

TITLE IX INVESTIGATIONS


NEW GUIDANCE – NEW PROCEDURES

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August 2020						
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Friday, Aug 14th 2020

PRESENTATION AGENDA

- New vocabulary
- Planning an investigation
- Standards of Proof
- Timelines for investigations
- Completing the investigation report
- Bullying



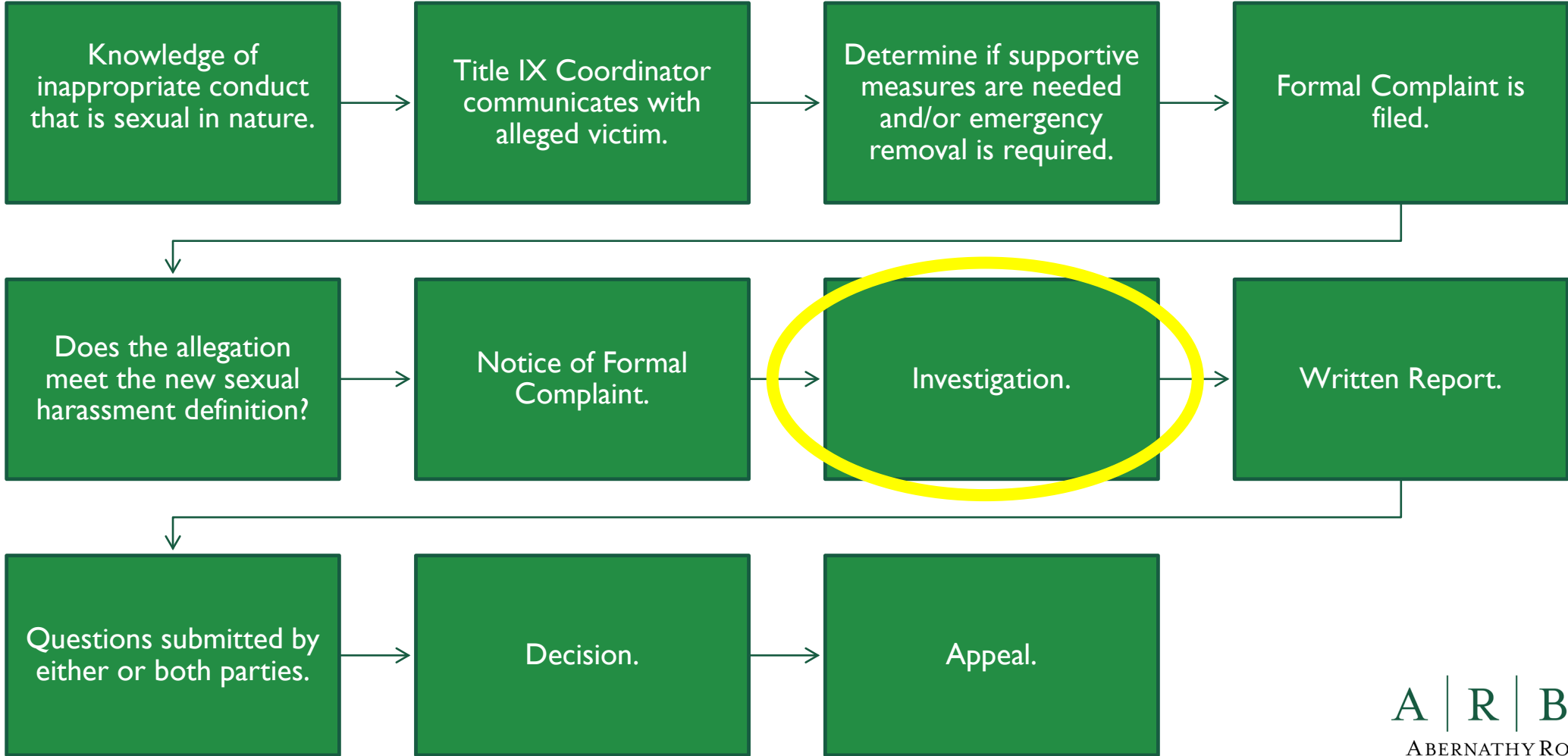
**Title IX
Coordinator**

**Informal
Resolution Facilitator**

Investigator

Decision Maker

Appeals Officer





NEW VOCABULARY

DEFINITIONS TO KEEP IN MIND

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DEFINITIONS

- “Actual knowledge” means notice of sexual harassment or allegations of sexual harassment to a district’s Title IX Coordinator or any official of the district who has authority to institute corrective measures on behalf of the district, **or to any employee of an elementary and secondary school.**
- Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.
- A recipient is not required to respond if it merely “should have known” about sexual harassment; rather, its obligation to respond is triggered only after the recipient has “actual knowledge” of the alleged conduct.

