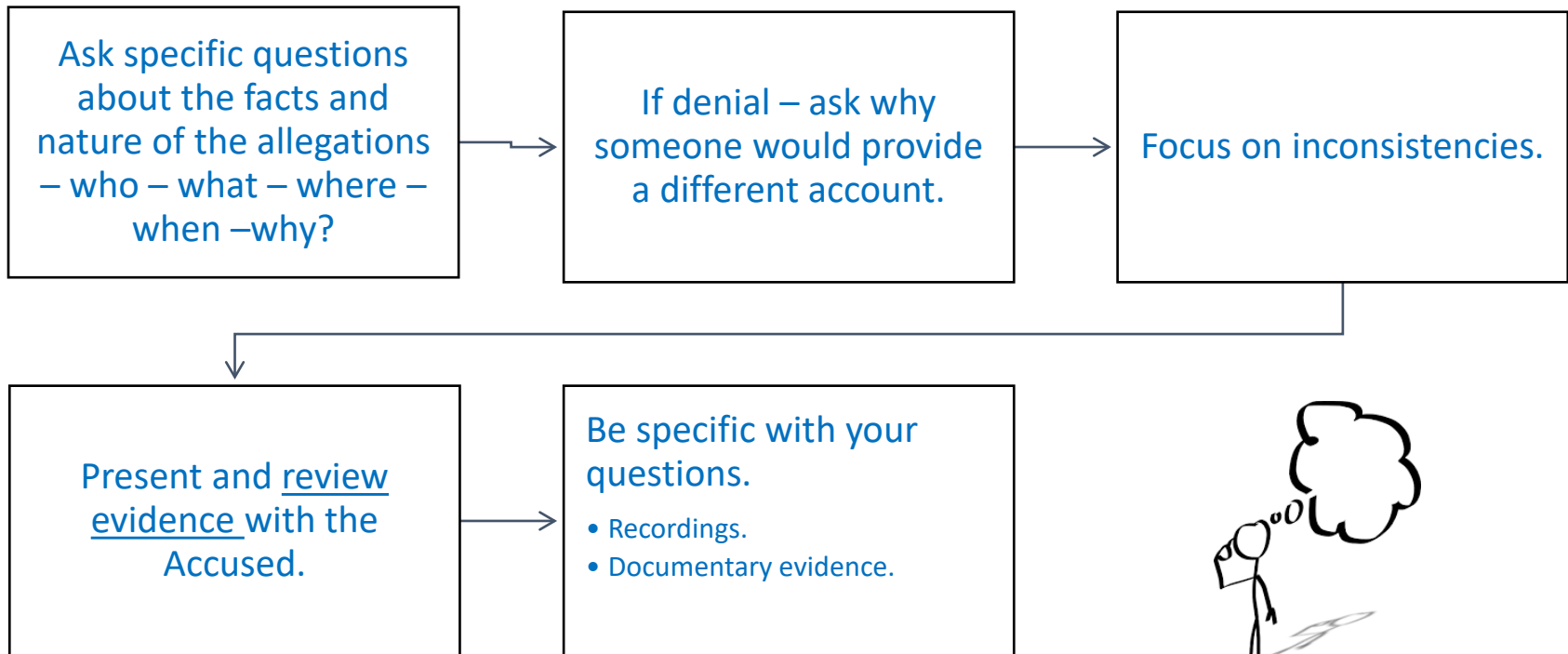


Use a script or talking points outline.



Consider having someone accompany you to take notes?

# Interviewing the Accused, cont.





# Ending the Interview with the Accused

Is there anything you would like to correct or clarify?

**No retaliation** (others also)

**No comments/contacts with the Complainant** about the nature of the complaint or allegations.



Emphasize

# PAUSE: Final Round-Up of Evidence

- Other/Outstanding requests for evidence/records?
- Discrepancies between witness statements and the accused? Conduct final interviews.
- Include relevant Title IX Policies, Code of Conduct, etc.
- Create timeline with supporting statements/evidence.
- Organize supporting statements & documentation to be included in report.

# THE INVESTIGATIVE “REPORT”

Mark “Confidential ...“use the passive voice.”

Structure your Report – include details:

- Background  
Initial referral & credentials (received training, certified administrator, etc.)
- Initial Complaint
- Statement of Allegations
- Applicable Board Policies
- Interviews conducted.
- Documentary communications, evidence & records
- Other info provided during investigation, including evidence you do not intend to rely in reaching a determination (along with an explanation why).