DEFINITIONS CONT'D.

- The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the district.
- A recipient is *not* liable in instances in which it took all steps required under the regulations, or took other actions that were not clearly unreasonable in light of the known circumstances, though the alleged harasser nevertheless is accused of subsequent harassment allegations.
- “Notice” as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator.

NEW TERMINOLOGY

New Terminology

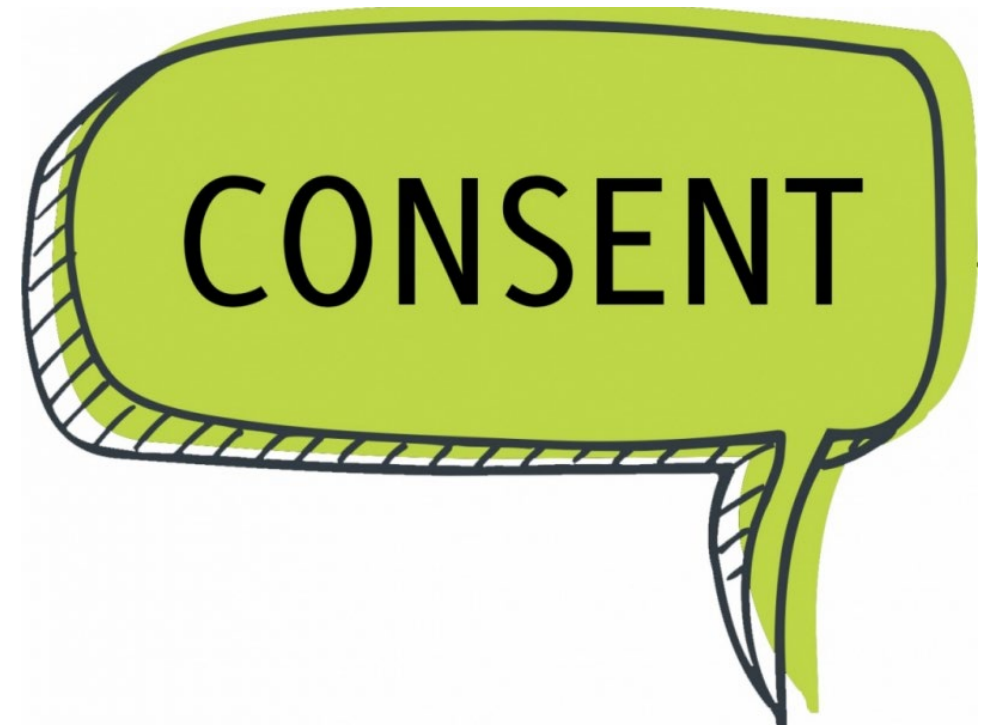
Complainant: Person alleged to be the victim of sexual harassment.

Respondent: Person alleged to be the perpetrator of sexual harassment.

A Parent may act on behalf of a minor student who is a Complainant or Respondent.

DEFINITIONS CONT'D.

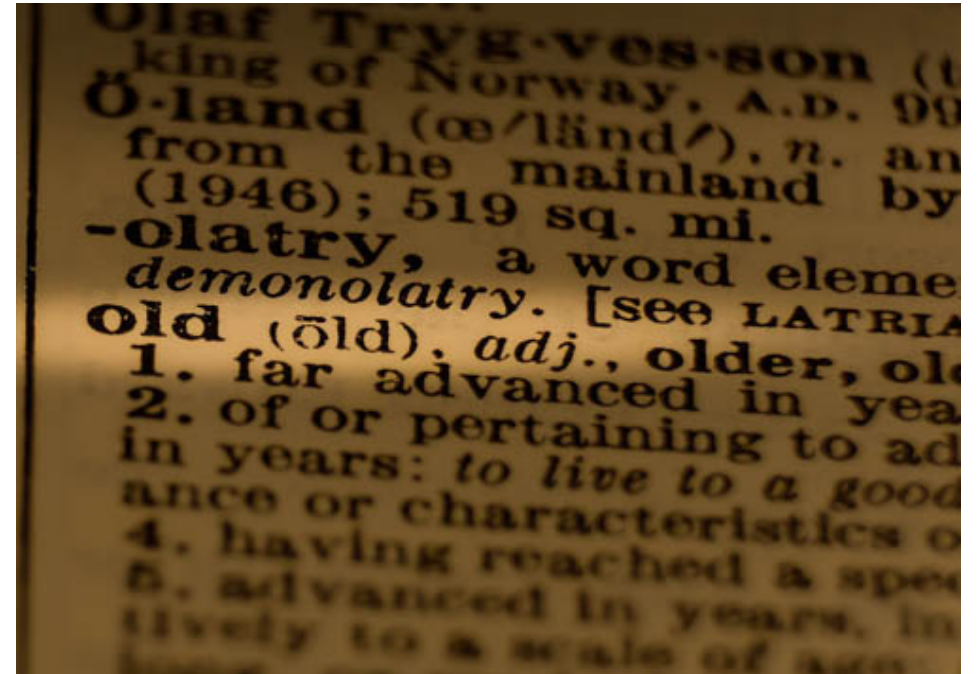
- “Consent” is not defined by the Title IX regulations, nor do the regulations require districts to adopt a particular definition of consent with respect to sexual assault.



WHAT IS SEXUAL HARASSMENT?

OLD DEFINITION

Previously, the regulations described sexual harassment as “**unwelcome conduct of a sexual nature.**”



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DEFINITION – SEXUAL HARASSMENT

The new Title IX regulation provides for a *narrower definition* of sexual harassment that constitutes sex discrimination. The new definition has **(3) types of sex-based conduct** which would constitute sexual harassment:

Sexual assault, dating violence, domestic violence, and stalking;

“Unwelcome conduct that is so severe, pervasive and objectively offensive that it effectively denies a person equal educational access;
AND

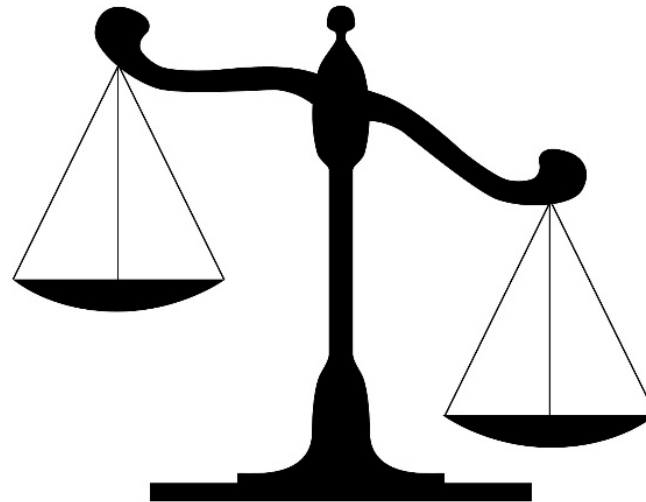
An employee conditioning the aid, benefit or service on participation of unwelcomed sexual conduct (Quid pro Quo).

STANDARD OF EVIDENCE

Districts can choose which standard of evidence they want to use – but must use the same standard for all proceedings with students and employees.

Clear and Convincing Evidence

Preponderance of Evidence



STANDARD OF EVIDENCE

Clear and Convincing

Higher standard of proof.

Evidence being presented must be “highly” and substantially more probable to be true rather than untrue.

STANDARD OF EVIDENCE

Preponderance of Evidence

More likely than not, or anything above a “fifty-fifty” likelihood of guilt.

Standard under the old rule.



STARTING / PLANNING AN INVESTIGATION

WHERE TO BEGIN

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STEPS THAT SHOULD BE COMPLETED BEFORE INVESTIGATION

- Title IX Coordinator speaks to the Complainant – offers supportive measures and explains the formal complaint process.
- Title IX Coordinator sends detailed notice to both the Complainant and the Respondent regarding the allegations and next steps.
- A formal complaint is received - signed by the Complainant or the Title IX coordinator.
- Consider informal resolution, if appropriate.

WHAT TRIGGERS AN INVESTIGATION?