# The Investigative Report

“The complainant, Jack, frequently contradicted himself with respect to his complaint that he was sexually harassed. ~~Jack is lying about the conduct in question and his complaint should therefore be dismissed.~~”

The investigator gathers, assesses, and synthesizes evidence, **but engages in no policy analysis, and renders no conclusions** (a finding of responsibility) or recommendations as part of the report.

# The “Initial” or “Draft” Investigator’s Report (before completing the Final Report)

- The Recipient **must send to each party (and the party’s advisor, if any) the evidence subject to inspection and review** (the draft report and attachments, including all evidence (e.g., exculpatory evidence)) in an electronic format or hard copy. The parties must have at least 10 days to submit a written response.
- **The Investigator will consider the written responses prior to completing the Final Investigative Report.**

# The Final Investigative Report Must fairly summarize relevant evidence.

At least 10 days prior to Decision Maker's determination (or hearing) regarding responsibility:

*(10 days prior to finalizing report, chance to respond + 10 days prior to decision maker's determination re: responsibility)*

- send the Final Investigation Report to each party (and the party's advisor, if any) in electronic or hard copy format **for their review and written response;**
- *(and provide a copy to the Title IX Coordinator and Decision Maker – See your School Policy).*

# Decision Makers & Appellate Decision Makers



## **The Decision Maker(s):**

cannot be the same person as the Title IX Coordinator or the Investigator(s);

**must issue a written determination regarding responsibility using the District's standard of evidence (clear and convincing; or preponderance of the evidence).**



**The Recipient must provide the Decision Maker's written determination to the parties simultaneously.**



**The Determination is deemed final either:**

- 1) if appealed, the date the written determination of the appeal is filed or**
- 2) if not appealed, the date on which an appeal is no longer timely.**

## After receiving final investigative report and prior to a decision... (during the ten-day period) 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.*
  - [NOTE]:...***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.
- **The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.**



# The Decision Maker(s)

Your Policy  
will help.

- **Again - Review your Policy.** Look for definitions (i.e., “Sexual Harassment”) and guidelines for determination, including which standard of evidence to apply.
- Evaluate the **totality of circumstances**. In making a determination whether conduct constitutes “Sexual Harassment” consider such factors as:
  1. the **degree to which the conduct affected** the ability of the student/employee to participate or benefit from his/her education or altered the conditions of the student’s learning environment or employee’s work environment;
  2. the **type, frequency and duration** of the conduct;
  3. the **identity of and relationship** between the alleged harasser and the subject of the harassment (i.e., authority figure?);
  4. the **number** of individuals involved;
  5. the **age of the alleged harasser and the subject** of the harassment;
  6. the **location** of the incidents and context in which they occurred; and
  7. **other** incidents – the school or school related.

# The Written Determination

(provide to the parties simultaneously)

Must include:

- ❑ the **allegations** potentially constituting sexual harassment as defined in Section 106.30
- ❑ A description of the **procedural steps** taken 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 facts supporting the determination;**
- ❑ **Conclusions** regarding the application of the recipient's code of conduct to the facts;
- ❑ **A statement of, and rationale for, the result as to each allegation**, including a determination for responsibility, any disciplinary sanctions the recipient imposes on the respondent, whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
- ❑ **The recipient's procedures and permissible basis for the complainant and respondent to appeal.**

# Decision Maker on Appeal

## 34 CFR 106.45

- Both parties have a right to appeal a determination, dismissal of a formal complaint, or any allegation **IF**:
  - **Procedural irregularity** that affected the outcome.
  - **New evidence that was not reasonably available** at the time of the determination regarding responsibility or dismissal that could affect the outcome.
  - The Title IX Coordinator, investigator(s) or decision makers had a **conflict of interest or bias** for or against the complainant or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
  - Or **any other basis the District deems appropriate**.

# Appeal? For example...

Coordinator			Appellate Decision Maker	Coordinator	
Notify	Ensure	Ensure	Give	Issue	Provide
Notify the other party in writing when appeal is filed & implement appeal procedures for both parties.	Ensure the decision maker for appeal is not the same person as the decision maker that reached the determination, the investigator, or the Title IX Coordinator;	Ensure the decision maker for appeal complies with standards set forth in 106.45(b)(1)(iii);	Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging the outcome;	Issue a written decision describing the result of the appeal & the rationale for the result; and	Provide the written decision simultaneously to both parties.