- “Formal complaint” means a document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that the district investigate the allegation of sexual harassment.
- At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the education program or activity of the district with which the formal complaint is filed.
- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator, and by any additional method designated by the district.

WHAT TRIGGERS AN INVESTIGATION CONT'D.

- The phrase “document filed by a Complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the district) that contains the Complainant’s physical or digital signature, or otherwise indicates that the Complainant is the person filing the formal complaint.
- Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a Complainant or otherwise a party to a Title IX formal complaint, and must comply with the requirements of the Title IX formal complaint process, including the informal resolution process.

FIRST STEPS UPON RECEIPT OF REPORT - CHECKLIST

- Pull relevant video or social media posts ASAP;
- Ensure there are no conflicts of interest or bias issues;
- Define the parameters of the investigation;
- Consider the potential objectives of the investigation;
- Determine the appropriate deadline for completing the investigation;
- Identify documents to be reviewed and witnesses to be interviewed;
- Review relevant rules, policies, procedures and instructions;
- Review records of prior complaints against the Respondent and records of prior complaints made by the Complainant;
- Decide the order of the interviews;
- Draft interview questions – focus on consistency; and
- Be mindful of law enforcement’s involvement in the investigation.



WHEN TO USE AN EXTERNAL INVESTIGATOR

- The proposed investigator is the subject of the complaint;
- The Complainant and potential investigator have a close relationship (appearance of a friendship);
- The issue is very complex;
- The resources are not available internally to complete the investigation in a timely manner; or
- It is an investigation of high-level administrators.



SEND NOTIFICATION OF MEETING

- Notice must include:
 - Date,
 - Time,
 - Location,
 - Participants, and
 - Purpose of all hearings, investigative interviews, or other meetings.
- Must be provided with sufficient time for the party to prepare to participate (3 – 5 business days or other mutually agreeable timeline).
- Request, but not require, the Complainant and Respondent bring all relevant evidence for your consideration.





COMPONENTS OF AN EFFECTIVE INVESTIGATION

KEY ELEMENTS TO CONSIDER

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KEY ELEMENTS

- **Impartiality:**
 - The investigation should be conducted by a qualified and impartial investigator.
- **Completeness:**
 - All relevant claims/issues should be investigated by interviewing all necessary witnesses.
 - Each step of the investigation should be well-documented. Witness statements should be complete, signed and dated.



KEY ELEMENTS

- **Timeliness:**

- The investigation should begin and end promptly within the timelines established by Board Policy. Any abatements / exceptions must be in writing.

- **Conclusions:**

- The Investigator should state conclusions upon which a Decision Maker can act; these conclusions should be stated objectively.
- Example conclusion: “The investigation demonstrates that Employee X violated the Acceptable Use of Technology Policy on Y date when he This finding is substantiated by . . . (cite to evidence and explain how it demonstrates a violation of the policy).”
- Avoid “there is no evidence.” Consider, “the evidence does not support . . .”

KEY ELEMENTS

- **Confidentiality:**
 - Encourage parties to maintain confidentiality, CANNOT require confidentiality on the part of the Complainant or Respondent.



KEY ELEMENTS

- **Communication:**
 - Interviewees should know when and where to meet. Investigation results should be promptly and properly communicated to the Complainant and the Respondent.



KEY ELEMENTS

- **Remedial Action:**

- Appropriate summary and interim remedial action should be taken and documented.

- **Policy Violation:**

- Identify the applicable policy violation(s).

RAPE SHIELD

- The new Title IX legislation provides rape shield protections to Complainants.
- All questions and evidence about a Complainant's prior sexual behavior will be deemed irrelevant.



RAPE SHIELD - EXCEPTIONS

It will only be allowed to prove that:

1. Someone other than the Respondent committed the alleged misconduct, or
2. It can be offered to prove consent.

EXCEPTIONS
ARE
INTERESTING





CONDUCTING THE INTERVIEWS

GETTING A COMPLETE PICTURE

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WHO TO INTERVIEW

- Who should be interviewed?
 - The Complainant(s);
 - The Respondent;
 - Third-party reporters;
 - Individuals identified by the Complainant and Respondent; and
 - Others with knowledge.
- If the Complaint or Respondent mentions a person, they must be interviewed.