*Consult your District Policy and Grievance Procedure regarding the appropriate steps and responsibilities for your District.*

# Recordkeeping

- A recipient must maintain for a period of seven years records of –
  - Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
  - Any appeal and the result therefrom;
  - Any informal resolution and the result therefrom; and
  - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.
- For each response to a complaint (including reports that don't result in a formal complaint), a recipient must create, and maintain for seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the **basis for its conclusion that its response was not deliberately indifferent**, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

*See your District's policies for specific guidance.*

# Title IX Harassment – Publication & Procedures Sec. 106.8 & 106.45

## Publish and Distribute **Notice of Nondiscrimination**

Must state that the recipient [school] does not discriminate on the basis of sex in the educational activities and programs it operates, and that it is required by title ix and the regulations not to discriminate in such a manner, and that it extends to admission and employment.

Notice must be widely distributed to students, employees, prospective students and employees and other relevant individuals.

**Must state inquiries about application of Title IX may be referred to Title IX Coordinator (with contact info) or to the Office of Civil Rights.**

- ***Notify applicants, students, parents/legal guardians, unions and employees of the name or title, office address, email address and telephone number of the Title IX Coordinator.***

# FYI: More Publication & Procedures

- Adopt and publish **grievance procedures** providing for prompt and equitable resolution of sex discrimination complaints;
  - Policy must address process for handling Formal Complaints under Title IX.
  - Provide *applicants, students, parents/legal guardians, unions and employees* notice of the grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.
- **Publications** – Recipient must prominently display the contact information of the Title IX Coordinator and the **policy on its website, and in each handbook or catalog** that it provides to any of the people listed in previous slide (*applicants, students, parents/legal guardians, unions and employees*).

*See your District's policies for specific guidance.*

# Review - Read your Sexual Harassment & Title IX Policies

## Follow your District's Policy & Grievance Process

Referral – Investigation – Decision – Appeal

- **Timelines?** General Requirements *such as* all reviews begin within 5 working days of initial complaint and be completed within 30 days absent extenuating circumstances.
- **Definition** of Sexual Harassment.
- **Requirement to investigate** verbal vs. written complaint.
- Informal vs. Formal investigation **procedures**.
- Rules regarding parental involvement for **student** complaints.
- Requirements for **notifications or outcome letters** to complainants “and” respondents (the accused).
- Range of **proscribed penalties and/or approved remedial actions**.
- Maintenance of **complaint records**. Check your record retention processes and rules.

**Behavior may not rise to the level of “Sexual Harassment,” but could still violate District work or school rules (other policies) such as unprofessional conduct or inappropriate conduct under the Code of Conduct.**



# REMEMBER...



## § 106.44 Recipient's response to sexual harassment

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

# State and Federal Agencies

- **New York State Division of Human Rights** ([www.dhr.ny.gov](http://www.dhr.ny.gov))
  - A complaint of harassment or discrimination under New York Law may be filed with either the Division of Human Rights or State Supreme Court.
  - A complaint may be filed with the Division of Human Rights **within 1 year** of the alleged discrimination (**3 years for sexual harassment in employment cases**), and you do not need an attorney.
  - A complaint may be filed in **State Supreme Court within 3 years** of the alleged discrimination. (*Complaints of certain alleged conduct against students may be filed, under the **Child Victims' Act**, many years after it is alleged to have occurred.*)
- **U.S. Equal Employment Opportunity Commission (EEOC)** ([www.eeoc.gov](http://www.eeoc.gov))
  - A complaint of harassment or discrimination under federal law may be filed with the local EEOC office **within 300 days** of the alleged discrimination, and you do not need an attorney.
- **Office of Civil Rights (OCR) – US Dept' of Education – Investigation, Fed. Funding**

## ***Check for your District's Compliance:***

- Designated and authorized "Title IX Coordinator."***
- Adopted an updated policy and grievance process.***
- Updated Resources and Published appropriate notices.***
- Considered available supportive measures.***
- Has everyone necessary been trained?***
- Let's take a look at some sample docs & resources.***

<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>



## *Questions arise?*

Feel free to contact the LR office for additional training and support.

## *A Hearing?*

*If your District policy allows for and your grievance process includes a hearing, please contact our office or another resource for additional training.*

# Thank you.



Nothing in this presentation is intended to constitute legal advice.

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