INTERVIEW PROCESS

- For every interviewee:
 - Briefly explain the nature of the investigation – be objective and neutral.
 - Explain the district's obligation to investigate, and its intention to seriously investigate all claims.
 - Explain the witness' obligation to provide complete, true, and accurate information.
 - Provide a brief summary of the investigation process.
 - Explain the need for confidentiality and privacy (but know that you cannot require it).
 - Provide the interviewee with the policy against retaliation.
 - Provide information about how the interviewee can follow up on the investigation (ex: who to contact if he/she left something out or has new information).
 - Explain when the investigation will conclude, and if/how the interviewee will learn of the results.

*Written notice of these elements documents the notice provided.

COMPLAINANT'S INTERVIEW

- When interviewing the Complainant:
 - Devote extra attention to the anti-retaliation policy.
 - Do not promise confidentiality.
 - Encourage the Complainant to produce a written statement.



INTERVIEWING THE RESPONDENT

- When interviewing the Respondent:
 - Explain the allegation objectively and carefully.
 - Share a copy of the formal complaint.
 - Reassure the accused that you would like to hear all of his/her side of the story.
 - Ask the hard questions last; stay neutral and nonjudgmental review your understanding of the story; ask one question at a time; ask open-ended questions.
- A presumption of innocence is required throughout the process. The Respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the grievance process.

ADVISOR

- Each party is allowed to bring an advisor that may or may not be an attorney – cannot be restricted.
- Can set parameters for advisor's role or involvement:
 - Observational capacity.
 - If the advisor engages in unreasonable, disruptive, harassing or retaliatory behavior, the meeting may be ended early and rescheduled.
 - Visitor guidelines are applicable.
- Not required to allow more than one advisor.

AFTER THE INITIAL INTERVIEWS

- Allow both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation.





CONDUCTING THE INVESTIGATION

PROPER DOCUMENTATION OF INVESTIGATION MATERIALS

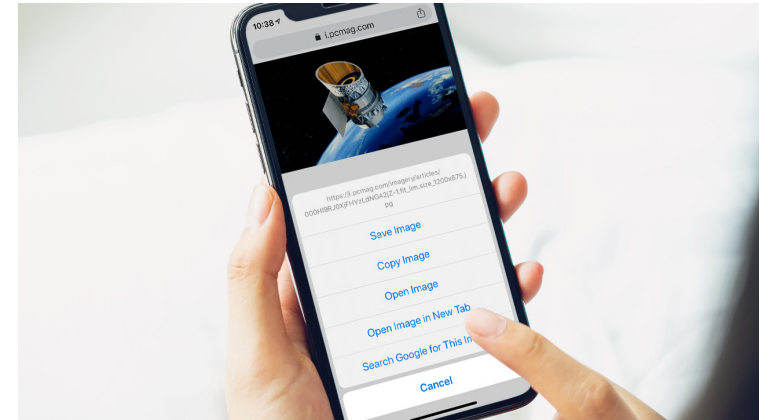
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SEARCHES - EMPLOYEES

- The District may search an employee or an employee's property if:
 - There are reasonable grounds to believe that the search will turn up evidence that the employee is guilty of work-related misconduct (reasonable at its inception); and
 - The search is reasonably related in scope to the circumstances that justified the interference in the first place (reasonable in scope).



SEARCHES - STUDENTS

- Students shall be free from unreasonable searches and seizures by school officials. School officials may search a student's outer clothing, pockets, or property by establishing reasonable cause or securing the student's voluntary consent.
- Coercion, either expressed or implied, such as threatening to contact parents or police, invalidates apparent consent.
- A search is reasonable if it meets both of the following criteria:
 - The action is justified at the inception; i.e., the school official has reasonable grounds for suspecting that the search will uncover evidence of a rule violation or a criminal violation.
 - The scope of the search is reasonably related to the circumstances that justified the search in the first place; i.e., the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age a student and the nature of the infraction.

INVESTIGATIONS

- Districts are required to disclose to the parties and their advisors any evidence directly related to the allegations and an investigative report that summarizes relevant evidence with at least ten days for the parties to inspect, review, and respond.
- Districts cannot access any medical, psychological, or similar treatment records without written consent.
- The investigator cannot be the Title IX coordinator and cannot be the decision-maker.



DOCUMENTATION BASICS

- Ensure that all your documents and notes are dated and labeled “privileged and confidential.”
 - Record the date, time, and duration of interviews.
- Avoid noting thoughts, impressions, or beliefs in notes.
 - Take notes as if they are going to be used as an exhibit in the grievance, an EEOC complaint, and/or a lawsuit.
- Ensure that all complaints/issues are noted, even if minor.
- Keep a record of when you received or provided documents to interviewees.
- Document all investigation directives **IN WRITING**.
- Issue confidentiality and anti-retaliation directives.

HOW TO DOCUMENT?

How do I document?

- **Email:**
 - Create a folder for conversations with the individual.
 - For very sensitive cases, print emails, with their properties, and store in physical notebook.
 - Collect all data – receiver, sender, dates, opened/not opened.



HOW TO DOCUMENT?

- **An interview:**
 - Collect a written statement from the individual.
 - Use prepared forms or prepare a form.
 - Maintain copies of witness outlines and responses.
 - Have the witness write out, sign and date their statement – **do not write it for them.**



HOW TO DOCUMENT?

- **An incident you witness:**

- Use only FACTS.
- Avoid conclusory and insufficiently specific statements.
 - Example: “Jim was walking to class” (assumes Jim’s destination) v. “Jim was walking in the main hallway between B and C hall.”
 - Example: “Carly was angry” v. “Carly spoke in a loud voice. She was crying, and had her arms crossed.”
- Use direct quotations rather than summaries or inferences, even if it involves “foul” language.
- Do not assume guilt.
 - Example: “Frank attacked Edward” (assumes Frank was the aggressor) v. “Frank punched Edward in the stomach.”

HOW TO DOCUMENT?

- **Something that happens online:**
 - Capture and print a screen shot. (unless pornography) in which case contact law enforcement.
 - Write down the time and location of access as well as the nature of the content.
 - Report to the appropriate authorities.

HOW TO DOCUMENT?

- **Something that happens via text:**
 - Capture and print a screen shot of the text. (unless pornography)
 - Have the recipient write a statement regarding the context and interpretation of the text.
 - Capture texts ASAP! Deleted / old texts are often unavailable.
- What if evidence is highly intimate or embarrassing? Male/female?



DOCUMENTATION – BEST PRACTICES

- Sign and date every document.
- Paginate; reference pages when necessary.
 - Example: “Employee A did not sign-in at the beginning of the school day on Monday, November 9th (see sign-in sheet, page 6) as required by the directive signed by Employee A on September 22nd (see page 12); Employee A was not out sick on November 9th (see Employee A attendance record, page 15).”
- Use official letterhead.
- Be factual (avoid opinions, inferences, and conclusions).
- Retain records year-to-year.





THE FINALE

FINISHING THE INVESTIGATION AND DRAFTING FINDINGS

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DRAFT INVESTIGATION REPORT

- Once you have a draft report, share all evidence used in the report with both the complainant and respondent.
- Must provide 10 days for review of the evidence before finalizing a report.
- Must allow both Complainant and Respondent an opportunity to submit follow up questions.



REPORT COMPONENTS

- Investigation report components:
 - Background.
 - Application of District Guidelines or Policies.
 - Key Factual Findings (Summary and Analysis).
 - Conclusion and Recommendations.
- Send to the Decision Maker.



ISSUING FINDINGS

- Investigators will issue recommendations, not the final decision.
- The Decision-Maker(s), cannot be the same person(s) as the Title IX Coordinator or the Investigator(s).
- The Decision-Maker must issue a written determination regarding responsibility.
- To reach this determination, the district must apply the standard of evidence selected by the district.
- Decision-maker(s) may seek additional information or clarification from the investigator.

ISSUING FINDINGS

The written determination must include:

1. Identification of the allegations potentially constituting sexual harassment;
2. A description of the 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;
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the district's code of conduct to the facts;
5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the district imposes on the Respondent, and 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; and
6. The district's procedures and permissible bases for the Complainant and/or Respondent to appeal.

ISSUE FINDINGS CONT'D.

- **The district must provide the written determination to the parties simultaneously.**
- The determination regarding responsibility becomes final either on the date that the district provides the parties with the written determination of the result of the 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.



COMMON MISTAKES

- Not documenting in hopes of avoiding confrontation.
- Not documenting with the hope the accused employee / student will improve on their own.
- “No good deed...”
- Not documenting because it takes too long.
- Not documenting unless it is a “big deal”.
- Conducting the investigation in a manner that appears retaliatory.



QUESTIONS?



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